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Committee on Subsidies and Countervailing Measures

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AUSTRALIAN CUSTOMS AMENDMENT ACT 1991 AND COUNTERVAILING DUTY PROCEEDING CONCERNING IMPORTS OF GLACE CHERRIES FROM FRANCE AND ITALY

Request by the European Communities for Conciliation under Article 17 of the Agreement

Communication from the European Communities

The following communication, dated 6 July 1992, has been received by the Chairman of the Committee from the Commission of the European Communities.

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1. The European Community remains seriously concerned about some provisions of Australian anti-dumping and countervailing duty legislation, in particular about clause 7 of the Customs Amendment Act 1991 and the notion of domestic industry contained therein.

2. The Community had drawn the attention of the Australian authorities to this matter in a timely fashion, both bilaterally and in the context of the Committee on Subsidies and Countervailing Measures (at its regular meetings of 1 May and 22 October 1991). Signatories of the Subsidies Code have also been made aware of the Community's concerns through the communication circulated in document ADP/68-SCM/127 of 15 October 1991.

3. The Community has tried to discuss this issue bilaterally with Australia, with a view to clarifying the situation and arriving at a mutually agreed solution, within the multilateral framework of the Subsidies Code. To this end, the Community had requested a special meeting of the Committee under the provisions of Article 16 of the Code. Both in the request for that meeting (circulated in document SCM/145 of 18 March 1992) and at the meeting itself (which took place on 26 March 1992) the Community made it clear that, while it considered that the procedural requirement of the Code had been fulfilled by the meeting of the Committee on 26 March, it considered nevertheless that substantive bilateral discussions with Australia were of great importance to the Community.

4. While Australia offered to hold consultations with the Community in relation to pending countervailing duty investigations in which the legislation at issue might be applied (document SCM/146 of 10 April 1992), and gave a partial reply to the substantive points raised by the Community document SCM/127 (in document SCM/W/259 of 10 April 1992), it contested the appropriateness of consultations on countervailing legislation itself.

5. The Community's position on this question is clearly and unambiguously set out in the statements delivered by its representative at the special meeting of the Committee on 26 March and at the regular meeting of 28 April 1992. However, in a spirit of co-operation, and to signal its willingness to tackle the substance of the matter, the Community continued to voice its concerns in the context of the review of the Australian Customs Amendment Act 1991 which was being carried out by the Committee, and repeated both in writing to the Australian authorities (communication circulated in document SCM/147 of 23 April 1992) and at the Committee's meeting of 28 April 1992, its wish to complete the process initiated under Article 16 with bilateral consultations. Australia has reiterated its unwillingness to respond positively to this request.

6. The Community remains firmly of the opinion that this Australian legislation is inconsistent with GATT and the Subsidies Code. Specifically, clause 7 of the Act is inconsistent with the definition of "domestic industry" for the purpose of determining injury contained in Article 6:5 of the Code, as supplemented by the definition of "like product" contained in footnote 18 to Article 6:1 of the Code. Enactment of the above legislation constitutes a violation of Australia's unqualified obligation under Article 1 of the Code "to ensure that the imposition of a countervailing duty ... is in accordance with the provisions of Article VI of the General Agreement and the terms of this Agreement".

7. In cases where legislation inconsistent with the Code gives private parties a right of action enforceable against the government before national courts, and the investigating authority has no discretion not to apply that legislation, the violation of Article 1 is already there, and its practical effects are only a matter of time and circumstances, not to mention the impact on business prospects of both exporters and importers that the threat of application of this kind of legislation undoubtedly has.

8. Furthermore, and apart from the obligations arising from Article 1 of the Code, domestic legislation which is inconsistent with any of the substantive provisions of the Code constitutes, in and by itself, a direct violation of Article 19:5(a) of the Code, which provides that "Each government accepting or acceding to this Agreement shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of this Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply to the signatory in question".

9. The Community's concerns are now highlighted by the concrete application of this new legislation in anti-dumping/countervailing duty investigations. In particular, in the investigation on imports of glacé cherries from France and Italy, countervailing duties have been imposed on those imports on the basis, inter alia, of the application of this legislation. Indeed, the report of the Australian Anti-Dumping Authority makes it clear that in view of the profit improvement of the glacé cherry manufacturing industry in Australia, this industry has not itself suffered material injury. The imposition of duties is based on the injury allegedly suffered by cherry growers and briners, and this is sufficient, in the ADA's view, to conclude that there is material injury to the "industry as a whole". There is no doubt that fresh or brined cherries are not "like" glacé cherries, whatever the economic links between producers of any of these products may be, and that therefore the application of this provision of Australian anti-dumping/countervailing duty legislation, resulting in the imposition of countervailing duties, is in violation of Articles 1 and 6 of the Code.

10. The Community and Australia have held consultations under Article 3 of the Code in respect of this investigation, the last meeting having taken place on 13 February 1992, following publication of a preliminary report by the Australian Customs Service.

11. On the basis of the above, the European Community requests the Committee on Subsidies and Countervailing Measures to undertake conciliation according to Article 17 of the Code, in respect of:

(a) The enactment by Australia of domestic countervailing duty legislation (notably clause 7 of the Customs Amendment Act 1991) which contradicts Article 6 of the Code, and therefore violates Articles 1 and 19:5(a) of the Code.

(b) The imposition by Australia of countervailing duties on imports of glacé cherries from France and Italy on the basis of injury allegedly suffered by the domestic producers of domestic products (fresh or brined cherries) which are not "like" the imported product (glacé cherries), thereby violating Articles 1, 6:1 and 6:5 of the Code.