European Communities – Tariff Treatment of Certain Information Technology Products

(DS375, DS376, & DS377)

Third Party Oral Statement of Australia

Geneva, 13 May 2009

I. Introduction

1. Chair, Members of the Panel, Parties and Third Parties, Australia welcomes this opportunity to present its oral statement today in open hearing.

2. This dispute centres on the interpretation of the European Communities (EC) WTO Schedule of Concessions, as modified pursuant to the *Ministerial Declaration on Trade in Information Technology Products* (ITA).[1]

3. As a general remark, Australia emphasises that the correct interpretation of Members' Schedules of Concessions (Schedules) is fundamental to the maintenance of the security and predictability of the multilateral trading system.

II. Australia's views on the correct interpretation of the EC's Schedule

4. In accordance with Article II of the GATT 1994, WTO Members have an obligation to grant 'treatment no less favourable than that provided' in their Schedules. Specifically, subject to the terms, conditions or qualifications set forth in Schedules, products are to 'be exempt from ordinary customs duties in excess of those set forth' in those Schedules.[2] The relevant Schedule establishing the obligations of the EC in the present dispute is the EC Schedule as modified by the 'Certification of Modifications to Schedule LXXX – European Communities' of 2 July 1997.[3] Pursuant to GATT Article II:7, a Member's Schedule of concessions is made an integral part of GATT 1994. Hence, the correct approach for the Panel to adopt in examining the EC's Schedule is set out in Article 3.2 of the DSU,[4] which states that the clarification of provisions under the covered agreements is to be done 'in accordance with customary rules of interpretation of public international law.'

5. The ITA is clearly an important element in this dispute. The ITA adopted a dual approach to the identification of products and the subsequent scheduling of commitments. Products were identified both through a list of World Customs Organization (WCO) HS

[1] WT/MIN(96)/16 signed at the WTO Ministerial Conference, Singapore, 13 December 1996.
[2] Art II:1(b) to the GATT 1994.
[3] WT/Let/156, 15 August 1997.
[4] *Understanding on Rules and Procedures Governing the Settlement of Disputes*.

1996[5] product codes and descriptions in Attachment A to the Annex to the ITA, as well as through a list of specific products to be covered regardless of where they were classified, included in Attachment B to the Annex to the ITA.

6. When scheduling these commitments, WTO Members party to the ITA maintained this dual approach to product coverage. The EC listed HS tariff headings in Attachment A directly into their Schedule. For Attachment B a 'headnote'[6] was also incorporated, which explicitly provided that any product described 'in or for Attachment B' had a bound tariff rate of zero. The text of the headnote, as part of the Schedule, must be interpreted in accordance with customary rules of interpretation of public international law, as codified in the *Vienna Convention on the Law of Treaties (Vienna Convention).*

7. Article 31 of the *Vienna Convention* provides that 'a treaty shall 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.' Article 31(2) sets out what can be considered 'context' in treaty interpretation.

8. In Australia's view, in accordance with Article 31, the operation of the headnote requires that concessions relating to the product descriptions in Attachment B are not limited to tariff headings solely identified by the EC. The headnote is a concession that operates in addition to the EC's tariff headings through the inclusion of the words 'wherever the product is classified.' Accordingly, the scope of this concession is only limited by the scope of the product descriptions as set out in Attachment B and not by individual tariff headings. This view is supported by the ordinary meaning of the text of the headnote. Such an interpretation gives meaning to the headnote and does not reduce it to 'inutility.'[7]

9. Turning to the question of context, Australia recognises that both the Harmonized System and the ITA can be relevant 'context' when interpreting Members' Schedules.

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[5] World Customs Organization Harmonized Commodity Description and Coding System (Harmonized System).

[6] The headnote to the EC Schedules states:

> With respect to any product described in or for Attachment B to the Annex to the Ministerial Declaration on Trade in Information Technology Products (WT/MIN(96)/16), to the extent not specifically provided for in this Schedule, the customs duties on such product, as well any other duties and charges of any kind (within the meaning of Article II:1(b) of the General Agreement on Tariffs and Trade 1994), shall be bound and eliminated, as set forth in paragraph 2(a) of the Annex to the Declaration, wherever the product is classified.

[7] See: *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, at p. 23 and *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, at para. 214.

10. In *EC – Chicken Cuts*[8], the Appellate Body said that the Harmonized System was relevant 'context' in the interpretation of tariff commitments in Members' Schedules within the meaning of Article 31(2)(a) of the *Vienna Convention*. The Appellate Body formed this view after noting that there was broad consensus to use the Harmonized System as a basis for Members' Schedules at the time of the Uruguay Round negotiations. Australia agrees with this view.

11. In the present dispute Australia considers that the Harmonized System is the starting point, but not the end point, for the identification of the correct context to interpret Schedules. Interpretation of Schedules must also take account of other relevant context and, ultimately, of the actual terms of those Schedules. This view is supported by the statement of the Appellate Body in the *China – Autos* dispute where it said that the Harmonized System and its product categories had limits and 'cannot trump the criteria contained in Article II:1(b) (of the GATT 1994).'[9]

12. Australia considers that the ITA provides important 'context' for interpreting the EC Schedule, the headnote and product descriptions under the headnote that accompany tariff headings in that Schedule. Article 31(2)(b) of the *Vienna Convention* provides that context relevant to treaty interpretation includes '[a]ny instrument made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.' The ITA was adopted by participating Members during the Singapore Ministerial Conference of the WTO, a declaration expressly welcomed by all Members.[10] Australia notes that pursuant to the ITA, parties agreed to modify their Schedules to incorporate ITA commitments. Members accepted the ITA as an instrument related to the EC Schedule by agreeing to modifications made to the EC Schedule pursuant to the ITA. Furthermore, the Appellate Body has previously established that while each Member's Schedule represents the tariff commitments made by that Member, Schedules also 'represent a common agreement among *all* Members.'[11]

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[8] *EC – Chicken Cuts* para. 199. See also, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/AB/R, WT/DS340/AB/R and WT/DS342/AB/R, para. 149 where the Appellate Body said '[i]t follows that the Harmonized System is context for purposes of interpreting the covered agreements, in particular for the classification of products under Schedules of Concessions…'.
[9] *China – Autos* para. 164.
[10] See *Singapore Ministerial Declaration*, adopted on 13 December 1996, WT/MIN(96)/DEC para. 18.
[11] *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R and WT/DS68/AB/R, para. 109.

13. Australia recalls that specific reference is made in the EC Schedule to '[f]lat panel devices … for products falling within this agreement, and parts thereof', and '[s]et top boxes'. In its submission the EC has sought to narrow the scope of its commitments under the headnote to the HS codes it identified alongside the product descriptions. Australia disagrees with this approach and considers that such an approach effectively reads-out words or text included in the Schedule, in particular the headnote, and is not consistent with the rules of treaty interpretation.

14. Australia acknowledges that a provision to negotiate the inclusion of additional products exists within the ITA.[12] However, in our view, this does not imply that products that fell within the ITA at the time of its conclusion would automatically fall outside the scope of tariff free treatment on the basis of technological advancement.

15. In its first written submission, the EC cites a judgment of the European Court of Justice in the *Kip* case.[13] The Court there held that multifunctional digital machines capable of performing one or more data processing functions in addition to copying 'could not be classified directly under heading 8471 60 unless it was shown that the copying function was "secondary"' to other automatic data processing (ADP)-related functions (such as printing).[14] The EC goes on to state that when the 'copying function of the MFMs at issue in this section is not secondary in relation to their ADP functions, they are prima facie classifiable under the HS96 headings 8471 and 9009'.[15] In such cases, the EC concludes that the Harmonized System remains the correct procedure to classify products with more than one 'material or component which gives them their essential character.'[16] Australia does not make a comment on the individual classification decisions of the EC, but recalls that the legal obligation of the EC contained in the headnote to its Schedule provides that the customs duties on products described in or for Attachment B are to receive tariff free treatment 'wherever the product is classified.'

[12] Paragraph 3 to the Annex to the ITA, WT/MIN(96)/16.
[13] European Court of Justice, Joined Cases C-362/07, *Kip Europe and Others*, and *Hewlett Packard International* C-363/07.
[14] First written submission by the European Communities in *European Communities – Tariff Treatment of Certain Information Technology Products*, WT/DS375, WT/DS376 and WT/DS377, para. 359.
[15] EC First Written Submission, para. 435.
[16] HS96 GIR 3(b). See EC First Written Submission at para. 441 states '[s]ince GIR 3(b) cannot be applied, it is necessary to resort to GIR 3(c).'

III. Australia's views on the products at issue in this dispute

16. We wish now to touch briefly on the specific products at issue in this dispute. Addressing flat panel displays, Australia recalls the EC states in its first written submission that only 'genuine ADP'[17] monitors fall within HS96 heading 8471 60 and would accordingly be entitled to duty free treatment. This is provided for in EC Regulation 1031/2008 which limits tariff free treatment to monitors '[o]f a kind *solely or principally* used in an automatic data-processing system' (emphasis added).[18] Australia notes the language 'solely or principally' in that Regulation is reflected in Note 5(B)(a) of Chapter 84 to HS 1996.[19] Australia recalls that the headnote to the EC's Schedule provides, *inter alia*, for tariff free treatment of products 'described in or for Attachment B' wherever they are classified.[20] Given that Attachment B specifically includes '[f]lat panel displays … for products falling within this agreement', Australia considers that the EC's approach of providing tariff free treatment only to monitors that can solely be used in an ADP is at odds with its requirement to provide tariff free treatment to products pursuant to its Schedule.[21]

17. Addressing multifunctional machines that can be connected to an ADP, Australia notes that Chapter Note 5(D) to Chapter 84 of the HS 1996 establishes that, among other products, '[p]rinters … which satisfy the conditions of paragraphs (B) (b) and (B) (c) above, are in *all* cases to be classified as units of heading No. 84.71' (emphasis added) where they are connectable to a central processing unit and can accept or deliver data used by the system. Further, '[p]rinters' are cited as an example of an 'output unit' in Subheading Note (1) to Chapter 84 of HS 1996.

18. Lastly, briefly touching on set top boxes, Australia again notes the absence of restrictive language either in the EC Schedule or in Attachment B that could permit the narrow interpretation of products to receive tariff free treatment. Australia considers that the ordinary meaning of the neologism 'set top box' was not frozen in time at the conclusion of the ITA, and an assessment of the objective characteristics or essential character of set top boxes must be viewed in their context and in the light of the object and purpose of the EC's Schedule.

[17] EC First Written Submission, para. 100.
[18] Commission Regulation (EC) No 1031/2008 of 19 September 2008.
[19] Note 5 (B) (a) to HS96 Chapter 84.
[20] See 'headnote' to EC Schedule, WT/Let/156.
[21] Further, in the absence of restrictive language, the ordinary meaning of the word '*for*' cannot be viewed narrowly.

IV. Conclusion

19. In conclusion, Australia considers that where a Member incorporates language in its schedule, this represents a binding obligation upon that Member. In the event of *specific* reference to, or incorporation of, another agreement, such as the ITA in the present dispute, this material constitutes relevant 'context' to assist in the interpretation of the ordinary meaning of treaty text consistent with customary rules of international law, as provided for in the DSU.

20. Thank you Chair.