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COMMUNICATION FROM AUSTRALIA

The following communication has been distributed by the delegation of Australia during the meeting of the Group on 21 September 1987 with the request that it be circulated to members of the Group.

DISPUTE SETTLEMENT IN THE GATT : AN AUSTRALIAN PROPOSAL

1. Australia considers dispute settlement a priority issue for the Uruguay Round of Multilateral Trade Negotiations. The introduction of a significantly strengthened and streamlined mechanism for dispute resolution or settlement will be important not only to improve the overall operational effectiveness of the GATT, but also to give effect to and reinforce new rules and disciplines negotiated during the Uruguay Round.

2 There is a general recognition amongst contracting parties that the dispute settlement procedures of the GATT as they currently operate suffer from a number of procedural shortcomings. These include problems of delays at each stage of the process, the apparent reluctance of panels to make specific findings and recommendations, and the difficulties in having recommendations adopted by the CONTRACTING PARTIES and subsequently implemented.

3. Some of these shortcomings are themselves the result of a more fundamental problem underlying the weaknesses in dispute settlement in the GATT. Some have argued that the problem

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arises from the displacement of the principle of equality before the law by the exercise of disproportionate economic influence. Others see the problem arising from the difficulties of applying existing GATT rules in a sufficiently flexible manner to take account of changed circumstances of international trade in an increasingly dynamic and interdependent world trading environment. Again, there are those who hold that the problem has its origin in a reluctance on the part of many contracting parties to use the dispute settlement process to best effect, or indeed to demonstrate the level of commitment necessary to maintain the dispute settlement process as a central element of the GATT system.

4. Whatever the origin of the fundamental problem, this proposal is an attempt to redress the resultant shortcomings and to provide the basis for a stronger, more flexible and effective mechanism for the resolution of disputes in the GATT. It is presented in the form of a draft Understanding, set out in the Attachment, which introduces some new procedures, strengthens and clarifies some existing ones, and integrates elements of existing understandings and arrangements which have to date guided the management of disputes in the GATT.

5. It has as its central element the establishment of a discrete and compulsory conciliation phase. It is clear that the conciliation provisions of Article XXIII, the 1979 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance and the 1982 Ministerial Declaration have not been effectively utilised. Australia is of the view that there exists considerable scope for the resolution of disputes through conciliation. This proposal therefore aims at significantly strengthening the mechanism for conciliation.

6. Under the terms of the proposal, conciliation would be undertaken by a person appointed by the Director-General. The procedures for conducting conciliation would be flexible, would take full account of the political and economic complexities of disputes under the GATT and would maximise the opportunities for disputing parties to reach mutually satisfactory solutions. The

conciliator would promote dialogue between the parties, propose solutions and ensure that any resolution reached through conciliation is consistent with the General Agreement and not prejudicial to the interests of third parties. The possibilities for finding a solution through conciliation should be exhausted before disputants refer a dispute to the CONTRACTING PARTIES.

7. The proposal also incorporates a number of changes to the panel procedures to tighten their operation and promote more expeditious settlements. It recommends

imposition of stricter time-limits for each phase of the panel process

acceptance by the contracting parties of an automatic right to a panel, on the grounds that this would not necessarily increase the number of requests for panels since straightforward disputes should be resolved through the improved conciliation process and that the conciliation process should also work to screen out disputes which are not substantiated

adoption of recommendations by the CONTRACTING PARTIES on the basis of a consensus which would exclude the parties to a dispute and third parties which have been involved in the panel process, while affording them every opportunity to place on record their views on the panel's findings and recommendations prior to a decision by the CONTRACTING PARTIES.

8. Additionally, the proposal provides for more thorough notification and surveillance, and clarifies the conditions under which a party may seek the authorisation of the CONTRACTING PARTIES to suspend concessions or obligations as provided for under Article XXIII:2.

9. The proposal seeks to be as comprehensive as possible, but it is acknowledged that there may be aspects requiring further clarification or refinement.

10. Finally, there are a number of issues which are not addressed in this proposal but which may at some point require consideration by the Negotiating Group on Dispute Settlement. These include, inter alia, the possibility of establishing a formal procedure for the consideration and surveillance by the Council of matters arising from disputes in the GATT and the possibility of involving Ministers directly in the dispute settlement process through other measures introduced to improve the functioning of the GATT system.

DRAFT UNDERSTANDING ON DISPUTE SETTLEMENT : AN AUSTRALIAN
PROPOSAL

- (i) The CONTRACTING PARTIES recognise that an essential prerequisite to an effective and efficiently functioning dispute settlement mechanism is that parties approach disputes in the GATT in good faith and with a view to reaching solutions which are acceptable to the parties to the dispute and which reinforce the basic principles and objectives of the General Agreement.
- (ii) The CONTRACTING PARTIES therefore reaffirm the understanding reached during the Tokyo Round of Multilateral Trade Negotiations that recourse to the dispute settlement mechanism of the GATT should not be intended or considered as contentious acts.
- (iii) In order to reinforce the independent and non-political nature of dispute settlement in the GATT, the CONTRACTING PARTIES further reaffirm their understanding that complaints and counter-complaints in regard to distinct matters should not be linked.
- (iv) The CONTRACTING PARTIES further reaffirm their adherence to the basic mechanism of the General Agreement for the management of disputes as set out in Articles XXII and XXIII. With a view to further improving and refining this mechanism and providing for more expeditious and equitable resolution of disputes, the CONTRACTING PARTIES agree to abide by the following four-step process.

1. Consultation

- 1.1 Contracting parties shall in the first instance endeavour to resolve disputes through consultations in accordance with the provisions of Articles XXII and XXIII:1 of the General Agreement and as agreed in paragraphs 4 and 5 of the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance.

2. Conciliation

- 2.1 The CONTRACTING PARTIES acknowledge that some disputes will not be resolved through the process of consultation outlined in paragraph 1.1 above. They also acknowledge that some disputes do not lend themselves to easy resolution through the necessarily more formal procedures of the panel process. Therefore, the CONTRACTING PARTIES agree to establish a discrete conciliation mechanism to operate in accordance with the following agreed procedures and to which disputing parties shall resort before referring a dispute to the CONTRACTING PARTIES.
- 2.2 If a contracting party is of the view that a dispute exists between itself and another contracting party which it has not been able to resolve through consultations in accordance with paragraph 1.1 above, it shall notify the CONTRACTING PARTIES through the Director-General to this effect. Within ten working days of receipt of such notification, the Director-General shall appoint a suitably qualified individual from an agreed list¹ to act as

¹The Director-General should maintain a list of persons qualified to act as conciliators. This list should be compiled from nominations made by contracting parties and from the list of panelists maintained by the Director-General referred to in paragraph 3.4 below.

conciliator between the parties to the dispute. In making such appointment, the Director-General shall take into account the need for any special technical expertise which should be advised by the complaining party in its original notification. The procedures for the selection of a conciliator, including consultation with the disputing parties, shall be left to the discretion of the Director-General, it being understood that his ultimate choice shall be binding on the parties. The Director-General shall advise the CONTRACTING PARTIES of the name of the conciliator.

- 2.3 The conciliator shall call for statements from the disputing parties on the nature of the dispute and as appropriate from the GATT Secretariat and shall confer as necessary with the disputing parties. On the basis of the information received, the conciliator should make an independent judgement as to the applicability of the General Agreement, the conformity with the General Agreement of measures giving rise to the dispute, the existence of nullification or impairment, and whether or not the attainment of any objective of the General Agreement is being impeded. Consequently, the conciliator shall make, in camera, such recommendations to the disputing parties considered appropriate to reaching a mutually satisfactory resolution.
- 2.4 In accordance with customary practice set out in the Annex to the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, these recommendations should, as a matter of priority, seek the withdrawal of any relevant measures considered to be inconsistent with the General Agreement.

- 2.5 If a satisfactory resolution cannot be reached through the provisions of paragraph 2.4, the conciliator shall then propose options for and make recommendations on ways of bringing about the amelioration of the situation for the benefit of the injured party.
- 2.6 If solutions cannot be found through the provisions of paragraph 2.4 or 2.5 above, the conciliator shall make recommendations on an appropriate level of compensation with a view to restoring the balance of benefits between the parties. It is understood that any solution reached in accordance with the provisions of paragraph 2.5 could be accompanied by an agreement on compensation in order to reach a settlement which is equitable, minimises trade distortion and restores the balance of rights and obligations between the disputing parties.²
- 2.7 The conciliator and the parties to the dispute should endeavour to resolve the dispute within three months of the date of appointment of the conciliator. If a mutually satisfactory resolution has not been reached within that period, the conciliation process may be extended for a nominated period with the agreement of both parties to the dispute. In the event that the conciliation process is extended, the conciliator shall advise the CONTRACTING PARTIES through the Director-General to this effect.

²The conciliator may choose to follow the sequence of possible solutions outlined in paragraphs 2.4 to 2.6, or vary them in order to expedite a resolution of the dispute.

- 2.9 If, at any time after the expiration of the initial three month period, either party to the dispute is of the view that all efforts to reach a mutually satisfactory resolution through the conciliation process have been exhausted, it may refer the dispute to the CONTRACTING PARTIES in accordance with the provisions of Section 3 of this Understanding.
- 2.10 If a mutually satisfactory resolution is reached through conciliation, the conciliator shall inform the CONTRACTING PARTIES of such resolution and the terms thereof through the Director-General.

3. Panel Process

- 3.1 If a dispute is unable to be resolved to the satisfaction of the disputing parties in accordance with the conciliation procedures set out in Section 2 above, the dispute may be referred to the CONTRACTING PARTIES in accordance with the following agreed procedures.
- 3.2 If a party to a dispute decides, pursuant to paragraph 2.9 above, to refer a dispute to the CONTRACTING PARTIES, it shall submit a written request to the CONTRACTING PARTIES outlining the basis of the dispute and giving details of consultations and efforts at conciliation. The other party to the dispute may also submit a statement to the CONTRACTING PARTIES expressing its views on the dispute. Unless they are able to put forward a proposal which would immediately result in a mutually satisfactory resolution to the dispute, the CONTRACTING PARTIES shall, at the earliest available opportunity after a request is made, agree to the establishment of a panel. The panel shall investigate the matter in accordance with paragraphs 3.7, 3.8 and 3.9 and make appropriate recommendations

to the CONTRACTING PARTIES with a view to reaching a settlement acceptable to the parties. Alternatively, the CONTRACTING PARTIES could refer the matter to a working party, if so requested by both parties to the dispute.

3.3 The Director-General shall notify the CONTRACTING PARTIES of the composition of the panel within ten working days of the date of the decision to establish the panel. Panels shall be composed of at least three members either governmental or non-governmental. It is understood that citizens of countries whose governments³ are parties to the dispute would not be members of the panel concerned with that dispute.

3.4 In order to facilitate the constitution of panels, the Director-General should maintain a list of governmental and non-governmental persons qualified in the fields of trade relations, economic development and other matters covered by the General Agreement, and who could be available for serving on panels. For this purpose, each contracting party shall be invited to indicate at the beginning of every year to the Director-General the names of persons who would be qualified and available to serve on panels.⁴ This list of panelists shall be published annually.

³The term "governments" is understood to refer to governments of all member countries in cases of customs unions.

⁴The coverage of travel expenses shall be met from the GATT budget and should be considered within the limits of budgetary possibilities.

3.5 Panel members would serve in their individual capacities and not as government representatives, nor as representatives of any organisation. Governments would therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel. Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience.

3.6 The standard terms of reference for a Panel shall have the following form:

"To examine in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by (name of contracting party) relating to (details of policies or practices causing the dispute and the name of the other contracting parties), and to make such findings and recommendations, including findings on the question of nullification or impairment, as will assist the CONTRACTING PARTIES in making recommendations or rulings, as provided for in Article XXIII:2."

If a party requesting a panel considers that these terms of reference are inappropriate in its case, it shall propose alternative wording in its written request to the CONTRACTING PARTIES. If agreement cannot be reached on alternative wording on the occasion that the CONTRACTING PARTIES consider the request for a panel, the standard terms of reference shall be used.

- 3.7 The panel shall expeditiously and objectively assess the information provided by the parties to the dispute and by interested third parties in accordance with paragraph 15 of the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance.⁵
- 3.8 On the basis of its assessment the panel shall make recommendations to the CONTRACTING PARTIES with a view to reaching a mutually acceptable settlement. It shall submit its findings and recommendations to the CONTRACTING PARTIES in writing and shall include a full account of the reasons and bases for such findings and recommendations. Specifically, panel reports should contain a summary of the legal issues involved, including the applicability of the General Agreement and the conformity with the General Agreement of measures giving rise to the dispute; findings with respect to the existence of nullification or impairment; and such recommendations as appropriate with the aim of removing the cause of the dispute or restoring the balance of rights and obligations between disputing parties. The panel may also recommend that compensation be extended to any interested third party where the panel establishes nullification or impairment to the third party due to the measure(s) giving rise to the dispute on the basis of information provided by the third party pursuant to the provisions of paragraph 3.7.

⁵Consideration should be given to establishing specific criteria to be used for determining eligibility as an interested third party for the purposes of making representations to a panel.

- 3.9 Panels should aim to reach conclusions and make recommendations without undue delay and normally within six months of the date of establishment of the panel. If a panel has not submitted its report to the CONTRACTING PARTIES within six months of its establishment, it shall inform the CONTRACTING PARTIES of its progress, the reasons why it has not been able to conclude its final report, and an expected date of completion.
- 3.10 No contracting party which is a party to a dispute, including third parties referred to in paragraph 3.7, shall be allowed to block the consensus adoption of recommendations or rulings by the CONTRACTING PARTIES as provided for in Article XXIII:2. Parties to the dispute should however be afforded the opportunity to place on record their views on relation to the rulings or recommendations prior to their adoption by the CONTRACTING PARTIES. No reservation or dissention shall in any way modify the rights or obligations of any contracting party resulting from rulings or recommendations by the CONTRACTING PARTIES.

4: Notification; Implementation and Surveillance

- 4.1 If the CONTRACTING PARTIES recommend, in accordance with the provisions of Section 3 of this Understanding, that a party take action to rectify a matter or provide compensation, the contracting party concerned shall advise the CONTRACTING PARTIES in writing as soon as possible, and in no case later than three months after the adoption of the recommendations, of the action it has taken or proposes to take in accordance with those recommendations.

- 4.2 The contracting party which is the subject of such recommendations shall submit a follow-up report to the CONTRACTING PARTIES six months after its initial advice pursuant to paragraph 4.1 above on progress in relation to the recommendations made by the CONTRACTING PARTIES.
- 4.3 If a contracting party which is the original complainant party in a dispute considers that the action taken or advice given in relation to the recommendations of the CONTRACTING PARTIES pursuant to paragraphs 4.1 and 4.2 above is unsatisfactory, and if its rights continue to be nullified or impaired as a result of the original action giving rise to the dispute or action taken by the respondent party in response to recommendations by the CONTRACTING PARTIES, it may request the immediate intervention of the CONTRACTING PARTIES with a view to obtaining appropriate relief, including the authorisation of the suspension of equivalent concessions or obligations in accordance with Article XXIII:2 of the General Agreement.
- 4.4 The CONTRACTING PARTIES agree to conduct regular reviews of matters impacting upon this Understanding with a view to ensuring that disputes between contracting parties are resolved in the most expeditious and equitable manner possible, consistent with the principles and provisions of the General Agreement.