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Committee on Subsidies and
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IMPOSITION BY AUSTRALIA OF COUNTERVAILING DUTIES
ON IMPORTS OF GLACÉ CHERRIES FROM FRANCE AND ITALY
IN APPLICATION OF THE AUSTRALIAN CUSTOMS AMENDMENT ACT 1991

Request by the European Community for Establishment
of a Panel under Article 17:3 of the Agreement

The following communication, dated 11 November 1992, has been received by the Chairman of the Committee from the European Communities.

1. In March 1992 the Australian Anti-Dumping Authority (ADA) issued a report recommending to the Minister for Small Business, Construction and Customs the imposition of definitive countervailing duties on imports of glacé cherries from France and Italy, following a complaint from Australian producers of glacé cherries. The Minister accepted this recommendation. The ADA, however, found that the allegedly subsidized imports had caused material injury to an Australian industry "defined to include briners and growers as well as the producers of glacé cherries", even though the larger of the two Australian complainants "achieved an increase in profits in the last two years under inquiry".

The relevant passage from the Summary of the ADA Report reads, in its entirety:

"For the purposes of this inquiry the local industry was taken to include the white cherry growers, the briners and the producers of glacé cherries. From its inquiries the Authority has concluded that material injury is evident in the industry so defined.

The complaint was in fact lodged on behalf of the two producers of glacé cherries. These two, the Authority found, had suffered decreases in sales volume and market share, and some depression and suppression of prices. The larger of the two, however, achieved an increase in profits in the last two years under inquiry. These profits seem to have been at the expense of the "upstream" part of the industry - the briners and growers: prices paid to these latter have remained essentially static for some years. Hence the Authority's

conclusion that material injury has been suffered by the industry, defined to include briners and growers as well as the producers of glacé cherries."

2. There is no doubt that fresh or brined cherries are not "like" glacé cherries within the meaning of footnote 18 to Article 6:1 of the Subsidies Code. The ADA has, therefore, recommended the imposition of countervailing duties on the basis of injury found to have been caused to a domestic industry comprising domestic producers of two distinct "like products", only one of which (glacé cherries) is in fact "like" the imported one.

3. The ADA has reached this conclusion on the basis of Australian countervailing duty legislation, as amended by clause 7 of the Customs Amendment Act 1991. Clause 7 reads, in the relevant part:

"(4A) Where, in relation to goods of a particular kind first referred to in subsection (4), the like goods referred to in that subsection are close processed agricultural goods, then, despite subsection (4), the industry in respect of those close processed agricultural goods consists not only of the person or persons producing the processed goods but also of the person or persons producing the raw agricultural goods from which the processed goods are derived."

4. Article 6:5 of the Subsidies Code is crystal clear in establishing that "In determining injury, the term "domestic industry" shall ... be interpreted as referring to the domestic producers as a whole of the like products ...", that is, to the domestic producers of a product which is, within the meaning of footnote 18 to Article 6:1 of the Code, "like" the imported and allegedly subsidized product. This clearly means:

- that no other manner of defining the "domestic industry" entitled to relief under countervailing duty legislation in conformity with Part I of the Code is acceptable; and
- that the effects that allegedly subsidized imports of a product might have on domestic producers of a product which is not "like" the imported one are totally irrelevant for the purposes of a determination of injury in conformity with Article 6 of the Code; and therefore
- that this holds true however close and whatever the nature of the economic interrelationship between a product which is "like" the imported one and another product, or between the domestic producers of such products.

5. Yet, as stated before, the ADA reached the conclusion, in application of clause 7 of the Customs Amendment Act, that there is a domestic industry injured by the allegedly subsidized imports; that this industry comprises not only domestic producers of the product "like" the imported one (that

is, glacé cherries), but also domestic producers of products (fresh and brined cherries) which are clearly not "like" the imported one; and indeed that injury to the domestic industry so defined is mainly attributable to the injury suffered by growers and briners, rather than to producers of glacé cherries. Indeed, in its conclusions on material injury, the ADA stated that since the local industry producing glacé cherries had increased its profits by 8 per cent over the last two years covered by the investigation, it would not normally conclude that this industry had suffered material injury. It then went on to make it clear that only the inclusion of the cherry growers and briners had enabled the ADA to arrive at a finding of material injury in this case.

6. The Community remains firmly of the opinion that this 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. As a result of the application of the above legislation, Australia's action in respect of glacé cherries from France and Italy 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 terms of this Agreement." Furthermore, this violation is compounded by another: that of Australia's obligation under Article 19:5(a) of the Code "... to ensure ... the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply to the signatory in question."

7. It has not proved possible to resolve this matter and to develop a mutually acceptable solution through bilateral consultations or through conciliation under Article 17:2 of the Code. The European Community, therefore, requests the Committee to establish a panel pursuant to Article 17:3 of the Code, in order to have the facts of the matter reviewed and the rights and obligations of the Community and of Australia clarified.

8. More specifically, the European Community requests that such a panel be established to find that the Australian countervailing duty action in respect of glacé cherries from France and Italy, in application of Section 269T (as amended) violates Articles 1, 6 and 19 of the Code, because the definition of a "domestic industry" entitled to relief under domestic countervailing duty legislation is that contained in Article 6 of the Code, and that no interpretation of that notion which would go beyond the producers of the product "like" the imported one is admissible under Article 6.