

2.3 In addition to the points, in his presentation to the Panel, referred to in para 2.1, the US representative argued that the EEC export subsidies on wheat flour are prima facie contrary to the obligations of Article 9 of the Code, since, in the US view, wheat flour is a processed product, not a primary product within the meaning of the Code.

2.4 The EEC representative argued that, since the U.S. representative had not referred to Article 9 in raising the matter in the Committee, the question of whether Article 9 applied to wheat flour did not fall within the terms of reference of the panel.

- A. EEC subsidies on the export of wheat flour are applied in a manner inconsistent with Article 10:1 of the Code in that they have resulted in the EEC having more than an equitable share of the world



's subsidy system in order to assure that
the trade distorting effect which the EEC system f BT1 0 0 1 136.08 568.32 Tm0 g /F21 6.6 Tf(1) TjETBT1 0 0

WHEAT FLOUR: WORLD COMMERCIAL EXPORTS
CROP YEARS 1959/60-1980/81
(1,000 Metric Tons Wheat Equivalent)

	<u>70/71</u>	<u>71/72</u>	<u>72/73</u>	<u>73/74</u>	<u>74/75</u>	<u>75/76</u>	<u>76/77</u>	<u>77/78²</u>	<u>78/79²</u>	<u>79/80²</u>	<u>80/81³</u>
Australia	299	241	167	160	265	280	273	108	81	76	78
Canada .	595	506	509	386	480	509	54	513	608	569	462
U.S. . . .	265	252	313	282	357	493	335	505	440	466	404
EEC ¹ . . .	1,496	2,111	2,382	2,356	2,204	2,653	2,095	2,761	2,926	3,679	4,047
Other . .	392	181	339	179	219	166	39	72	117	245	93
Total . . .	3,047	3,291	3,710	3,363	3,525	4,101	2,796	3,959	4,172	5,035	5,084

-- Market Share --
(%)

Australia	10	7	5	5	8	7	10	3	2	2	2
Canada .	20	15	14	11	14	12	2	13	15	11	9
U.S. . . .	9	8	8	8	10	12	12	13	11	9	9
EEC ¹ . . .	49	64	64	70	63	65	75	70	70	73	80
Other . .	13	5	9	5	6	4	1	2	3	5	2

¹ EEC-6 until 1973; EEC-9 thereafter

² EEC food aid shipments were not separated from commercial transactions in data submitted to the IWC by the EEC for 1977/78, 1978/79 or 1979/80, but such transactions were reported separately again for 1980/81. Therefore, based on EEC wheat flour aid levels in the 6 years prior to 1977/78, we have estimated special transactions at 10.8 per cent of total flour exports and have deducted these amounts in estimating EEC commercial shipments for 1977/78, 1978/79 and 1979/80.

³ Adjusted for discrepancies in IWC data.

Source: IWC, Annual Record of Operations.

In comparison, the market share and volume of all other major exporters had been marked by an equally dramatic decline. The average US share had fallen from 25 per cent to 9 per cent and its average volume had declined by nearly 50 per cent. Australia's average share had dropped from 20 per cent to 2 per cent and Canada's average share from 25 per cent to 11 per cent. The enormous increase in the EEC's wheat flour exports, accompanied by the commensurate decrease in the market share of all other major suppliers indicated, by itself, the acquisition of "more than an equitable share" of world export trade. The US representative considered it appropriate to focus on commercial wheat flour transactions, as in Tables I and II, rather than also including special transactions, such as PL 480 or food aid programmes of the EEC and other countries. PL 480 transactions are virtually entirely food aid, either donations or sales on highly concessional terms. PL 480 shipments are typically granted on the condition that Usual Marketing Requirements for commercial imports be met from whatever source may be selected by the PL 480 recipient. There are various rules, particularly in the FAO, designed to protect commercial markets from adverse effects of special transactions. The US representative emphasized, however, that even if commercial and special transaction were considered together, as in Table III, the EEC share must still be considered more than equitable, having risen from an average of 18 per cent in the three year period 1959/60-1961/62 to 62 per cent during 1978/79-1980/81. This dramatic rise had occurred to the detriment of the United States and other exporters. He argued that the dramatic shift in market shares to the advantage of the EEC, and to the disadvantage of all other suppliers, had occurred because the EEC's subsidized wheat flour exports had displaced the exports of other suppliers in violation of Article 10:1, as interpreted by Article 10:2(a). He considered it self-evident that, in a market divided among four suppliers, the dramatic expansion of one supplier's share, particularly when the market was not expanding, must displace the exports of other suppliers. This displacement resulted from export subsidies which made price undercutting possible.

2.11 He further considered that in the case of wheat flour, it was particularly appropriate to focus on total world commercial trade, because the market structure for this product was characterized by a large number of importing countries, many of which purchased relatively small quantities of flour. In addition, there was a great deal of volatility in particular markets, reflecting changes in milling capacity, in income and demand, and in domestic food production. Moreover, essentially all types of flour and specifications demanded by individual countries could be supplied by the technologically advanced and highly diversified US industry

TABLE III

COMMERCIAL AND SPECIAL TRANSACTION
WHEAT FLOUR EXPORTS BY SOURCE
CROP YEARS 1959/60 - 1980/81
(1,000 Metric Tons Wheat Equivalent)
(Table submitted by the United States)

	59/60	60/61	61/62	62/63	63/64	64/65	65/66	66/67	67/68	68/69	69/70
Australia	744	758	654	586	871	716	486	551	497	475	429
Canada .	1,032	967	870	132	1,528	800	1,082	819	593	626	783
U.S. . . .	2,382	2,907	2,946	2,601	2,701	2,309	2,376	2,035	1,689	2,104	1,402
EEC ¹ . . .	947	880	1,218	991	1,416	1,531	1,449	1,754	1,232	1,239	1,750
Other . .	94	47	13	89	251	531	508	779	1,494	459	1,136
Total . . .	5,198	5,559	5,701	4,999	6,767	5,887	5,901	5,938	5,505	4,903	5,500

-- Market Share --
(%)

Australia	14	14	11	12	13	12	8	9	9	10	8
Canada .	20	17	15	15	23	14	18	14	11	13	14
U.S. . . .	46	52	52	52	40	39	40	34	31	43	25
EEC ¹ . . .	18	16	21	20	21	26	24	30	22	25	32
Other . .	2	1	*	1	4	9	9	13	27	9	21

¹EEC-6 until 1973; EEC-9 thereafter.

²Adjusted for discrepancies in IWC data and for donations to India.

*Less than 1 per cent.

Source: IWC, Annual

COMMERCIAL AND SPECIAL TRANSACTION
WHEAT FLOUR EXPORTS BY SOURCE
CROP YEARS 1959/69-1980/81
(1,000 Metric Tons Wheat Equivalent)

	<u>70/71</u>	<u>71/72</u>	<u>72/73</u>	<u>73/74</u>	<u>74/75</u>	<u>75/76</u>	<u>76/77</u>	<u>77/78</u>	<u>78/79</u>	<u>79/80</u>	<u>80/81</u> ²
Australia	414	272	215	200	312	299	308	160	114	97	136
Canada .	764	653	599	458	551	883	324	783	818	693	547
U.S. . . .	1,670	1,504	1,337	816	936	950	1,645	1,539	1,462	1,487	1,394
EEC ¹ . . .	2,008	2,431	2,720	2,572	2,456	2,906	2,400	3,096	3,280	4,125	4,404
Other . . .	570	245	378	238	296	302	148	157	115	297	153
Total . . .	5,426	5,105	5,249	4,284	4,551	5,340	4,825	5,735	5,789	6,699	6,634

-- Market Share --
(%)

Australia	8	5	4	5	7	6	6	3	2	1	2
Canada .	14	13	11	11	12	17	7	14	14	10	8
U.S. . . .	31	29	25	19	21	18	34	27	25	22	21
EEC ¹ . . .	37	48	52	60	54	54	50	54	57	62	66
Other . . .	11	5	7	6	7	6	3	3	2	4	2

¹ EEC-6 until 1973; EEC-9 thereafter.

² Adjusted for discrepancies in IWC data and for donations to India.

* Less than 1 per cent.

Source: IWC, Annual Record of Operations.

TABLE IV
 U.S. and EEC Flour Exports
 to Specific Markets
 (1,000 Metric Tons Wheat Equivalent)
 (Table submitted by the United States)

Reference Period
1959/60 - 61162

Most Recent 3-Year Period
1978/79 - 80181

A. Markets Where U.S. Share Has Declined

	<u>Vol.</u>	<u>Market Share</u>		<u>Vol.</u>	<u>Market Share</u>
			<u>Barbados</u>		
U.S.	6.5	43%		0.0	0%
EEC	3.6	24%		5.1	63%
<u>Other</u>	<u>4.9</u>	<u>33%</u>		<u>3.0</u>	<u>37%</u>
TOTAL	15.0	100%		8.0	100%
			<u>Cameroon</u>		
U.S.	1.3	100%		0.0	0%
EEC	0.0	0%		54.0	100%
<u>Other</u>	<u>0.0</u>	<u>0%</u>		<u>0.0</u>	<u>0%</u>
TOTAL	1.3			54.0	
			<u>Chile</u>		
U.S.	34.8	70%		0.0	0%
EEC	13.1	26%		22.2	100%
<u>Other</u>	<u>1.6</u>	<u>4%</u>		<u>0.0</u>	<u>0%</u>
TOTAL	49.5			22.2	
			<u>Israel</u>		
U.S.	0.3	100%		0.1	1%
EEC	0.0	0%		26.0	99%
<u>Other</u>	<u>0.0</u>	<u>0%</u>		<u>0.0</u>	<u>0%</u>
TOTAL	0.3			26.1	
			<u>Jamaica</u>		
U.S.	29.6	28%		14.3	19%
EEC	30.5	29%		55.4	74%
<u>Other</u>	<u>45.8</u>	<u>43%</u>		<u>5.5</u>	<u>7%</u>
TOTAL	105.9			75.2	
			<u>Jordan</u>		
U.S.	16.3	26%		0.1	0%
EEC	45.7	74%		33.8	100%
<u>Other</u>	<u>0.0</u>	<u>0%</u>		<u>0.0</u>	<u>0%</u>
TOTAL	62.0			33.9	

Lebanon

U.S.	42.9	100%	0.3	2%
EEC	0.0	0%	12.7	98%
<u>Other</u>	<u>0.0</u>	<u>0%</u>	<u>0.0</u>	<u>0%</u>
TOTAL	42.9		13.0	

Nigeria

U.S.	41.7	55%	5.6	6%
EEC	1.6	0%	76.3	94%
<u>Other</u>	<u>32.7</u>	<u>45%</u>	<u>0.0</u>	<u>0%</u>
TOTAL	76.0	100%	81.9	100%

Philippines

U.S.	53.9	40%	0.5	4%
EEC	0.9	0%	4.7	35%
<u>Other</u>	<u>80.7</u>	<u>60%</u>	<u>8.3</u>	<u>61%</u>
TOTAL	135.5		13.5	

Saudia Arabia

U.S.	77.8	92%	204.2	38%
EEC	1.8	2%	322.3	61%
<u>Other</u>	<u>8.2</u>	<u>6%</u>	<u>4.6</u>	<u>1%</u>
TOTAL	87.8		531.1	

Sierra Leone

U.S.	2.8	19%	0.0	0%
EEC	0.0	0%	21.4	100%
<u>Other</u>	<u>11.7</u>	<u>81%</u>	<u>0.0</u>	<u>0%</u>
TOTAL	14.5		21.4	

Trinidad-Tobago

U.S.	33.0	42%	0.0	0%
EEC	4.7	6%	2.1	70%
<u>Other</u>	<u>41.3</u>	<u>52%</u>	<u>0.9</u>	<u>30%</u>
TOTAL	79.0		3.0	

Zaire

U.S.	6.4	30%	1.4	30%
EEC	1.9	9%	2.5	66%
<u>Other</u>	<u>13.0</u>	<u>61%</u>	<u>0.0</u>	<u>0%</u>
TOTAL	21.3		3.9	

B. Markets Where US Has Been Virtually Excluded

Egypt

U.S.	0.1	0%	117.3	11%
EEC	35.2	56%	988.0	89%
<u>Other</u>	<u>27.3</u>	<u>44%</u>	<u>1.0</u>	<u>0%</u>
TOTAL	62.6		1,106.3	

Sri Lanka

U.S.	0.0	0%	1.4	0.5%
EEC	7.9	100%	314.3	99.0%
<u>Other</u>	<u>0.0</u>	<u>0%</u>	<u>1.1</u>	<u>0.5%</u>
TOTAL	7.9		316.8	

Syria

U.S.	0.0	0%	7.0	2%
EEC	0.0	0%	354.2	97%
<u>Other</u>	<u>2.4</u>	<u>100%</u>	<u>2.1</u>	<u>1%</u>
TOTAL	2.4		363.3	

Yemen

U.S.	0.0	0%	0.0	0%
EEC	2.9	100%	101.6	100%
<u>Other</u>	<u>0.0</u>	<u>0%</u>	<u>0.0</u>	<u>0%</u>
TOTAL	2.9		101.6	

the countries concerned which the

the years in which subsidies were granted, on the ground that the market would allegedly be functioning abnormally because of the existence of subsidies. The best proof that could be cited in this connection was the fact that, during the Tokyo Round, one delegation (Australia) had deliberately proposed that the grant of subsidies made market functioning abnormal, so that in determining normal market shares account should not be taken of a period in which subsidies had been granted (MTN/NTM/W/217/Rev.1). A number of delegations, including the United States, had opposed that proposal, which had consequently not been included in the final text. During the Tokyo Round negotiations the United States position had been that the representative period to be taken into consideration should be the most recent three or five years, leaving aside abnormal phenomena such as poor harvests because of drought, etc.

2.18 He also considered that the United States' interpretation did not correspond to the logic of Article 10. Indeed, one of the main characteristics of Article 10 was precisely that it did not consider export subsidies as unlawful but on the contrary accepted them when they met certain conditions. Accordingly, for the Code, the mere grant of export subsidies could not, in principle and automatically, render the functioning of the world market abnormal during the period in which those subsidies existed. Furthermore, the United States' interpretation led to impracticable consequences since, as was here the case, it meant referring to years several decades ago, in other words to a period for which it was very difficult to determine exactly whether or not subsidies of any kind had existed. If one followed the United States interpretation to its logical

however, that data on such tenders was difficult to obtain. There were relatively few public tenders in the world wheat flour trade, business usually being conducted through private arrangements. In addition, given the lack of success of US flour exporters in competing with subsidized EEC exports, US exporters had refrained from bidding in many cases.

2.24 The representative of the United States said that, in addition, data submitted by his delegation, demonstrated that the EEC export unit values for wheat flour were consistently below those of the US. He said that further data providing export unit values for specific markets over the 1976-1981 period, showed that EEC prices had consistently been below those of the US. These data were to support the US argument that the EEC had used export subsidies to displace US wheat flour exports and to gain an inequitable share of the world market. They also suggested that the price-undercutting demonstrated for specific tenders were not isolated instances but part of a systematic pattern. The US representative also drew attention to the high level of EEC export subsidies and to the fact that these subsidies were habitually higher than could be accounted for by the difference between world and EEC prices for wheat.

2.25 He said that there were no continuous export price data for wheat flour readily available for the period from 1962 to the present when EEC subsidies had been in effect. However, it was useful to examine export unit values to demonstrate comparative flour prices over the years, and to see how recent EEC underpricing was merely a continuation of a consistent practice in prior years. These unit values did not

millers were, in general, able to adapt to local specifications and therefore offer flour which was of a different quality and less expensive. Objective and realistic comparison must therefore make allowance for price differences based on quality differences. Furthermore the prices quoted were C&F prices, i.e. they included freight charges. These charges were lower (about \$20 per ton) for shipments from Europe, if only because of the shorter distance. Here again, objective comparison had to make allowance for freight charges, i.e. be based on an f.o.b. price. Thirdly, reference was made in the United States complaint to the public price quotations in the trade, which were unanimously recognized and practised by the trade in and outside the United States. However a comparison of "US Gulf" prices f.o.b. of flour there quoted showed no significant difference with Community prices, while at the same time revealing a considerable difference with the prices, even f.o.b., of the United States "bids" on the markets in question. This led to questions about the exact circumstances surrounding these isolated, and certainly insufficient, "examples" of United States bids in markets in which US suppliers were not really present, except when operating under PL 480.

2.28 He also drew the Panel's attention to some factors which influenced price formation in the case of flour. In many developing countries there was a trend towards the introduction of local milling in order to create more jobs and to save foreign exchange. Whenever the price of flour was seen to be too high as compared to that of wheat there was danger of establishment of local milling capacity and of irremediable loss of the market. Consequently the price of flour could not go beyond a level representing a certain coefficient of the price of wheat. Another factor was sales under PL 480. These sales on easy credit terms defying all competition influenced, inter alia, the prices of flour on the normal market. In this relation he stressed that the selling of massive quantities of wheat under PL 480 constituted a powerful incentive for installation of local milling capacity. As a result PL 480 was creating a permanent source of uncertainty in world flour markets. A third factor related to the importance of supplementary costs of transporting and loading and unloading flour. Here it was important to note that such costs depended not only on distance but also on the volume and regularity of deliveries. Thus, American flour mills, which worked primarily for the domestic market and which were sited to serve that market, found themselves penalized by the costs of storage (which were very high in the United States), of forwarding and especially of domestic transport within the United States, in addition to international transport. For numerous markets the United States could not use regular shipping lines and must resort to charters - which completely excluded deliveries in small quantities.

2.29 As to the argument ~~that~~ the complete dominance of world flour milling is achieved

weighing, etc., which might bear no relation to the actual cost of these expenses. Because of the method by which the subsidy was calculated, the EEC created substantial uncertainty in world flour markets through the administration of the subsidy. Neither the importer nor other competing reporters could anticipate

3.2 After a transitional period from July 1962 to June 1967 (Regulation No. 19/62 EEC of 4 April 1962), the common organization of the market in cereals and cereal-based products was originally established by Council Regulation No. 120/67 EEC of 13 June 1967. The single market in cereals came into force on 1 July 1967.

3.3 Council Regulation No. 120/67 (as amended) remained applicable until the marketing year 1974/75, when it was replaced by Council Regulation (EEC) No. 2727/75 of 29 October 1975 which came into effect on 1 November 1975. This regulation (as amended) is still in force.

3.4 The common organization of the market in cereals provides a single system of internal prices valid

position. This calculation results, for the whole Community, in a range of f.o.b. wheat flour prices, which are different according to the export points. From this range of calculated prices the Commission selects a price as representative of Community prices (f.o.b.) for wheat flour for purposes of calculating the level of export refund for the Community as a whole. As a general rule, the French prices are selected because France is the EEC Member State with the largest surplus of common wheat; it exports most common wheat and flour to third countries, and Rouen is the leading European port for the export of cereal and flour.

- b) The third criteria is aimed at determining other countries' export prices for wheat flour, according to the available information. This determination is made essentially on the basis of world prices for wheat (notably common wheat of a quality comparable to that of European wheat), as the cost of

3.16 A wide variety of types of wheat flour can, therefore, be produced and traded internationally to suit differing requirements of importing countries, or particular users within each country. Among those types a distinction can be drawn between hard flours which are produced from more expensive, high-protein hard wheat grades, and soft flour which are produced from mainly cheaper, low-protein soft wheat grades. Actually, types of wheat flour traded differ considerably among major

3.22 Wheat flour prices in domestic markets are determined by a number of factors, such as the cost of wheat, which is the major single pricing element for flour, and of other inputs, the market value of by-products, marketing and other commercial costs, and the supply/demand situation which can differ considerably from one country to another as well as in given country from one year to another. As a result, not only do different types of flour normally vary in prices according to quality characteristics¹, but also a given type and quality of flour is often subject to sharp price fluctuations.

3.23 Government involvement in the grains sector, to a varying extent and by different methods, is also a common feature in all major exporting countries. The broad outlines of the EEC systems are set out in paras 3.2 to 3.15. In the other major exporting countries Australia, Canada and the United States, government involvement as it relates to wheat flour is reflected primarily or exclusively in the price at which millers obtain their wheat, because of national price and support policies for wheat.

3.24 As regards wheat flour prices in the international trade, a world price for flour does not exist, at least in the sense it does for other internationally traded commodities, such as wheat, coffee, sugar, cocoa, etc. nor is there a futures market for wheat flour. Published quotations do not represent specific, individual market transactions, but reflect rather an average of such transactions. Wheat flour export prices are fixed freely by the exporters on the basis of their own appreciation of the market, consideration being given *inter alia*, to factors relating to domestic prices for wheat flour (cf. paragraph 3.22), the availability of export payments, the quantity of flour involved in the shipment, transportation and other handling costs, and also the price level of wheat in the importing country. Broad price differences can, therefore, occur in a given market for a given type and quality of wheat flour. These differences in prices are normally sharpened by differences in the quality of wheat flour. Little is known, however, on actual prices paid for individual deliveries. Most transactions are concluded by means of tenders to which little publicity is given. Usually, only the price of the winning tender is known, as private firms generally consider pricing to be a confidential matter.

IV. Findings

4.1 The Panel carried out its consideration of the matter referred to it by the Committee for examination in light of the terms of reference as expressed in paragraph I.1.A. It has based its consideration on:

- (a) the facts of the matter as presented by the parties to the dispute, and information which was available to it;
- (b) arguments presented to it by the parties to the dispute;
- (c) the relevant provisions of the Code.

4.2 With regard to the United States' assertion in its presentation to the Panel that EEC export subsidies on wheat flour are *prima facie* contrary to Article 9 of the Code, the Panel was of the opinion that this question did not constitute part of the matter referred to the Panel by the Committee and therefore the Panel did not consider the substantive issue involved.

4.3 When examining the Community system for granting refunds on exports of wheat flour, the Panel noted that such refunds were financed out of the EAGGF - Guarantee Section and that, in the sense of Article XVI:1, they operated to increase exports of wheat flour from the Community. The Panel therefore concluded that the granting of refunds by the EEC on exports of wheat flour must be considered a form of subsidy and subject to the provisions of Article XVI of the General Agreement as interpreted and applied by the Code.

¹Notably the extraction rate, the protein content, the percentage of ash, acidity and colour.

4.4 The Panel therefore addressed itself in particular to whether

4.8 In light of the provisions of Article 10:2(c) of the Code, the Panel first compared world market shares in the three most recent crop years¹ prior to the US complaint under the Code, i.e., 1977/78, 1978/79 and 1979/80 with market shares in 1980/81.

TABLE VI

(1,000 Metric Ton Wheat Equivalent)

	<u>1977/78</u>	<u>1978/79</u>	<u>1979/80</u>	<u>1980/81</u>
Australia	160	114	97	135
Canada	783	818	693	547
United States	1,539	1,462	1,487	1,394
EEC*	3,096	3,280	4,125	4,404
Other	157	115	297	153
Total:	5,735	5,789	6,699	6,634

Source: Table III.

Market Share

			<u>Percentage change</u>
Australia	11%	2%	- 82%
Canada	18%	11%	- 39%
United States	40%	18%	- 55%
EEC	24%	62%	+ 158%
Other	7%	3%	- 57%
Total	76%	38%	- 50%

4.14 Relative changes in market shares over this period can be seen in the following graph:

PERCENTAGE OF WORLD FLOUR MARKET

[Graph]

4.15 It is evident therefore that the EEC share of world exports of heat flour has become larger over a time period when payment by the EEC of export subsidies was the general practice.¹

2. Developments in the Wheat Flour Market

(a) General observations - basic features of the world flour market

4.16 Before examining particular phenomena which might be regarded as "special factors" in the sense of Article 10, the Panel considered a number of general features which in its view were of fundamental importance in understanding developments in the world wheat flour market, and the rôle of export subsidies therein.

- (i) There has been a significant trend, based on political and economic factors, toward increased domestic milling capacity throughout the world. This meant that in the past twenty years the wheat flour market has grown very slightly (to a total in 1980/81 of some 6,634,000 metric tons) while that of wheat has more than doubled (to a total in 1980/81 of some 80,505,000 metric tons).² Associated with this development, there has been increased sensitivity as between wheat and flour prices, i.e. in general, the propensity toward wheat imports has meant that wheat flour prices must be maintained within a certain margin to those of wheat - otherwise the shift from flour to wheat is likely to be hastened.

¹The exceptions were from 30 May 1973 to 3 August 1973, 6 August 1973 until 1 February 1975, and 1 August 1975 to 3 December 1975, at times when the world market situation strengthened to a point where export price levels rose to those established within the EEC, obviating the need for export assistance. World prices strengthened to the point that from November 1973 to December 1974, export levies were applied to ensure that internal supplies at established prices were met.

²See IWC Record of Operations, 1980/81.

- (ii) It is noteworthy that relatively little of world trade in wheat flour takes place on the basis of the free play of the market. In recent years, the bulk of EEC and US shipments (which together account for more than four-fifths of total world exports of wheat flour) were made either under export subsidies or under non-commercial transactions. Thus both the levels and conditions of trade in wheat flour are highly artificial.¹ It is apparent that with these various measures the market for wheat flour has been maintained at a higher level than otherwise might have been expected.
- (iii) Developments in the world wheat flour market might in some respects be characterized as chaotic due to the existence of a few important markets with greatly varying imports from one year to another, a large number of small markets, some of which import only on an irregular and unpredictable basis², the absence of recognized world prices, and the sometimes broad price differences in a given market for a given type and quality of wheat flour.³

(iv) The opening of international trade in wheat flour under various forms of government support has sometimes been the result of government policy. These have sometimes been the result of government policy. They have had a major impact on the world market for flour.

These basic features of the world flour market the Pa

(ii) Non-commercial sales

4.20 The Panel noted that during the period under review the levels of wheat flour entering international trade under conditions not conforming to usual commercial practices, and the proportion of total wheat flour imports which were

4.25 The Panel also examined whether the quality of EEC wheat flour constituted a certain advantage for the EEC, given developments in the market and the need for competitive pricing. Apart from some 10 per cent produced from imported, higher quality wheat, EEC flour entering international trade is produced from domestically grown soft wheat which on the world market commands a lower price than hard, higher protein product. Noting the generally higher, pre-established internal EEC price, the Panel found however that EEC wheat flour was not "lower price" without the benefit of the

4.29 The Panel noted that, when viewed over the time period suggested by the US (from 1959/60)¹ there were several markets² in which in the earlier three year period the US was in a stronger position than the EEC, whereas in the most recent three years the EEC was in the stronger position. These markets however had changed considerably in size and nature over such a long period, and the changes in market share were such that cases of displacement in the sense of Article 10:2(a) was not evident. There were a number of markets³ where US commercial shipments had not been particularly significant in the earlier years, and in which the EEC has in recent years obtained all or most of the commercial growth. Finally, in Jamaica the EEC share has increased but not so much at the expense of the US as of other suppliers. Jamaica is a declining market where the EEC has been able to maintain and sometimes increase its volume of exports and thus obtain a relatively larger share of the market. The Panel considered that the foregoing developments were not to be seen so much in terms of Article 10:2(a) and (b), but rather as being indicative of the growth of the EEC share of the market more generally. The Panel found in its examination of individual markets that

4.35 The Panel then examined the US argument that export unit values provided evidence of price undercutting. It considered that wheat flour was not a homogeneous product and that differences in qualities would lead to price differences.¹ It also considered that there was not reasonable price stability in the wheat flour market over a given period of time nor were there shipments of similar quantities by suppliers from the exporting countries under consideration. Consequently the Panel was of the opinion that these above characteristics of wheat flour market did not allow the use of report unit values in the particular case before it.

C. Nullification or Impairment; Serious Prejudice

4.36 The Panel considered the United States complaint that the application of EEC export refunds results in nullification or impairment to the United States, and is causing serious prejudice to the interests of the United States. The Panel found in its consideration that there is lack of clarity in the provisions of Article 8 as regards the demonstration of adverse effects in third countries markets so far as certain primary products are concerned. In light of the legal uncertainty in this regard the Panel did not find on nullification or impairment, or serious prejudice, beyond the question of adverse effects in terms of Article 10, dealt with in Sections A and B above.²

¹Wheat flour transactions are generally reported in foreign trade statistics under one heading without distinction with respect to their quality.

²The Panel also took into account that in this case the United States complaint was largely based upon its contention that practices by the EEC were inconsistent with its obligations under Article 10, and that adverse effects were therefore pursuant to exist.

V. Conclusions

The Panel reached the following conclusions:

5.1 EEC export refunds for wheat flour must be considered as a form of subsidy which was subject to the provisions of Article XVI of the General Agreement as interpreted and applied by the Code.

5.2 It was evident to the Panel that the EEC share of world exports of wheat flour has increased considerably over the period under consideration when application of EEC export subsidies was the general practice, while the share of the US and other suppliers has decreased.

5.3 The Panel found however that it was unable to conclude as to whether the increased share has resulted in the EEC "having more than an equitable share" in terms of Article 10, in light of the highly artificial levels and conditions of trade in wheat flour, the complexity of developments in the markets, including the interplay of a number of special factors, the relative importance of which it was impossible to assess, and, most importantly, the difficulties inherent in the concept of "more than equitable share".

5.4 The Panel concluded that, despite the considerable increase in EEC exports, market displacement in the sense of Article 10:2(a) was not evident in the seventeen markets examined by the Panel.

5.5 With regard to price undercutting in the sense of Article 10:3, the Panel found that, on the basis of available information there was not sufficient ground to reach a definite conclusion as to whether the EEC had granted export subsidies on export of wheat flour in a manner which resulted in prices materially below those of other suppliers to the same markets.

5.6 The Panel was not convinced, however, that the application of EEC export subsidies had not caused undue disturbance to the normal commercial interests of the United States in the sense of Article XVI:2, to the extent that it may well have resulted in reduced sales opportunities for the United States.

5.7 The Panel considered it desirable that the EEC, bearing in mind, the provisions of Article XVI:2, make greater efforts to limit the use of subsidies on the exports of wheat flour. The Panel considered that there were a number of practical aspects of the application of the export refund which might be examined to this end.

5.8 Finally, from a broader economic and trade policy perspective, the Panel considered the situation as regards export subsidies and other aspects of trade in wheat flour to be highly unsatisfactory and was concerned over what this implied for the effectiveness of the legal provisions in this area. The artificial level and conditions of much of the trade in this product typified the current problems and prospective risks. In this connection it found it anomalous, for instance, that the EEC which without the application of export subsidies would generally

w e l l

5.9 The Panel considered that certain problems might be reduced by improved transparency and possibly other forms of multilateral co-operation in either the IWC or the GATT. It was of the view, however, that solutions to the problem of export subsidies in this area could only be found in making the pertinent provisions of the Code more operational, stringent and effective in application. Areas which deserve attention in this regard are, inter alia:

- (i) a clearer and common understanding of the concept of "more than equitable share", and rendering the concept more operational,
- (ii) consideration of whether international understandings relating to sales on other than commercial terms adequately complement and support intended disciplines on export subsidies.

ANNEX A

Changes in EEC Shipments to Individual Markets
1980/1981 Compared to Previous Three-Year Average
(1,000 metric ton wheat equivalent)

Markets where an increase of greater than
1,000 MT has taken place:

Malta
USSR
Cuba
Iraq
Israel
Egypt
Libya
Poland
Jamaica
Yemen A. Rep.

Markets where a decrease of greater than
1,000 MT has taken place:

ANNEX B

1. There are a number of problems in establishing price levels on the international wheat flour market. There is no recognized world price, there is lack of transparency in international wheat flour sales generally, and there are relatively low levels of wheat flour of a quality comparable to the EEC standard product exported by other suppliers to provide a consistently reliable export price standard.

2. The EEC constructs a world price for wheat flour drawing on the following sources:

- (a) quotations for wheat of a roughly comparable quality to EEC wheat, such as US "Soft Red Winter, FOB Gulf";
- (b) prices of wheat from the US or other sources delivered to Rotterdam;
- (c) prices actually prevailing on various markets for competing flour, to the extent these are known;
- (d) prices of US flour as reported in the US milling trade periodical The Milling and Baking News (formerly The Flour Trade Journal) (that hard flour prices, adjusted downward to take into account quality differences).

3. There are difficulties inherent in drawing from each of these sources:

- (a) US "Soft Red Winter, FOB Gulf" - prices obtained on the wheat market for SRW are not absolutely consistent with EEC common wheat; a calculation must be made to transform the wheat price to a flour price; and SRW based wheat flour is not marketed in quantities internationally or with sufficient price transparency to provide a consistently valid price comparison;
- (b) wheat imported through Rotterdam - this is seldom of quality comparable to EEC wheat, and comparison is difficult given that prices are established

ANNEX C

Exports of Wheat Flour to Selected Markets -
Tables submitted by the United States in connection with
its representation under Article 10:2

[See original document - tables pp.45 - 77]