OPINION OF MR ADVOCATE GENERAL MANCINI
delivered on 15 March 1988 *

Mr President,
Members of the Court,

1. My Opinion relates to the actions brought in Cases 187/85 and 188/85 by the EEC Seed Crushers' and Oil Processors' Federation (hereinafter referred to as 'Fediol') for a declaration that Decisions 85/233 and 85/239, adopted by the Commission of the European Communities on 16 and 18 April 1985 respectively, are void. By means of those decisions — which are based on Council Regulation (EEC) 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) — the Commission terminated the anti-subsidy proceedings which had been initiated as a result of a complaint submitted by Fediol concerning imports into the Community of soya meal originating in Brazil and Argentina (see Official Journal 1985, L 106, p. 19, and L 108, p. 28).

Although the two actions are not identical, they have many points in common. In the first place, the representations which set in motion the Commission's investigation concern imports of the same product. Secondly, the practices criticized as constituting subsidies and the grounds relied upon by Fediol overlap to a large extent. These close links and, in addition, the obvious interest in rationalizing the proceedings justify dealing with the two cases together. The submissions and criticisms relied upon in the application concerning imports from Brazil (Case 188/85) will of course be considered separately (paragraphs 9 to 14).

There are some further remarks I wish to make by way of introduction. The cases before the Court arise in the context of a dispute which has pitted Fediol and the Commission against one another for more than a decade. The Court has already given judgment in that dispute once before (judgment of 4 October 1983 in Case 191/82 [1983] ECR 2913) and will soon do so again for the third time: an action is pending in which Fediol seeks the annulment of the decision of 22 December 1986 rejecting its request that the Commission initiate a proceeding concerning other allegedly unlawful practices involving the importation of soya meal from Argentina (Case 70/87).

At the root of this long-standing conflict lie the economic interests of the European seed crushing and oil producing industry which processes soya beans. Community producers of meal (a solid residue resulting from the extraction of the oil contained in the beans and used mainly as animal feed and fodder) have sustained material injury as a result of imports from Brazil and Argentina which have, in recent years, taken over a share of the European market approaching 50%. On the other hand, the export of soya-based products, and in particular soya meal, yields profits which represent one of the principal assets in the balance of payments of the two South American countries concerned, which, as is well known, are in deficit. That explains why the relevant soya producers'

* Translated from the Italian.

organizations, the Cámara de la industria aceitera de la República argentina and the Associaça o brasileira das industrias de oleos vegetais (hereinafter referred to as 'Ciara' and 'Abiove' respectively) have intervened in support of the contested decisions of the Commission.

2. In order to gain a better grasp of the problems submitted to the Court, it is appropriate to refer to the relevant legislation. That legislation consists of Regulation No 2176/84, cited above, which has amended and updated the provisions adopted in conformity (a) with the international obligations imposed on the Community by Article VI of the General Agreement on Tariffs and Trade (GATT) (Nations unies, *Recueil des traités*, Vol. 55, p. 187) and (b) with the rules on interpretation laid down, in connection with the Tokyo Round, in the so-called 'Anti-subsidy Code' (Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, concluded in Geneva on 12 April 1979).

That regulation contains a number of procedural and substantive provisions concerning the matter under consideration. The cornerstone of the system is Article 3 (1) which states that 'a countervailing duty may be imposed for the purpose of offsetting any subsidy bestowed, directly or indirectly, in the country of origin or export, upon the manufacture, production, export or transport of any product whose release for free circulation in the Community causes injury'. However, the principle thus laid down is subject to certain limitations. According to Article 4, the injury must relate to a Community industry and must be 'material'. In addition, according to Article 12, definitive action may not be taken except where it is required in 'the interests of the Community'.

It is noteworthy that, in contrast to the approach it takes with regard to dumping (Article 2 (2)), the regulation does not define the concept of a subsidy in general and abstract terms, but merely lays down the conditions on which duty may be imposed. Nor is it possible to state that the absence of a proper definition of that concept is remedied by the list set out in the annex. Apart from the fact that the list is merely illustrative, it mentions only practices which constitute export incentives and only for the purposes of the imposition of duty.

In any event, it is well known that direct subsidies differ from indirect subsidies inasmuch as they are capable of being granted forthwith in respect of the end product, and that export subsidies differ from internal subsidies according to the intended purpose of the product itself. Under the General Agreement on Tariffs and Trade, internal subsidies are not to be offset by countermeasures in view of the 'important objectives of social and economic policy' which certain countries, and in particular Third World countries, pursue by means of such subsidies (see Articles 8, 11 and 14 of the Anti-subsidy Code). However, they may be offset by countermeasures within the Community. The Council and the Commission have recourse to Article 3 where, instead of aiming to confer a general advantage on industry and agriculture, subsidies are sectoral or specific in nature and therefore aim to increase the competitiveness of certain sectors of production.

3. The Commission has raised an objection *in limine litis* against the admissibility of certain claims put forward by Fediol, although it has not made a separate application to that effect. According to the Commission, those claims seek a declaration from the Court that the contested practices constitute a subsidy for the purposes of

Community law. The Commission's objection is supported by Ciara in Case 187/85.

I would point out that, in arguing along those lines, the Commission is confusing the claim in the two applications — which clearly seeks the annulment of the decisions terminating the anti-subsidy proceedings — with the submissions put forward in support of that claim. The Commission's objection is therefore unfounded.

4. I now turn to the substance of the case. Fediol alleges in the first place that the decision concerning imports from Argentina (Case 187/85) infringes Article 3 of Regulation No 2176/84. In its view, that infringement consists in the Commission's failure to acknowledge that the following practices constitute subsidies: (a) the imposition of differential taxes on exports of soya meal and (b) the raising of obstacles in the way of exports of soya beans. The applicant also alleges that Article 7 of the regulation has been infringed. It maintains that the Commission failed to carry out an exhaustive investigation into the facts and, in particular, that its enquiries into the nature, the extent and the impact of the practices complained of were inadequate.

On the other hand, with regard to the decision concerning imports from Brazil (Case 188/85), Fediol advances three sets of submissions. The first set of submissions also relates to the infringement of Article 3 but the practices which the Commission is criticized for not treating as subsidies are more numerous. In addition to those referred to under (a) and (b) above, they consist of (c) concessionary financing for storage of soya beans, (d) concessionary financing for exports of soya oil inasmuch as it is indirectly intended to subsidize soya meal, and (e) the exemption from taxation of profits realized on exports of soya oil.

The second set of submissions alleges both a breach of law and a misuse of powers and concerns the Commission's failure to impose countervailing duties in respect of two further practices, namely (f) concessionary financing of soya meal exports and (g) the grant of tax benefits in respect of hedging transactions concluded by Brazilian producers on foreign markets. The Commission acknowledged that those practices constituted subsidies causing injury to Community industry but it did not impose countervailing duties on the ground that this was not in the interests of the Community, as required by the regulation.

The third set of submissions also alleges a breach of law and, in particular, of Articles 9 and 12 of Regulation No 2176/84. The Commission is charged with terminating the anti-subsidy proceeding even though it had submitted a proposal to the Council to adopt countervailing measures in respect of the practices described under (f) and (g). That contradictory line of approach is also said to involve a misuse of powers.

5. The submission alleging an infringement of Article 3 as regards the Argentinian and Brazilian practices referred to under (a) and (b) is based on a detailed criticism of the concept of a subsidy adopted by the Commission. According to Fediol, that concept is too narrow, particularly because it is based on whether the subsidy is capable of constituting an effective 'charge' on the resources of the State which grants it. Instead, according to the applicant, there are a number of arguments demonstrating that the concept should be defined in broad terms.

In the first place, there is the wording of Regulation No 2176/84. The condition that there must be a charge on the public account cannot be inferred either from Article 3, which refers only to subsidies bestowed 'directly or indirectly', or from the illustrative list annexed to the regulation. Point (d) of that list, for instance, refers to practices which have no financial implications such as 'the delivery by governments or their agencies of . . . products or services . . . ' and clearly no purpose is served by relying, as against that factor, on the wording of point (l) ('any . . . charge on the public account') which, in view of the illustrative nature of the list, is not of decisive significance.

On the other hand, there are a number of factors militating in support of a broad definition of the concept of a subsidy, namely (a) the purpose of the regulation, which was adopted precisely in order to defend Community producers against competition from imports, however subsidized, from non-member countries, (b) international rules, and in particular the second sentence of Article VI (3) of GATT and Articles 8, 9 and 11 of the Anti-subsidy Code, (c) legislation adopted by the United States (the Trade Agreement Act 1979, Section 771) and Canada (Special Import Measures Act 1984), and (d) Article 92 of the EEC Treaty, as interpreted by the Court and applied by the Commission. In that regard, the severity with which the Commission penalizes the different kinds of aid without requiring such aid to have an impact on the finances of a State is particularly significant.

6. The Commission holds the opposite view. In its opinion, to the limits which the regulation sets to the adoption of countervailing measures (material injury to Community industry and the existence of a Community interest) must be added three further requirements, that is to say the subsidy must (a) be granted by the State, (b) constitute a charge on the public account, and (c) give an advantage to the recipients. Particular importance attaches to the second condition. Admittedly, Article 3 does not refer to it. However, that condition is laid down in point (l) of the illustrative list, which, as is clear from the context in which it is set and from its comprehensive wording, establishes a general criterion. Hence it is necessary to read points (a) to (h) in the light of that condition and to regard it as inherently applicable to any other practice, even though such practice may not be provided for in the illustrative list and may even be aimed at subsidizing production or transportation unconnected with exports.

That interpretation, moreover, is fully consistent with the objectives of Regulation No 2176/84 and with the spirit of the GATT rules which, although they raise obstacles in the way of free trade, do not exceed the limits of what is strictly necessary. Nor can that interpretation be contradicted by referring to the solutions adopted by the Communities' trading partners and to Article 92 of the EEC Treaty. As is clear from the third recital in the preamble to the regulation, United States and Canadian practices constitute matters to be taken into account by the Council and the Commission but are not factors which those institutions must slavishly abide by. With regard to the concept of aid, it is well known that it was conceived in an intra-Community context and from the point of view of a single market. It is therefore natural that its interpretation should be governed by criteria stricter than those applicable to the interpretation of the concept of a subsidy.

7. In considering the arguments summarized above and the applicant's criticisms, it is advisable to bear in mind the principles on which the Court bases the power of review which Community law

confers upon it with regard to subsidies. According to the first *Fediol* judgment, the Court may not intervene in the exercise of the discretion reserved to the Community authorities by the regulation. However, notwithstanding the existence of that discretion, it is required to review the legality of the measure terminating the proceeding. When challenging such a measure, therefore, a complainant is entitled to put before the Court any matters 'which would facilitate a review as to whether the Commission has observed the procedural guarantees . . . has committed manifest errors in its assessment of the facts, has omitted to take into consideration any essential matters of such a nature as to give rise to a belief in the existence of subsidization or has based the reasons for its decision on considerations amounting to a misuse of powers' (paragraph 30 of the judgment).

Having said that, let me point out at once that, in the terms in which it is couched, the Commission's argument would appear to be unacceptable. The wording of point (l), on which the Commission relies to a large extent, cannot be regarded as being of such a kind as to lay down a general criterion for at least two reasons; (a) point (l) forms part of a list which, according to Article 3 (2) of the regulation to which it is annexed, is not exhaustive; (b) the position of point (l) at the end of the list, which, far from ascribing decisive importance to that point, makes it purely residual in relation to the practices set out in the preceding points. But that is not all. The Commission is confusing or unifying — like Fediol moreover — two concepts which in legal terms must be rigorously distinguished: on the one hand, a subsidy as such, and on the other, a subsidy justifying the imposition of duty.

The two errors are inter-related or, to put it more clearly, the first error is the result of the second. As the Court will remember, the Commission lays down three further requirements in addition to the existence of a Community interest and injury to Community producers. However, since from its point of view the only kind of subsidy that exists is the one that may be subjected to countervailing measures, the Commission relates those requirements to that subsidy. The result is obvious: the Commission is compelled to find a legal basis for those requirements which in fact deals exclusively with *that* subsidy. And, not finding a legal basis in Article 2, it has to resort, with all the distortions and contradictions that have been mentioned, to the only point in the illustrative list which lends some support to its argument.

Instead, I propose to take as a basis the distinction to which I have referred or, in other words, to recognize that the interpreting court is bound above all to consider whether a subsidy exists and, only in the event of an affirmative answer, to establish whether it needs to be offset by the imposition of a duty. All the pieces of the puzzle will thus fall into place. In other words, it will lead to the realization that the legal requirements of the existence of a Community interest and injury to Community producers relate to the second problem, whilst the requirements laid down by the Commission relate to the first question. And there is not the slightest doubt that in *that* context those requirements are appropriate, inasmuch as they unfailingly correspond to the constituent elements of the 'subsidy as such'.

That is borne out by a finding which, although unsupported by rules of Community or international law, is semantically and logically indisputable. I think I can express it in the following terms: a subsidy necessarily entails the grant of a benefit to the recipients and the acceptance of a corresponding sacrifice on the part of a natural or legal person who, in the general interest, puts himself outside the laws of the market. Clearly the term 'sacrifice' must be

understood in the broadest sense. Hence not only a disbursement but also a loss of income or a reduced income and even — as in the case of the practices referred to in point (d) of the illustrative list — a measure which deflects persons, goods, know-how and so on from their intended purposes constitutes a subsidy.

The validity of that conclusion is borne out, moreover, by other — perhaps less relevant but none the less significant — arguments. The first argument, which is to be found particularly in legal literature, is *a contrario*: unless it is linked to the requirement of a charge on the public account, the concept of a subsidy may expand until it encompasses any type of State aid to the economy and consequently includes policies on pricing or the fixing of environmental parameters (Cunnane and Stanbrook, *Dumping and Subsidies. The Law and Procedures Governing the Imposition of Anti-dumping and Countervailing Duties in the European Communities*, London and Brussels, 1983, p. 51; Beseler and Williams, *Anti-dumping and Anti-subsidy Law. The European Community*, London, 1986, pp. 123 to 125). The second argument is based on the manner in which the Treaty — which, it must not be forgotten, is an agreement governed by international law — defines the related concept of aid. Aid, according to Article 92, also consists of a measure adopted by the State, which affects public resources and is intended to promote certain undertakings or certain kinds of production.

8. Now that the validity of the criteria which determine the extent to which a subsidy constitutes a burden for the State and an advantage for the recipients has been established, it is necessary to ascertain whether the Commission has correctly applied them to the Argentinian and Brazilian practices complained of by Fediol. As I said earlier, those practices consist of (a) the system of differential taxation established by those two countries in respect of exports of soya-based products and (b) the raising of obstacles by those States in the way of exports of soya beans.

According to the applicant, the practice referred to under (a) harbours two kinds of subsidies. The first is characterized by the difference in the rates of tax imposed on soya beans, on the one hand, and on soya-based products (meal and oil), on the other. Soya beans are penalized (the rate charged being 25% as against 13% in Argentina, and 13% as against 11% and 8% respectively in Brazil), with the result that producers are obliged to offer them for sale on the domestic market. Argentinian and Brazilian seed crushers thus receive an *indirect* subsidy for the manufacture of soya meal, which consists in the possibility of processing a raw material — soya beans — obtainable at prices which are particularly low because supply is so great.

The second is a *direct* subsidy. For the State the difference between the two rates means a loss of revenue from exports of soya beans, that is to say a loss of profits or, to put it another way, a financial charge on which the Commission makes the application of Article 3 conditional. In the case of Brazil, moreover, that state of affairs is further aggravated by the existence of a tax on the movement of goods (ICM) which is in the nature of a real export refund. In fact, the applicable rules provide that the difference between the tax charged on the soya beans and the tax payable on the soya meal exports is to be recovered from the seed crushers.

There is little to say with regard to the practice referred to under (b). According to Fediol, registration fees and the other formalities imposed by Brazil and Argentina for the exportation of soya beans are also aimed at discouraging the disposal of the product on the world market and for that very reason ensure that national seed crushers acquire their raw materials at prices which are as low as possible.

This submission must be rejected. There is no doubt that the fixing of differential rates of tax for goods belonging to the same sector (the so-called 'soya complex') gives an advantage to traders liable to the lower rate, and the Commission acknowledges this quite openly in the contested decisions. Can it be said, however, that a measure of that kind also satisfies the requirement of a sacrifice on the part of the public account? I do not believe so. As I said earlier, a sacrifice in terms of reduced revenue is clearly conceivable but — as is obvious — only in so far as there is a rule to which that reduced revenue constitutes an exception and, consequently, only if the goods or the activities liable to a specific charge are all taxed at the same rate. In the case of the Argentinian tax on exports that condition is not satisfied (vegetables and hides, for instance, are taxed at the rate of 10%), and in the case of the Brazilian tax on the movement of goods (ICM) processed products are as a rule zero-rated.

As far as that tax is concerned, moreover, it is appropriate to bear in mind that it was extended to exports of oil and meal precisely as a result of the Commission's intervention and that it was defined in the contested decision as a tax not constituting a charge on the public account because it is levied on the processed product (paragraph 12.5). In its defence, however, the Commission has pointed out that, as it is levied at the time at which the soya beans are purchased, the tax is borne by the product during the processing stage and is therefore connected with turnover. Nor is the nature with which that tax is thus endowed affected by the fact that in the calculation of the tax the charges already paid on the raw material are taken into account at the time when the oil and the meal are exported.

As it is based on turnover, the ICM is covered by point (h) of the illustrative list annexed to the regulation, which authorizes the remission of charges already levied on raw materials used in the manufacture of the product intended for export. It was therefore quite legitimate for the Commission to deny that the practice under consideration constituted a subsidy. Moreover, the fact remains, as the intervener Abiove has pointed out, that not even the inflexible and suspicious United States authorities have questioned the correctness of the differential taxation imposed by Brazil.

Nor, finally, is it possible to accept Fediol's criticism of the obstacles raised by Argentina and Brazil in the way of exports of soya beans. Since the price of that product depends on the degree of elasticity of supply and demand on the world market, the possibility that a number of diverse administrative formalities may affect its amount by directing production towards the domestic market and thus favouring the seed crushers is to be ruled out. However the requirement of a charge on the public account is not satisfied either. On the one hand, those formalities are prescribed for statistical purposes, and on the other they are aimed at preventing speculative manoeuvres.

The foregoing analysis completes the assessment of Fediol's complaints, also on the basis of Article 7 of the regulation, against the decision concerning imports of soya meal from Argentina and it undoubtedly entails the dismissal of the application in Case 187/85.

9. That brings me to Fediol's criticisms of the decision concerning imports from Brazil (Case 188/85). Those criticisms raise four kinds of problems. In the first place, it is necessary to ascertain whether, in assessing a practice concerning soya beans (*supra*, under (c)), the Commission was right to deny that it constituted a subsidy. Then it will be necessary to establish whether the Commission was correct in deciding that two practices concerning exports of soya oil (*supra*, under (d) and (e)) and the practices relating to soya meal could not be equated. Next, consideration will have to be given to the assessment on the basis of which the defendant declared that the Community had no interest in offsetting the practices deemed to constitute subsidies for exports of soya meal (*supra*, under (f) and (g)). Finally, it will be necessary to raise the question whether, after submitting a proposal to the Council to impose duty in respect of those practices, the Commission was lawfully entitled to terminate the proceeding.

I shall consider each of those matters in turn. The first complaint concerns concessionary financing for the storage of soya beans. The applicant points out that, during the period under investigation by the Commission (1983), the normal interest rate on loans for 180 days was between 100% and 150%. By contrast, as regards the financing for the same length of time of the storage of soya beans, a government programme concerning the storage of 27 agricultural commodities fixed the rate at 45%. Fediol therefore alleges that the Commission (a) failed to recognize that such concessionary financing was clearly specific to a given sector and, as such, was liable to duty (*supra*, section 2, final part), (b) disregarded the fact that, even though the concessionary financing programme was formally withdrawn on 1 January 1984, it remained in existence for some considerable time and was in any event applied during the investigation period, and (c) was guilty of a misuse of powers by failing in those circumstances to safeguard Community industry.

The first allegation (a) cannot be upheld. According to Fediol, the practice under consideration was specific to a given sector because only certain undertakings processing agricultural products, and in particular those operating in the soya sector, benefited from it. However, the documents in the file show that the subsidies in question related to a range of different goods (soya, fish, grapes, silk and so on) that was so wide as to coincide with the entire range of agricultural commodities qualifying for storage. The only goods that were ineligible for those subsidies were those that are not suitable for storage because of their nature or their limited production or — as in the case of cocoa and coffee — because of the special arrangements to which they are subjected by international agreements.

Nor can it be said that, amongst those goods, soya was treated in an unjustifiably preferential manner. In addition to being very close to one another, the figures produced on that point by Fediol and the Commission (31.9 and 31.7%) seem to be wholly proportionate to the importance

which the 'soya complex' has gained in the Brazilian economy. As is well known, soya, annual production of which exceeds 15 million tonnes, has replaced coffee as Brazil's most important crop.

Clearly, once the argument that the subsidy is specific to a given sector has been rejected, the allegations regarding the length of time for which it was paid and the misuse of powers of which the Commission was supposedly guilty in terminating the relevant proceeding cannot be sustained either. Accordingly, there is no need to deal with those allegations.

10. I now turn to the practices of concessionary financing for exports of soya oil and of exempting from taxation the profits realized on such exports. The applicant maintains that those practices constituted an indirect subsidy for exports of soya meal since the traders concerned transferred the benefits resulting from those practices to the soya meal sector.

That criticism is unfounded. Although those two concessions undoubtedly imposed a burden on the Brazilian treasury, they brought no benefit whatever — not even an indirect one — to the soya meal sector. That sector may possibly have derived some profit from those concessions in the manner complained of by Fediol, but there was certainly no causal connection between any such profit and the contested measures. If it really did take place, the transfer to which the applicant refers was the result of a choice freely made by the exporters by reference to a wide range of factors based on their own convenience.

11. The last two practices challenged by Fediol consist in concessionary financing for exports of soya meal and the grant of tax benefits in respect of hedging transactions concluded by seed crushers on foreign markets. Having recognized that those practices constituted subsidies and calculated the amount of those subsidies at 7.66 and 0.09% respectively of the f.o.b. value, the Commission submitted a proposal to the Council to impose a duty thereon but not to collect it at once (4 January 1985). Subsequently, however, after establishing that the Brazilian Government had abolished the concessionary financing programme with effect from September 1983, and having regard to the misgivings which the prospect of imposing a duty had raised in the Council, the Commission changed its mind. It stated that the interests of the Community did not require the adoption of countervailing measures and the proceeding could be terminated.

Fediol levels three criticisms against the corresponding paragraphs of the contested decision (paragraphs 5, 6 and 27). The first criticism concerns the infringement of Articles 9 and 12 of Regulation No 2176/84. The applicant argues that once it has been established that a practice constitutes a subsidy to such an extent as to cause injury to Community industry, the imposition of countervailing duties must perforce be in the interests of the Community and, in any event, cannot be excluded by relying on those interests. Moreover, Article 12 confers on the Council alone the power to assess those interests in connection with the imposition of definitive measures.

Next, Fediol maintains that, because the Commission changed its mind, the decision is vitiated by a misuse of powers. The procedure which culminated in the adoption of that decision must, in addition, be regarded as irregular. In its third criticism, the applicant alleges that, once it has requested the Council to impose duties, the Commission lacks the power to terminate the proceeding by implicitly withdrawing its

proposal and preventing the Council from taking a decision on the substance of the matter.

12. A preliminary point. In its reply Fediol waived its complaints concerning hedging transactions and recognized the limited impact of such transactions. The following considerations are therefore concerned solely with the practice of concessionary financing for exports of soya meal.

With regard to the first criticism, I would remind the Court that, according to Regulation No 2176/84, the fact that a subsidy is capable of causing material injury to a Community industry does not in itself justify the imposition of countervailing measures. In accordance with the provisions of the General Agreement on Tariffs and Trade, and departing from the United States Trade Agreement Act, the regulation lays down a second requirement, that is to say the imposition of such measures must be required by the 'interests of the Community'.

It seems clear to me that those interests include those of the Community producers operating in the sectors concerned. It is equally clear, however, that those interests are not limited to safeguarding those producers, whose circumstances have in any event already been considered in connection with the determination of injury. The interests of the Community can be assessed only by recourse to criteria which are much wider in scope, such as whether it is appropriate, not only from a commercial but also from a *political* point of view, to impose duties. Moreover, once it has been established that that assertion is correct — or, more specifically, that, unlike the position with regard to dumping, the practices in respect of which the duties are imposed are introduced not by undertakings but by *governments* and frequently in order to safeguard essential public requirements — it is equally clear that the institutions entrusted with that assessment must be given a broad discretion.

Now that this principle has been established (and the existence of which, moreover, the Court takes for granted — see paragraph 30 of the first *Fediol* judgment), it must at once be added that, for the purposes of that assessment, the Council does not enjoy a general position of primacy but is empowered only to adopt *one* of the measures which may constitute the outcome of the proceeding. In the event of the imposition of provisional duties, for instance, Article 11 of the regulation expressly provides that the interests of the Community are to be assessed by the Commission. That is also laid down by Article 9, if it is to be given any reasonable interpretation at all, with regard to the decision to terminate the proceeding where it becomes apparent that protective measures are unnecessary. In circumstances such as those, it is surely wrong to argue on the basis of Article 12 that the system established by the regulation confers on the Council an exclusive power of assessment. In reality, that provision merely calls upon the Council to carry out a final examination of the interests of the Community at the time when definitive duties are imposed.

13. The second criticism is also tenuous. As I have just said, Articles 9, 11 and 12 of Regulation No 2176/84 make it quite clear that the Commission enjoys an independent power of assessment from the date on which representations are made to it until the date on which the Council takes the final decision. Hence, depending on the circumstances, the Commission may decide whether or not to initiate a proceeding, whether to pursue it or to terminate it, whether or not to impose provisional duties, whether to allow those duties to lapse on the expiry of the period for which they are imposed or whether to ask the Council to extend them and, finally, whether or not to

submit a proposal to the Council to impose definitive duties.

Under a system of that kind, it seems clear to me that the Commission is entitled to adjust the action it takes to the demands of the situation and it is therefore absurd to reproach it for acting in a contradictory manner if the occurrence of an event — for instance the withdrawal of concessionary financing — induces it to rectify or reverse the approach hitherto taken. In this case, moreover, the Commission's change of direction was anything but sudden and unforeseeable. As the Court will recall, the Commission had suggested suspending the validity of the duties at the very time at which it proposed their imposition.

14. That brings me to the third criticism, according to which the Commission exceeded its powers by implicitly withdrawing the proposal which it had submitted to the Council. In the light of the considerations set out in the two preceding paragraphs, that allegation cannot in my view be upheld any more than those which preceded it. If, as I have shown, the investigation is conducted exclusively by the Commission until definitive action is taken by the Council, there is no doubt that the Commission may decide to terminate the proceeding even after requesting the Council to impose definitive measures.

The only condition is that such action should take the form of a decision duly stating the reasons on which it is based. In this case, that condition has been fulfilled. The decision meets all the requirements laid down by Regulation No 2176/84 for terminating the proceeding and, in particular, takes formal note of the fact that no objections were raised within the Advisory Committee established by Article 6.

15. In the light of all the foregoing considerations, I suggest that the Court dismiss both of the applications lodged on 18 June 1985 by Fediol against the Commission of the European Communities.

The unsuccessful party should be ordered to pay the costs.