EUROPEAN COMMUNITIES – TARIFF TREATMENT OF CERTAIN INFORMATION TECHNOLOGY PRODUCTS
(DS375, DS376 & DS377)
Australia's Responses to Questions of the Panel

Geneva, 2 June 2009

1. (*All Third parties*) At least one party has stated that certain terms in the dispute should be given a "special meaning" pursuant to Article 31.4 of the *Vienna Convention on the Law of Treaties*. Could the Third Parties please elaborate further on the applicability of this provision in the present case? In particular:

1.(a) What, if any, are the terms that may need to be given a "special meaning" within the meaning of Article 31.4 of the *Vienna Convention on the Law of Treaties*?

Australia does not have any particular comments on the specific terms raised in this case. However, we would make the following general comments on the application of Article 31.4 of the *Vienna Convention on the Law of Treaties*.

A panel's task is to clarify provisions of an agreement 'in accordance with customary rules of interpretation of public international law' pursuant to Article 3.2 of the DSU. For a term to have a 'special meaning' and come within the scope of Article 31.4 of the *Vienna Convention* we consider that the meaning must necessarily not be the 'ordinary meaning' pursuant to Article 31.1. Article 31.1 requires a treaty to be interpreted 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty *in their context and in light of its object and purpose*'. The terms of a treaty are not individually picked out and analysed in isolation from the rest of the agreement. Instead, the terms of a treaty are analysed in their context and in light of the object and purpose of the treaty.

1.(b) Could the Panel *sua sponte* apply this provision without any Party having <u>expressly</u> invoked it? The Panel in *Mexico - Telecoms* seemed to indicate that since the provision under interpretation was "technical" and from a "specialized service sector" it was "entitled" to examine what "special meaning" it may have in the telecommunications context (Panel Report, *Mexico - Telecoms* paragraph. 7.108). Do you agree?

Australia considers that it is not necessary for a party to have expressly raised Article 31.4 of the *Vienna Convention* in order for a Panel to apply the provision. While it is for each of the parties to discharge the applicable burden of proof in making their case, the Appellate Body has consistently recognised that Article 3.2 of the DSU requires WTO Panels and the Appellate Body to interpret the covered agreements in accordance with the customary rules of interpretation of public international law, as codified under Articles 31 and 32 of the *Vienna Convention*.[1]

1.(c) If a party provides the "technological meaning/sense" in addition to "ordinary sense" to interpret a treaty term, could this be considered an <u>implicit</u> invocation of Article 31.4 of the *Vienna Convention*? If so, who bears the burden to prove that a "special meaning" of a treaty term was intended?

A party would be implicitly invoking Article 31.4 of the *Vienna Convention* where they allege that a 'special meaning' applies, rather than the 'ordinary meaning' that would otherwise apply to a term through the application of Article 31.1. But, as distinct from a 'special meaning' within the

scope of Article 31.4, an 'ordinary meaning' analysis may result in a term being given its technical meaning.

[1] See: *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, at p. 17; *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, at p. 10; *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/AB/R, at para. 145.

1.(d) If a "special meaning" is to be given to a treaty term according to Article 31.4 of the *Vienna Convention*, what is the relationship between this provision and the elements of the preceding paragraphs of Article 31, in particular those related to context and elements to be taken into account together with context?

Whether the parties intended a 'special meaning' be given to particular words is established in the same way as the 'ordinary meaning' that is by interpretation of the words *in their context and in light of its object and purpose*. Article 31.4 merely clarifies that if the context of words, in light of their object and purpose led to a 'special meaning' rather than the ordinary meaning of the words, then the words should be given that special meaning.

2. (*All Third parties*) What is the role, if any, of Article 32 of the *Vienna Convention on the Law of Treaties* concerning supplementary means of interpretation in this dispute?

Australia notes that Article 32 of the *Vienna Convention* is only applicable 'when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.' Australia does not consider that the interpretation of the EC's Schedule in the present dispute is not sufficiently clear so as to require recourse to Article 32 of the *Vienna Convention*.

3. (*All Third parties*) What is the legal nature and relevance of the ITA to this dispute?

The ITA is not part of the Final Act Embodying the Results of the Uruguay Round Negotiations nor the 'covered agreements' which can be subject to dispute under the *Dispute Settlement Understanding*. Therefore the Panel would not have jurisdiction to consider a claim made pursuant to the ITA alone. However, the ITA has been given legal effect in this dispute by virtue of the 'headnote' to the EC Schedule. As outlined in paragraph 12 of Australia's oral statement, we consider that the ITA is important context for interpreting commitments in the EC Schedule, in particular the headnote and the product descriptions under the headnote.

4. (*All Third parties*) To what extent if any does "technological development" of products affect the determination of the scope of tariff treatment?

4. In the absence of other binding commitments affecting tariff treatment (e.g. a 'headnote' incorporated into a Member's Schedule or language modifying HS tariff headings to a Member's Schedule), products are classified on the basis of their 'objective characteristics'[2] or their 'essential character.'[3] Technological development does not *a priori* affect tariff classification. If a particular good represents a technological advance from preceding models or forms of that good, the tariff classification may remain the same or alter dependent upon whether the essential character of the goods has changed. The physical features, principal function or a clearly defined function of the good can provide the basis for a determination of the 'essential character' of a good dependent upon the requirements imposed by the terms of the tariff, any relevant Notes and which of the General Rules for the Interpretation of the Harmonized System are used. This determination can be assisted by an examination of the relevant HS Explanatory Notes.

The scope of the EC's obligation to provide tariff free treatment is contained in its Schedule to the GATT 1994. Australia considers that where products meet the terms of a product description

[2] *EC – Chicken Cuts* para. 246. [3] WCO Harmonized Commodity Description and Coding System 1996, GIR 2(a).

contained in the EC Schedule, those products must be afforded tariff treatment specified in that Schedule. Article II:1(b) of the GATT 1994 provides that products described in Schedules must be exempt from ordinary customs duties, 'subject to the terms, conditions or qualifications' in its Schedule.[4]

Technological developments should not affect the scope of the commitments in the EC Schedule, although they may ultimately affect the significance of commitments if developments lead to a product falling outside the scope of the relevant commitment.

5. (*All Third parties*) What is your view on the European Communities' arguments that a case-bycase assessment is necessary to determine the appropriate classification of the products at issue?

On the EC's arguments for a case-by-case consideration of individual products, see Australia's response to Question 4. This does not however, release the EC from its obligation to provide tariff free treatment for products 'in or for' Attachment B of the ITA Annex wherever they are classified.

6. (*All Third parties*) Assuming the HS96 interpretative rules are relevant as context for the interpretation of the concessions in the EC Schedule, what would be -in general terms- the interplay amongst the different rules which have been cited, i.e.: 1) GIR 3; 2) the Note 3 to Section XVI; and 3) the Note 5 to HS 84. In other words, when will one rule be applied *instead* of another? Is there an order in which the rules must be applied? If so, what determines that order?

Parties to the HS Convention are obliged to apply the General Rules for the interpretation of the Harmonized System and all the Section, Chapter and Subheading notes to their customs tariff nomenclatures (Article 3.1(a)(ii)). The first General Rule provides that classification should be determined according to the terms of the headings and any relevant section or chapter notes and, provided such headings or Notes do not otherwise require, the remaining General Rules. General Rule 1 therefore takes precedence.

Under General Rule 1, terms of heading and Notes have equal importance; however Notes normally act to define, clarify, extend or restrict the headings and hence generally modify terms. It is necessary to read the Section and Chapter Notes in conjunction with the terms of the headings.

In regard to Notes and terms which, prima facie, appear to be contradictory or to provide conflicting direction in regard to classification, the normal processes of interpreting statute law apply in Australia. Therefore the usual considerations such as the scope and specificity of the Notes, the language used and the overall legislative context would need to be examined.

In regard to Note 3 to Section XVI and Note 5 to Chapter 84, no true conflict exists.

- Section XVI Note 3 governs the classification of composite machines consisting of two or more machines fitted together to form a whole and other machines designed for the purpose of performing two or more complementary or alternative functions, *unless the context otherwise requires*. That is, Note 3 is the general provision for the classification of composite/multifunctional goods when there is not a more specific provision made for

[4] GATT 1994 Art II:1(b).

the goods either under the terms or by another Note. Where another Note governs the classification of a specific good, then that would be a context 'otherwise requiring'.

- Chapter 84 Note 5 defines terms in the context of a specific heading and it also directs either classification or the means of classification of goods meeting certain criteria. Therefore, if the goods fall within the provisions of Note 5, then this provides the context that precludes classification by Note 3.

General Rule 3 is used only when there are two or more headings under which the goods are prima facie classifiable and that the terms of the headings and any relevant Section or Chapter Notes do not preclude the use of the General Rule 3. Where a Note is relevant to a good and the Note requires that the good be classified to a specific heading, or that the classification is to be

determined in a manner set out by the Note, then this would require that the Note, not General Rule 3, be used.