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RESPONSE BY AUSTRALIA TO POINTS MADE BY THE EEC CONCERNING THE ANTI-DUMPING LEGISLATION OF AUSTRALIA

The following communication from the delegation of Australia originally circulated to members of the Committee on Subsidies and Countervailing Measures (SCM/W/259) is hereby circulated to members of the Committee on Anti-Dumping Practices (see ADP/M/37, paragraphs 33).

At a regular meeting of the Committee on Subsidies and Countervailing Measures on 22 October 1991, the representative of the EEC argued (paragraph 9 of SCM/M/54) that Clause 7 of the Customs Amendment Act 1991 extended the definition of domestic industry to "... producers of what was clearly not a like product ..." and this was clearly inconsistent with the requirements of Articles 6:5 and Footnote 18 of the Code (see also the EEC Communication in ADP/68, SCM/127).

Footnote 18 and Article 6:5 of the Subsidies Code (as well as, mutatis mutandis, Articles 2:2 and 4:1 of the Anti-Dumping Code) define the terms "like product" and "domestic industry" as follows:

> "... the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which although not alike in all respects, has characteristics closely resembling those of the product under consideration ..."

> "... the term "domestic industry" shall be interpreted ... as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products ..."

In Australia's view these definitions make it clear that domestically produced inputs cannot be considered a "like product" compared to the finished or processed import derived from such inputs.

Nonetheless, Australian authorities consider that the amendment in question does not contradict the principle established by these definitions. it simply delimits the definition of "domestic industry" in certain circumstances. In the Second Reading Speech on the amendment, Mr. Beddall (the Minister for Small Business and Customs) made clear how the legislation would operate: for a primary producer to the considered part of a processed agricultural product industry, the raw agricultural goods of the primary producer must be devoted substantially or completely to the processed agricultural goods and the processed goods must be derived substantially or completely from the raw agricultural goods.

In addition, vertical integration is subject to an economic test requiring either a close relationship between the movement in prices of the raw agricultural goods and the processed goods, or that the raw agricultural goods constitute a significant proportion of the production cost of the processed agricultural goods. (Hansard, House of Representatives, 9 May 1991, p.3439).

The EEC claims in paragraph 9 of SCM/M/54 that the only precedent the Community had for a provision of this kind was the definition of industry for wine and grape products in the United States Trade and Tariff Act of 1984.

In our view that case is irrelevant since the legislation involved simply deemed the producers of the raw agricultural product to be within the definition of "industry", unlike the Australian legislation where there must not only be "vertical integration" but also a close economic relationship between the relevant producers. Accordingly, the wine and grape case - both in terms of law and fact - is irrelevant to the Australian legislation in question.

In our opinion it is quite reasonable to treat producers who are closely related in the process of production as part of the same "domestic industry" for the purpose of the Code. Moreover, legislation in similar terms has already passed through the Committee process (SCM/1/Add.3/Rev.3). Consequently, Australia cannot see why its legislation should now be treated any differently from this legislation.

At a special meeting of the Subsidies and Countervailing Committee held on 26 March 1992, the EEC sought consultations regarding some provisions of recently enacted Australian legislation, in particular about Clause 7 of the Customs Amendment Act 1991 and the notion of domestic industry contained therein.

The Australian view expressed at the meeting was that Australia could not consider, for the purposes of Article 17, the process which had taken place to be a valid consultation possibly leading to further action under Article 16 or 18.

Under the Code it is clear that particular countervailing actions may be contested following consultations under Article 3. However, Australia holds that legislation itself cannot be validly examined under the dispute

settlement provisions of the Code. To permit this would be to usurp the sovereignty of the Code signatories in relation to domestic legislation. Australia is firmly of the view that its legislation is consistent with the Code. In any event, Australia considers that it is relevant to observe that within the GATT, which this Code purports to interpret, it has been held on a number of occasions that inconsistent legislation is not a violation of GATT obligations until such legislation is applied. Further a related Code, the Anti-Dumping Code, makes clear in Article 1 that the Code applies to actions and not to legislation.

Australia is not denying the managerial rôle of the Subsidies and Countervailing Committee in examining legislation, making recommendations to members, and adjudicating on general principles. This is not the rôle of Panels in the settlement of disputes between two members. Further, the Code must be interpreted against what it says and not what members would like it to say. The obligations of members in relation to their legislation are clearly set out in Article 19:5 of the Code.