practices and of injury caused thereby to Community undertakings, it has a very wide discretion to decide, under the powers with respect to the assessment of the interests of the Community which must be held to be vested in it by virtue of Article 9 (1) of Regulation No 2176/84, that protective measures would be inappropriate and, consequently, to terminate the proceeding.

REPORT FOR THE HEARING
delivered in Case 188/85 *

I — Facts and written procedure

1. By letter of 6 January 1984, the EEC Seed Crushers' and Oil Processors' Federation (hereinafter referred to as 'Fediol') submitted to the Commission an anti-subsidy complaint against Brazil concerning imports into the Community of soya meal originating in that country (coming under subheading ex 23.04 B of the Common Customs Tariff, corresponding to Nimexe Code 23.04-40) on the basis of Article 5 of Council Regulation No 2176/84 of 23 July 1984 on protection against dumped or subsidized imports from countries not members of the European Economic Community (Official Journal 1984, L 201, p. 1). In December 1977, the Commission had issued a notice closing the proceedings initiated as a result of a complaint submitted by Fediol in January 1977, and in February 1982 it had refused to initiate proceedings following a complaint submitted by Fediol in April 1980.

2. In a notice published in the *Official Journal of the European Communities* (C 76, 13 March 1984, p. 13) the Commission initiated an anti-subsidy proceeding under Article 7 of Regulation No 2176/84. During the investigation, which covered the period from 1 January to 31 December 1983, the Brazilian Government, eight representative Brazilian exporters, all Community producers and a number of importers submitted their views and detailed comments.

3. As a result of the investigation, the Commission considered that the anti-subsidy proceeding should be terminated and, consequently, in accordance with Article 9 of Regulation No 2176/84, it adopted, on 16 April 1985, Decision 85/233/EEC terminating the proceeding.

4. With regard to two of the nine types of subsidy which Fediol alleged to exist, namely concessionary financing for imports of soya beans and concessionary financing for exports of soya meal through a programme of aid for the development of

* Language of the Case: German.

exports (Proex), the Commission gave as the reason for its decision the fact that the subsidies in question were not paid during the period of the investigation.

5. In regard to five other practices contested by Fediol, the decision to terminate the anti-subsidy proceeding was based on the fact that the practices did not amount to a subsidy of soya meal. Those practices were as follows:

concessionary financing for the storage of soya beans; this did not constitute an export subsidy nor did it constitute a domestic subsidy because it was not aimed at a specific sector of the economy;

concessionary financing for exports of soya oil; this did not provide for subsidies in respect of the product referred to in the complaint, namely soya meal;

a tax concession on profits made from the export of soya oil; this likewise did not deal with soya meal;

differential taxation of exports of soya-based products (13% for soya beans, 11.1% for soya meal and 8% for soya oil); this did not constitute a subsidy because it did not represent a 'charge on the public account' which, according to the Commission, was the essential factor in a subsidy;

finally, obstacles in the way of exports of soya beans; this similarly did not constitute a subsidy since there was no charge on the public account.

6. Finally, with regard to two other practices contested by Fediol, the Commission concluded that a subsidy actually existed and that the oil industry in the Community had suffered damage. However, as regards the first of those subsidies, consisting of concessionary financing for the export of soya meal, the Commission considered that the interests of the Community did not require the imposition of countervailing duties, since the subsidy had been abolished during the reference period, namely on 14 September 1983. The second of those subsidies, resulting from tax benefits in respect of hedging transactions on foreign markets carried out by exporters of soya meal, represented only a minimal advantage (0.09% of the fob value of exports); having regard to the interests of the Community, the imposition of countervailing duties was again not justified.

7. Fediol's application for annulment, received at the Court Registry on 18 June 1985, is against the Commission's refusal to accept, in its decision of 16 April 1985, that the five abovementioned practices of the Brazilian authorities constitute subsidies and its refusal to propose the imposition of countervailing duties in regard to them and to the other two practices, which it accepts as constituting subsidies.

8. By an application lodged at the Court Registry on 9 November 1985, the Associaçao Brasileira das Industrias de Oleos Vegetais (Association of Brazilian Soya Producers, hereinafter referred to as 'Abiove') sought leave to intervene in support of the Commission's conclusions.

9. By order of 29 January 1986, the Court granted Abiove leave to intervene and it submitted its observations on 24 June 1986, within the time allowed.

10. The written procedure followed the normal course. Upon hearing the Report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Conclusions of the parties

11. The *applicant* claims that the Court should:

Declare void the Commission's decision of 16 April 1985 (No 85/233/EEC) terminating the anti-subsidy proceeding concerning imports of soya meal originating in Brazil in so far as the Commission found that:

(i) concessionary financing for storage of soya beans,

(ii) concessionary financing for exports of soya oil,

(iii) income-tax relief on profits from soya oil exports,

(iv) differential taxation of exports of soya-based products, and

(v) obstacles in the way of exports of soya beans,

were not subsidies within the meaning of Article 3 of Regulation No 2176/84 and in so far as the Commission terminated the anti-subsidy proceeding with regard to those practices and to the two practices considered to be subsidies, namely:

(i) concessionary financing for exports of soya meal, and

(ii) tax benefits for hedging transactions on foreign markets;

Order the Commission to pay the costs.

12. The *Commission* contends that the Court should:

Dismiss the application;

Order the applicant to pay the costs.

13. The *intervener* claims that the Court should:

Dismiss the application as being unfounded;

Order the applicant to pay the costs.

III — Submissions and arguments of the parties

Admissibility

The admissibility of the applicant's conclusions

14. The Commission accepts that the action is admissible, but only in so far as the applicant is seeking a declaration that its decision to terminate the anti-subsidy investigation is void. On the other hand, the action is inadmissible in so far as the applicant is asking the Court to declare that the Commission was wrong to deny the existence of subsidies within the meaning of Article 3 of Regulation No 2176/84 in regard to certain practices mentioned in the application and that the Commission was wrong to terminate the proceeding in regard to those practices and in regard to the subsidies which were found to exist. According to the Commission, the operative part of a judgment of the Court containing such findings would be the equivalent of a decision adopted by the Court in the Commission's place and would fail to take account of the fact that if the contested decision is declared void the Commission alone has the power to initiate a new anti-subsidy proceeding and to adopt the appropriate measures if the necessary conditions are fulfilled.

15. The Commission also contends that, to the extent to which the application seeks to obtain a declaration that the contested decision is partly void, the applicant's conclusions do not reflect the text of the decision of 16 April 1984, which consists of a single article, and the applicant does not make a sufficiently clear distinction between the claim for annulment and the subsequent general statement of grounds.

16. The applicant explains that in its conclusions it put forward only one head of claim, namely the partial annulment of the contested decision. The subsequent statements to be found in its conclusions are intended only to make clear which parts of the decision it regards as unlawful by setting out clearly the extent of its complaints and do not constitute a separate head of claim.

The admissibility of the submissions put forward in support of the application

17. The Commission emphasizes that the contested decision is a decision of economic policy adopted in the context of the very wide discretion which it enjoys, with the result that it is subject to review only to the limited extent laid down in the judgment of the Court of 4 October 1983 in *Fediol* v *Commission* (Case 191/82 [1983] ECR 2913) and in the judgment of 20 March 1985 in *Timex* v *Council and Commission* (Case 264/82 [1985] ECR 849, paragraph 16). The Court's review is confined to the question whether the procedural guarantees have been observed, whether or not there has been a manifest error in the assessment of the facts, whether there has been a failure to take into consideration essential matters demonstrating the existence of a subsidy and whether there has been a misuse of powers.

18. The applicant claims that the Commission's discretion under the aforementioned judgment of 4 October 1983 consists in determining the measures to be taken in order to deal with a situation and the assessment of the facts permitting such a determination, judicial review being limited on that point merely to a review of whether or not there has been a misuse of powers. For the rest, the Commission remains legally bound and subject to the Court's review in regard to whether the

legal framework of the matter has been correctly determined, whether all the facts have been established, whether or not there has been a manifest error or failure to take into consideration essential matters demonstrating the existence of subsidies, whether the statement of the reasons on which the decision is based contains considerations which constitute a misuse of powers and whether the procedural guarantees have been observed.

Substance of the case

The practices which the Commission refused to regard as subsidies

19. The applicant's complaints are based essentially on the argument that the Commission has misinterpreted and misapplied Article 3 of Regulation No 2176/84 by adopting a definition of export subsidies which is too narrow and, in regard to subsidies which may be regarded as domestic subsidies, a definition which is too vague, since it has refused to regard as subsidies five practices of the Brazilian authorities contested in the anti-subsidy complaint. Consequently, the Commission failed to carry out a sufficient inquiry into the facts, thereby infringing Articles 7 and 8 of Regulation No 2176/84, which requires a complete and accurate finding of the facts as a procedural guarantee; the Commission thereby overlooks the fact that, unlike the complainant, it alone has access to the necessary information and it alone can carry out investigations into the financial arrangements under which subsidies are granted to the beneficiaries; moreover, where it is refused the necessary information, it may base its decision on the facts available (Article 7 (7) (b) of Regulation No 2176/84).

Differential taxation of exports of soya-based products

20. The applicant states that since 1971 (and during the investigation period) Brazil has levied under the title of 'Imposto Sobre Circulacão de Mercadorias' (tax on the movement of goods, hereinafter referred to as 'ICM') various charges on exports of soya-based products at rates which, as a result of successive increases and in accordance with Resolution No 129 of the Brazilian authorities of 29 November 1979, were as follows during the investigation period: 13% for soya beans, 11.1% for soya meal and 8% for soya oil.

21. According to the applicant, the effect of that system is to permit the national vegetable oil industry to acquire soya beans at prices below the international market price because national growers cannot trade profitably on the world market by reason of the high taxation on exports of soya beans and have therefore turned to the internal market, on which the national vegetable oil industry is the sole purchaser. Since soya products are associated products forming a group consisting of the primary product (soya beans) and products obtained by crushing (soya meal and soya oil), the effect of that practice was to give the Brazilian vegetable oil industry a high crushing margin (the difference between the price at which soya beans are purchased plus the cost of crushing, on the one hand, and the income from the sale of the products obtained by crushing, namely soya meal and soya oil, on the other). The applicant claims that as a result of that system not only were exports of products obtained by the crushing of soya beans placed in a favourable position compared to the primary product, since they were liable to a

lower rate of taxation on export, but the high crushing margins obtained by the Brazilian industry made it possible, on the one hand, to compensate for the tax levied on them and, on the other hand, to subsidize the price of their exports by virtue of a greater degree of competitiveness, due to the possibility of lowering those prices on the world market, with the effect that exports grew.

22. According to the applicant, that practice of levying differential taxation may be analysed as consisting of two subsidies: on the one hand, an indirect subsidy on exports of soya meal through a reduction of the purchase price of soya beans brought about by a reduction of the purchase price for such beans on the internal market by reason of the higher taxation levied on them, and, on the other, a direct subsidy on exports of soya meal and oil by virtue of their being liable to a lower rate of taxation on export.

23. The applicant claims that the economic advantages which the Brazilian industry derived from that system of subsidies by virtue of the common crushing margin, which permits an overall calculation of the cost of production of soya products, may be freely used for the benefit of each of the crushed products and principally for the benefit of soya meal, of which more than 80% is exported, 57% of soya oil being disposed of on the internal market. Those advantages represent 3.3% of the fob value of soya meal, that is to say, USD 5.31 per tonne, which represents 15 to 25% of the costs of crushing the beans or of the value added by crushing. The applicant also refers to a calculation of the subsidy provided by the system at issue carried out by the American vegetable oil industry in connection with a complaint lodged by it, from which it appears that the differential taxation of exports in Brazil increases the crushing margin by USD 2.9 per tonne of soya beans processed.

24. The applicant observes that the Commission, in its defence, claims that the 13% tax is levied both on internal sales of soya beans and on exports and that it is reimbursed when, after processing, the products obtained by crushing beans (soya meal and oil) are exported; consequently, according to the Commission, in the absence of any tax on the export of such crushed products, which are not subject to the ICM but to 'additional charges upon export', there is no differential taxation of soya products and hence no subsidy in the sense that the term is used by the applicant. The applicant claims that, if that were so, the system would be even more in the nature of a subsidy because the Brazilian industry would obtain an advantage from it, since the difference between a tax of 13% and a tax of 11.1% or 8% is refunded to it upon export of the crushed products, the financial advantage in respect of soya meal being 1.9% or USD 5.30 per tonne.

25. On the basis of those considerations, the applicant claims that, by refusing to regard the Brazilian practice in question as a subsidy, after accepting that it was in the nature of a subsidy in the context of the two previous anti-subsidy proceedings initiated in 1977 and 1980, the Commission has wrongly defined the legal framework of the case, basing itself on too narrow a definition of what constitutes a subsidy by applying the criterion of a financial contribution on the part of the public authorities. Furthermore, the Commission has not completely established the facts and it has committed an error of assessment.

26. According to the applicant, the subsidy is a 'combination of factors' resulting from

all the elements of fact which characterize a practice (purposes of the subsidy, quality and volume of the products subsidized, level of the subsidy and favourable effects on exports) which must be assessed without regard to formal criteria linked to the legal structure of the public authorities' intervention and solely by reference to the effects of such intervention, where it is established that the beneficiaries obtain an advantage and injury is caused to an economic sector in the importing country.

27. In support of such a broad definition of a subsidy, devoid of any criterion related to a 'financial contribution by government' or 'a charge on the public account', the applicant refers first to:

Article 3 (1) of Regulation No 2176/84, which itself adopts a broad definition of a subsidy since it refers to subsidies bestowed 'directly or indirectly' and mentions several types of activities (manufacturing, production, etc.);

the fact that the various types of export subsidy are listed in a purely illustrative and non-restrictive way in the lists annexed to Regulation No 2176/84 and to the GATT Anti-subsidy Code;

point (d) of those illustrative lists, which refers to a subsidy lacking the element of financial contribution by the State ('delivery by governments or their agencies of . . . products or services . . . '), having regard to the fact that the reference made in point (l) of the same lists to a 'charge on the public account' is of no particular importance in the light of the illustrative nature of those texts;

the fact that the objective of protecting a given economic sector against injury, which is the purpose of Regulation No 2176/84, will be achieved only if a wide definition of a subsidy is adopted in order to prevent hidden ('environmental') subsidies.

28. Furthermore, the applicant emphasizes that the GATT rules in question and the agreements entered into for the interpretation and application thereof, which should provide the framework for the interpretation of the Community rules pursuing the same objectives and adopted in conformity with those rules, in accordance with the Community's international obligations, such as Regulation No 2176/84, also permit a wide interpretation of the term 'subsidy'. In that regard, the applicant refers to:

the second sentence of Article VI (3) of GATT, which regards a subsidy as a combination of factors and defines a 'countervailing duty' as a 'special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly or indirectly, upon the manufacture, production or export of any merchandise';

the Anti-subsidy Code (Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, Official Journal L 71, 17 March 1980, p. 72), which provides, both in the preamble (fourth recital) and in Articles 8, 9 and 11 that it is the effects of

subsidies and not their form which are important; Article 9 (2) merely refers to 'practices', of which examples are set out in the annexed list, without defining the term 'subsidy';

the nature of GATT (Articles II, III, XI, I-XVI and XXIII) which, like the EEC Treaty (Articles 9, 12, 30 to 34, 92 and 95), constitutes a 'homogenous system of defence' against measures which distort or damage competition, among which differential tax systems are to be classified as a matter of priority.

29. The applicant also claims that a broad definition of the term 'subsidy' is justified on the basis of:

the practice and legislation of the Community's principal trading partners, namely the United States (Trade Agreement Act 1979, Section 771) and Canada (Special Import Measures Act 1984);

the wide interpretation given to the term 'aid' in Article 92 of the EEC Treaty both by the Court, whose case-law shows that it has regard to the effects of state intervention, and by the Commission itself (replies to written questions, Journal Officiel 1963, p. 2235, and Official Journal 1982, C 221, p. 5; Commission decision of 5 June 1985 concerning an aid scheme in favour of the textile and clothing industry in France funded by means of parafiscal charges, Official Journal 1985, L 217, p. 20);

the previous position of the Commission in regard to export subsidies, which reveals a wide interpretation of that term, inasmuch as the Commission regarded as aid advantages granted by the public authorities to enable supplies of national raw materials to be obtained by industry at prices below world prices; moreover, in Regulation No 143/67 (Official Journal, English Special Edition 1967, p. 97), it assimilated to aid barriers to exports imposed on producers by the public authorities, and in the context of the anti-subsidy proceedings in 1977 and 1980 it accepted that the Brazilian system of differential taxation was in the nature of a subsidy.

30. Although the applicant denies that the Commission is justified in adopting a narrow definition of the term 'subsidy' by applying the criterion of a charge on the public account, it none the less considers that the system of differential taxation of exports does constitute such a charge, taking the form of a waiver by the public authorities of a fiscal charge. According to the applicant, that criterion of the waiver by the public authorities of fiscal charges might not be satisfied in so far as the Brazilian system of differential taxation on exports constitutes an indirect subsidy for exports of soya meal by reason of the reduction of the purchase price of soya beans on the internal market by means of the high tax of 13% levied on the export of such beans. On the other hand, that criterion is certainly satisfied in so far as the system of differential taxation constitutes a direct subsidy for the export of products obtained by crushing soya beans taking the form of low export prices attributable to the fact that the products are liable to a lower export tax than the tax on the raw material. The same is true in so far as the difference between the tax levied on soya beans and the tax on products obtained by crushing them is reimbursed to the Brazilian industry at the time of export since, in accordance

with point (h) of the illustrative list annexed to Regulation No 2176/84, the remission of prior stage cumulative indirect taxes on goods used in the production of exported products constitutes an export subsidy when the amounts remitted are higher than those taxes. The Brazilian authorities therefore waived part of the export tax on products obtained by crushing, since there was undoubtedly an existing tax liability and yet the Brazilian State did not collect part of the tax inasmuch as it limited it to 11.1% for soya meal instead of the 13% levied on soya beans. That failure to collect taxes involved a loss for the public account, and it is not necessary to distinguish between the case in which a tax is levied but the State fails to collect it in whole or in part and the case in which the State, by levying a reduced tax, decides from the very start not to levy or collect the amount resulting from the difference in the rates (13% minus 11.1% or 8%) applicable to products in the same group and offered on the same market.

31. Furthermore, the applicant observes that, although the Commission did not consider whether the system of differential taxation constituted a domestic subsidy, its position would have been the same even if it had actually considered that possibility having regard to the criterion of 'charge on the public account' which it employs. The applicant claims that the system at issue is in fact a domestic subsidy in so far as it is a production subsidy and the Brazilian vegetable oil industry obtains an advantage from it which disrupts the normal conditions of competition and causes the European industry to suffer injury caused by the low price of Brazilian meal in a specific sector, namely soya products. The 'sectoral specificity', an essential criterion for classifying a subsidy as domestic, is apparent first from the purpose for which the system at issue was established, namely to permit Brazilian crushed soya products to be more competitive on international markets; this is evidenced by the fact that Brazil increased only gradually the tax imposed on exports of soya meal (5, 8, 10 and 11.1%) and by the importance of the export of crushed products for Brazil, in particular, the export of meal, of which domestic consumption amounts to only 20%. The sectoral specificity of the system can also be seen from the harmful effects which the subsidy has had since it was instituted on the European seed crushing industry. The applicant claims that, in the absence of a theoretical definition of 'sectoral specificity', a domestic subsidy which has a harmful effect on production in another country must be regarded as specific to a sector, since no State can subsidize the export of products at the expense of its economy at a level which is not specific to a single sector to the extent of causing noticeable damage to production in the importing countries.

32. The Commission claims that the criterion of a financial contribution by the State or a charge on the public account is an unwritten characteristic which is necessary for the existence of a subsidy, and its abandonment would be likely to enlarge unreasonably the concept of a subsidy and entail a proliferation of countervailing measures. It considers that the criterion of a charge on the public account is inherent in all the examples of subsidies given in the illustrative lists annexed to Regulation No 2176/84 and the Anti-subsidy Code, point (l) of which

refers in that connection to 'any other charge on the public account constituting an export subsidy in the sense of Article XVI' of GATT.

33. The Commission considers that the applicant cannot, in support of a wide definition of the term 'subsidy', devoid of any requirement of a charge on the public account, rely on the overall protective purpose of Regulation No 2176/84 and turn that purpose into a general criterion; the result of this would be to justify any countervailing measure in the absence of subsidies fulfilling precise criteria, thus depriving of all meaning the relevant provisions of Regulation No 2176/84.

34. The Commission emphasizes that, even accepting that the other parties to GATT adopt a wide definition when interpreting the term 'subsidy', the Community has a discretion in defining that term in the context of Community law, taking account of the principle of the peaceful settlement of disputes and the exclusion of reprisals within GATT, which, furthermore, is not a 'homogenous system of defence' against measures which distort or adversely affect competition, as the applicant claims.

35. Moreover, unlike the applicant, the Commission claims that the concept of a subsidy is narrower than the concept of aid in Article 92, which, as a primary provision of Community law, must be interpreted in accordance with the objectives of the Community; that is not true of Article 3 of Regulation No 2176/84, which is linked to Article XIV of GATT and the agreements entered into for the interpretation and implementation thereof, the purposes of which are fundamentally different since they are agreements concluded with non-member countries.

36. The Commission observes that the applicant's reference to the Commission's previous practice in regard to subsidies is irrelevant. Regulation No 143/67 dealt with prohibitions of exports which constituted 'measures having equivalent effect' assimilated to subsidies for the purposes of that regulation, and it also emphasizes that, at the time when that regulation entered into force, the countervailing measures to be adopted under Article VI of GATT, subject to the restrictions of the Anti-subsidy Code, did not yet exist. Finally, the Commission emphasizes that the criterion of a charge on the public account was never applied in its previous practice or in the anti-subsidy proceedings initiated until now, with the result that it cannot be accused of modifying its view.

37. On the basis of the foregoing considerations, the Commission, which contests the calculations submitted by the applicant in regard to the scale of the advantage which the Brazilian vegetable oil industry obtains from the system, contends that the differential tax on exports of soya products constitutes neither a direct nor an indirect subsidy since it does not fulfil the criterion of a charge on the public account, in particular in its form of the non-collection of a tax debt.

38. With regard to the claim that there is a direct subsidy, the Commission accepts that the ICM constitutes taxation of soya products at different rates but none the less

emphasizes that it is not a tax on exports but a general tax on the movement of goods, that is to say, a turnover tax.

39. With regard to the claim that there is an indirect subsidy on exports of soya meal by way of a reduction in the price of the raw material (soya beans) caused by the higher rate of taxation imposed on the latter, the Commission emphasizes that there is a manifest absence of any charge on the public account or non-collection of a tax debt. Furthermore, in the Commission's view, even supposing that the high rate of taxation imposed on the export of soya beans brings about a reduction in their price on the internal market, which is doubtful having regard to the fact that the rate of taxation is the same both for internal transactions and exports, such a reduction in price cannot be the result of the rate of taxation applied to exports of crushed products, the level of which cannot have any influence on the formation of the prices of raw materials, which are traded on another market.

40. The Commission also refuses to accept that the Brazilian system challenged by the applicant constitutes a domestic subsidy, since it is not specific to one sector (the test for determining whether that requirement is met being particularly strict). It emphasizes that the fulfilment of that requirement cannot be deduced solely from the presumed effects of a State measure since, on the one hand, Article 11 (1) of the Anti-subsidy Code permits the contracting States to have recourse to domestic subsidies to achieve important policy objectives and, on the other hand, it is emphasized in Article 14 of the same code that domestic subsidies are a fundamental part of economic development programmes and their effects may only be counterbalanced if damage is caused to another State; furthermore, Article 14 (7) provides that State intervention in the economy is not *per se* to be regarded as a subsidy. According to the Commission, in the absence of a binding definition of measures limited to a specific sector, the correct approach is to consider the particular circumstances of each case and not to regard a measure as specific to a given sector when the benefit of a subsidy is general and not limited to one undertaking or one branch of industry. The purpose, nature and form of the subsidy must be taken into consideration where its aim is to give an advantage to certain undertakings which is not granted to other undertakings in the same position (Article 11 (3) of the Anti-subsidy Code). In the Commission's view, an essential criterion is that the subsidy should be granted to a limited number of undertakings on the basis of arbitrarily defined criteria having a discriminatory effect rather than on the basis of a neutral, objective and clearly identifiable criterion automatically giving the right to a subsidy to any undertaking which applies for one.

41. The intervener states that the ICM is an indirect tax levied on the turnover of producers and dealers at a rate varying between 12 and 17% and is levied in respect of all products and not merely those which are soya based. It is levied on all exports of basic products but, in principle, it is not levied on exports of manufactured products. The current rates of 11.1% on meal and 8% on soya oil are in fact the result of an

agreement entered into in 1977 with the Community concerning the gradual increasing of the ICM on products obtained by crushing soya beans; there is no obligation to impose a tax on such products.

42. The intervener rejects the applicant's claim that the difference of 1.9% resulting from the different rates of taxation for soya beans (13%) and meal (11.1%) constitutes a direct subsidy of the final product by reason of the fact that the public authorities have not collected it. It observes that, since the rate of 13% is not the normal rate of taxation in Brazil, it cannot constitute the benchmark for determining whether or not differential taxation exists. The intervener also emphasizes that Article VI (4) of GATT, points (g) and (h) of the list annexed to the Anti-subsidy Code and Article 3 (3) of Regulation No 2176/84 provide that the exemption from or remission of indirect taxes upon export is not to be considered an export subsidy if such taxes are also effectively borne by the like product sold for domestic consumption. Since the ICM is an indirect tax effectively levied on domestic sales of meal, the Brazilian authorities, who could have entirely exempted exports of soya meal from taxation, may *a fortiori* levy a tax of 11.1% on that product without running the risk of having that fiscal system regarded as an export subsidy because of the differential rates of taxation.

43. According to the intervener, the tax levied on the export of the primary product, namely soya beans, similarly does not constitute an indirect subsidy of the final product by reason of the alleged reduction in the price of soya beans on the internal market. It observes that the applicant's arguments on this point are in contradiction with its argument to the effect that the differential tax system constitutes a direct subsidy because either the 13% tax must be regarded as the normal rate and therefore it cannot be regarded as limiting exports of soya beans or it is an abnormal tax, in which case the rate of 13% cannot be compared to the rate of 11.1% levied on meal. Furthermore, the applicant's arguments are factually without foundation because the ICM is not a tax on exports but a tax levied both on domestic sales and on exports of soya beans, with the result that it cannot have the effect on the Brazilian market attributed to it. Finally, the intervener points out that the American authorities have accepted, in the context of proceedings brought against Brazil, that the differential taxation of exports does not constitute a subsidy which may be countervailed, and that position was confirmed in the case of *Anhydrous and Aqua Ammonia from Mexico* by the International Trade Administration (22 June 1983, 5 ITRD 1253 at 1258-59).

Obstacles in the way of exports of soya beans

44. The applicant states that those obstacles are due to the registration of exports of soya beans under a quota scheme managed by the foreign trade department of the Bank of Brazil (Cacex) pursuant to measures which have not been published. That system, which has been applied continuously at least from 6 September 1983, as can be seen from various items published in the

press, may not be analysed as a mere obligation to declare exports but as preventing the export of soya beans if such exports have not been registered, which, if registration is declared 'closed', is the equivalent of a prohibition of exports.

45. According to the applicant, the export restrictions on soya beans have the same effects on the Brazilian oil industry's crushing margins as the system of differential taxation of exports because they create a monopoly of demand in favour of the national oil mills. The applicant considers that examination of the Brazilian export restrictions must therefore be closely linked to the differential taxation scheme because their effects are similar and the adoption of countervailing measures against the effects of one of the two practices is likely to lead to intervention by the Brazilian authorities in regard to the other.

46. The applicant claims that the view that these practices should be regarded as subsidies, even though there is no financial contribution by the State, finds support in point (d) of the illustrative list annexed to Regulation No 2176/84, which regards as a subsidy the delivery by governments or their agencies of products for use in the production of exported goods on terms or conditions more favourable than for the delivery of like or directly competitive products. Similarly, point (c) of the same list regards as a subsidy the granting of favourable internal transport and freight charges, without distinguishing according to the nature of the intervention.

47. The applicant observes that it is possible that the system of export restrictions might fall under Article XI of GATT if the prohibitions or restrictions hindered the importation of Brazilian soya beans into the Community. In that case, the applicable provisions of Community law would be Articles 2 and 3 of Regulation No 2176/84 and the question might be asked whether the obligation to register exports could be justified under Article XI (2) (b) of GATT. However, in this case, it is only the financial repercussions of the restrictions which are relevant, that is to say, the creation of a processing margin in favour of the Brazilian industry higher than the margin which it would obtain under the normal conditions of competition. It therefore concludes that, from that point of view, the system in question is in the nature of a subsidy and that the applicable provision is clearly Article 3 of Regulation No 2176/84.

48. Furthermore, the applicant observes that the Commission has implicitly admitted that in this case an advantage was provided (paragraph 13.3 of the decision) and it was unwilling to accept that that practice constituted a subsidy within the meaning of Article 3 of Regulation No 2176/84 only because there was no financial contribution on the part of the public authorities. According to the applicant, the Commission's position in that regard is contradicted by its previous practice, which was to regard as subsidies state intervention intended to reduce the purchase price and, consequently, the cost of processing exported products in the oil seed and vegetable oils sector (Regulation No 143/67, Journal Officiel No 126, 26 June 1967, p. 2464) without distinguishing between export taxes, measures having equivalent effect or prohibitions on exports. Furthermore, during the first anti-subsidy proceeding in 1977, the Commission accepted that the contested practice

constituted a subsidy in the sense meant by the applicant and, during the second proceeding in 1982, it required Brazil to abolish totally that practice, which has however constantly reappeared.

49. Finally, the applicant claims that in this case the amount of the subsidy should have been assessed by the Commission for the entire period during which restrictions were placed on exports of soya beans on the basis of the difference between the price actually paid for them in Brazil and their price on the world market, applying if need be the method of assessment provided for in Article 3 (4) (c) of Regulation No 2176/84. That article provides that the amount of a subsidy may be determined 'by allocating the value of the subsidy as appropriate over the level of production or exports of the product concerned during a suitable period', having recourse to weighted averages if the amount of the subsidy has varied.

50. The Commission contends that apart from the fact that the practice of registering exports of soya beans does not constitute a charge on the State's budget, a necessary condition for the existence of a subsidy, it is merely intended to facilitate the drawing up of statistics and hence is not a restriction on exports of soya beans. It observes that, even if the obligation to register actually hindered exports and reduced the price of soya beans, it would still not constitute a subsidy because it is in fact the subject of the specific derogation provided for in Article XI (2) (b) of GATT, applicable to measures for the classification, grading or marketing of commodities in international trade, and therefore is not liable to countervailing measures under Article VI. However, Article XI of GATT may not itself be applied since its provisions are not directly applicable and have not been transposed into the Community legal order; moreover, its implementation would have made it necessary to have recourse to the special procedures for consultation and the peaceful settlement of disputes.

51. Finally, according to the Commission, it is impossible to measure the possible effects of the obligation to register exports of soya beans on domestic prices of that product in the absence of points of reference, since the formation of prices is a complex process at national and international level.

52. The intervener states that in 1982, and until 6 September 1983, soya products were exempt from the export declaration and were made subject to that formality only from that date (Cacex Notice No 59 of 6 September 1983) in order to prevent possible speculation and, for that reason, solely in regard to long-term shipments and not to exports to be shipped immediately. Furthermore, since the registration requirement applied both to soya beans and to processed products, it may not be regarded as a barrier to exports of soya beans.

Concessionary financing for storage of soya beans

53. The applicant states that the concessionary financing for storage of soya beans consists in the granting of an interest rate of 45% for 180 days whereas at the time in question the normal interest rate was between 100 and 150%. That practice

developed in the context of a Brazilian Government programme (EGF) which, according to Recommendation No 674 of the Central Bank of Brazil of 22 January 1981, is intended 'to provide producing undertakings with resources' and 'applies to the sectors and products indicated by the National Monetary Council'. The concessionary financing, which in fact covers the storage of 27 basic agricultural products, amounted in 1983 to 7 416 thousand million cruzeiros. In the soya products sector, in which soya beans received approximately 31.9% of the subsidy, the financing amounted to 212 thousand million cruzeiros, of which 16.1 thousand million (8%) were paid to producers, 83.1 thousand million (39%) to cooperatives, including those operating an oil mill, and 114.3 thousand million (53%) went to oil mills not operated by cooperatives. The oil mills, which received the major part of this financing, could therefore reduce their costs and increase their crushing margins. According to the applicant, that system is therefore an indirect subsidy (subsidization of manufacturing at a previous stage) of products obtained by crushing soya beans (associated products) and, essentially, of soya meal (1 000 kilograms of beans yields approximately 750 kilograms of meal and 180 kilograms of oil), representing approximately 50% of the value of the raw material and constituting the principal crushed product exported.

54. In accordance with Article 3 of Regulation No 2176/84, which refers to subsidies 'upon the manufacture, production, and export or transport' of a product, that advantage may attract countervailing measures on the ground that it is a domestic subsidy through the application by analogy of point (k) of the illustrative list, which regards as a subsidy the grant by governments of export credits at rates below those normally paid. The applicant considers that the requirement that a domestic subsidy must be specific to a given sector in order to be liable to countervailing measures is fulfilled in this case because the subsidy in question is not of a general nature, pursuing a general social and economic purpose on the purely internal level, as referred to in Article 11 (1) of the Anti-subsidy Code. According to the applicant, it is clear that the subsidy in question is a special subsidy in view of its beneficiaries, which are the industries processing agricultural products and in particular, in the soya sector, the cooperative and other oil mills which receive the major part of the concessionary financing, which is not generally available to any undertaking. The same is true if regard is had to the subsidized products themselves, including soya beans within a limited group of 27 basic agricultural products. Finally, the subsidy is specific to a given sector for the further reason that its effects cause massive damage to a branch of the economy on another market, namely the vegetable oil industry in the Community.

55. The applicant points out that since 1 January 1984, in accordance with Resolution No 888 of the Brazilian authorities of 27 December 1983, the interest rate applicable under the EGF programme has been greater than the cost of refinancing by the Brazilian State, with the result that there is no longer a 'charge on the public account' and therefore no subsidy. However, notwithstanding the fact that the EGF programme no longer has any further reason to exist, it in fact continues to be applied, which, in the applicant's view, must be regarded as an indication that an advantage is still being granted. Furthermore, according to the applicant, even if that programme were to be regarded as genuinely withdrawn with effect from

1 January 1984, the subsidy nevertheless existed during the investigation period (1 January to 31 December 1983).

56. The applicant considers that, by refusing to regard the practice in question as a domestic subsidy, the Commission has infringed Articles 3 and 7 of Regulation No 2176/84. It complains that the Commission neither looked for nor took account of substantial factors having the effect of a subsidy and that there are manifest errors in its assessment of the facts, since in a 'Status Report' the American Association of Soya Producers regarded the EGF programme as a subsidy inasmuch as it provided for concessionary financing for the benefit of the oil mills. The Commission did not carry out an adequate investigation concerning the value of the subsidy in favour of the Brazilian oil mills (7 416 thousand million cruzeiros, of which 31.9% was for soya beans), it did not consider the size and strength of the Brazilian vegetable oil industry and its capacity to obtain advantages for itself and verified only information supplied by four undertakings, chosen by it, out of a total of more than 40. Finally, the Commission, by failing to consider the subsidy from the point of view of its combined effect with other subsidies, undermined the effectiveness of the proceedings and ultimately concluded that the practice concerned did not constitute a subsidy for 'reasons of a general nature', leaving the European industry defenceless. That constitutes a misuse of powers.

57. The Commission contends that the financing of the storage of soya beans constitutes a domestic subsidy which cannot attract countervailing measures because it is intended to promote important internal policy objectives (Article 11 (1) of the Anti-subsidy Code) and because it is not specific to a given sector inasmuch as it is not limited to certain undertakings (last subparagraph of Article 11 (3) of the Anti-subsidy Code) but is granted generally in respect of all the major basic agricultural products. The reason why it is limited to 27 products is that the other products are either not amenable to storage (sugar-cane, pineapples, bananas, coconuts), are subject to special international rules (coffee, cocoa) or do not require storage owing to their particular characteristics (oranges, tomatoes, raw tobacco) or to the fact that their production is limited and they are disposed of regularly (onions, piments).

58. The Commission contends that, contrary to the applicant's view, the sectoral nature of a domestic subsidy does not follow from the grant of a subsidy to a product but from the fact that it is not made available to all the undertakings concerned, which is not the case here. The Commission emphasizes that, since the purpose of the EGF is to ensure the regular disposal of products, financing for the storage of soya beans may be sought by all producers of agricultural products and not merely producers of soya beans; oil mills benefit from the financing in so far as they decide to acquire soya beans earlier than they otherwise would and to store them rather than leaving such storage to the producers themselves.

59. The Commission, which contests the figures cited by the applicant, observes that the proportion of the aid allocated to the storage of soya beans corresponds to 31.7% of the total financing and that that product represents 31.9% of Brazil's production of basic agricultural products, with the result

that products derived from soya beans do not receive more favourable treatment than other agricultural products. The subsidy cannot therefore be specific to one sector.

60. The Commission states that, during its investigation, it had at its disposal documents concerning eight undertakings, regarded as representative by the applicant itself, and that it is only because the subsidy was not specific to one sector that it did not pursue its investigations concerning the use of the storage aid and its effect on the price of exported soya meal, although this would in fact have been practically impossible.

61. Finally, the Commission points out that Resolution No 888 of the Central Bank of Brazil of 27 December 1983 raised the interest rate applicable under the EGF programme to the level of the rate of growth of indexed treasury bonds (ORTN), increased by 3%. Since the rate in question thus exceeded the cost of refinancing by the State, the financing of the storage of agricultural products no longer constituted a subsidy because there was no 'charge on the public account'. The Commission observes that, contrary to the doubts expressed by the applicant, the maintenance of the programme is useful because it permits certain producers to store basic products. Furthermore, the Commission contends that in its decision it was obliged to take account of the withdrawal of the subsidy, since the provisions of Regulation No 2176/84 did not prohibit it from so doing and Article 4 (4) of the Anti-subsidy Code provides that a countervailing duty may not be imposed unless the subsidy has not been withdrawn; moreover, Article 4 (9) provides that a countervailing duty is to remain in force only as long as and to the extent necessary to counteract the subsidization which is causing injury.

62. The intervener refers to the Commission's arguments. It also states that the EGF programme is related to the national rural credit system and allows the processing of the products to which it applies to be spread throughout the year, thus providing market and price stability, and is therefore not unlike similar Community measures adopted under Article 39 (1) (c) of the EEC Treaty. The programme is general in scope and is therefore compatible with Article 11 (1) of the GATT code, since it in fact applies to all agricultural products except those which do not have to be stored or cannot be stored or which are covered by international agreements. It is not therefore specific to the soya sector. The advantages which flow from it may not therefore be regarded as countervailable because they are not specific to a single sector.

Concessionary financing for exports of soya oil

63. The applicant states that, during the investigation period, Brazil financed exports of soya oil by granting the concessionary interest rates laid down in Resolution No 643 of the Central Bank of Brazil of 22 October 1980. That practice constituted an indirect subsidy for exports of soya meal, a product 'associated' with soya oil, by a 'transfer of subsidies' by reason of the common crushing margin (the two products are the sole products of the crushing of soya beans, representing 90 to 95% of their

price); the increase in that margin made it possible to distribute the benefit freely between the products obtained by crushing and in fact to concentrate it on meal, of which 80% is exported, rather than oil, of which only 40% is exported. The applicant claims that the effect of that subsidy on the price of meal is in the order of USD 9 to USD 25 per 1 000 kilograms. Finally, it states that even if that subsidy was withdrawn with effect from 1 January 1984, as the Commission claims, but which the applicant contests in the absence of precise information, such a withdrawal is of no importance because it occurred subsequent to the period covered by the investigation.

64. The applicant also complains that the Commission infringed Articles 3 and 7 of Regulation No 2176/84 by stating categorically that the subsidy related only to soya oil and by not taking account of certain essential factors indicating the existence of a subsidy. The inquiry which it carried out in that regard is insufficient since it did not establish the effects of the subsidy which, in the case of an 'indirect subsidy', may occur through the financing of another product and not solely through the products obtained during an earlier phase of processing, as is the case in regard to dumping. It claims that the Commission should have taken account of all the circumstances (purpose of the subsidy, actual use thereof, market conditions, relationship between the products concerned) and to have calculated precisely the advantage granted to Brazilian soya meal, the price of which dropped sharply up to the end of 1985 by reason of the various other subsidies from which that product benefited in addition to this subsidy. The applicant claims that the Commission should have carried out a thorough and detailed study of all the factors and documents concerning each exporting undertaking instead of merely verifying the information supplied by only four undertakings. If the Brazilian undertakings persistently refused it access to all the information necessary, it could have made its decision on the basis of the information available, in accordance with Article 7 (7) (b) of Regulation No 2176/84.

65. The Commission emphasizes that the advantage which may have been obtained from the subsidy in question was not transferable to soya meal because it was not a fixed amount but an amount proportional to the quantities of soya oil actually exported. Furthermore, the Commission contends that it could not regard that practice as an indirect subsidy of soya meal on the basis of its actual use and the intermediate purposes to which that advantage was put because to take account of remote and indirect effects of a direct subsidy would deprive Article 4 (4) of Regulation No 2176/84 of its meaning and would lead to an unlimited extension of the concept of a subsidy, entailing a proliferation of countervailing measures, contrary to the overall structure and purpose of Regulation No 2176/84 and to the spirit and letter of GATT and of the Anti-subsidy Code. In the Commission's view, it is impossible to carry out such a verification because any advantage granted to a manufacturer in receipt of a subsidy may be passed on to all his other products, at any stage of production (purchase of raw materials or domestic sales of different or equivalent products).

66. The Commission emphasizes that, according to the provisions of Article 3 (1) of Regulation No 2176/84, a countervailing duty may only be imposed in respect of either a direct or an indirect subsidy

concerning the same product and following a finding that injury has been caused to a like product on the Community market (Article 2 (12) of Regulation No 2176/84). In this case, since the subsidy in question is a direct subsidy on soya oil, it legitimately concluded that it could not constitute at the same time an indirect subsidy on another product, namely soya meal. As a result, consideration of the injury necessary for the imposition of countervailing measures could be carried out only in relation to a product similar to the subsidized product. No injury was suffered in respect of soya oil by virtue of the subsidy concerned, since it is subject to a duty of 10% upon importation into the Community, destroying the advantage from which that product benefited; consequently, the Commission considers that its refusal to verify the existence of a subsidy in favour of a product other than soya oil was justified.

67. Finally, the Commission observes that the investigation which it carried out, on the basis of satisfactory documentary evidence, did not show the slightest sign that the subsidy in question had any effect on the price of soya meal; moreover, that subsidy was withdrawn with effect from 1 January 1984 by raising the interest rates for obtaining finance to rates corresponding to the cost to the Treasury of refinancing, plus 3%, which caused the charge on the public account necessary for the existence of a countervailable subsidy to disappear.

68. The intervener states that under Resolution No 643 (replaced by Resolution No 883 of 21 December 1983) the concessionary financing in question is available only to export trading companies, in their capacity as dealers and distributors, and not to producers of soya meal and soya oil. There is no reason why the benefits accruing from the concessionary financing of exports of soya oil should be passed on to the producers and suppliers of that product, from whom exporters have every interest in purchasing on the most advantageous terms possible. Furthermore, the mere theoretical possibility that a benefit might be transferred to an associated product does not mean that the latter is in fact subsidized, as is shown by the results of the Commission's investigation. According to Abiove, even if the effect of the subsidy in question were to promote the production of soya meal, such a benefit could not be regarded as aid for the export of meal, because it is not linked to that transaction but to the actual export of soya oil. The grant of such an advantage for the production of meal would also promote domestic sales, and therefore neither its purpose nor effect could be to promote meal. Neither can it be considered a domestic subsidy in respect of soya meal, not being specific to that sector, having regard to the fact that the advantages in question are not specifically granted to soya products but apply to many other products.

Exemption from taxation of profits realised on exports of soya oil

69. The applicant claims that this form of subsidy for exports of soya oil (Brazilian Decree-Law No 1598 of 26 December 1977) has the same effect as the conces-

sionary financing granted in respect of the same product and that the effect on the price of soya meal should have been considered together with the effects of other subsidies granted in respect of exports of that product. The contested decision is thus not based on specific findings; the Commission was entitled to base its decision on the 'facts available' where the undertakings concerned refused to supply it with complete information (Article 7 (7) (b) of Regulation No 2176/84). Furthermore, the Commission did not take account of a number of factors from which it could be concluded that soya meal was being subsidized (the fact that soya meal is a product associated with soya oil, the common crushing margin and common calculation of production costs, the proportion of value and of exports).

70. The Commission and the intervener advance the same arguments as those put forward in regard to the susidization of soya oil through the concessionary financing of exports.

Lawfulness of the termination of the anti-subsidy proceeding

(i) The termination of the proceedings concerning the subsidization of soya meal exports through concessionary financing

71. The applicant emphasizes that the Commission found that during the investigation period exports of soya meal enjoyed a subsidy amounting to 7.66% of their fob value, by way of one-year loans granted by the Brazilian Treasury at an interest rate of 40% (until 9 June 1983) and 60% (from 10 June 1983), at a time when the cost of money to the Brazilian State was 156.6%, the difference between the two rates constituting the amount of the subsidy. It observes that the Commission also found that the vegetable oil industry in the Community had suffered injury by reason of that subsidy. It observes that the Commission's refusal to impose countervailing duties, despite having proposed to the Council on 4 January 1985 that it impose a suspensory countervailing duty of 7.27% of the cif value of imports, was based on the fact that the practice in question, instituted by Resolution No 674 of 21 January 1981, had been withdrawn by Communiqué No 60 of 14 September, which, with effect from that date, excluded soya meal from the scope of the benefit; moreover the benefit was withdrawn in its entirety when Resolution No 882 of 21 December 1983 increased the interest rates with effect from 2 January 1984. According to the applicant, notwithstanding that withdrawal, the adoption of protective measures was absolutely necessary and the Commission's decision not to do so is unlawful and is a misuse of powers.

72. The applicant emphasizes that, unlike the termination of investigations after the acceptance of undertakings offered under Article 10 (1) of Regulation No 2176/84 or the adoption of definitive measures permitting the anti-subsidy proceedings to continue either by the imposition of countervailing duties where undertakings have been violated (Article 10 (6) of the regulation) or by the procedure for the review of definitive measures (Article 14 of the regulation), the termination of anti-subsidy proceedings by the lapse or repeal of countervailing duties, by the lapse of the undertakings given to the Community (Articles 14 or 15 and 7 (9) (b) of the regu-

lation) and, as in this case by the closing of the inquiry without the imposition of countervailing duties and without any undertakings being given, deprives the complaining party of the right to seek either the imposition of countervailing duties (Article 10 (6)) or review of measures adopted (Article 14). According to the applicant, since the adoption of such a decision under Article 9 (1) of Regulation No 2176/84 entails the loss of such important rights, it should be possible only if it appears, objectively and after consultation, that no protective measure appears to be necessary. In this case, the Commission did not arrive at that conclusion inasmuch as it merely declared that the interests of the Community did not require the imposition of countervailing duties.

73. In that regard, the applicant claims that the only lawful and objective criterion for assessing whether or not countervailing measures are necessary are the findings made by the Commission during the period covered by the investigation (Articles 12 (1) and 7 (1) (c) of Regulation No 2176/84), which in this case did indeed reveal the existence of a subsidy and injury suffered by the economic sector concerned in the Community. The Commission should not therefore have deviated from the principle that such findings are decisive by refusing, for reasons connected with the interests of the Community, to adopt countervailing measures. In the applicant's view, by so doing, the Commission committed the following infringements:

It infringed the provisions of Articles 7 (1) (c) and 12 of Regulation No 2176/84.

It acted contrary to the proposal it had made to the Council on 4 January 1985 for the adoption of a countervailing duty.

It deprived Article 3 of Regulation No 2176/84 of its proper scope by unreasonably limiting the definition of a countervailable subsidy and its powers of permanent supervision in the matter, inasmuch as it did not take account of the fact that Brazil did not withdraw the subsidy until the end of the period covered by the investigation and did so by means of purely internal administrative decisions not published in Brazil's Official Journal. Although formally requested to do so by the Commission, Brazil refused to give a definitive undertaking, in the context of this third anti-subsidy proceeding, to withdraw the subsidies found to exist and not to reintroduce subsidies of that nature. It has infringed the undertaking to that effect given during the 1977 proceedings. It never notified either GATT or the Community of the multitude of subsidies granted in respect of soya meal. It set up a system of hidden, cumulative subsidies, constantly modified and added to, which have not been significantly changed since 1975 and, in any event, were not changed during or after the investigation period and which are in any case of considerably greater significance than the Commission's findings suggest. Brazil has not revealed in the context of the present proceedings the subsidies challenged by the applicant in the additional anti-subsidy complaint lodged on 8 January 1985. Finally, it can be seen from the confidential documents on the file that Brazil intends to continue to grant subsidies.

It did not take account of the continuing injury caused to the European vegetable oil

industry, which became even more serious in 1984 (the share of the Community market held by Brazilian soya meal increased from 28.2%, the place which it occupied between January and September 1983, to 37.5% for the same period in 1984), and hence failed to respect the rationale of the anti-subsidy proceedings, which is to provide protection against subsidies which distort competition;

It overlooked the fact that Regulation No 2176/84 contains no provision corresponding to Article 4 (4) of the GATT Anti-subsidy Code, according to which a countervailing duty may be imposed 'unless the subsidy is withdrawn'; moreover, that provision does not prohibit the adoption of countervailing measures when confronted with subsidies persisting in various forms and with unchanged or even increased injury, as can be seen from Articles 2 (12) and 6 (4) of the Anti-subsidy Code, and at most may be applied to the letter only to States which have given notice of subsidies in the context of GATT (Article XVI of GATT) and which are prepared to give an undertaking to withdraw the subsidies found to exist (Article 10 of Regulation No 2176/84).

74. With regard to the 'interests of the Community', consideration of which justified, in the Commission's view, the termination of the proceedings without the adoption of protective measures, the applicant claims that those interests may not be used in this case as a criterion upon which to base the decision having regard to the fact that the injury caused to the European industry was real and continuing and that the maintenance in effect and reintroduction of subsidies by Brazil remain probable. According to the applicant the concept of 'Community interests' cannot be extended so as to hinder the adoption of protective measures which appear justified in the light of the letter and purpose of Regulation No 2176/84. Furthermore, according to the applicant, the criterion of the interests of the Community can be legitimately applied only in regard to the imposition of provisional duties and, in particular, of definitive anti-subsidy measures (only Articles 11 and 12 of Regulation No 2176/84 refer to the interests of the Community), after a definitive finding that such subsidies exist; thus the Council alone has the power, in the context of Article 12 of Regulation No 2176/84, to defend the 'interests of the Community'. The Commission therefore does not have the right, once a protective measure is shown to be 'necessary within the meaning of Article 9 (1) of Regulation No 2176/84', to terminate the proceedings and must submit to the Council a proposal calling for the imposition of countervailing duties (Article 12 (1)), as it did in its proposal of 4 January 1985 (although its proposal was inappropriate since it proposed the adoption of suspended countervailing duties notwithstanding the definitive character of its findings during the investigation). The applicant considers that, having made that proposal, the Commission no longer had the right to withdraw it and to reach a decision itself on the basis of the 'interests of the Community', thereby preventing the Council from adopting a decision under Article 12 of Regulation No 2176/84, which does not authorize it either to refrain from adopting a decision or to delegate its power to do so.

75. The Commission states that the subsidy at issue was initially withdrawn with respect to soya meal and subsequently was completely withdrawn by raising the interest rates for the loans granted. It emphasizes that that withdrawal was brought about by measures of the same legal nature as the

measure which had instituted the subsidy (resolutions and communications of the Central Bank of Brazil and of Cacex, the former's foreign trade department) and that the subsidy has not been reintroduced since then, as can be seen, moreover, from a statement made by the competent authorities (Cacex) on 18 April 1984. That withdrawal also made it unnecessary for Brazil to give any undertaking under Article 10 of Regulation No 2176/84, because such an undertaking would have dealt with a subsidy already withdrawn during the reference period. The contested decision to terminate the proceedings was therefore legitimately adopted because there was no countervailable subsidy in the absence of any financial charge on the public account.

76. Furthermore, according to the Commission, the interests of the Community do not justify the adoption of countervailing measures in those circumstances. The Commission claims that it is itself entitled to assess the interests of the Community as a factor in its decision, in the context of Article 12 of Regulation No 2176/84, by reason of the consultation procedure which it is obliged to follow (Article 6 (4) (d), concerning consideration of the circumstances in question) and because its proposal to the Council must be based on all the factors on which the latter must base its decision. The same is true under Article 9 (1) by reason of the fact that the examination to be made in order to determine whether measures should or should not be proposed to the Council necessarily involves verifying the necessity of protective measures in the interest of the Community, the absence of such interest consequently permitting it to terminate the proceedings. The condition concerning the need to adopt protective measures referred to in Article 9 (1) is additional to the conditions laid down in Article 3 (1), but its scope is wider inasmuch as it grants the Community authorities a discretion in assessing the circumstances both in regard to the submission by the Commission of a proposal to the Council or in regard to the adoption of a decision by the Council.

77. The Commission thus explains that, when it assessed the interests of the Community in this case, it concluded, without misusing its powers, that the withdrawal of the subsidy and the failure to reintroduce it entailed the removal of the injury suffered by the Community industry. The fact that the withdrawal of the subsidy took place at the end of the reference period or thereafter is not decisive because although, according to Regulation No 2176/84 (28th recital in the preamble and Articles 7 (1) (c) and 12 (1)), countervailing measures may be adopted only if the facts justifying them have been found to exist during the investigation period, it is not thereby prohibited to take account of the disappearance of those facts during or after the reference period. Furthermore, account must be taken of the withdrawal of a subsidy, since according to Article 4 (4) of the Anti-subsidy Code the adoption of countervailing duties is possible if the subsidy has not been withdrawn and, according to Article 4 (9), such duties may remain in force only as long as and to the extent necessary to counteract the subsidy.

78. With regard to the complaint that it did not take account of the continuance of the subsidy and the aggravation of the injury in 1984, which the applicant claims to have demonstrated in its anti-subsidy complaint of 8 January 1985, the Commission observes

that that complaint could not be lawfully included in the proceedings terminated by the decision of 16 April 1985 and that a separate procedure had to be initiated in respect of it. With regard to the practices of the Brazilian Government in the past, the Commission observes that those practices have either been withdrawn or did not constitute countervailable subsidies and may not be examined again in the present proceedings. The same is true in regard to the applicant's reservations concerning the practices which the Brazilian Government may follow in the future, and to share those reservations would show, in the Commission's view, a particular lack of confidence towards Brazil.

79. The Commission explains in regard to its proposal made to the Council on 4 January 1985 that, since the subsidy had been withdrawn, it proposed that the Council impose a definitive duty of 7.27%, but suspend the operation thereof, and the same considerations led it subsequently to the conclusion that the interests of the Community did not ultimately require such a measure. It emphasizes that its right to withdraw a proposal made to the Council derives from Article 149 of the EEC Treaty and may be exercised as long as the Council has not adopted a decision, as was the case here owing to the reservations expressed by certain of its members concerning the utility of the proposed measure (a definitive duty whose collection was suspended) and even concerning its compatibility with Regulation No 2176/84, both from a technical point of view (the introduction of a new subsidy would in any event require a new investigation under Article 11 (1) unless Article 10 (6) was applied) and from a political point of view (the Community's relations with Brazil).

80. The intervener agrees with the Commission's arguments in regard, in particular, to the withdrawal of the subsidy and the possibility of not imposing countervailing measures where the interests of the Community do not require it and refers to the judgment of the Court in Case 191/82 (*Fediol* v *Commission* [1983] ECR 2913, paragraph 26). It emphasizes that the Council's refusal to adopt the Commission's proposal was a lawful exercise of its discretionary powers and that the Commission was therefore under an obligation to terminate the proceedings since, on the one hand, a further proposal for the imposition of a definitive countervailing duty which was not suspended would not have been realistic and, on the other hand, a proposal to the Council that no duty be imposed is not provided for in Regulation No 2176/84. Finally, it emphasizes that the decision to terminate the proceedings was in accordance with the GATT code on subsidies and countervailing duties (Article 4 (4), (3) and (9)).

(ii) Tax benefits in respect of hedging transactions on foreign markets

81. The applicant states that under Decree Law No 1418 of 3 September 1975 the Brazilian oil mills enjoyed during the period under consideration, and even after 1983, favourable treatment in regard to taxation of their profits and losses on hedging transactions on foreign markets. The profits thus made were exempt from taxation and, even though the Commission does not mention it in its decision, losses could be deducted from income tax. It points out that the

Commission calculated the amount of that subsidy in accordance with Article 3 (4) (c) at 0.09% of the fob value of exports resulting from a weighted average covering eight exporters, but it regarded that amount as too small to justify the imposition of countervailing duties.

82. The applicant firstly contests the view that the subsidy may, in accordance with the *de minimis* principle, be properly regarded as so small as to justify a refusal to impose countervailing measures and emphasizes that the rate applied in the United States is 0.1%. Secondly, according to the applicant, the Commission made inadequate calculations since it failed to take account of certain factors essential to the existence of a subsidy, such as the possibility of deducting losses from income tax; in regard to the amount of the subsidy, it made insufficient findings of fact, since it itself states that it merely verified the information supplied by four exporters without making an on-the-spot enquiry, and thereby infringed Article 7 of Regulation No 2176/84. It claims that the subsidy is worth considerably more than the minimum amount of 0.09% (or 0.1%) if account is taken of the fact that the system makes it possible to avoid income tax and that such a small advantage would never give rise to a tax exemption, and that, in the opinion of experts, that advantage must be greater than 2% of the fob value of exports. Although the applicant stated that it was abandoning this complaint following explanations provided by the Commission during the written proceedings concerning the composition and calculation of the subsidy, it claims nevertheless that the fiscal advantages resulting from that practice are still relevant in the context of a consideration of the cumulative effect of the various subsidies granted to the Brazilian vegetable oil industry.

83. For the rest, the applicant's arguments are the same as those put forward in regard to the concessionary financing for exports of soya meal.

84. The Commission explains that the Brazilian tax scheme in question, which applies to products other than soya meal, is designed to reduce the disadvantages flowing from fluctations in export prices and to facilitate the country's intake of foreign currency. It emphasizes that tax relief is not granted separately on profits made abroad, on the one hand, and losses which flow from such transactions, on the other, (the deduction of losses is perfectly normal and has no connection with the tax mechanism in question), but is granted on the annual total of the hedging transactions carried out on foreign markets, which is exempt from tax only to the extent that it is brought back to Brazil not later than the date of the annual tax declaration.

85. The Commission emphasizes that the advantage which results therefrom for exporting undertakings has been calculated at 0.09% of the fob value of exports, and that it did not therefore consider it necessary to impose countervailing duties, on the basis of the *de minimis* principle, which, since no amount is laid down in Community law, is applied by it in each case after considering all the circumstances in order to determine what amount may be regarded as minimal.

86. With regard to the calculations which it carried out, the Commission states that they were based on the documents (tax declar-

ations setting out separately the amounts of the hedging transactions) supplied by eight undertakings chosen with the applicant's agreement; two undertakings had not engaged in such transactions, three had made losses and only three had made a profit. The figure of 0.09% results from the multiplication of the final amount of the profits made on those transactions by the applicable rate of tax (30%); the advantage thus arrived at was compared with the exports carried out by each of the undertakings concerned, giving a maximum rate of 0.36%, which, on the basis of a weighted average of the rates for the eight undertakings, represented only 0.09% of the value of the exports of those undertakings.

87. For the rest, the Commission advances the same arguments as those submitted in regard to concessionary financing for exports of soya meal.

88. The intervener emphasizes that the applicant ultimately does not contest the Commission's calculations. The intervener agrees with the essence of the Commission's arguments in the same way as it did in regard to the subsidization of exports of soya meal by way of concessionary financing.

C. Kakouris
Judge-Rapporteur

OPINION OF MR ADVOCATE GENERAL MANCINI

(see Case 187/85, p. 4173)