WORLD TRADE ORGANIZATION

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EUROPEAN COMMUNITIES AND ITS MEMBER STATES – TARIFF TREATMENT OF CERTAIN INFORMATION TECHNOLOGY PRODUCTS

Reports of the Panel

Note by the Secretariat:

In the disputes WT/DS375, WT/DS376, and WT/DS377, as explained in paragraph 2.4 of the Panel's Findings, the Panel decided to issue its Reports in the form of a single document constituting three Panel Reports, each of the Reports relating to each one of the three complainants in this dispute. The document comprises a common cover page, a common Descriptive Part and a common set of Findings in relation to the complainants' claims that the Panel decided to address. This document also contains Conclusions and Recommendations that, unlike the Descriptive Part and the Findings, are particularised for each of the complainants. Specifically, in the Conclusions and Recommendations, separate document numbers/symbols have been used for each of the complainants (WT/DS375 for the United States, WT/DS376 for Japan and WT/DS377 for Chinese Taipei).

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Mexico – Corn Syrup (Article 21.5 – US)	Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6675
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EEC – Newsprint	GATT Panel Report, *Panel on Newsprint*, L/5680, adopted 20 November 1984, BISD 31S/114
Greece – Phonograph Records	Group of Experts Report, *Greek Increase in Bound Duty*, 9 November 1956, unadopted, L/580

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Short title	Full title
Commission Regulation No. 517/1999	Commission Regulation (EC) No. 517/1999 of 9 March 1999, concerning the classification of certain goods in the Combined Nomenclature, OJ L 61/23, 10 March 1999.
Commission Regulation No. 400/2006	Commission Regulation (EC) No. 400/2006 of 8 March 2006, concerning the classification of certain goods in the Combined Nomenclature, OJ L 70/9, 9 March 2006.
ADP machines	Automatic data-processing machines
BTI	Binding Tariff Information
BTI Guidelines	BTI Guidelines, Administrative Guidelines on the European Binding Tariff Information (EBTI) System and Its Operation, 28 October 2004.
CCT	Community Customs Tariff
CN	Council Regulation (EEC) No. 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, OJ L 256/1, 7 September 1987, as amended.
CN1997	Commission Regulation (EEC) No. 1734/96 of 9 September 1996, amending Annex I to Council Regulation (EEC) No. 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, OJ L 238/1, 19 September 1996, as amended.
CN2006	Commission Regulation (EC) No. 1719/2005 of 27 October 2005 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, OJ L 286/1, 28 October 2005, as amended.
CN2007	Commission Regulation (EC) No. 1549/2006 of 17 October 2006 of amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, OJ L 301/1, 31 October 2006, as amended.
CN2008	Commission Regulation (EC) No. 1214/2007 of 20 September 2007 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, OJ L 286/1, 31 October 2007, as amended.

CN2009	Commission Regulation (EC) No. 1031/2008 of 19 September 2008, amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, OJ L 291/1, 31 October 2008, as amended.
CN2010	Commission Regulation (EC) No. 948/2009 of 30 September 2009, amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, OJ L 287, 31 October 2009, as amended.
CNEN	Explanatory Notes to the CN.
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Comitology Decision	Council Decision 1999/468/EC of 28 June 1999, establishing the procedures for the exercise of implementing powers conferred on the Commission, OJ L 184/23, 17 July 1999, as amended by Decision 2006/512/EC, OJ L 200/11, 22 July 2006.
Commission	European Commission
Commission Regulation No. 1165/95	Commission Regulation (EC) No. 1165/95 of 23 May 1995 concerning the classification of certain goods in the combined nomenclature, OJ L 117/15, 24 May 1995.
Commission Regulation No. 2171/2005	Commission Regulation (EC) No. 2171/2005 of 23 December 2005 concerning the classification of certain goods in the Combined Nomenclature, OJ L 346/7, 29 December 2005.
Commission Regulation No. 2184/97	Commission Regulation (EC) No. 2184/97 of 3 November 1997, concerning the classification of certain goods in the Combined Nomenclature, OJ L 299/6, 4 November 1997.
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Community Customs Code or CCC	Council Regulation (EEC) No. 2913/92 of 12 October 1992 establishing the Community Customs Code, OJ L 302/1, 19 October 1992, as amended.
Council Regulation No. 179/2009	Council Regulation (EC) No. 179/2009 of 5 March 2009 amending Annex I to Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs tariff, OJ L 63/1, 7 March 2009.
Council Regulation No. 2658/87 or CN	Council Regulation (EEC) No. 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, OJ L 256/1, 7 September 1987, as amended.
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2005 Statement	Customs Code Committee – Tariff and Statistical Nomenclature Section, *Report of the Conclusions of the 360th meeting of the Committee* (26-28 January 2005), Annex VII, 3 March 2005.
Customs Code Committee (407th meeting)	Customs Code Committee – Tariff and Statistical Nomenclatures Section (Mechanical/Miscellaneous Sector), *Conclusions of the 407th Meeting of the Committee* (18-20 October 2006), Draft CNEN on "Satellite receivers with built-in modem", Annex VI, 8 January 2007.
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Customs Code Committee (432nd meeting)	Customs Code Committee – Tariff and Statistical Nomenclature Section Mechanical/Miscellaneous Sector), *Conclusions of the 432nd meeting of the Committee* (19 October 2007), point 6, 15 November 2007.

Customs Code Committee (433rd meeting)	Customs Code Committee – Tariff and Statistical Nomenclature Section (Heads of Tariff), *Summary Report of the 433rd meeting of the Committee* (22 October 2007), point 5, 23 November 2007.
EC member States	member States of the European Communities
European Court of Justice (Clees)	European Court of Justice 3 December 1998 (Clees v Hauptzollamt Wuppertal, C-259/97), [1998] ECR I-08127.
European Court of Justice (Develop Dr. Eisbein)	European Court of Justice 16 June 1994 (Develop Dr. Eisbein, C-35/93) [1994] ECR I-2655.
European Court of Justice (DFDS BV)	European Court of Justice 16 September 2004 (DFDS BV v. Inspecteur der Belastingdienst, C-396/02), [2004] ECR I-8439.
European Court of Justice (Dittmeyer)	European Court of Justice 15 February 1977 (Dittmeyer, C-69/76 and 70/76), [1977] ECR 231.
European Court of Justice (Gebr. Vismans Nederland BV)	European Court of Justice 18 September 1990 (Gebr. Vismans Nederland BV v Inspecteur der Invoerrechten en Accijnzen, C-265/89), [1990] ECR I-3411.
European Court of Justice (GoldStar Europe)	European Court of Justice 13 December 1994 (GoldStar Europe GmbH v Hauptzollamt Ludwigshafen, C-401/93), [1994] ECR I-5587.
European Court of Justice (Hewlett Packard)	European Court of Justice 17 May 2001 (Hewlett Packard BV v Directeur général des douanes et droits indirects, C-119/99), [2001] ECR I-03981.
European Court of Justice (Kamino)	European Court of Justice 19 February 2009 (Staatssecretaris van Financiën v Kamino International Logistics BV, C-376/07).
European Court of Justice (Rank Xerox)	European Court of Justice 9 October 1997 (Rank Xerox Manufacturing Nederland BV, C-67/95), [1997] ECR I-5401.
European Court of Justice (Sunshine Deutschland Handelsgesellschaft)	European Court of Justice 19 April 2007 (Sunshine Deutschland Handelsgesellschaft, C-229/06), [2007] ECR I-3251.
European Court of Justice (Kip and Hewlett Packard)	European Court of Justice 11 December 2008 (Kip Europe and Others; and Hewlett Packard, C-363/07 v. Administration des douanes - Direction générale des douanes et droits indirects, C-362/07 and 363/07).
ECR	European Court Reports
FPDs	Flat Panel Displays
GIRs	General Rules for the Interpretation of the HS or General Rules for the Interpretation of the CN
HS	Harmonized Commodity Description and Coding System

HS Convention	International Convention on the Harmonized Commodity Description and Coding System
HSEN	Explanatory Notes to the HS
ITA	Ministerial Declaration on Trade in Information Technology Products, 13 December 1996 (WT/MIN(96)/16)
MFMs	Multifunctional digital machines
McGraw-Hill Dictionary	McGraw-Hill Dictionary of Scientific and Technical Terms, 1994 (fifth edition).
Rules of Procedure of the Customs Code Committee	Rules of procedure of the Customs Code Committee adopted by the Section for General Customs Rules of the Customs Code Committee on 5 December 2001 (TAXUD/741/2001).
STB	set top box
STBCs	set top boxes which have a communication function
The *Shorter Oxford Dictionary* (1993)	New Shorter Oxford English Dictionary, 1993 (4th edition), Volumes I and II.
The *Shorter Oxford Dictionary* (2002)	*New Shorter Oxford English Dictionary,* fifth edition, 2002, Volume I (A-M).
The *Shorter Oxford Dictionary* (2003)	*New Shorter Oxford English Dictionary,* fifth edition, 2003, Volume II (N-Z).
Vienna Convention	Vienna Convention on the Law of Treaties 1969, done at Vienna on 23 May 1969. Entered into force on 27 January 1980, United Nations, Treaty Series, vol. 1155, p. 331.

I. INTRODUCTION

A. COMPLAINTS OF THE UNITED STATES, JAPAN AND CHINESE TAIPEI

1.1 On 28 May 2008, the United States and Japan, and on 12 June 2008, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu ("Chinese Taipei"), independently requested consultations with the European Communities[1] and its member States ("European Communities")[2] pursuant to Article 4 of the DSU and Article XXII:1 of the GATT 1994 regarding the tariff treatment that the European Communities accords to certain information technology products.[3]

1.2 The United States, Japan and Chinese Taipei requested, pursuant to paragraph 11 of Article 4 of the DSU, to join in each other's consultations.[4] China, the Philippines, Singapore and Thailand requested to join in the consultations requested by the United States and Japan, and China also requested to join in the consultations requested by Chinese Taipei.[5] The European Communities did not accept these requests, with the exception of the request of China to join in the consultations requested by Chinese Taipei.[6]

1.3 Separate consultations were held in Geneva between each complaining party and the European Communities. The European Communities and the United States held their consultations on 25 and 26 June 2008 and 14 and 15 July 2008. The European Communities and Japan held their consultations on 26 June 2008 and 16 and 17 July 2008. The European Communities and Chinese Taipei held their consultations on 3, 18 and 25 July 2008. None of these consultations led to a mutually satisfactory resolution of the dispute.

1.4 On 18 August 2008, the United States, Japan and Chinese Taipei, jointly and severally, requested the establishment of a panel pursuant to Article 6 of the DSU, with standard terms of reference.[7] At its meeting on 29 August 2008, the Dispute Settlement Body ("DSB") deferred the establishment of a panel following opposition by the European Communities.[8]

B. ESTABLISHMENT AND COMPOSITION OF THE PANEL

1.5 At its meeting on 23 September 2008, the DSB established a single Panel pursuant to the joint panel request of the United States, Japan and Chinese Taipei in document WT/DS375/8, WT/DS376/8 and WT/DS377/6 in accordance with Article 6 of the DSU.[9]

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[1] On 1 December 2009, the *Treaty of Lisbon* amending the *Treaty on European Union* and the *Treaty establishing the European Community* (done at Lisbon, 13 December 2007) entered into force. On 29 November 2009, the WTO received a *Verbal Note* (WT/L/779) from the *Council of the European Union* and the *Commission of the European Communities* stating that, by virtue of the *Treaty of Lisbon*, as of 1 December 2009, the *European Union* replaces and succeeds the *European Community*.

[2] The use of the term "European Communities" is without prejudice to the European Communities' position that its member States are not responding parties in this dispute (see below paragraph 1.10). This matter is addressed below, as appropriate, in the Findings Section of these Reports.

[3] WT/DS375/1, WT/DS376/1 and WT/DS377/1, respectively.

[4] See WT/DS375/3 and 6; WT/DS376/3 and 6; and WT/DS377/2 and 4.

[5] See WT/DS375/2, 4, 5 and 7; WT/DS376/2, 4, 5 and 7; and WT/DS377/3.

[6] See WT/DS377/5.

[7] The joint panel request was circulated on 19 August 2008 as a single document (WT/DS375/8, WT/DS376/8 and WT/DS377/6). The joint panel request is reproduced in Annex [G-1] to these Reports.

[8] WT/DSB/M/255, para. 69.

[9] WT/DSB/M/256, para. 52.

1.6 At that meeting, the parties to the dispute agreed that the Panel should have standard terms of reference. The Panel's terms of reference are, therefore, as follows:

> "To examine, in the light of the relevant provisions in the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the United States, Japan and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu in document WT/DS375/8, WT/DS376/8 and WT/DS377/6, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

1.7 On 12 January 2009, the United States, Japan and Chinese Taipei requested the Director-General to determine the composition of the Panel, pursuant to paragraph 7 of Article 8 of the DSU.

1.8 On 22 January 2009, the Director-General accordingly composed the Panel as follows:[10]

Chairman: Mr Wilhelm Meier

Members: Mr David Evans
Ms Valerie Hughes

1.9 Australia; Brazil; China; Costa Rica; Hong Kong, China; India; Japan (in respect of the United States' and Chinese Taipei's complaints); Korea; the Philippines; Singapore; Chinese Taipei (in respect of the United States' and Japan's complaints); Thailand; Turkey; the United States (in respect of Japan's and Chinese Taipei's complaints); and Viet Nam reserved their rights to participate in the Panel proceedings as third parties.[11]

C. PANEL PROCEEDINGS

1.10 On 4 February 2009, the parties and the Panel held their organizational meeting. In that meeting, as well as in oral and written communications thereafter, the European Communities raised concerns on the status of the complaining parties as third parties to this dispute and also objected to the inclusion of its member States as responding parties of this dispute. The Panel will address these matters below, as appropriate, in the Findings Section of these Reports.

1.11 The Panel held its first substantive meeting with the parties on 12 and 14 May 2009. The session with the third parties took place on 13 May 2009. The Panel held its second substantive meeting with the parties on 9 July 2009. Upon request by the complaining parties, and in accordance with the procedures adopted by the Panel after consulting with the parties, both the first and the second meetings were opened to the public.[12] A real time closed-circuit television broadcast of the Panel's open sessions was presented in a separate room of the WTO building in Geneva to allow the public to observe the proceedings.

1.12 On 25 August 2009, the Panel issued the draft descriptive part of its Panel Reports. On 8 September 2009, the Panel received comments from the parties on the draft descriptive part. The

[10] WT/DS375/9, WT/DS376/9 and WT/DS377/7 of 26 January 2009.
[11] On 23 January 2009 the United States, Japan and Chinese Taipei notified their interest to participate as third parties.
[12] "Procedures for open hearings, first and second substantive meetings of the Panel" of 29 April 2009, adopted under paragraph 2 of the "Working Procedures for the Panel" of 10 February 2009.

Panel issued its Interim Reports to the parties on 11 June 2010. The Panel issued its Final Reports to the parties on 23 July 2010.

II. FACTUAL ASPECTS

A. MEASURES AT ISSUE

2.1 The complaining parties claim that the European Communities is required to accord duty-free tariff treatment to certain information technology products. These products[13] are described by the complaining parties as certain "flat panel display devices" ("FPDs"), "set-top boxes which have a communication function" ("STBCs") and "multifunctional digital machines" ("MFMs")[14]. The complaining parties claim that the European Communities is obliged to grant such duty-free treatment under the European Communities Schedule of Concessions to the GATT 1994 ("the EC Schedule") pursuant to modifications therein to reflect the commitments it has made under the *Ministerial Declaration on Trade in Information Technology Products* ("Information Technology Agreement" or "ITA").[15]

2.2 The complaining parties have identified the following as the measures at issue in this dispute:

1. FPDs

(a) Council Regulation (EC) No. 493/2005 of 16 March 2005;

(b) Commission Regulation (EC) No. 634/2005 of 26 April 2005;

(c) Commission Regulation (EC) No. 2171/2005 of 23 December 2005;

(d) Council Regulation (EEC) No. 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, including all annexes thereto, as amended;

(e) Explanatory Notes to the Combined Nomenclature of the European Communities, 2008/C 133/01 (May 30 2008), alone or in combination with Council Regulation (EEC) No. 2658/87 of 23 July 1987; and

(f) Any amendments or extensions and any related or implementing measures.

[13] The reference to "flat panel display devices", "set-top boxes which have a communication function" and "multifunctional digital machines", and their respective acronyms "FPDs", STBCs" and "MFMs", is for ease of reference only and will be used in these Reports without prejudice to the positions taken by the parties on the description and designation of the products at issue in this dispute.

[14] In footnote 15 of their joint panel request, the complaining parties explain that they use this term to refer to "machines which perform two or more of the functions of printing, copying, or facsimile transmission, capable of connecting to an automatic data processing machine or to a network (including devices commercially known as MFPs (multifunctional printers), other 'input or output units' of 'automatic data processing machines', and facsimile machines)."

[15] *Ministerial Declaration on Trade in Information Technology Products*, 13 December 1996 (WT/MIN(96)/16). The full text of the ITA is also reproduced in Annex G to these Reports.

2. STBCs

(a) Council Regulation (EEC) No. 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, including all annexes thereto, as amended;

(b) Explanatory Notes to the Combined Nomenclature of the European Communities, 2008/C 112/03 (7 May 2008)[16], alone or in combination with Council Regulation (EEC) No. 2658/87 of 23 July 1987; and

(c) Any amendments or extensions and any related or implementing measures.

3. MFMs

(a) Commission Regulation (EC) No. 517/1999 of 9 March 1999;

(b) Report of the Conclusions of the 360th meeting of the Customs Code Committee, Tariff and Statistical Nomenclature Section, TAXUD/555/2005-EN (March 2005);

(c) Commission Regulation (EC) No. 400/2006 of 8 March 2006;

(d) Council Regulation (EEC) No. 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, including all annexes thereto, as amended (including amendments adopted pursuant to Commission Regulation No. 1214/2007 of 20 September 2007); and

(e) Any amendments or extensions and any related or implementing measures.

B. REQUEST FOR INFORMATION FROM THE WORLD CUSTOMS ORGANIZATION

2.3 On 8 September 2009, the Panel, pursuant to Article 13.1 of the DSU, sent a letter to the World Customs Organization ("WCO") Secretariat requesting its assistance in certain issues relating to the Harmonized System ("HS"). The WCO replied to the Panel's letter on 29 September 2009. On 14 October 2009, the parties submitted their comments on the WCO's reply.

C. REQUEST FOR SEPARATE REPORTS

2.4 At the organizational meeting of 4 February 2009, the European Communities requested the Panel to issue separate Panel Reports. The complaining parties did not object to such request at that meeting. In their comments to the draft descriptive part of these Reports, the complaining parties requested that, if the Reports are issued as a single document, the conclusions and recommendations for each of the disputes be set out on separate pages, with each page bearing only the Report symbol relating to that dispute. The Panel findings are therefore issued in the form of a single document containing three separate Reports. The Panel's conclusions and recommendations for each of the

[16] Reference has also been made to certain actions of the Customs Code Committee with respect to amendments to these Explanatory Notes (footnote 11 and page 5 of the joint panel request).

disputes will be set out on separate pages, with each page bearing only the Report symbol relating to that dispute.[17]

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. UNITED STATES, JAPAN AND CHINESE TAIPEI

3.1 In light of the measures cited above, the complaining parties request the Panel to find as follows:

1. FPDs

3.2 As a result of the measures cited above, the United States, Japan and Chinese Taipei request the Panel to find that the European Communities has acted inconsistently with Articles II:1(a) and II:1(b) of the GATT 1994 by according certain FPDs treatment less favourable than that provided in the EC Schedule, and by imposing on these products ordinary customs duties, or other duties and charges, in excess of those set forth in the EC Schedule.

2. STBCs

3.3 As a result of the measures cited above, the United States, Japan and Chinese Taipei request the Panel to find that the European Communities has acted inconsistently with Articles II:1(a) and II:1(b) of the GATT 1994 by according STBCs treatment less favourable than that provided in the EC Schedule, and by imposing on these products ordinary customs duties, or other duties and charges, in excess of those set forth in the EC Schedule.

3.4 The United States and Chinese Taipei further request the Panel to find that the European Communities, with respect to STBCs, has acted inconsistently with Articles X:1 and X:2 of the GATT 1994 by not promptly publishing the Explanatory Notes identified above in respect to these products and by applying duties to these products using the approach specified in these Explanatory Notes prior to the date of their publication.

3. MFMs

3.5 As a result of the measures cited above, the United States, Japan and Chinese Taipei request the Panel to find that the European Communities has acted inconsistently with Articles II:1(a) and II:1(b) of the GATT 1994 by according certain MFMs treatment less favourable than that provided in the EC Schedule, and by imposing on these products ordinary customs duties, or other duties and charges, in excess of those set forth in the EC Schedule.

B. EUROPEAN COMMUNITIES

3.6 The European Communities requests that the Panel reject all the claims raised by the United States, Japan and Chinese Taipei.

[17] The Panel will therefore follow the similar approach taken by the panel in *US – Steel Safeguards* (see cover note to that Report and para. 10.725) See also the Appellate Body Report on *EC - Bananas (21.5 - Ecuador II)* and *China – Auto Parts*.

IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties, as set forth in their executive summaries of their written submissions and oral statements to the Panel, are attached to these Reports as Annexes A, B, C and D (see List of Annexes, pages ii and iii). The replies of the parties to questions and the parties' comments on each other's replies to questions are not attached to these Reports as annexes. They are, however, reflected in the findings section of these Reports where relevant. [18]

V. ARGUMENTS OF THE THIRD PARTIES

5.1 The arguments of the third parties, as set forth in their executive summaries of their written submissions and oral statements to the Panel, are attached to these Reports as Annexe E (see List of Annexes, page iii).[19] The replies of the third parties to questions are not attached to these Reports as annexes. They are however reflected in the findings section of these Reports where relevant.[20]

VI. INTERIM REVIEW

6.1 Pursuant to Article 15.3 of the DSU, the findings of the final panel report must include a discussion of the arguments made by the parties at the interim review stage. This Section of the Panel Report provides such a discussion. As Article 15.3 makes clear, this Section forms part of the Panel's findings.

A. BACKGROUND

6.2 The United States, Japan, Chinese Taipei and the European Communities separately requested an interim review by the Panel of certain aspects of the Interim Report issued to the parties on 11 June 2010.[21] None of the parties requested an interim review meeting. However, the parties made use of the opportunity to submit further written comments on each others' requests.[22] On 23 July 2010, the Panel issued its Final Report to the parties on a confidential basis.

B. PARTIES' REQUESTS FOR CHANGES TO THE INTERIM REPORTS

6.3 Below, the **Panel** will address the parties' requests for changes to the Interim Report. Unless otherwise indicated, the references below are to paragraph or footnote numbers appearing in the Interim Report.

1. General Comments

(a) Comments by the Complainants

6.4 **Japan** requests the Panel to modify paragraph 7.91 to reflect its request that the Panel refrain from exercising judicial economy with respect to its claims regarding Attachments A *and* B of the ITA, and not just those pertaining to Attachment A.

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[18] As established by paragraph 18 of the "Working Procedures for the Panel" of 10 February 2009.

[19] Australia; Brazil; Hong Kong, China; India; Japan; Chinese Taipei; Thailand; the United States; and Viet Nam did not make written submissions. Brazil; Japan; Korea; Chinese Taipei; the United States; and Viet Nam did not make oral statements.

[20] As established by paragraph 18 of the "Working Procedures for the Panel" of 10 February 2009.

[21] Letters of the parties of 25 June 2010.

[22] Letters of the parties of 9 July 2010.

6.5 None of the parties have commented on Japan's request.

6.6 The **Panel** has modified paragraph 7.91 to reflect Japan's request to refrain from exercising judicial economy with respect to its claims concerning Attachments A and B of the ITA.

6.7 The **complainants** request the Panel to modify paragraphs 7.94, 7.119, 7.291, 7.599, 7.603 and other relevant paragraphs throughout the report to use the term "tariff item numbers" rather than "CN codes", where the terms are used to refer to eight-digit numbers appearing in the EC Schedule.

6.8 The **European Communities** has not commented on the complainants' request.

6.9 The **Panel** has replaced the term "CN code" with the term "tariff item number" where appropriate.

6.10 The **complainants** ask that the panel modify paragraphs 7.82 - 7.90 7.290, 7.817 and 8.2 to reflect that EC member States have acted inconsistently with their obligations through the application of duties to products. They assert that the Panel has declined to consider certain applications by EC member States customs officials on grounds that the complainants limited their claims to "as such" challenges, and by asserting that reaching findings with respect to member States would not be necessary to secure a positive resolution to the dispute in view of "certain assurances" made by the European Communities. Japan and the United States argue, however, that failing to consider applications by member States may fail to provide a positive resolution to the dispute. This would result, they argue, if member States were to continue to impose duties on the products at issue. The United States and Japan argue that the claims are within the Panel's terms of reference. Moreover, they note that EC member States are WTO Members in their own right with individual obligations, and that the internal relationship between the European Communities and its member States cannot diminish the rights of other WTO Members to exercise their rights under the WTO Agreements.

6.11 The **European Communities** requests the Panel to reject the complainants' request. It argues that the complainants may not challenge the "application" of duties by EC member States to the products at issue, in particular, in light of their statements to the Panel during the proceedings that the complainants have not challenged the measures on an "as applied" basis. The European Communities submits that it is "exclusively competent to decide the duty applicable to each product at issue", whereas the "application" of such duty is the sole responsibility of the EC member State customs authorities. In its view, the application of duties to products at issue is the same as the "application" of the EC measures at issue. The European Communities asserts that the complainants have not provided evidence of the application of duties to all products concerned by each of the 27 EC member States sufficient to support their claim regarding the application of duties, nor does it consider that the complainants may make their claim by referring solely to the legal effects of the EC measures.[23] Finally, the European Communities challenges the view of the complainants that the Panel's failure to reach findings with respect to EC member States would compromise the ability of the complainants to achieve a positive resolution to the dispute. The European Communities contends that the complainants' position assumes that EC member State customs authorities would disregard EC law if the European Communities modified through amendment or repeal the measures at issue in order to implement the Panel report. As it argued in its submissions, the European Communities submits that it

[23] The European Communities further argues that Japan and Chinese Taipei may not sustain their claims based on their reliance on evidence submitted by the United States only (as provided in footnote 1 of the United States' request for review of precise aspects of the Interim Report). At most, the European Communities submits that evidence provided by the United States could support its own claim, and not any by Japan or Chinese Taipei.

has exclusive competence to determine the applicable duty rate for the products at issue, and that member States are bound to apply any new applicable duty rate.

6.12 The **Panel** observes that, despite the complainants' identification in their joint Panel request of all EC member States as respondents in this dispute, the complainants have directed their claims against a set of EC measures. While the complainants have submitted evidence of the *application* of duties by certain EC member State customs authorities in particular instances, we recall that the complainants have confirmed to the Panel that they did not seek to challenge these particular applications, but rather submitted such evidence in support of their "as such" claims against the EC measures. The Panel also observes that the evidence provided by the complainants does not reflect all customs determinations by all EC member States. For these reasons, the Panel considers that it has made the appropriate findings in this regard and hence, we have not made the requested changes. We have nevertheless adjusted paragraph 8.2 to clarify our position in this regard.

6.13 The **complainants** request the Panel to designate the argument set forth in the penultimate sentence in paragraph 7.95 regarding whether or not the complainants have made a "prima facie" case as that advanced by the European Communities. They contend that the Panel has not necessarily adopted the European Communities' characterization in its reports and the paragraph should be clearer to that effect.

6.14 The **European Communities** has not commented on the complainants' request.

6.15 The **Panel** has inserted the terms "according to the European Communities", in the penultimate sentence, for purposes of clarification, specifying that the arguments pertain exclusively to the European Communities.

6.16 The **complainants** request that the final clause in the last sentence of paragraph 7.114 be deleted, arguing that the Report considers the complainants' characterization of the measures for each of the claims, and not only certain claims "in particular".

6.17 The **European Communities** has not commented on the complainants' request.

6.18 The **Panel** has deleted the clause; it does not consider that this change affects the substance of the Reports.

6.19 The **complainants** request the Panel to refer in paragraphs 7.119 and 7.315 to refer to a separate section of the Reports to reflect that the complainants have presented different views on whether the concessions based on Attachment B of the ITA are located exclusively in the Annex to the EC Schedule or whether they are incorporated by reference. In particular, the complainants request the Panel to include the following footnotes: "Regarding the complainants' views on the location of the concession, see paras. 7.213-7.220".

6.20 The **European Communities** has not commented on the complainants' request.

6.21 The **Panel** has inserted the footnote to clarify that the parties hold different views on the location of the concessions.

6.22 The **complainants** request the Panel to reconsider the relevant analysis in paragraph 7.137 in determining whether the 2009 CN is within its terms of reference. In particular, the complainants argue that the approach set forth in paragraphs 7.169-1.170 that was used to evaluate whether the 2007 and 2009 regulations are within its terms of reference should also be relevant for evaluating the

2009 CN. The latter approach was discussed in the Appellate Body Report on *Chile – Price Band System*.

6.23 The **European Communities** has not commented on the complainants' request.

6.24 The **Panel** has revised paragraph 7.137 to reflect the decision of the Appellate Body in C*hile – Price Band System*, as discussed in paragraphs 7.175-7.176 of the Report, for purposes of completeness. The Panel has additionally harmonized the section with the approach taken in paragraphs 7.171-7.191.

6.25 The **complainants** request the Panel to revise the final sentence in paragraph 7.183 to read "...we consider that a ruling that takes into consideration Council Regulation No. 179/2009 would aid in the settlement of this dispute". They argue, in paragraphs 7.168-7.190, that the Panel does not need to evaluate whether amendments to the duty suspensions (in particular Council Regulations Nos. 301/2007 and 179/2009) are within the Panel's terms of reference, or whether it may rule on the measures in the present dispute. The complainants argue that they included Council Regulation 493/2005 within the their joint Panel request due to the reference that certain flat panel displays using LCD technology that are "capable of reproducing video images from a source other than an automatic data-processing machine" are not covered by the ITA. The complainants do not contest that the Panel may consider whether it will address the arguments made by the European Communities and the complainants in connection with these measures. In particular, the complainants recognize that the Panel may consider whether the duty suspensions "cure" the breach of Articles II:1(a) and II:1(b) resulting from the imposition of duties on certain displays. However, the complainants contend that the does not raise a question of the Panel's terms of reference. The complainants argue that the duty suspension elements of the measures in question were not part of the complainants' claims, and thus do not give rise to a terms of reference question.

6.26 The **European Communities** has not commented on the complainants' request.

6.27 The **Panel** notes that it has considered the duty suspension as set forth under Council Regulation 493/2005, and subsequently modified and extended under Council Regulations Nos. 301/2007 and 179/2009, not only due to the complainants' initial identification of Council Regulation 493/2005 as a measure at issue, but also in light of subsequent arguments made by both the European Communities and the complainants in connection with these regulations. Moreover, we note that Chinese Taipei and the European Communities have acknowledged the more recent modification, Council Regulation No. 179/2009, in the context of their arguments.[24] Chinese Taipei noted that it considered that Council Regulations Nos. 301/2007 and 179/2009 have not changed the essential nature of the original measure in dispute.[25] The Panel considers these measures to be relevant to its analysis of the measures as issue, particularly in light of argumentation advanced by the parties to this dispute. Having regard to the complainants' concern with the Panel's characterization of its analysis, however, the Panel has revised language in the section heading and paragraphs 7.167-7.171 and 7.183 accordingly.

6.28 The **complainants** request the Panel to revise paragraph 7.198 to provide as follows: "means that the complainants have failed to satisfy the provisions of Article 6.2 ...".

6.29 The **European Communities** argues that this change is one of substance and should be rejected.

[24] See, for instance, European Communities' first written submission, para. 94.
[25] Chinese Taipei's response to Panel question No. 18.

6.30 The **Panel** disagrees with the European Communities that this change affects the substance of the paragraph and agrees to make the change requested by the complainants.

6.31 The **complainants** request the Panel to revise paragraph 7.229 to provide as follows: "The European Communities argues that CN codes 8528 51 00 and 8528 41 00 in the current CN are the relevant provisions implementing obligations pursuant to the ITA...".

6.32 The **European Communities** argues that this change is one of substance and should be rejected. The European Communities submits generally that the paragraph misrepresents the arguments of the European Union, the last sentence of the paragraph having been taken out of context. Accordingly, the European Communities requests that the Panel review the paragraph in its entirety.

6.33 The **Panel** has reviewed the paragraph in its entirety, which summarizes arguments appearing in paragraphs 44-47 of the European Communities' second written submission. The Panel has made minor editorial changes to paragraph 7.229 and sees no need for additional changes.

6.34 The **complainants** request the Panel to modify the first sentence of paragraph 7.234 as follows, to reflect their arguments: "Based on the terms of the descriptions for these CN codes, it appears evident that under the CN 'monitors of a kind solely or principally used in an automatic data-processing system of heading 8471' are classifiable under duty free CN codes 8528 41 00 and 8528 51 00".

6.35 The **European Communities** has not commented on the complainants' request.

6.36 The **Panel** has made this editorial change, which does not alter the substance of the paragraph.

(b) Comments by the European Communities

6.37 The **European Communities** requests the Panel to use the term "EC member States customs authorities" in place of "EC member States" in paragraphs 7.141, 7.147 and 7.150 for accuracy.

6.38 The **United States** submits that the Panel uses the term "EC member States" correctly in the context in which these terms appear, to refer to the entities that have undertaken obligations pursuant to the EC legal regime under discussion. The United States asserts that the European Communities has not explained why the references are incorrect other than to state that EC member State customs authorities apply EC law. The United States argues that the European Communities does not contend that EC member State customs authorities are in fact authorities of the member State rather than of the European Communities.

6.39 The **Panel** does not perceive a substantive distinction between one term or the other in the context of its Reports. We note, in addition, that the Panel used the term "EC member States" in discussing their identification as respondents in the dispute in paragraphs 7.82 - 7.90 of the report. For these reasons, and for consistency, the Panel does not consider it necessary to adopt the proposed changes of the European Communities.

6.40 The **European Communities** requests the Panel to refrain, in paragraphs 7.161, 7.267, 7.757, 7.1153, 8.4, 8.5, 8.14, 8.16, 8.17, 8.25, 8.27, 8.28 and 8.37, from making recommendations with respect to point 4 in the annex to Commission Regulation No. 634/2005 and all of Commission Regulation No. 2171/2005. The European Communities argues that these provisions have been

repealed by Commission Regulation No. 1179/2009 of 26 November 2009 (Articles 2 and 3 and Annex II, point 46 and Annex III, point 28). Furthermore, it requests the Panel to refrain from making recommendations with respect to CNEN 2008/C 133/01, because aspects thereof relevant to this dispute have been deleted. In addition, the European Communities requests the Panel to refrain from making recommendations with respect to Commission Regulation No. 517/99 in its entirety and point 4 of the Annex to commission Regulation No. 400/2006, arguing that these provisions have been repealed by Commission Regulation No. 1179/2009 of 26 November 2009. The European Communities refers to Attachments 1 and 2 to its Comments on the Interim Reports in these respects.

6.41 The European Communities additionally requests that the following text be added at the end of each of paragraphs 8.14, 8.25 and 8.37: "Since the European Union has confirmed that point 4 of Commission Regulation No. 634/2005 has been deleted, Commission Regulation No. 2171/2005 has been repealed and the relevant parts of CNEN 2008/C 133/01 have been deleted, the Panel does not make any recommendations on these measures."

6.42 Additionally, in commenting on paragraph 7.1153 of the Interim Reports, the European Communities informs the Panel of the attachments to its comments on the Interim Reports. However, Unlike with its comments with respect to other paragraphs of the Interim Reports, the European Communities does not request any specific changes to paragraph 7.1153, or to the findings on the consistency of the relevant measures with respect to the treatment of MFMs.

6.43 The **complainants** ask the Panel to decline the request by the European Communities to modify its recommendations in the cited paragraphs and request the Panel to delete paragraph 7.161, the final sentence of paragraph 7.267, paragraph 7.1156 and paragraphs 8.14, 8.25 and 8.37. In this last respect, the United States argues that paragraph 8.14 as written may make resolution of the dispute more difficult by conditioning the recommendation and providing no mechanism for determining which measures will be in force on the date of adoption of the reports. It asserts that the scope of recommendations would be unclear.

6.44 The **United States** submits that the Interim Reports propose to make a conditional recommendation on the basis of statements by the European Communities that certain measures would be repealed. The complainants argue that the European Communities did not provide evidence confirming the repeal of these measures during the Panel proceedings, and that introduction of evidence at this stage of the proceedings is inappropriate.[26] Accordingly, they argue that there is not a permissible basis for failing to make recommendations. They argue that a Panel is required to make recommendations on measures that are within its terms of reference once it has determined any WTO inconsistency, finding support for this in Article 19.1 of the DSU and various Panel and Appellate Body Reports, in particular in cases where the measure expired only after the panel was established. As a factual matter, the United States and **Chinese Taipei** further argue that the introduction of evidence of the repeal of the measures does not establish that the measures do not continue to have legal effect, or that EC member States do not continue to apply duties to products subject to the Panel's findings in contravention of their own WTO obligations and the repeal of the measures.

6.45 Moreover, the United States and Chinese Taipei recall their concern that, by declining to make findings regarding EC member States, the Panel may have increased the risk that a positive

[26] Chinese Taipei submits in addition, that the late introduction of evidence of the repeal of certain measures runs contrary to paragraph 15 of the Panel's Working Procedures. This paragraph states that "the parties shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to factual evidence necessary for purposes of rebuttals, answers to questions or comments on answers provided by others. Exceptions to this procedure will be granted upon a showing of good cause."

resolution to the dispute will not be achieved. Specifically, the United States is concerned that the European Communities may not take steps beyond repeal of certain measures, and thus fail to deal with member States that continue to apply duties to the products despite such repeal.

6.46 **Japan** questions why the matter of the repeal was not reported to the Panel earlier and, like the United States, observes that the interim review stage is not the appropriate stage to introduce new evidence.

6.47 The **Panel** notes at the outset that the European Communities submitted on June 25, 2010 two documents (Attachments 1 and 2) attached to the European Communities' Comments on the Interim Reports. The Panel had not seen these materials prior to their submission by the European Communities. The European Communities argues that these documents demonstrate that it has deleted point 4 in the annex to regulation 634/2005 and that regulation 2171/2005 has been entirely repealed. The European Communities also argues that the relevant parts of CNEN 2008/C 133/01 have been deleted. The European Communities requests that, on the basis of these documents, the Panel refrain from making any recommendations in relation to those measures.

6.48 We note that the documents in Attachment 1 and 2 were published in November 2009, long after the record had closed. At no time between November 2009 and the issuance of the Interim Reports did the European Communities seek leave of the Panel to provide this additional information. Article 15.2 of the DSU, which provides for the Interim Review process, was considered by the Appellate Body in *EC – Sardines*. It clarified that this provision does not permit parties to "introduce new evidence", and is availabe only "for the panel to review precise aspects of the interim report".[27] Consistent with the Appellate Body's approach and in the interest of protecting the due process rights of the complainants, who had no opportunity to make submissions for the record on the documents provided, we decline to consider further the documents attached by the European Communities to its request for interim review. The Panel also declines to make adjustments to the Interim Reports to exclude the measures in question from the Panel's recommendation and to add text about the European Communities' confirmation that certain measures have been repealed, as requested by the European Communities.

6.49 The Panel now turns to the issue raised by the complainants in response to the European Communities' request, namely whether the Panel may decline to make recommendations on those measures once it has concluded that they are inconsistent with the respondents' WTO obligations. The complainants refer to Article 19.1 of the DSU, which provides that "[w]here a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it *shall* recommend that the Member concerned bring the measure into conformity with that agreement" (emphasis added by the complainants in their comments). The complainants additionally refer to a series of Appellate Body and Panel reports in which panels and the Appellate Body have proceeded to make recommendations on measures within their terms of reference that were modified or expired after the panel was established.[28] The United States contends that panels have declined to make recommendations only where measures had expired before the Panel was established.[29]

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[27] Appellate Body Report on *EC – Sardines*, para. 301. The Appellate Body held similarly in two subsequent disputes: see Appellate Body Report on *EC – Selected Customs Matters*, para. 259 and Appellate Body Report on *EC – Bananas III (US)*, paras. 6.1-6.18.

[28] See, e.g., Panel Report on *EC – Approval and Marketing of Biotech Products*, paras. 8.16 and 8.36; Appellate Body Report on *EC – Selected Customs Matters*, para. 310; Appellate Body Report on *Dominican Republic – Import and Sale of Cigarettes*, para. 129.

[29] See Appellate Body Report on *US – Certain EC Products*, para. 81; Appellate Body Report on *US – Upland Cotton*, para. 272. Appellate Body Report on *EC – Bananas III (US).*

6.50 The Panel has decided to adjust certain paragraphs of its Reports, including its recommendation pursuant to Article 19.1 of the DSU, in order to reflect more clearly the fact that, at the time of writing the Interim Reports, there was no evidence properly before the Panel that the measures in question had in fact been repealed. Accordingly, the Panel has made adjustments to paragraphs 7.161, 7.267, 7.1156, 8.14, 8.25 and 8.37, in this respect.

6.51 The **European Communities** requests the Panel to review paragraph 7.191 of the Reports in their entirety and reflect differences in the scope of the complainants' claims. It submits that Japan's claims with respect to flat panel display devices are narrower than those advanced by the United States and Chinese Taipei on the basis of language appearing in paragraphs 216 of Japan's first written submission, which refers to "flat panel display devices 'for' ADP machines", as well as "LCD monitors with DVI", and those referred to in arguments of the United States and Chinese Taipei, namely in this last respect, "those devices that can display information only from an ADP machine".

6.52 The **United States** submits that it is not necessary for the Panel to make changes to these sections, noting that Japan expressly stated that the scope of its claims concerning flat panel display devices was the same as that of the other parties. **Japan** argues that the European Communities has mischaracterized the scope of its claim concerning flat panel display devices, as it had equally done in its second written submission. Accordingly, the United States and Japan request the Panel to reject the proposal by the European Communities to modify paragraph 7.191.

6.53 The **Panel** sees no distinction in the scope of Japan's claim in relation to those of the other complainants, in particular in light of statements by Japan that it considers products at issue to be those it has described and those referred to by other parties. Similar to the other complainants, Japan has referred to the language of the FPDs narrative description, as well as to language in tariff item number 8471 60 90 in the EC Schedule. In addition, similar to the other complainants, Japan has discussed certain technology in display devices, such as LCD monitors with DVI interfaces. In addition, all three complainants submitted a joint Panel request discussing identical claims and the matter before the Panel. For these reasons, the Panel sees no basis to make revisions to the Reports as requested by the European Communities.

2. Flat Panel Display Devices (FPDs)

(a) Comments by the Complainants

6.54 The **complainants** request the Panel to revise paragraph 7.246 to provide as follows: "The Panel considers that, under the CN, read in conjunction with the CNEN, a display based on LCD, OLED or plasma technology ... cannot be capable of connecting to other sources".

6.55 The **European Communities** argues that this change is one of substance and should be rejected.

6.56 The **Panel** disagrees that this change is one of substance and has made this change as it better reflects the intention of the Panel.

6.57 The **complainants** request that the final sentence of paragraph 7.477 be revised for consistency, as follows: "Rather, we consider our task to be to determine whether the concession covers those products at issue, namely those that are designed for use with automatic data-processing machines (which, undisputedly, fall within the ITA)...".

6.58 The **European Communities** has not commented on the complainants' request.

6.59 The **Panel** has made this editorial correction for consistency.

6.60 The **complainants** request the Panel to revise the concluding sentence of paragraph 7.502 as follows: "Nor do we understand them to argue that all "televisions" necessarily qualify as flat panel display devices under the concession." The complainants acknowledge that they do not claim that all display devices or monitors, such as televisions using LCD or other non-CRT technologies, necessarily fall within the meaning of the FPDs narrative description. However, they request the Panel to clarify a statement in paragraph 7.502 regarding whether televisions may qualify as flat panel display devices under the concession. The complainants argue that they have not excluded the possibility that some "televisions" might fall under the concessions, depending on the definition given to a "television".

6.61 The **European Communities** submits that the complainants' request amounts to an attempt to enlarge the findings of the panel ex-post of the actual proceedings. It argues that the complainants never argued that flat panel televisions would be within the scope of the claims.

6.62 The **Panel** notes that the complainants have not provided any citation to arguments that support the broader formulation requested. The complainants point out that the meaning of the term "television" was not discussed in this dispute. Accordingly, the Panel declines to modify the text.

6.63 The **complainants** request the Panel to clarify its statement regarding the duty suspension in paragraph 7.744 with the following modifications: "However, Council Regulation No. 179/2009 suspends those duties for some products, and hence there is no inconsistency with Article II:1(b) to the extent the duty suspension is applied to a product covered by either concession."

6.64 The **European Communities** submits that it does not understand the changes in light of the language appearing in paragraphs 7.745 of the Interim Report.

6.65 The **Panel** has modified the text to clarify the distinction between when the suspension is applied (as in para. 7.744) and when it is not (as in para. 7.745).

(b) Comments by the European Communities

6.66 The **European Communities** requests the Panel to review the citations in paragraphs 7.269, 7.270 et seq., and footnotes 359, 360 and 363, which it argues concern exclusively MFMs. The European Communities expresses concern that the analysis in this section is based on the existence of evidence that pertains to MFMs.

6.67 The **United States** argues that the evidence relied on by the Panel is not inapplicable simply because the BTI pertains to a product other than LCD monitors. It argues that the evidence demonstrates that EC member States rely on regulations that use earlier CN numbers to classify goods under the most recent CN, supporting the conclusion that a mere change in CN numbers does not result in prior regulations losing their relevance for purposes of customs classification in the European Communities. For purposes of accuracy, the United States proposes that the Panel modify the penultimate sentence to eliminate a reference to LCD monitors, as follows: "Moreover, there is some evidence that at least in some instances national authorities continue to support their classification decisions with reference to classification measures using older CN codes".

6.68 The **Panel** has taken the approach described by the United States in the proposed Interim Report. Namely, despite the fact that the BTI pertains to a product different than an LCD monitor, the Panel considers the method applied demonstrates that EC member States rely on regulations using

older CN numbers despite changes in the current CN. As suggested by the United States, the Panel has modified the penultimate sentence to remove the reference to LCD monitors.

6.69 The **European Communities** requests the Panel revise paragraph 7.475. The European Communities submits that it did not argue that the terms "mainly" and "only" in paragraph 7.475 should be "added" to the narrative description, but are "interpretative tools".

6.70 The **United States** responds that it does not understand the Panel to have asserted in this paragraph that the European Communities argued that words should be added to the text of the concession. Rather, the United States submits that it understands the Panel to find that the position of the European Communities would require one to reads words into the text that do not appear. Therefore, it submits that the paragraph need not be revised.

6.71 For purposes of clarity, the **Panel** has chaged the word "add" to read "read in", as the Panel did not mean to suggest the literal addition of terms.

6.72 The **European Communities** submits that, in paragraphs 7.560 et seq., including 7.587 to 7.596, the Panel has not considered the state of technology at the time of the ITA negotiations in the context of the ordinary meaning of the relevant concessions, despite what it asserts are very clear arguments in its submissions. The European Communities requests the Panel to address these arguments.

6.73 The **United States** submits that the Panel has not omitted considering arguments regarding the state of technology at the time of ITA negotiations, but instead considers and rejects the argument, in particular in paragraphs 7.589 – 7.594. It thus considers revisions unnecessary.

6.74 The **Panel** has addressed what it understood to be arguments by the European Communities concerning the state of technology in the section of the report entitled "Other arguments". We note that in their submissions on flat panel display devices, unlike in their submissions for set top boxes, the European Communities did not clearly designate arguments concerning the state of technology as necessarily relating to "surrounding circumstances" or "ordinary meaning". In any event, in light of the broad nature of the terms of the concessions, the Panel concluded that the state of technology does not inform its interpretation. Accordingly, the Panel considers it has addressed the arguments of the European Communities in paragraphs 7.560 et seq.

6.75 The **European Communities** requests the Panel to revise paragraph 7.614 to reflect its arguments appearing in paragraphs 100-101 and footnote 812 of its first written submission. It argues that these paragraphs do not state that "genuine ADP monitors" do not equate to "those solely used with ADPs".

6.76 The **Panel** notes that the paragraphs cited by the European Communities state that the question of whether "a given multifunctional LCD monitor falls within the scope of [tariff heading 8471 60 90]" is "wholly different" from whether a "genuine ADP monitor would fall within the scope of the ordinary meaning of the heading". It continues, stating that "ADP monitors undoubtedly fall within this heading, but this says very little about whether the different kinds of multifunctional LCD monitors subject to this dispute fall within the ordinary meaning of the heading". It then states that these multifunctional monitors may be classified as video monitors or as reception apparatus for television under different headings.

6.77 Based on this language in these paragraphs, the Panel understands the European Communities to distinguish between what it considers are "multifunctional" monitors from "genuine ADP

monitors". The Panel understands the principal differentiator in the terms used by the European Communities is whether a product is multifunctional or not. A product that is not multifunctional is one that does not have multiple uses or one that is only capable of being used in one respect. As the European Communities refers to ADP machines in this context, the Panel understands the European Communities to refer to products that are not multifunctional, but those capable of being used exclusively with ADP machines.

6.78 Nevertheless, the Panel has revised the text to paraphrase the views of the European Communities expressed in paragraphs 100-101 and footnote 812 of its first written submission.

6.79 The **European Communities** requests the Panel to reflect arguments in paragraph 7.698 from paragraphs 160 to 169 in its first written submission. The European Communities submits that it has not conceded that "it would in all cases have 'placed relatively too much weight on criteria in CNEN 2008/C 133/01 in classifying these products'", referring to paragraphs 160 to 169 in its first written submission.

6.80 The **complainants** have not commented on the European Communities' request.

6.81 The **Panel** has revised the text to paraphrase the views of the European Communities expressed in paragraphs 167-169 of its first written submission.

6.82 The **European Communities** considers that paragraph 7.710 misrepresents its position. The European Communities submits that it has not argued that LCD technology would fall outside the coverage of ITA products.

6.83 The **complainants** have not commented on the European Communities' request.

6.84 The **Panel** has revised the text to paraphrase the views of the European Communities expressed in paragraphs 71-76, 87, 90 of the European Communities' first written submission.

6.85 The **European Communities** requests the Panel to delete the final sentence of paragraph 7.711, submitting that it misrepresents the position of the European Communities.

6.86 The **complainants** have not commented on the European Communities' request.

6.87 The **Panel** has revised the text to reflect the European Communities' arguments as reflected in its Response to Panel question No. 50.

6.88 The **European Communities** submits that findings of violation of Article II:1(a) in paragraphs 7.757, 8.4(e), 8.5(e), 8.16(e), 8.17 (e), 8.27 (e) and 8.28(e), should be confined to the scope of the findings under Article II:1(b) of the GATT 1994 absent the duty suspension.

6.89 The **complainants** observe that the Panel's findings under Article II:1(a) apply both to products subject to the duty suspension as well as to products that are not subject to the duty suspension. They accordingly reject these proposed changes.

6.90 The **Panel** determined in paragraph 7.757 that a violation of Article II:1(a) results regardless of whether the duty suspension is applied. Accordingly, the Panel declines to make the proposed changes.

3. Set Top Boxes Which Have a Communication Function (STBCs)

(a) Comments by the Complainants

6.91 The **complainants** request the Panel to modify language in paragraphs 7.854, 7.855, 7.882, 7.937, 7.948, 7.952, 7.977 and 7.981, discussing the features and additional characteristics of a "set top box", by removing the term essential character. Specifically, the complainants request the Panel to refrain from using the term "essential character" in explaining a set top box, because this terminology is also used in the HS GIR 3(b). The complainants point to a finding by the Panel that the HS is not relevant in the context of Attachment B concessions.

6.92 The **European Communities** has not commented on the complainants' request.

6.93 The **Panel** has modified paragraphs 7.854, 7.855, 7.882, 7.937, 7.948, 7.952, 7.977 and 7.981 in the interim report to remove the use of the term "essential character" without changing the substance of the paragraphs.

6.94 The **complainants** request the Panel to include a footnote in paragraph 7.823, citing the complainants' response to Panel question Nos. 85, 88 and 146.

6.95 The **European Communities** has not commented on the complainants' request.

6.96 The **Panel** has included the suggested footnote.

6.97 The **United States** requests the Panel to reconsider its conclusion in paragraph 7.957 with respect to tariff line number 8528 12 91, in light of its view that it provided an adequate explanation of each of the terms in the concession for tariff line number 8528 12 91. It notes that the terms are "materially identical" to the terms used for the concession contained in Attachment B of the ITA. It further argues that the Panel's conclusions regarding the terms of Attachment B are "equally applicable" to those elements of the concession in the subheading. The United States acknowledges that this subheading refers to devices "capable of receiving televisions signals", unlike the description in Attachment B. The United States additionally contends that it has explained why the terms of heading 8528 support its interpretation of the concession for tariff line number 8528 12 91. To the extent the Panel were not to modify its conclusions, the United States requests the Panel to, at a minimum, delete the sentence stating that the United States has not addressed the interpretative issue by taking into consideration the location of the concession in the EC Schedule.

6.98 The **European Communities** argues that the changes proposed by the United States would not be appropriate in light of its arguments presented throughout the proceedings.

6.99 The **Panel** does not consider it appropriate to modify its conclusions that the United States has failed to meet its burden to establish a prima facie case of violation, in light of its initial consideration of arguments by the United States. The Panel has incorporated a number of textual changes to clarify its conclusions in paragraph 7.957.

6.100 The **complainants** request the Panel to modify paragraph 7.990 to reflect their argument against the statement in the HSEN that ISDN, WLAN and Ethernet modems "perform a similar function but ... do not modulate or demodulate signals". The complainants suggest the use of the phrase "the presence of a modem, but not including devices that it states perform a similar function but do not...".

6.101 The **European Communities** has not commented on the complainants' request.

6.102 The **Panel** has made this editorial change.

6.103 **Chinese Taipei** notes that paragraphs 7.998 and 7.999 correctly reflect its erroneous reference to "May 2007" instead of "April 2007" and to a "favourable" opinion instead of "no opinion" in its Joint Panel Request. Chinese Taipei underlines that it did, however, correctly refer to "April 2007" and to the "no opinion" since its first written submission and that the European Communities acknowledged this in its comments on the United States' and Chinese Taipei's response to Panel question No. 154.

6.104 The **European Communities** has not commented on this matter.

6.105 The **Panel** confirms that Chinese Taipei is correct.

(b) Comments by the European Communities

6.106 The **European Communities** requests the Panel to reconsider its summary of arguments in paragraphs 7.782-7.786, and paragraphs 7.774 to 7.778; and 7.779 to 7.780, concerning the complainants' citation of "with" and "which" in the context of discussing the STBCs narrative description. It considers the Panel's summary does not reflect the exchange between the parties. In particular, the European Communities states that a principal point it was making in its discussion was that a correct interpretation of a commitment or concession requires consideration of the correct text of the concession. It argues that the complainants' decision to replace the language "which" at times with the term "with", caused a lack of clarity with respect to what was the correct description at issue, where it was located and the meaning of the two terms. The European Communities asserts that this lack of clarity affected "the procedural situation that the [European Communities] was facing". In its view, the Panel's approach to addressing the issue obscures the real exchange between parties.

6.107 The **United States** submits that it has not taken the position that terms other than those used in the text of the concession should be the basis for an analysis, in particular, as explained in paragraphs 7.783 and 7.784. It therefore request the Panel to reject the European Communities' proposal.

6.108 The **Panel** understands the European Communities to assert that the manner in which the complainants described the concession for "set top boxes", including their reference to both the terms "with" and "which", as well as their discussion of the role of the EC headnote, created a due process issue. However, the Panel notes its conclusion in paragraph 7.780 that the language in the STBCs narrative description in Attachment B and that appearing in the Annex to the EC Schedule is identical, thus giving rise to identical scope (as concerns that language). In addition, in paragraph 7.787, we determined that the parties have sufficiently identified the concession in setting forth their claim pursuant to the STBCs narrative descriptions. Accordingly, the Panel does not consider that paragraphs 7.782-7.786; 7.774 to 7.778; and 7.779 to 7.780 should be adjusted.

6.109 The **European Communities** argues that the Panel's summary of arguments in paragraph 7.829 and footnote 1037 seems to relate, in part, to arguments that concern flat panel display devices and not set top boxes which have a communication function.

6.110 The **United States** submits that the arguments cited by the Panel pertain to the view on interpretation of the EC headnote, and are equally relevant to the STBCs narrative description under discussion. It therefore considers changes unnecessary and inappropriate.

6.111 The **Panel** recognizes that the cited arguments relate, in part to arguments that concern flat panel display devices. However, as indicated by the United States, these arguments apply to the European Communities' interpretation of the EC headnote. The Panel considers these relevant to its analysis of the concession based on the STBCs narrative description, and had therefore referenced them in this paragraph. For purposes of clarity, the Panel has made editorial revisions to the language in the footnote.

6.112 The **European Communities** submits that the Panel has not considered evidence in paragraph 7.872 that was presented in Exhibit EC-107 in a manner "optimal for WTO proceedings". The European Communities argues that the exhibit, which is 19 pages long, establishes that a terminal adapter used with ISDN service is not a modem, and is sometimes incorrectly considered a modem.

6.113 The **complainants** have not commented on the European Communities' request.

6.114 In the course of its deliberations in this case, the **Panel** considered the exhibit referred to by the European Communities. This is reflected by reference to Exhibit EC-107 in paragraph 7.872. The Panel therefore declines to make any changes.

6.115 The **European Communities** submits that the Panel has not adequately considered evidence presented in paragraph 7.943 (as found in Exhibits EC-39, 40, 41 and 42) in a manner "optimal for WTO proceedings".

6.116 The **United States** argues that the European Communities is attempting to reargue points that were already addressed by the Panel.

6.117 The **Panel** has reviewed the evidence discussed by the European Communities (including each of the exhibits, which provide lists of proposed products and headings to be considered, many of which are not relevant), as reflected in paragraph 7.943. The Panel notes that this evidence was considered by the Panel in the course of its deliberations. In particular, the Panel noted the list of products referred to in the 18 October 1996 paper refer to a set top box product broadly, thereby supporting a broad interpretation. In addition, we noted no reference was made to language that was not included in the final text, and that no discussion centred on hard drive or recording features, or additional functionality. On the basis of this consideration, the Panel concluded that the European Communities did not demonstrate how or why the documents it referred to should lead to any different interpretation of the concession. The European Communities has not indicated any specific changes it wishes to be included. In light of the foregoing, the Panel declines to make any changes.

6.118 The **European Communities** requests the Panel to give a more thorough assessment in paragraph 7.951 to Exhibit EC-41, a fax from Japan's MITI dated 23 October 1996. The European Communities argues that this document is actual and contemporaneous, available to ITA drafters, specifically refers to the narrative description, and refers to the products the European Communities considers to be covered by the terms of the concession based on the STBCs narrative description. It emphasizes further that this document was communicated to others. For these reasons, the European Communities asserts it is not clear why this document should not inform or influence interpretation of the concession at issue. At a minimum, the European Communities suggests that a more thorough consideration is appropriate given the importance attributed to the document by the European Communities.

6.119 The **Panel** has reviewed and incorporated the referenced fax from Japan's Ministry of International Trade, dated 23 October 1996, which itself attaches a "Web TV Networks" press release,

in paragraph 7.951. The Panel observes that this document confirms what was included in Exhibit EC-38. In addition, the Panel took the evidence presented by the European Communities into consideration, weighing it against what was provided by the complainants (e.g. Exhibit US-114).

6.120 The **European Communities** requests the Panel to reconsider its analysis and conclusions regarding paragraphs 7.1017 – 7.1025 and paragraph 7.1092. The European Communities rejects the analysis and conclusions in paragraphs 7.1017-7.1032 and 7.1092, arguing that the Panel did not sufficiently consider the "draft" character of the CNENs at issue. In particular, the European Communities argues that the Panel only considered the attributes of duly adopted CNENs, and not those of the draft or preparatory versions, when determining whether the "draft CNENs" are "laws, regulations, judicial decisions or administrative rulings of general application" and "measures of general application ..." under Articles X:1 and X:2 of the GATT 1994. By doing so, the European Communities considers the Panel's analysis to be flawed. In its view, the Panel should have considered the draft character at all points in the analysis, and not solely in its assessment of whether the CNEN amendments were "made effective", under Article X:1, or whether the CNEN amendments were "enforced" within the meaning of Article X:2.

6.121 The European Communities does not reject the possibility that preparatory acts which were enforced may fall within the disciplines of Articles X:1 and X:2. However, it presupposes that one would analyze such draft measures together with any relevant administrative instructions that were given, or other measures giving effect to the preparatory act. Such an approach, it argues, would allow a panel to properly consider the new attributes of the draft measures, which, in fact, would no longer be draft measures, but would be given a certain effect beyond that of a mere draft. In this case, the European Communities argues that the Panel should have taken into account the second Chairman's Statement together with the draft CNEN, in considering whether the draft constituted a "law, regulation, judicial decision [or] administrative ruling" or "measure of general application taken by any contracting party".

6.122 The European Communities further notes that the Panel's approach contradicts the way the Panel itself refers to its findings. According to the European Communities, the Panel refers interchangeably to CNENs and to the "draft" CNEN amendments, which highlights the conceptual difficulty with the Panel's approach to the interpretation. The European Communities refers to paragraphs 7.1026, 7.1032 and 7.1092.

6.123 The **United States** and **Chinese Taipei** request the Panel to reject the comments by the European Communities. The United States submits that the European Communities is attempting to reargue points about the legal effect of the "draft" CNENs that were rejected by the Panel in paragraphs 7.1038-7.1063. For reasons described in those paragraphs, it does not consider the so-called "draft" character of the CNENs to alter its views on whether the measures in question are "laws, regulations, judicial decisions and administrative rulings." The United States suggests that the Panel insert a footnote in paragraph 7.1024 that cross-refers to paragraphs 7.1037-7.1062, noting that the issues are relevant to the matters discussed in this section. Chinese Taipei considers that the Panel correctly examined whether the draft CNENs qualify as "laws, regulations, judicial decisions or administrative rulings" and "measures of general application". In its view, the draft character of the said measures does not alter the analysis. If the interpretation of the European Communities were accepted, such an approach would render Articles X:1 and X:2 of the GATT 1994 "inutile".

6.124 The **Panel** considers that its analysis and findings in paragraphs 7.1017-7.1032 and paragraph 7.1092 are correct and that there is no basis for agreeing with the European Communities' request. The Panel has not concluded that all draft measures or preparatory acts would necessarily be covered by Articles X:1 and/or X:2. Instead, the Panel concluded that an analysis of the coverage of

Articles X:1 and X:2 must be based primarily on the content and substance of the instrument at issue, and not merely on its form or nomenclature, such as, for example, the alleged "preparatory" character of the CNENs at issue. Put differently, the mere fact that a measure is labelled as a "draft" is not enough to preclude it from coverage under Articles X:1 and X:2. In order to assess whether the CNENs at issue are indeed "preparatory acts" – as opposed to only being labelled as "preparatory acts" – the Panel considered whether the CNENs at issue had any effect in practice, i.e., were "made effective", before their formal adoption by the Commission and publication in the EU Official Journal. Because Article X:1 also explicitly requires considering whether the "law, regulation, judicial decision or administrative ruling" at issue was made effective, the Panel considered that the alleged "preparatory" character of the CNENs at issue should be addressed separately when considering the "made effective" requirement. Had the Panel concluded that the draft CNENs at issue were true preparatory acts, with no effect until their official adoption by the Commission and publication in the EU Official Journal, the Panel would have concluded that the CNENs at issue were not covered by Article X:1. However, the Panel found that in this dispute, the CNENs at issue were made effective, even though they were labelled "draft CNEN", such that they were in fact not mere "preparatory acts". Similarly, the Panel did not consider the alleged "preparatory" nature of the CNENs at issue when considering whether the CNENs at issue are a "measure", but instead, did so when considering the requirement of "enforcement". Again, had the Panel concluded that the draft CNENs at issue were not being enforced, the Panel could not have established an Article X:2 violation.

6.125 In addition, the Panel would note that it in fact analyzed the draft measures together with the particular constellation of facts, including relevant statements that were given by the Chairman of the Customs Code Committee, the votes on the measures taken by the Customs Code Committee, and also in light of BTIs that were issued by certain EC member States. In this respect, the Panel recalls its finding in paragraph 7.1061.

6.126 Accordingly, the Panel declines the European Communities' request to revise its analysis or conclusions. For clarity, the Panel will include the footnote proposed by the United States in paragraph 7.1023. Finally, the Panel notes that it referred to CNENs when dealing with CNENs in general, while it referred to "CNEN amendments" when addressing the specific CNENs at issue.

4. Multifunctional Digital Machines (MFMs)

(a) Comments by the complainants

6.127 The **complainants** ask the Panel to modify pargraph 7.1234 to clarify that the type of apparatus referred to in subparagraph (a) is one which can connect to an ADP.

6.128 The **European Communities** has not commented on the complainants' request.

6.129 The **Panel** has made the requested clarification.

6.130 The **complainants** suggest that the Panel add the following language after the penultimate sentence in paragraph 7.1303:

> "As we indicate in pargraph 7.1392 *et seq.*, no MFM may properly be classified under HS 9009.12, and no other argument has been made by the EC to the effect that any MFM can be classifiable outside Chapters 84 and 85"

The complainants believe that this clarification will avoid any confusion over the way in which the Panel is using Note 3 to Section XVI as context in its discussion.

6.131 The **European Communities** has not commented on the complainants' request.

6.132 The **Panel** does not consider that the way the Panel is using Note 3 to Section XVI as context in its discussion of subheading 8471 60 is confusing, and indeed does not relate to its separate findings later about the scope of subheading 9009 12. However, to avoid the possibility of confusion, the Panel has added the following footnote to the penultimate sentence of that paragraph:

> "We note that the only argument the European Communities has made with respect to the possible classification of MFMs outside Chapters 84 and 85 is with respect to their classification in subheading 9009 12. The Panel has dealt with whether MFMs can be classified in subheading 9009 12 in paragraphs 7.1392 *et seq.* below."

6.133 The **complainants** suggest adding the following text at the end of paragraph 7.1392:

> "In this connection, the Panel notes that in pargraph 7.1476 it finds that "the ADP MFMs at issue . . . cannot fall within the scope of the concession in subheading 9009 12 of the EC Schedule, regardless of the primary, secondary, or equivalent nature of the copying function vis-à-vis these machines' other functions" such as printing and scanning."

The complainants believe this will clarify the Panel's findings and avoid any confusion about what the Panel has found about the proper scope of subheading 9009 12 of the EC Schedule.

6.134 The **European Communities** has not commented on the complainants' request.

6.135 The **Panel** does not see any need to add clarification on this point as the Panel indicates in the immediately following paragraph that it is turning to the issue of the scope of subheading 9009 12. Given that the Panel had not yet made findings on the scope of subheading 9009 12 at that point in the Interim Reports, there can be no need to "clarify" them at that point.

6.136 The **complainants** request the Panel to edit paragraph 7.1495 to clarify that the 12 pages per minute criterion in subheading 8443 31 is only relevant for determining whether an MFM with a facsimile function is subject to the complainants' request.

6.137 The **European Communities** has not commented on the complainants' request.

6.138 The **Panel** has made the suggested change.

6.139 The **United States** also made specific requests for additional citations in particular footnotes to reflect the United States argumentation on the points referred to in those paragraphs.

6.140 The **European Communities** has not commented on the United States' request.

6.141 The **Panel** has inserted the additional citations.

(b) Comments by the European Communities

6.142 The **European Communities** asks the Panel to delete the first sentence of paragraph 7.1299 because it argues, the Panel is incorrectly attributing to the European Communities the view that a determination pursuant to Chapter Note 5(B) should be based on actual use.

6.143 The **complainants** have not commented on the European Communities' request.

6.144 The **Panel** did not intend the paragraph to serve as a summary of the European Communities' arguments, but rather to reflect its own understanding of the implications of the European Communities' position. The Panel has changed the first sentence of paragraph 7.1299 to clarify that the paragraph reflects the Panel's understanding of the logical consequence of the European Communities' arguments. To further clarify, the Panel has also removed the term "actual use" from the second sentence of paragraph 7.1299.

6.145 The **European Communities** notes that paragraph 7.1386 restates the Panel's conclusion set out in the first sentence of paragraph 7.1363. For "reasons of consistency" the European Communities feels it would be appropriate to restate the conclusion set out in the second sentence of paragraph 7.1363 in paragraph 7.1386 as well.

6.146 The **United States** does not consider this change necessary; however, if the Panel opts to make the change requested by the European Communities, the United States requests that it insert a footnote at the end of the second sentence referencing paragraph 7.1476, as follows. "However, with regard to subheading 9009 12, see paragraph 7.1476, infra."

6.147 The **Panel** has made both of the suggested changes with minor modifications. The footnote as modified reads: "However, with regard to whether MFMs fall within the scope of subheading 9009 12, see paragraph 7.1476, below."

6.148 The **European Communities** asks the Panel to amend paragraph 7.1389 to reflect accurately the EC position. In particular the European Communities argues that it has never "conceded" that the "print module" is the largest component of an MFM and that it has never agreed that the way copying is achieved is through the combined use of the printer and scanner modules.

6.149 Additionally, the European Communities states that it did not argue that

> "the combination of the [printing and scanning] functions together, with the addition of the copying function, somehow creates a machine that necessarily is not of a kind principally used with an ADP machine if the copying function is equivalent or primary over the other functions."

According to the European Communities, its position is that if the copying function of an ADP MFM is equivalent to its ADP functions then it is *prima facie* classifiable under both headings 8471 60 and 9009 12 with the consequence that classification must be determined under GIR 3. With respect to an ADP MFM whose principal function is copying "such machine cannot be considered to be of a kind principally used with an ADP machine for the purposes of Chapter Note 5(B)."

6.150 The **complainants** have not commented on the European Communities' request.

6.151 The **Panel** has modified the paragraph to more precisely reflect what the European Communities' argued during the course of the proceedings.

6.152 The **European Communities** requests that the Panel amend paragraph 7.1390 to accurately reflect its arguments. In particular, the European Communities recalls that it has repeatedly explained that the function of the principal component or the value of the various components in the MFM may not be dispositive for classification purposes when such components are themselves multifunctional.

6.153 The **complainants** have not commented on the European Communities' request.

6.154 The **Panel** first notes that although the European Communities asserts that it has repeatedly explained its position, the European Communities did not provide the Panel with any citations to its arguments on this point during the course of the proceedings. The Panel is aware that the European Communities did state in paragraphs 438-440 of its first written submission that classification of an MFM based on the classification of the component which imparts the product's essential character, pursuant to GIR 3(b), is not possible if that component is a print engine, which is itself multifunctional. However, the Panel did not say in paragraph 7.1390 that the European Communities had not explained why the function of the principal component or the value of the various components should not be *dispositive* for classification purposes, but rather that the European Communities had not explained why pages per minute or the other criteria listed by the ECJ in the *Kip* judgment were *more relevant* than those two factors or why the factors listed by the ECJ should be dispositive. However, to avoid any perception that the Panel has misunderstood the European Communities' arguments, we are modifying the paragraph as well as adding an additional sentence to footnote 1774 to paragraph 7.1390, which will now read:

> "A focus on the function of the principal component seems more in line with Note 3 to Section XVI. We note that the European Communities has argued that if the principal component, in this case the print engine, is itself multifunctional then classification of the MFM, pursuant to GIR 3(b) based on the classification of the component which imparts the products essential character is not possible. (see European Communities' first written submission, paras. 438-440). However, the Panel is not persuaded by this argument."

6.155 The **European Communities** requests that the Panel amend paragraph 7.1451 to clarify that the European Communities was not invoking the classification practice of Members as "subsequent practice" in the sense of Article 31(3)(b) of the Vienna Convention, but that pursuant to the Appellate Body rulings in *EC – Computer Equipment* and *EC – Chicken Cuts*, classification practice of Members may still be relevant under Article 32 of the Vienna Convention. Additionally, the European Communities would like the Panel to clarify that it also referred to the judgment of the ECJ in the *Rank Xerox* case in its arguments as well as to the classification practice of Chinese Taipei and some third countries.

6.156 The **complainants** have not commented on the European Communities' request.

6.157 The **European Communities** renews its position that it did not refer to the classification practice of individual Members for the purpose of establishing "subsequent practice demonstrating a common, consistent and concordant practice of members" with respect to paragraph 7.1454 as well.

6.158 The **complainants** have not commented on the European Communities' request.

6.159 The **Panel** notes that in section VII.G.3(a)(iv) entitled "subsequent practice" the Panel dealt extensively with the European Communities' arguments with respect to the classification practice of itself and other Members with respect to the interpretation of the ordinary meaning of subheading 8471 60, the relevant concession in this dispute. This discussion contained references to the European Communities' arguments pertaining to the *Rank Xerox* case and to the practice of Chinese Taipei. The Panel notes that the European Communities did not object to our referring to these types of arguments relating to the classification of the products at issue as dealing with "subsequent practice" in our interpretation of subheading 8471 60 or anywhere else in the Interim Report. Given that the European Communities referred to the classification practice of Members which was subsequent to the relevant

subheadings being inscribed in the HS as support for its understanding of the scope of the subheadings, we consider that we appropriately dealt with these arguments under Article 31(3)(b) of the Vienna Convention. The Panel did make minor clarifications to paragraph 7.1451 of the Interim Report, to more precisely reflect the European Communities' arguments.

6.160 The **European Communities** argues that, because it referred to the lack of agreement within the WCO as indirect evidence of the classification practice of individual Members, the discussion of the disagreement in the WCO contained in paragraph 7.1456 is best considered with the other materials on the classification practice of Members, rather than as an independent supplementary means of interpretation.

6.161 The **complainants** have not commented on the European Communities' request.

6.162 The **Panel** has moved the reference to the citation of discussions in the WCO from paragraph 7.1456 of the Interim Report as well as the Panel's consideration of this discussion in paragraph 7.1459, with some minor modifications, to the immediately preceding section on subsequent practice.

6.163 The **European Communities** argues that the first sentence of paragraph 7.1459 suggests that there is a contradiction between the references made by the European Communities to the discussions within the WCO and the "admission" by the European Communities that there was significant disagreement among Members within the WCO. The European Communities does not propose any specific alterations in the language of the first sentence of paragraph 7.1459.

6.164 The **complainants** have not commented.

6.165 The **Panel** has deleted the phrase "that even the European Communities' admits" from the first sentence of paragraph 7.1459 which, as noted above, has been moved to the immediately preceding section on subsequent practice.

6.166 The **European Communities** points out that the cross-reference to paragraph 7.1478 made in the first sentence of paragraph 7.1496 appears to be erroneous. Additionally, the European Communities requests that the word "certain" be inserted before the term ADP MFMs in the first sentence of the same paragraph.

6.167 The **complainants** have not commented on the European Communities' request.

6.168 The **Panel** has corrected the cross reference and inserted the word "certain" before ADP MFMs.

5. Other changes to the Interim Reports

6.169 The **complainants** further identified a variety of typographical errors and editorial suggestions in the following paragraphs. The **Panel** has reviewed all of these errors and amended the text accordingly.[30] The Panel has also made a number of stylistic changes that do not affect the substance of the Reports.

[30] See paragraphs 2.3; 7.42; 7.100; 7.111; 7.120; 7.140; 7.144, fn. 217; 7.150, fn. 235; 7.159, fn. 245; 7.191; 7.196; 7.228; 7.234; 7.238; 7.239; 7.250; 7.259; 7.265; 7.269, fn. 360; 7.277, fn. 367; 7.288; 7.304; 7.325; 7.326; 7.335; 7.354; 7.355; 7.357; 7.358, fn. 484; 7.360, fn. 491; 7.361; 7.371; 7.430; 7.431, fn. 571; 7.440; 7.441; 7.453; 7.455; 7.457; 7.465; 7.474; 7.498, fn. 672; 7.502; 7.504; 7.513; 7.521; 7.531; 7.539; 7.548, fn. 720; 7.582; 7.584; 7.591; 7.593, fns. 789 and 791; 7.600; 7.614; 7.619, fn. 816; 7.624; 7.642, fn. 860; 7.644;

VII. FINDINGS

A. SUMMARY OF THE MAIN ISSUES FOR THE PANEL'S DETERMINATION

7.1 The fundamental issue for the Panel's determination in these disputes is whether a series of EC measures are inconsistent with Articles II:1(a) and (b) of the GATT 1994 because they result in less favourable treatment to imports of flat panel display devices, set top boxes which have a communication function and multifunctional digital machines ("MFMs") than that provided for these products under the European Communities' WTO Schedule (the "EC Schedule"), and because the tariff treatment provided is in excess of that provided for these products under the EC Schedule.

7.2 The **complainants** argue that, pursuant to commitments made in the ITA, the European Communities is obligated to provide duty-free treatment to each of these products. Specifically, the complainants allege that certain flat panel display devices are covered by two duty-free concessions in the EC Schedule: one that is set forth in a narrative description (the "FPDs narrative description") in an Annex attached to the EC Schedule, and a second arising under tariff item number 8471 60 90 of the EC Schedule. The complainants jointly allege that certain set-top boxes which have a communication function are covered by a narrative description (the "STBCs narrative description") in the Annex to the EC Schedule, while separately, the United States alleges that certain set top boxes which have a communication function are also covered by duty-free concessions arising under tariff item numbers 8517 50 90, 8517 80 90, 8525 20 99 and 8528 12 91 of the EC Schedule. Finally, the complainants argue that certain MFMs are covered under either HS1996 subheading 8471 60 or heading 8517 21 of the EC Schedule. According to the complainants, despite these duty-free concessions, the challenged measures require that particular products that satisfy the terms of those concessions be classified under dutiable headings. The complainants argue that the application of duties to those products which they believe should be afforded duty-free treatment results in a violation of Articles II:1(a) and (b) of the GATT 1994.

7.3 In addition to claims under Article II of the GATT 1994, the United States and Chinese Taipei, further allege that the European Communities has acted inconsistently with Articles X:1 and X:2 of the GATT 1994 by failing to publish and enforce certain EC measures related to the classification of STBCs in accordance with the requirements of those provisions.[31]

7.4 The **European Communities** requests the Panel to reject all claims raised by the complainants. The European Communities argues that the specified measures do not require the assessment of duties in a manner inconsistent with any of the particular concessions identified by the complainants in its Schedule of concessions. The European Communities further rejects that the actions cited by the United States and Chinese Taipei are inconsistent with Articles X:1 and X:2 of the GATT 1994.

7.646; 7.664; 7.667; 7.669; 7.675; 7.679; 7.682; 7.694; 7.698; 7.703; 7.705; 7.710; 7.710, fn. 934; 7.711; 7.711, fn. 942; 7.715; 7.717; 7.727; 7.735; 7.740; 7.754; 7.755, fn. 974; 7.758; 7.759; 7.761, fn. 979; 7.762; 7.798; 7.799; 7.807; 7.820; 7.822; 7.823; 7.839; 7.842; 7.843; 7.845, fn. 1069; 7.848; 7.851; 7.855; 7.875; 7.876; 7.918; 7.921; 7.923; 7.925; 7.933; 7.934; 7.941; 7.949; 7.950; 7.952; 7.964; 7.872 and 7.966; 7.973; 7.975; 7.978; 7.979; 7.1035, fn. 1344; 7.1042, fn. 1361; 7.1044; 7.1059, fn. 1380; 7.1074; 7.1120; 7.1126; 7.1128, fn. 1475; 7.1134; 7.1158; 7.1200; 7.1213; 7.1243-7.1246; 7.1249, fn. 1619; 7.1266; 7.1270-7.1272; 7.1284; 7.1292; 7.1301; 7.1314; 7.1325; 7.1326; 7.1377; 7.1394; 7.1398; 7.1402; 7.1429; 7.1430, fn. 1831; 7.1440; 7.1457 and its fn. 1858; 7.1465; 7.1469; 7.1478; 7.1479; 7.1493; 7.1495; 7.1496; 7.1505; 7.1506; 7.1513; 7.1527; 7.1531; 8.6(d); 8.8(c); 8.11(c); 8.19(c); 8.22 (c); 8.31 (c); 8.34 (c).

[31] Although the three complainants made a *joint* request for the establishment of this Panel, which includes *inter alia* joint claims under Article X of the GATT 1994, Japan did not pursue these particular claims in its submissions.

B. BACKGROUND

1. The Information Technology Agreement (ITA)

7.5 Two years following the conclusion of the Uruguay Round negotiations, during the WTO Ministerial Conference held in Singapore between 9-13 December 1996, 29 WTO Members[32] and States or separate customs territories in the process of acceding to the WTO adopted the "Ministerial Declaration on Trade in Information Technology Products" ("the ITA").[33]

7.6 The ITA preamble expresses the desire to "achieve maximum freedom of world trade in information technology products" and to "encourage the continued technological development of the information technology industry on a world-wide basis". Paragraph 1 of the ITA "declares" that "[e]ach party's trade regime should evolve in a manner that enhances market access opportunities for information technology products".

7.7 In accordance with paragraph 2 of the ITA, participants to the ITA ("ITA participants") agreed to "bind and eliminate" customs duties and other duties and charges within the meaning of Article II:1(b) of the General Agreement on Tariffs and Trade 1994, through equal duty rate reductions, on "(a) all products classified (or classifiable) with Harmonized System (1996) ('HS') headings listed in Attachment A to the Annex to this Declaration"; and "(b) all products specified in Attachment B to the Annex to this Declaration, whether or not they are included in Attachment A".

7.8 Further to paragraph 2 of the ITA, the ITA in its Annex (the "ITA Annex"), sets forth "Modalities and Product Coverage". Specifically, paragraph 1 of the ITA Annex states that:

> "[E]ach participant shall incorporate the measures described in paragraph 2 of the [ITA] into its schedule to the General Agreement on Tariffs and Trade 1994, and, in addition, at either its own tariff line level or the Harmonized System (1996) ("HS") 6-digit level in either its official tariff or any other published versions of the tariff schedule, whichever is ordinarily used by importers and exporters."

7.9 Paragraph 2 of the ITA Annex, in its chapeau, instructs ITA participants to incorporate "the measures described in paragraph 2 of the [ITA]" in the following manner:

> "[...] each participant shall provide all other participants a document containing (a) the details concerning how the appropriate duty treatment will be provided in its WTO schedule of concessions, and (b) a list of the detailed HS headings involved for products specified in Attachment B."

7.10 Paragraph 2(b) of the ITA Annex specifies the manner in which ITA participants should modify their respective Schedules to implement the ITA, as follows:

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[32] Both the European Communities as such (then of 15 member States) and each of its then member States were Participants to the "Ministerial Declaration on Trade in Information Technology Products".

[33] The ITA included an invitation for other WTO Members and acceding States or separate customs territories to join the plurilateral technical discussions that would take place in Geneva at the beginning of 1997. Para. 3 of the ITA provides:

"Ministers express satisfaction about the large product coverage outlined in the Attachments to the Annex to this Declaration. They instruct their respective officials to make good faith efforts to finalize plurilateral technical discussions in Geneva on the basis of these modalities, and instruct these officials to complete this work by 31 January 1997, so as to ensure the implementation of this Declaration by the largest number of participants."

> "The modifications to its Schedule to be proposed by a participant in order to implement its binding and elimination of customs duties on information technology products shall achieve this result:
>
> (i) in the case of the HS headings listed in Attachment A, by creating**,** where appropriate**,** sub-divisions in its Schedule at the national tariff line level; and
>
> (ii) in the case of the products specified in Attachment B, by attaching an annex to its Schedule including all products in Attachment B, which is to specify the detailed HS headings for those products at either the national tariff line level or the HS 6-digit level.
>
> Each participant shall promptly modify its national tariff schedule to reflect the modifications it has proposed, as soon as they have entered into effect."

7.11 As reflected above, paragraph 2 of the ITA Annex refers to two attachments – Attachment A and Attachment B – that set forth product coverage under the ITA. A chapeau paragraph preceding these Attachments indicates that Attachment A "lists the HS headings or parts thereof to be covered", whereas Attachment B "lists specific products to be covered by an ITA wherever they are classified in the HS".[34] Attachment A is divided in two sections. Attachment A, Section 1 includes a table listing HS1996 headings (four digits) and subheadings (six digits) with their corresponding "HS descriptions", including the following HS1996 subheading at issue in this dispute:

	HS96		HS description
	8471	60	Input or output units, whether or not containing storage units in the same housing

7.12 Certain headings and subheadings in Attachment A, Section 1 are "ex-outs", identified with the term "ex", which indicates partial coverage of the corresponding HS1996 heading, i.e. only a subset of products falling within the description of the specific heading are bound to the specified duty. Attachment A, Section 2, entitled "Semiconductor manufacturing and testing equipment and parts thereof", includes a second table containing HS1996 subheadings, with corresponding "descriptions" of the covered products. Certain headings listed in this section are designated "[f]or Attachment B" in the comments column.[35] Attachment B is preceded by a chapeau paragraph, which states:

> "Positive list of specific products to be covered by this agreement wherever they are classified in the HS.
>
> Where parts are specified, they are to be covered in accordance with HS Notes 2(b) to Section XVI and Chapter 90, respectively."

7.13 Following the chapeau, Attachment B lists 13 products, including the following descriptions at issue in this dispute:

[34] Exhibits US-1; TPKM-1.
[35] All the product descriptions with the comment "[f]or Attachment B" are "ex-outs".

"**Flat panel displays** (including LCD, Electro Luminescence, Plasma and other technologies) for products falling within this agreement, and parts thereof."

"**Set top boxes which have a communication function**: a microprocessor-based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange".

7.14 In addition to modalities and product coverage, paragraph 5 of the ITA Annex directs ITA participants to consider any divergence among them in classifying information technology products, beginning with the products specified in Attachment B, in furtherance of the "common objective of achieving, where appropriate, a common classification for these products within existing HS nomenclature".[36] Further, the ITA contemplates that ITA participants meet "periodically" to "review product coverage" and determine whether "Attachments should be modified to incorporate additional products".[37] At the time of implementation, discussed in paragraphs 7.16-7.20 below, participants agreed to establish a Committee of Participants on the Expansion of Trade in Information Technology Products ("CITA"). Among other responsibilities, CITA is responsible for conducting consultation and review concerning the expansion of ITA product coverage as provided for in paragraph 3 of the ITA Annex and the elimination of classification divergences provided for in paragraph 5 of the ITA Annex.[38]

7.15 ITA participants agreed to review participation in the ITA "no later than 1 April 1997".[39] Following the review and approval, the ITA participants agreed to modify their respective schedules of concessions, including agreement to bind all tariffs on items listed in the Attachments no later than 1 July 1997 and "phase in" customs duty rate reductions beginning in 1 July 1997 and concluding "no later than 1 January 2000".[40]

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[36] Para. 5 of the ITA Annex provides:

"Participants shall meet as often as necessary and no later than 30 September 1997 to consider any divergence among them in classifying information technology products, beginning with the products specified in Attachment B. Participants agree on the common objective of achieving, where appropriate, a common classification for these products within existing HS nomenclature, giving consideration to interpretations and rulings of the Customs Co-operation Council (also known as the World Customs Organization or 'WCO'). In any instance in which a divergence in classification remains, participants will consider whether a joint suggestion could be made to the WCO with regard to updating existing HS nomenclature or resolving divergence in interpretation of the HS nomenclature."

[37] Para.3 of the ITA Annex provides as follows:

"Participants shall meet periodically under the auspices of the Council on Trade in Goods to review the product coverage specified in the Attachments, with a view to agreeing, by consensus, whether in the light of technological developments, experience in applying the tariff concessions, or changes to the HS nomenclature, the Attachments should be modified to incorporate additional products, and to consult on non-tariff barriers to trade in information technology products. Such consultations shall be without prejudice to rights and obligations under the WTO Agreement."

[38] Implementation of the Ministerial Declaration on Trade in Information Technology Products, WTO Document G/L/160, para. 8 (2 April 1997) (Exhibit EC-5). To date, the ITA participants have not agreed to a plurilateral basis to expand ITA coverage or eliminate any particular classification divergences.

[39] Para. 4 of the ITA Annex provides that ITA participants meet "no later than 1 April 1997 to review the state of acceptances received and to assess the conclusions to be drawn therefrom". Implementation was to proceed on the condition that "approximately 90 per cent of world trade in information technology products have by then notified their acceptance", and "provided that the staging has been agreed to the participants' satisfaction". The WTO Secretariat was tasked with determining the level of participation on the basis of the most recent data available at the time of the meeting. A 92 per cent level of participation was determined, prior to implementation. See para. 7.17 for further information.

[40] Para. 2 of the ITA Annex provides, in part, as follows:

2. Implementation of the ITA

7.16 WTO Members commit to bind duty levels on a variety of goods. In other words, Members commit not to levy duties in excess of their bound levels on products originating from other WTO Members. Members' tariff bindings are recorded in their Schedules of concessions on goods, which are annexed to the GATT 1994 and are an integral part thereof in accordance with Article II:7 of that Agreement. The Appellate Body clarified in *EC – Computer Equipment* that concessions provided for in Members' Schedules are part of the terms of the treaty, in this case the GATT 1994.[41] Article II:2 of the WTO Agreement further provides that the Agreements contained in the Annexes to the WTO Agreement, which includes the GATT 1994, are integral parts of the WTO Agreement.[42]

7.17 In accordance with paragraph 3 of the ITA, ITA participants met in January 1997 in an effort to complete work on implementation of their ITA commitments within their particular WTO Schedules.[43] Participants agreed to submit their proposed schedules of concessions no later than 1 March 1997, to be reviewed and approved by ITA participants on a consensus basis no later than 1 April 1997.[44] On 26 March 1997, the ITA participants informed the Chairman of the Council for Trade in Goods of their decision to implement the ITA in their WTO Schedules.[45] ITA participants then agreed to implementation following review and approval, on a consensus basis, of 25 Schedules of the original ITA participants (including the 15 EC member States separately) and a determination

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"These documents will be reviewed and approved on a consensus basis and this review process shall be completed no later than 1 April 1997. As soon as this review process has been completed for any such document, that document shall be submitted as a modification to the Schedule of the participant concerned, in accordance with the Decision of 26 March 1980 on Procedures for Modification and Rectification of Schedules of Tariff Concessions (BISD 27S/25)."

Para. 2(a) of the ITA Annex specifies as follows:

"The concessions to be proposed by each participant as modifications to its Schedule shall bind and eliminate all customs duties and other duties and charges of any kind on information technology products as follows:

(i) elimination of such customs duties shall take place through rate reductions in equal steps, except as may be otherwise agreed by the participants. Unless otherwise agreed by the participants, each participant shall bind all tariffs on items listed in the Attachments no later than 1 July 1997, and shall make the first such rate reduction effective no later than 1 July 1997, the second such rate reduction no later than 1 January 1998, and the third such rate reduction no later than 1 January 1999, and the elimination of customs duties shall be completed effective no later than 1 January 2000. The participants agree to encourage autonomous elimination of customs duties prior to these dates. The reduced rate should in each stage be rounded off to the first decimal; and

(ii) elimination of such other duties and charges of any kind, within the meaning of Article II:1(b) of the General Agreement, shall be completed by 1 July 1997, except as may be otherwise specified in the participant's document provided to other participants for review."

[41] Appellate Body Report on *EC – Computer Equipment*, para. 84.

[42] Additionally, Article XVI:4 of the WTO Agreement requires that "[e]ach Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements". Thus, a Member is obliged to ensure that its domestic legislation is consistent with the concessions contained in its Schedule.

[43] Paragraph 3 of the ITA (Exhibits US-1; TPKM-1).

[44] Paragraph 2 of the ITA Annex (Exhibits US-1; TPKM-1). See also the note by the WTO Secretariat on the Informal Meeting of ITA participants of 26 March 1997, document G/L/159/Rev.1 (24 April 1997) (Exhibit US-37).

[45] Implementation of the Ministerial Declaration on Trade in Information Technology Products, WTO Document G/L/160, para. 2 (2 April 1997) (Exhibit EC-5); Notes by the WTO Secretariat of the informal meeting that took place on 25-26 March 1997, WTO document G/L/159/Rev.1 (24 April 1997) (Exhibit US-37).

by the WTO Secretariat that participants to the ITA represented more than 92 per cent of world trade on information technology products.[46] In the review and approval process, ITA participants agreed to amend certain narrative product descriptions in Attachment B, including the product description for FPDs at issue in this dispute.[47]

7.18 In accordance with paragraph 2 of the ITA Annex and the *Decision of 26 March 1980 on Procedures for Modification and Rectification of Schedules of Tariff Concessions* (the "1980 Procedures"), each ITA participant submitted a proposed modification to its own Schedule for review by all WTO Members.[48] Each participant's schedule was certified following a three-month review period for that particular schedule.[49]

7.19 With minor variations, most of the original ITA participants incorporated the ITA-related concessions into their WTO Schedules by: (i) consolidating in a single section of their WTO Schedules the HS1996 tariff item numbers listed under *both sections* of Attachment A[50]; (ii) listing those product descriptions from Attachment A, Section 2 that were described as "[f]or Attachment B", and all product descriptions from Attachment B in a unified, separate section or annex to their schedules[51]; and (iii) attaching a "staging matrix" to their respective WTO Schedules, indicating the duty reductions that would be applicable each year for each of the relevant tariff lines.[52] The majority

[46] For further explanation, see fn. 39 above.

[47] The EC Schedule (like other ITA participants' schedules) incorporates the terms "devices" and "vacuum-fluorescence" in the product description for FPDs. These modifications are discussed in further detail below.

[48] Proposed schedules for the European Communities, India, Indonesia, Israel, Norway and Turkey requests were circulated on 2 April 1997. The circulation of schedules of the remaining ITA participants was delayed subject to domestic ratification proceedings. See G/IT/1 (28 July 1997), G/IT/1/Rev.1 (28 October 1997), and G/IT/M/1 (13 October 1997), paras. 2.1-2.13 (minutes of the first formal meeting of the Committee Participants to ITA).

[49] Modifications to the schedules of the following 14 ITA participants were certified in 1997: Canada (WT/Let/ 158); European Communities (WT/Let/156); Hong Kong, China (WT/Let/160); Iceland (WT/Let/159); India (WT/Let/181); Indonesia (WT/Let/157); Israel (WT/Let/174); Japan (WT/Let/138); Macao, China (WT/Let/ 177); Malaysia (WT/Let/176); Norway (WT/Let/153); Singapore (WT/Let/175); Turkey (WT/Let/173); and the United States (WT/Let/182). Modifications to the following eight additional schedules were certified in 1998: Australia (WT/Let/248); Costa Rica (WT/Let/196); Czech Republic (WT/Let/256); Korea (WT/Let/249); Romania (WT/Let/260); Slovak Republic (WT/Let/258); Switzerland/Liechtenstein (WT/Let/253); and Thailand (WT/Let/250).

[50] In accordance with para. 2(b)(i) of the ITA Annex, some ITA participants included subdivisions, based on their domestic tariff nomenclatures, in addition to the HS1996 six-digit codes listed in Attachment A. For example, the European Communities included the eight-digit CN codes 8471 60 40 and 8471 60 90, in addition to including the HS1996-based subheading 8471 60. Not all ITA participants conformed with this approach.

[51] In accordance with para. 2(b)(ii) of the ITA Annex, the majority of ITA participants listed 55 products (including 42 product descriptions from Attachment A, Section 2 and 13 product descriptions from Attachment B). See paragraph 7.10 above. Exceptionally, the United States included 8 additional products in an annex to its Schedule, though the United States did not provide in writing a reason for doing so. These aspects are discussed in further detail below.

[52] The term "staging matrix" does not appear either in the ITA or in the ITA related concessions of the *EC Schedule*, and it is used in these Reports for ease of reference only. Most ITA participants included such a matrix in accordance with the "stages" of tariff rate reductions established in para. 2(a)(i) of the ITA Annex (also referred to in para. 2 of the ITA and para. 4 of the ITA Annex). Japan exceptionally did not include a staging matrix in the modifications it proposed to reflect its ITA-related concessions. WT/Let/138 (17 April 1994).

of ITA participants[53] included a "headnote" in advance of listing those product descriptions from Attachment A, Section 2 that were described as "[f]or Attachment B", and product descriptions from Attachment B. As relevant to this dispute, the headnote in the EC Schedule (hereinafter the "EC headnote"*)* provides as follows:

> "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 as 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".[54]

7.20 Due to the informal nature of the plurilateral technical discussions that took place during the negotiation and implementation of the ITA, there is no formal record of ITA participants' discussions on how modifications would be incorporated into Members' WTO Schedules. Almost all ITA participants included an identical or similarly worded headnote in their WTO Schedules but there is no express requirement in the ITA itself or elsewhere to do so. The origin of the idea for including a headnote as an aspect of the implementation of the ITA is not clear.

3. The EC Schedule of concessions

7.21 The European Communities sets forth its tariff bindings in EC Schedule LXXX following the conclusion of the Uruguay Round.[55] On 28 February 1996, the European Communities submitted Schedule CXL to update its tariff concessions and other commitments following enlargement of the European Communities.[56] Approximately one year later, on 1 April 1997, the European Communities submitted WTO document G/MA/TAR/RS/16 proposing to implement its ITA commitments via modifications to its Schedule.[57] EC Schedule CXL was not certified until 19 March 2010[58]; however,

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[53] Nineteen out of 24 of the original "ITA Schedules" (excluding those of WTO acceding States or separate customs territories) included a headnote in their WTO Schedules employing nearly identical language. The WTO Schedules of Japan and Switzerland/Lichtenstein, in particular, do not contain a headnote like those appearing in the WTO Schedules of other ITA participants. Japan included similar, though not identical, language in note 3 of the "Notes to Attachment II to Section II of Part I" to its Schedule (See WT/Let/138, p. 5; (17 April 1994). Switzerland/Lichtenstein (participating jointly) did not include a headnote at all in their Schedules (see WT/Let/253 (20 November 1998)). Differences among the headnotes appearing in ITA participants' Schedules and variations in the Schedules of Japan and Switzerland/Lichtenstein will be discussed in further detail below.

[54] WT/Let/156 (Exhibit US-7).

[55] On 15 December 1994, the European Communities notified its intention to withdraw tariff commitments previously made by Austria in Schedule XXXII, Finland in Schedule XXIV, Sweden in Schedule XXX and the European Communities of 12 in Schedule LXXX. See G/L/65/Rev.1, 14 March 1996, paragraph 1. See also GATT document L/7614 (15 December 1994).

[56] See G/L/65/Rev.1, 19 March 1996, paragraph 3. The European Communities subsequently proposed a number of modifications to Schedule CXL which include, but are not limited to G/L/65/Rev.1/Add.2 (21 October 1997) and Corr.1 (10 February 1998), G/L/65/Rev.1/Add.3 (23 November 1998), G/L/65/Rev.1/Add.4 (1 July 1999) and G/L/65/Rev.1/Add.5 (22 February 2000). See also a summary by the WTO Secretariat in G/MA/W/23/Rev.6 (19 March 2009).

[57] Rectifications and Modifications of Schedules, G/MA/TAR/RS/16 (2 April 1997). The European Communities requested modifications pursuant to the *1980 Procedures*, discussed in paragraph 7.20 above.

[58] WT/Let/666 (19 March 2010).

the proposed modifications in G/MA/TAR/RS/16 were certified by the WTO Director General in WTO Document WT/Let/156 and became effective on 2 July 1997.[59]

7.22 The ITA-related commitments implemented in the EC Schedule follow the format used by many ITA participants, as discussed in paragraph 7.19 above. In particular, the European Communities consolidated in a single section all the HS1996 codes appearing in both sections of Attachment A. In many cases, the European Communities introduced further sub-divisions of its domestic nomenclature (the "Combined Nomenclature" or "CN") at the eight-digit level.[60] In addition, the European Communities attached an annex to its Schedule (the "Annex to the EC Schedule") that includes a headnote (the "EC headnote") and a consolidated list of product descriptions from Attachment A, Section 2, labelled "[f]or Attachment B", and those descriptions from Attachment B itself.

7.23 The EC headnote appears at the beginning of the first page of the Annex to the EC Schedule, as follows:

EC	**26 March 1997**
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 as 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.	

7.24 Following the EC headnote, the Annex to the EC Schedule lists 55 product descriptions. As explained in footnote 51 above, these comprise 42 product descriptions from Attachment A, Section 2 that are described with the comment "[f]or Attachment B" and 13 products descriptions listed in Attachment B. The product descriptions appear in a left-hand column, labelled "Description". A right-hand column, labelled "HS", includes tariff item numbers at the eight-digit level next to each product description. The following is an excerpt showing the first two entries in the Annex to the EC Schedule:

Description	**HS**
Quartz reactor tubes and holders designed for insertion into diffusion and oxidation furnaces for production of semiconductor wafers	70200005
Chemical vapour deposition apparatus for semiconductor production	84198920

7.25 Of the 55 product descriptions in the Annex to the EC Schedule, 30 have only one code listed next to them, while 25 have two or more codes listed next to them. All the codes that appear in the Annex to the EC Schedule also appear in the separate, consolidated section of the EC Schedule that lists the HS1996 codes from Sections 1 and 2 of Attachment A. All these codes also appear in the

[59] Document WT/Let/156 (15 August 1997) (Exhibit US-7).

[60] The CN was established by Council Regulation (EEC) No. 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ L 256/1, 7 September 1987, as amended) ("Council Regulation No. 2658/87") (Exhibits EC-49; US-13; TPKM-5). The first six digits of the CN are based on the HS. Any digits beyond the HS six-digit level are CN-specific.

"staging matrix" that appears in the EC Schedule.[61] The following is an excerpt showing the first entry in the *Staging Matrix to the EC Schedule*:

EC **26 March 1997**

ex	HS	Base rate	July 1997	1998	1999	2000	2001	2002	2003	2004	2005
	38180010	6.9	5.2	3.5	1.7	0.0					

7.26 The European Communities has made several modifications to its ITA-related concessions since the modifications in document WT/Let/156 became effective on 2 July 1997. For example, on 4 February 1998, the European Communities replaced all references to codes 8471 30 00, 8471 41 90, 8471 49 90, 8471 50, 8528 12 10, 8528 13 10 and 8543 89 17 with codes 8471 30 91, 8471 41 91, 8471 49 91, 8471 50 91, 8471 30 10, 8471 41 30, 8471 49 30, 8471 50 30, 8471 30 99, 8471 41 99, 8471 49 99 and 8471 50 99. The European Communities explained in WTO Document G/MA/TAR/RS/47, that "[t]he World Customs Organisation has debated the classification of multimedia personal computers and the general view, which prevailed, was that such products no matter what their principal function are to be classified within 8471". WTO document G/MA/TAR/RS/47 indicates further that "[t]he European Communities has implemented this classification opinion by transferring the products concerned, together with their accompanying rates of duty, from 8528 and 8543 to 8471".[62] Each of the new headings was specified with a final duty rate of zero. References to the new codes were included in the Annex to the EC Schedule next to the product descriptions for "Computers, etc." and "Network equipment".[63] These modifications were certified by the WTO Director General in WTO Document WT/Let/261 and became effective on 10 May 1998.[64]

7.27 On 22 February 2000, the European Communities circulated an amendment to its then-proposed Schedule CXL, explaining that ITA-related modifications in document G/MA/TAR/RS/16 and G/MA/TAR/RS/47 (that were certified in documents WT/Let/156 and WT/Let/261, as discussed in paragraphs 7.21 and 7.26 above, respectively) had "overtaken" those commitments proposed in Schedule CXL.[65]

7.28 On 29 November 2000, the European Communities notified that it would add a reference to a new code (tariff item number 8528 12 91) next to the product description for "set-top boxes which have a communication function" as it appears in the Annex to the EC Schedule.[66] The European Communities explained in WTO document G/MA/TAR/RS/74 that "the European Communities have decided to join some other ITA participants in classifying certain types of ITA set-top boxes under HS Sub-heading 8528 12".

7.29 When EC Schedule CXL was certified on 19 March 2010 in WTO document WT/Let/666[67], the WTO Director General expressly noted that certification of EC Schedule CXL was "without

[61] For further explanation of this matter, see para. 7.19 above.
[62] G/MA/TAR/RS/47 (10 February 1998), p. 3.
[63] The European Communities proposed to modify the references as follows (See G/MA/TAR/RS/47 (10 February 1998), p. 5):
"Computers etc. Replace by following reference: 8471.10.90 (unchanged), 8471 30 10, 8471.30.91, 8471.30.99, 8471.41.30, 8471.41.91, 8471.41.99, 8471.49.30, 8471.49.91, 8471.49.99, 8471.50.30, 8471.50.91, 8471.50.99
Network equipment replace 8471.50.90 by 8471.50.99".
[64] WT/Let/261 (25 November 1998).
[65] G/L/65/Rev.1/Add.5, para. 2 (22 February 2000).
[66] G/MA/TAR/RS/74 (15 December 2000) (Exhibit US-26).
[67] WT/Let/666 (19 March 2010). See also para. 7.21 above.

prejudice" to ITA-related concessions that were previously certified in documents WT/Let/156 and WT/Let/261.[68] At this time, the WTO Director-General additionally certified the amendment pertaining to set-top boxes proposed in G/MA/TAR/RS/74 (discussed in paragraph 7.28) in WTO document WT/Let/667.[69]

7.30 The parties to this dispute agree that the concessions contained in WTO documents WT/Let/156, WT/Let/261 and G/MA/TAR/RS/74 (now certified as document WT/Let/667) comprise those relevant to this dispute.[70]

4. The Harmonized System (HS)

(a) The Harmonized System

7.31 The "Harmonized Commodity Description and Coding System" (the "HS") was established under the "International Convention on the Harmonized Commodity Description and Coding System" ("HS Convention")[71], and entered into force on 1 January 1988.[72]

7.32 The preamble of the HS Convention sets out the objectives of the HS including "to facilitate international trade", "to facilitate the collection, comparison and analysis of statistics", "to reduce the expense incurred by re-describing, reclassifying and recoding goods as they move from one classification system to another in the course of international trade", and "to facilitate the standardisation of trade documentation and the transmission of data".[73] The HS Convention aims to achieve these objectives through the HS, which establishes an international standard for product nomenclature for more than 5,000 commodity groups, and includes approximately 1,200 headings that are grouped into 21 sections comprising 99 chapters.[74] Product groups are organized systematically and each group is identified by a "heading", represented as a four-digit code. The first two digits indicate the chapter to which they correspond, while the two subsequent digits indicate the position within the heading of a particular chapter. HS headings are sometimes further divided into

[68] G/L/65/Rev.1/Add.5, para. 2 (22 February 2000).

[69] WT/Let/667 (19 March 2010).

[70] In their responses to Panel question No. 8, the parties agreed that the ITA-related concessions by the European Communities are those contained in documents WT/Let/156, WT/Let/261 and G/MA/TAR/RS/74.

[71] The HS Convention is available in Exhibits EC-15; US-8; TPKM-6.

[72] Exhibits EC-15; US-8; TPKM-6. The HS has its origin in the "Geneva Nomenclature", which came into existence on 1 July 1937 in the form of the 1937 *Draft Customs Nomenclature of the League of Nations*. The Geneva Nomenclature was subsequently replaced in 1959 by the *Brussels Convention on Nomenclature for the Classification of Goods in Customs Tariffs* ("Brussels Tariff Nomenclature"). The Brussels Tariff Nomenclature came into force on 11 September 1959, following the adoption on 1 July 1955 of a Protocol of Amendment establishing a revised version of the Nomenclature. The Brussels Tariff Nomenclature was in turn renamed the *Customs Co-operation Council Nomenclature* in 1974 (the "CCCN"). The *Customs Co-operation Council Nomenclature* was replaced by the HS on 1 January 1988, when the HS Convention entered into effect. See also the Panel Report on *EC – Chicken Cuts*, para. 7.186.

[73] Second, Third and Fourth tirets of the Preamble of the HS Convention (Exhibits EC-15; US-8; TPKM-6).

[74] The HS is set out as an Annex to the HS Convention and is an integral part thereof (see Article 1(a) and Article 2 of the HS Convention) (Exhibits EC-15; US-8; TPKM-6). Strictly speaking, the HS has 97 chapters. Our indication of the HS as having only 96 chapters is because chapter 77 is "reserved for possible future use in the Harmonized System", and chapters 98 and 99 are "reserved for special uses by Contracting parties". These chapters are therefore empty.

subheadings, which are identified by a six-digit code, which is the maximum level of disaggregation permitted by the HS. The last two digits then indicate the relevant HS subheading.[75]

7.33 The HS Convention requires contracting parties to the HS to ensure that their laws are in conformity with the HS. Article 3.1(a)(i) of the HS Convention provides in particular that HS contracting parties shall use, in respect of their customs tariff and statistical nomenclatures, all the HS headings and subheadings "without addition or modification, together with their related numerical codes". Article 3.3 of the HS Convention permits HS contracting parties to create sub-divisions classifying goods *beyond* the six-digit level (for example, at the eight-digit level or more), provided that any such subdivision is added and coded at a level *beyond* that of the six-digit numerical code as it appears in the HS. The European Communities' domestic nomenclature (i.e., the CN) is an example thereof.[76]

(b) The HS General Rules for Interpretation ("GIRs")

7.34 Pursuant to Article 3.1(a)(ii) of the HS Convention, each contracting party also undertakes to apply the "General Rules for the Interpretation of the Harmonized System and all the Section, Chapter and Subheading Notes, and that it shall not modify the scope of the Sections, Chapters, headings or subheadings of the HS".[77] The Annex to the HS Convention sets out six general rules for the interpretation and uniform application of the HS ("GIRs"). The first five rules relate to the four-digit headings, while rule six relates to the classification in the five- or six-digit subheading. The GIRs must be applied in an hierarchical order. In other words, a contracting party should begin with the first GIR and proceed to subsequent GIRs only if necessary.[78]

(c) HS Explanatory Notes (HSEN) and opinions by the WCO Council

7.35 Article 3(1)(a)(i) of the HS Convention stipulates that HS contracting parties must use all the headings and subheadings of the HS without addition or modification, together with their related numerical codes and that each contracting party must follow the numerical order of the HS. Article 6 of the HS Convention establishes the HS Committee composed of representatives from each of the Contracting Parties that meets at least twice annually. Under Article 7(1)(b) of the HS Convention, the HS Committee prepares HS Explanatory Notes (HSEN), classification opinions and other advice as *guidance* to secure uniformity in the interpretation of the HS. The HSEN provide guidance for interpreting the terms of a specific HS heading. Classification opinions are opinions of the HS Committee regarding the customs classification of a specific product.

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[75] See Appellate Body Report on *EC – Chicken Cuts*, para. 230 (quoting a response by the WCO Secretariat).

[76] See Article 3 of Council Regulation No. 2658/87 (Exhibits EC-49; US-13 and TPKM-5); see also paragraphs 7.39-7.40 below. The HS was approved on behalf of the European Communities by Council Decision 87/369/EEC of 7 April 1987 (OJ 1987 L 198/1), (Exhibits EC-15; US-8; TPKM-6). The CN not only reproduces the headings and subheadings of the HS up to the six-digit level, but also contains codes at seven and eight-digit levels. See also fn. 60 above.

[77] See also Article 1(a) of the HS Convention (Exhibits EC-15; US-8; TPKM-6).

[78] GIR 1 explains that classification should be based, first, on the terms of the headings, relevant Section or Chapter Notes pursuant to GIR 1 and provided such headings or Notes do not otherwise require, according to the provisions of GIRs 2-6. Moreover, according to the Explanatory Notes to GIR 1 "the expression 'provided such headings or Notes do not otherwise require' is intended to make it quite clear that the terms of the headings and any relative Section or Chapter Notes are paramount, i.e., they are the first consideration in determining classification."

(d) Amendments to the HS

7.36 The preamble of the HS Convention recognizes as an important objective that of "ensuring that the HS is kept up-to-date in the light of changes in technology or in patterns of international trade".[79] In this respect, Article 7.1(a) of the HS Convention provides that one of the functions of the HS Committee is "to propose such amendments to this Convention as may be considered desirable, having regard, in particular, to the needs of users and changes in technology or in patterns of international trade". Since its entry into force on 1 January 1988, the HS has been partially amended every four to six years. Such amendments have come into force on 1 January 1992 (HS1992), 1 January 1996 (HS1996), 1 January 2002 (HS2002) and 1 January 2007 (HS2007).[80]

7.37 Amendments to the HS must be approved by the HS Committee and subsequently by the Council, the highest governing body of the World Customs Organization (WCO)[81]. Each of these amendments included several changes to product codes or descriptions. When a recommendation to amend the HS is approved, HS contracting parties are obliged to implement these changes in their national tariff nomenclature.[82] Modifications have been partial in nature, leaving various HS headings and subheadings unchanged from one version to the next.

5. Tariff classification in the European Communities

7.38 The following summary is intended only to aid the general understanding of the tariff classification system of the European Communities. Aspects of this system will be discussed in greater detail in sections where such discussion has relevance.

(a) The Combined Nomenclature

7.39 The European Communities applies a common customs tariff vis-à-vis third countries. Article 20(3) of the Community Customs Code ("CCC")[83] clarifies that the Customs Tariff of the European Communities comprises, *inter alia*, a "Combined Nomenclature" of goods (CN) and conventional duties.[84] The Common Customs Tariff provides for the applicable duties.[85]

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[79] Preamble of the HS Convention, thirteenth recital.

[80] For an explanation by the WCO Secretariat of the list of the amendments, see: TAR/W/91 (HS1996), G/MA/W/26 (HS2002), G/MA/W/76 (HS2007).

[81] The Preamble of the HS Convention indicates that it has been "established under the auspices of the Customs Co-operation Council". Paragraph 1(f) of the HS Convention indicates that "the Council" refers to the Customs Co-operation Council. The Council is headed by the Secretary General of the Council. See Para. 1(g) of the HS Convention. Article 8.1 of the HS Convention provides that "the Council shall examine proposals for amendment of this Convention, prepared by the Harmonized System Committee, and recommend them to the Contracting Parties under the procedure of Article 16 unless any Council Member which is a Contracting Party to this Convention requests that the proposals or any part thereof be referred to the Committee for re-examination".

[82] See para. 7.35 above.

[83] Council Regulation (EEC) No. 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ L 302/1, 19 October 1992), as amended (the "CCC") (Exhibits US-19; TPKM-16).

[84] Annex I of Council Regulation No. 2658/87, Part One, Preliminary provisions, Section I – General Rules, "B. General rules concerning duties", explains in its general rules that conventional duties are "[t]he customs duties applicable to imported goods originating in countries which are Contracting Parties to the General Agreement on Tariffs and Trade or with which the European Community has concluded agreements containing the most-favoured-nation tariff clause". The Annex states further that "[u]nless the context requires otherwise, these conventional duties are applicable to goods, other than those referred to above, imported from any third country" (Exhibits EC-49; US-13; TPKM-5).

7.40 The CN, which is set forth in Annex I to Council Regulation No. 2658/87, is established by the European Commission (the "Commission") and comprises: (i) the HS nomenclature; (ii) Community subdivisions to that nomenclature, referred to as "CN subheadings" and (iii) preliminary provisions, additional section or chapter notes and footnotes relating to CN headings".[86] These additional section and chapter notes and footnotes are intended to further define the scope of the CN. Products are grouped in chapters, divided over sections.[87] Both section and chapter notes assist in determining the customs classification of goods.[88] When notes are intended to be relevant for the entire section, they are set out as section notes. When they relate only to a specific chapter, it is a chapter note. The section notes and chapter notes, if any, can be found at the beginning of each section and chapter, respectively. Annex I to Council Regulation No. 2658/87 is divided into three parts, entitled: "Part one – Preliminary provisions"; "Part two – Schedule of customs duties" and "Part three – Tariff annexes".

7.41 "Part one — Preliminary provisions", contains two sections. Section I, entitled "General rules", includes *inter alia*, the General Rules for the Interpretation of the CN (CN GIRs), which are identical to those of the HS.[89] Section II, entitled "Special provisions", deals with specific issues relating to goods for certain categories of ships, boats and other vessels and for drilling or production platforms; civil aircraft and goods for use in civil aircraft; pharmaceutical products; containers and packing materials; or signs, abbreviations and symbols.

7.42 "Part two — Schedule of customs duties", contains the CN codes and conventional duties. Each CN code is an eight-digit number, reproducing the headings and subheadings of the HS up to the six-digit level, with the seventh and eighth digits being CN-specific.[90] As a national nomenclature of a contracting party to the HS, the CN has the same Sections and chapters as the HS.[91] The CN also reproduces all the HS Section, Chapter, and Subheading Notes without modifying their scope, with additional notes particular to the CN.[92] Each CN chapter comprises a table with four columns, labelled from left to right as "CN code"; "Description"; "Conventional rate of duty (%)", and "Supplementary unit".

7.43 "Part three — tariff annexes" contains agricultural annexes, lists of pharmaceutical substances which qualify for duty-free treatment, information on quotas, and information on "favourable tariff treatment by reason of the nature of the goods".

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[85] Article 20(1) of the CCC.

[86] Article 1 of Council Regulation No. 2658/87 (Exhibits EC-49; US-13; TPKM-5).

[87] As discussed in fn. 74 above in relation to the HS, the CN includes 99 chapters. Only 97 are used, however. In particular, CN chapters 77 and 99 are reserved for possible future uses. Unlike in the case of the HS, the CN includes a 98th chapter that covers "complete industrial plants".

[88] CN GIR Rule 1 provides that customs classification shall be determined according to the terms of the headings and any relative section or chapter notes; see paragraph 7.41.

[89] See para. 7.34 above. According to Article 3 of the HS Convention, the European Communities must apply the HS GIRs. In the case of the CN GIRs, the first five rules relate to the six-digit headings while rule 6 relates to the CN breakouts, i.e. the eight-digit subheading. The GIRs are part of the CN (they are included in its "Part one – Preliminary provisions") and accordingly, are binding.

[90] Article 3 of Council Regulation No. 2658/87 (Exhibits EC-49; US-13; TPKM-5). See also para. 7.33 above.

[91] See also fn. 87 above.

[92] As indicated in para. 7.33 above, HS contracting parties are required to use all the headings and subheadings of the HS without addition or modification, together with their related numerical codes, and each contracting party must follow the numerical order of the HS.

7.44 In accordance with Article 2 of Council Regulation No. 2658/87, as amended, the Commission has also established the integrated tariff of the European Communities, known as the "Taric".[93] The Taric is based on the CN, with further subdivisions at the ninth- and tenth-digit levels, referred as the "Taric subheadings". These additional tariff subheadings are utilized for the implementation of specific policies, such as, for example, tariff suspensions; tariff quotas; tariff preferences (including tariff quotas and ceilings); the generalized system of tariff preferences applicable to developing countries; anti-dumping and countervailing duties; countervailing charges; agricultural components and others. The Taric is part of the Common Customs Tariff.[94]

7.45 Pursuant to Article 12 of Council Regulation No. 2658/87, as amended, the Commission must publish each year, before 31 October, a consolidated version of the CN, incorporating the amendments of the past year. The consolidated version of the CN – as a Commission Regulation amending Annex I to Regulation No. 2658/87 – is published in the Official Journal of the European Union (the "EU Official Journal").[95] It applies as of 1 January of the year following its official publication. To avoid confusion, the year of application is indicated. The CN2007, for example, indicates that this was the CN version applicable in 2007. The CN currently applicable as of the date of the issuance of these Reports is the CN2010.

(b) The Customs Code Committee and the EC Comitology procedure

7.46 According to Council Regulation No. 2658/87, as amended, the Commission establishes and manages the CN and Taric.[96] Article 9 of Council Regulation No. 2658/87, as amended, authorizes the Commission to adopt measures relating to the application of the CN, such as classification regulations (these are Commission Regulations) and explanatory notes to the CN ("CNEN"), in accordance with the procedure set out in Article 10 of that Regulation. Article 10 states that the Commission may adopt such measures with the assistance of the "Customs Code Committee" as per the "management procedure" in Article 4 of Council Decision 1999/468/EC (the "Comitology Decision").[97]

7.47 The Customs Code Committee consists of a representative of the Commission service (as chairperson) and representatives of the governments of each EC member State. Under the "management procedure", the Commission service submits draft implementing measures related to classification to the "Comitology committee", which delivers an opinion in favour or against (or reaches "no opinion") on these draft measures by means of a vote by EC member State representatives prior to adoption by the Commission.[98] The Comitology committee opinion is handled through voting by member States representatives. Article 4(2) of the Comitology Decision explains that the opinion

[93] The acronym "TARIC" corresponds to its title in the French Language: "Tarif Intégré de la Communauté" (See also Exhibit US-12, containing the Commission's information on Taric).

[94] See Exhibit US-12, p. 5.

[95] The CN2009 version, for example, was established by Commission Regulation (EC) No. 1031/2008 of 19 September 2008, amending Annex I to Council Regulation No. 2658/87, OJ L 291/1, 31 October 2008 (Exhibits US-11; TPKM-21).

[96] See Council Regulation No. 2658/87, Articles 1, 2 and 6 (Exhibit EC-49; US-13; TPKM-5).

[97] Exhibits EC-51 and TPKM-18. Article 10 of Council Regulation No. 2658/87 cross-refers to Article 7 of the Comitology Decision, which provides that each Committee shall adopt its own rules of procedure. The Rules of Procedure of the Customs Code Committee were submitted in Exhibit EC-52.

[98] European Communities' first written submission, paras. 292-293; Article 4.2 and 4.3 of the Comitology Decision (Exhibit EC-51; TPKM-18).

"shall be delivered by a qualified majority of members, excluding a vote by the chairperson".[99] A vote can result in three possible outcomes: (i) a qualified majority vote *in favour* of the proposal, i.e., a favourable opinion is reached; (ii) a qualified majority vote *against* the proposal, i.e., a non-favourable opinion is reached; or (iii) there is a *lack of a qualified majority* either in favour or against the proposal, i.e., a no-opinion result. Where either a favourable opinion or no opinion is reached, the Commission may adopt a proposed measure.[100] But, if a non-favourable opinion is rendered, the Commission must defer to the European Council, which can itself reach a different decision by a qualified majority, within three months.[101] If the European Council takes no decision within this time limit, the Commission adopts the proposed measure.[102]

7.48 In addition to the CNEN and Classification Regulations, Article 8 of Council Regulation No. 2658/87, as amended, also provides that "customs items" can be submitted by the Chairman of the Customs Code Committee for examination, either on his or her own initiative or at the request of a representative of an EC member State. Under this "Article 8 procedure", the Customs Code Committee functions as a "discussion forum" between the Commission and the EC member States, and not as the "Comitology Committee".[103] The result of such discussion is reflected in the minutes of the meeting as an "Article 8" topic.

7.49 Prior to each Customs Code Committee meeting, the agenda of items on which the Comitology Committee is requested to give its opinion is circulated.[104] After each meeting, the minutes of the meeting are drawn up and circulated amongst the EC member States' representatives.[105]

(c) Interpretation of the CN

7.50 In addition to the GIRs, the HS Section and Chapter Notes and CN additional notes discussed in paragraphs 7.40 and 7.41 above, the Commission has at its disposal a variety of tools to ensure uniform classification practice throughout the Community. These tools include (i) HSEN and Opinions; (ii) EC classification regulations; (iii) CNEN; (iv) Opinions of the Customs Code Committee in the framework of Article 8 of Council Regulation No. 2658/87; and (v) Binding Tariff Information decisions ("BTIs"). These instruments are described in more detail below.

(i) HS Explanatory Notes (HSEN) and Opinions by the HS Committee

7.51 HSEN and Opinions by the WCO Council may also inform interpretation of the CN at the six-digit level. These are discussed in paragraph 7.35 above.

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[99] Following the most recent enlargement of the European Union on 1 January 2007, a qualified majority constitutes 255 votes out of a total of 345 votes. (see European Communities' first written submission, para. 292, fn. 191).

[100] European Communities' first written submission, paras. 292-293; Article 4.3 of the Comitology Decision (Exhibits EC-51; TPKM-18).

[101] European Communities' first written submission, paras. 292-293; Article 4.3 of the Comitology Decision (Exhibits EC-51; TPKM-18). In the case the EC Council becomes involved, the Commission may defer the application of the measure for a period of up to three months.

[102] Article 4.3 and 4.4 of the Comitology Decision (Exhibits EC-51; TPKM-18).

[103] See para. 7.47 above.

[104] Article 3 of the Rules of Procedure of the Customs Code Committee (Exhibit EC-52).

[105] Article 12.1 of the Rules of Procedure of the Customs Code Committee (Exhibit EC-52).

(ii) Classification Regulations

7.52 Pursuant to Article 9(1)(a) of Council Regulation No. 2658/87, as amended, the Commission may adopt regulations on the classification of goods. Such classification regulations are adopted by the Commission in accordance with the "management procedure" discussed in paragraph 7.47 above. The Commission may in practice first submit its proposed measure as an "item submitted to the Customs Code Committee for examination under Article 8 of Regulation No. 2658/87", which may lead to amendments to the original proposal. Once the Commission considers that its proposal is finalized, it may again submit it to the Customs Code Committee for an opinion.

7.53 Classification regulations that are published in the EU Official Journal are binding throughout the European Communities.[106] In general, the preamble of a classification regulation explains that the regulation is necessary "in order to ensure uniform application of the Combined Nomenclature annexed to the said Regulation".[107] In their main text, classification regulations contain a detailed description of one or several goods, provide for the applicable CN code, and give the reasons for such classification.[108] However, classification regulations do not "amend" the CN.[109]

(iii) Explanatory Notes to the Combined Nomenclature (CNEN)

7.54 The Commission may also issue CNEN in accordance with Article 9(1)(a) of Council Regulation No. 2658/87, as amended, for interpretation of the CN. The Court of Justice of the European Union ("European Court of Justice") has concluded that CNEN are not "legally binding", but provide "an important aid in the interpretation of the CN".[110] As with classification regulations, CNEN are adopted by the Commission in accordance with the "management procedure" of the Comitology Committee discussed in paragraph 7.47 above. However, CNEN are distinct from the CN Section and Chapter notes.[111]

(iv) Statements of the Customs Code Committee in the framework of Article 8 of Regulation No. 2658/87

7.55 The Statements of the Customs Code Committee in the framework of Article 8 of Regulation No. 2658/87, which are discussed in paragraph 7.48 above, may also be considered when interpreting the CN. Article 8 states that the Customs Code Committee may examine any matter referred to it by its Chairman, either on his or her own initiative or at the request of a representative of a EC member State (a) concerning the CN; (b) concerning the Taric nomenclature and any other nomenclature which is wholly or partly based on the CN or which adds any subdivisions to it, and which is established by specific Community provisions with a view to the application of tariff or other measures relating to trade in goods. In practice, the Customs Code Committee thus examines

[106] See Article 288(2) of the Treaty on the functioning of the European Union, formerly, Article 249(2) of the EC Treaty.

[107] See, e.g., Commission Regulation (EC) No. 517/1999 of 9 March 1999 concerning the classification of certain goods in the Combined Nomenclature, OJ L 61/23, 10 March 1999 (Exhibits US-59; TPKM-35).

[108] Classification regulations may also contain illustrations of the products (see, e.g., Exhibits US-59; TPKM-35).

[109] European Court of Justice (GoldStar Europe), para. 19 (Exhibit TPKM-9); European Court of Justice (Gebr. Vismans Nederland BV), para. 13 (Exhibit TPKM-10). See also the Panel Report on *EC - Selected Customs Matters*, para. 2.37.

[110] See, e.g., European Court of Justice (DFDS BV), para. 28 (Exhibits US-16; TPKM-37); European Court of Justice (Clees), para. 12 (Exhibits EC-57; US-17). See also the Panel Report on *EC - Selected Customs Matters*, para. 2.39 and the Panel Report on *EC - Chicken Cuts*, para. 7.412.

[111] See para. 7.40 above.

questions concerning the interpretation of Community Customs law such as, for example, tariff classification issues. The Customs Code Committee operates as a specific forum for cooperation between the EC member States and the Commission. The Customs Code Committee's opinions on questions relative to the application and interpretation of the CN are not legally binding. However, the European Court of Justice has held that such opinions constitute an important means of ensuring the uniform application of the common customs tariff by the authorities of the member States and as such can be considered as a valid aid to the interpretation of the tariff.[112]

7.56 Through an online "Comitology register"[113], one can access the agendas of the Customs Code Committee meetings; certain draft implementing measures; summary records of meetings and summaries of voting results. Other documents are considered confidential and access must be requested. Access, however, can be denied on certain grounds.[114]

(v) Binding Tariff Information (BTI)

7.57 The European Communities also has an advance ruling system in tariff classification matters, known as the Binding Tariff Information ("BTI"). BTIs are issued by the customs authorities of the EC member States upon request by importers, in writing and free of charge, except for special costs incurred by the customs authorities for certain procedures, such as necessary laboratory analysis of the products.[115] The customs authority specifies the customs classification code of the product in a BTI. BTIs are valid throughout the European Communities, regardless of their location of issuance[116], and are generally valid for a period of six years.[117] Article 12(5)(a) of the CCC explains, however, that BTI shall cease to be valid: (i) where a regulation is adopted and the BTI no longer conforms to this regulation[118]; or (ii) where a BTI is no longer compatible with the interpretation of the CN by reason of amendments to the CNEN. In both cases, BTIs can still remain valid for a three-month grace period.[119]

7.58 Issued BTIs are maintained in a database (the EBTI database) that is managed by the Commission, in particular, the Directorate General for Taxation and Customs Union (DG TAXUD).[120] The Commission has issued "administrative guidelines" on the EBTI and its operation in order to contribute to the harmonization of national practices in the area of Binding Tariff Information.[121] The content of the EBTI database largely depends on the information transmitted by

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[112] Panel Report on *EC – Selected Customs Matters*, para. 2.40 (citing European Court of Justice (Dittmeyer), para. 4).

[113] See http://ec.europa.eu/transparency/regcomitology/index.cfm.

[114] See Article 15 of the Rules of procedure of the Customs Code Committee: "The principles and conditions concerning public access to the committee's documents shall be the same as those defined in Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001. It is for the Commission to take a decision on requests for access to these documents" (Exhibit EC-52).

[115] Article 11.2 of the CCC (Exhibits US-19; TPKM-16).

[116] Article 11 of Commission Regulation (EEC) No. 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No. 2913/92 of 12 October 1992 establishing the CCC, (OJ L 253/1, 11 October 1993) (Exhibit US-21).

[117] Article 12(4) of the CCC (Exhibits US-19; TPKM-16).

[118] This could, e.g., be the case with a classification regulation classifying a similar product in a different tariff heading.

[119] Classification Regulations, e.g., normally state that a BTI "issued by the customs authorities of Member states, which is not in accordance with this Regulation, can continue to be invoked for a period of three months under Article 12(6) of Regulation (EEC) No. 2913/92." (Exhibit TPKM-35).

[120] See the BTI Guidelines, p.4 (Exhibits US-18; TPKM-85); Panel Report on *EC - Selected Customs Matters*, para. 7.123.

[121] See the BTI Guidelines, point "1. Objectives of the Guidelines" (Exhibits US-18; TPKM-85).

the national customs authorities. A limited version of the database is accessible to the public via the internet. This version of the EBTI lists the following information: the BTI's reference (each BTI has a unique reference that includes the International Organization for Standardization (ISO) country code, followed by a series of numbers to represent the year of issue and/or an administrative code); the issuing country; the start and end dates of validity; the nomenclature code; the classification justification (most often limited to a reference to the applicable GIR of the CN); the language of issuance; the place and date of issuance with identification of the issuing authority; a brief description of the goods; some national and/or Commission keywords; and any applicable images or illustrations.[122] A more complete version of the EBTI-database is exclusively available to the Commission and issuing authorities of the member States. This version contains additional information of a confidential nature, such as the name and address of the applicant/holder, the composition of the product and its trade name and any additional information that the applicant considers confidential.[123] Most BTIs submitted in this dispute were extracted from the public EBTI database.

C. GENERAL ISSUES

1. Burden of proof

7.59 The Panel recalls the general principles applicable to burden of proof in WTO dispute settlement, i.e., that parties claiming a violation of a provision of a covered agreement by another Member must assert and prove its claim.[124] In *US – Wool Shirts and Blouses* the Appellate Body stated that:

> "the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. Also, it is a generally-accepted canon of evidence in civil law, common law, and, in fact, in most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption" (original footnote omitted).[125]

7.60 Furthermore, in *Canada – Dairy (Article 21.5 New Zealand and US II)* the Appellate Body stated explicitly that:

> "as a general matter, the burden of proof rests upon the complaining Member. That Member must make out a prima facie case by presenting sufficient evidence to raise a presumption in favour of its claim. If the complaining Member succeeds, the responding Member may then seek to rebut this presumption. Therefore, under the usual allocation of the burden of proof, a responding Member's measure will be treated as WTO-*consistent*, until sufficient evidence is presented to prove the contrary."[126]

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[122] See the BTI Guidelines, point "5. Operation of the EBTI-database" (Exhibits US-18; TPKM-85).
[123] Panel Report on *EC – Selected Customs Matters*, paras. 7.124-7.125.
[124] Appellate Body Report on *US – Wool Shirts and Blouses*, DSR 1997: I, p. 16.
[125] Appellate Body Report on *US – Wool Shirts and Blouses*, DSR 1997: I, p. 14.
[126] Appellate Body Report on *Canada – Dairy* (Article 21.5 New Zealand and US II), para. 66.

7.61 The Appellate Body has also stated that "[i]t is also well to remember that a prima facie case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the prima facie case."[127] The Appellate Body has said that "[a] prima facie case must be based on 'evidence *and* legal argument' put forward by the complaining party in relation to *each* of the elements of the claim. Complaining parties may not simply submit evidence and expect the panel to divine from it a claim of WTO-inconsistency. Nor may complaining parties simply allege facts without relating them to its legal arguments."[128]

7.62 The Appellate Body has also explained that "[i]n the context of the *GATT 1994* and the *WTO Agreement*, precisely how much and precisely what kind of evidence will be required to establish such a presumption will necessarily vary from measure to measure, provision to provision, and case to case."[129]

7.63 In addition, the Appellate Body in *EC – Hormones* established that "when that prima facie case is made, the burden of proof moves to the defending party, which must in turn counter or refute the claimed inconsistency."[130] As the Appellate Body explained in *Japan – Apples*, the complaining party is not responsible for providing proof of all facts raised in relation to the issue of determining whether a measure is consistent with a given provision of a covered agreement. Although the complaining party bears the burden of proving its case, the responding party must prove the case it seeks to make in response.[131]

7.64 In this dispute, the United States, Japan and Chinese Taipei have jointly claimed that the European Communities acted inconsistently with provisions of Articles II:1(a) and (b), and Articles X:1 and X:2 of the GATT 1994.[132] The complainants thus bear the burden to demonstrate that the European Communities acted inconsistently with these provisions.

2. Treaty interpretation

7.65 Article 3.2 of the DSU directs panels to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". It is well settled in WTO case law that the principles codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("Vienna Convention") are such customary rules.[133] These provisions read as follows:

> "Article 31: General rule of interpretation
>
> 1. 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 the light of its object and purpose.

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[127] Appellate Body Report on *EC – Hormones,* para. 104.
[128] Appellate Body Report on *US – Gambling*, para. 140.
[129] Appellate Body Report on *US – Wool Shirts and Blouses*, DSR 1997: I, p. 14.
[130] Appellate Body Report on *EC – Hormones*, para. 98.
[131] Appellate Body Report on *Japan – Apples*, para. 154.
[132] Although the three complainants made a *joint* request for the establishment of this Panel, which includes *inter alia* joint claims under Article X of the GATT 1994, Japan did not pursue these particular claims in its submissions. See also para. 7.996 below; fn. 31 below and fn. 994 above.
[133] Appellate Body Report on *US – Gasoline*, p. 17, DSR 1996:I, 3 at 15-16; Appellate Body Report on *India – Patents (US)*, para. 45; and Appellate Body Report on *US – Shrimp*, para. 114.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32: Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

leaves the meaning ambiguous or obscure; or

leads to a result which is manifestly absurd or unreasonable."[134]

7.66 We recall that the Appellate Body in *EC – Computer Equipment* explained that tariff concessions provided for in a Member's Schedule are part of the terms of the treaty, and, "[a]s such, the only rules which may be applied in interpreting the meaning of a concession are the general rules of treaty interpretation set out in the Vienna Convention." [135]

7.67 Accordingly, the Panel shall apply these principles in interpreting the relevant provisions of the covered agreements.

D. PRELIMINARY HORIZONTAL ISSUES

1. The status of the complainants as third parties in this dispute

7.68 On 23 January 2009, more than three months following the establishment of this Panel, on 23 September 2008, and one day after the composition of the Panel, on 22 January 2009, the United

[134] The Vienna Convention on the Law of Treaties (the "Vienna Convention"), done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679.

[135] Appellate Body Report on *EC – Computer Equipment*, para. 84.

States, Japan and Chinese Taipei notified their interest to participate as third parties to each others' complaints.[136] On 4 February 2009, at the Panel's organizational meeting, the European Communities commented on such requests and raised the issue of whether the complainants' participation as third parties to each of the other two disputes for which they are not the main party serves any "legitimate purpose", since the complainants had submitted a joint Panel request.

7.69 On 13 February 2009, the European Communities sent an email to the Panel stating that it expected the Panel to make a ruling on the matter. On 17 February 2009, the Panel responded via a fax to the parties, asking whether the European Communities was formally requesting a preliminary ruling on the matter in accordance with paragraph 14 of the Panel's Working Procedures. In a letter dated 20 February 2009, the European Communities informed the Panel that it did not intend to request a formal ruling on the matter, but requested the Panel to "take appropriate organizational measures in the course of the proceedings in order to preserve a fair balance of procedural rights between defendant and the complainants and, more generally, to ensure due process." The European Communities expressed its particular concern that participation of the main parties as third parties could "disadvantage [it] by giving each [c]omplainant additional opportunities for arguing their own claims before the Panel, beyond those already provided" under the DSU and the Panel's Working Procedures.

7.70 At the "open session" of the first substantive meeting with the third parties, which took place on Wednesday, 13 May 2009, the Panel reminded the complainants of the due process concerns raised by the European Communities in its 20 February 2009 letter. In that meeting, the Panel noted that the European Communities had not requested any ruling on the matter and that, according to paragraph 14 of the Working Procedures, the deadline for such a request had already passed. The Panel then gave the complainants, as third parties to each others' complaints, the opportunity to make third party statements, but reminded them that any such statements should be made bearing in mind the due process concerns raised by the European Communities in its 20 February 2009 letter. None of the complainants made any oral statements at this meeting. Subsequently, only Japan made a submission responding to Panel questions to third parties in its role as a third party; however, the European Communities has not raised any specific due process concern with Japan's responses made as a third-party.[137]

7.71 The **Panel** will briefly consider below concerns raised by the European Communities on the participation of the main parties as third parties, as well as the complainants' notifications of their interest to participate as third parties more than ten days after the date of the establishment of the Panel. We recall, however, that the European Communities did not formally request a formal ruling by the Panel on this matter when given the opportunity to do so.

(a) The notification of interest to participate as third parties

7.72 Article 10 of the DSU provides in relevant part:

[136] See triple-numbered document WT/DS375/9, WT/DS376/9 and WT/DS377/7 of 26 January 2009 (in particular, fn. 1).

[137] Japan submitted responses to the Panel questions to the third parties after the first substantive meeting. However, in its response, Japan solely referred to paragraphs from its responses to the questions from the Panel, in its capacity as a main party to the dispute. Japan's comments therefore did not reflect additional arguments that had not already been made.

> "1. The interests of the parties to a dispute and those of other Members under a covered agreement at issue in the dispute shall be fully taken into account during the panel process.
>
> 2. Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a "third party") shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report."

7.73 Although Article 10 is silent on the period of time Members have to notify their interest to participate as third parties in a given dispute, we note the following GATT Council Chairman's Statement of June 1994 discussed notification within a ten-day period following the establishment of a panel:

> "Delegations in a position to do so, should indicate their intention to participate as third party in a panel proceeding at the Council session which establishes the panel. Others who wish to indicate a third party interest should do so within the next ten days."[138]

7.74 We are aware that WTO Members have on previous occasions notified their interest to participate as third parties in disputes beyond the ten days following the establishment of the panel. For example, two third-party notification requests in *EC – Export Subsidies on Sugar (Australia)* were submitted after that period but *prior* to composition of the panel pursuant to Article 8.7 of the DSU.[139] The panel in that dispute recalled the Appellate Body's decision in *EC – Hormones* that "the DSU leaves panels a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated."[140] That panel allowed third party participation on the basis that the notification did not adversely affect the selection and composition of the panel, nor otherwise hamper the panel process.[141] In *Turkey – Rice*, a third party request was notified more than ten days after the establishment of the Panel, and *after* the panel had been composed.[142] This panel allowed participation, stating:

> "[S]imilarly to the relevant third party requests in *EC – Export Subsidies on Sugar (Australia)*, as a result of Pakistan's request, the Panel process has not been hampered. In addition, although the Panel had already been composed when Pakistan formulated its third party request, we see no reason to believe that accepting Pakistan's request would affect the "independence of the members" of this Panel, as stipulated by Article 8.2 of the DSU, nor does it seem to prejudice in any way the manner in which this Panel fulfil (sic) its functions specified in Article 11 of the DSU: '[T]o assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the

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[138] Third Party Participation in Panels, Statement by the Chairman of the Council, document C/COM/3 of 27 June 1994, page 1. However, as noted by a previous panel, the question of formalizing a ten-day notification requirement remains the subject of proposals in the context of the *DSU* negotiations (see Panel Report on *EC – Export Subsidies on Sugar (Australia)*, para. 2.2).

[139] Panel Report on *EC – Export Subsidies on Sugar (Australia)*, para. 2.1.

[140] Panel Report on *EC – Export Subsidies on Sugar (Australia)*, para. 2.3 (citing the Appellate Body Report on *EC – Hormones*, fn. 138).

[141] Panel Report on *EC – Export Subsidies on Sugar (Australia)*, para. 2.3.

[142] Panel Report on *Turkey – Rice*, para. 6.1.

> applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements...'".[143]

7.75 In the present dispute, the complainants notified their interest to participate as third parties more than three months following the establishment of this Panel, i.e., on 23 September 2008, and one day *after* the composition of this Panel, i.e., on 22 January 2009. Despite the length of delay and the fact that this Panel had already been composed, we see no reason why accepting the complainants' requests would affect the "independence of the members" of this Panel or otherwise hamper the Panel process. The members of this Panel had been selected taking into consideration the participation of the complainants as main parties. We do not see how the additional participation of the complainants as third parties would have compromised the initial selection of these panellists; nor has the European Communities made any such allegation. Given the foregoing, we confirm our acceptance of the complainants' request to participate as third parties to this dispute.[144]

(b) Multiple complainants and the joint panel request

7.76 Article 9 of the DSU provides in relevant part:

> "1. Where more than one Member requests the establishment of a panel related to the same matter, a single panel may be established to examine these complaints taking into account the rights of all Members concerned. A single panel should be established to examine such complaints whenever feasible.
>
> 2. The single panel shall organize its examination and present its findings to the DSB in such a manner that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired. If one of the parties to the dispute so requests, the panel shall submit separate reports on the dispute concerned. The written submissions by each of the complainants shall be made available to the other complainants, and each complainant shall have the right to be present when any one of the other complainants presents its views to the panel."

7.77 We additionally recall the cited provisions of Article 10 of the DSU, presented in paragraph 7.72 above.

7.78 In the present dispute, we do not consider the fact that multiple complainants have presented a *joint* panel request should *per se* prevent parties from seeking to participate as third parties, or that the complainants' participation as third parties would not serve a "legitimate purpose". Nothing in the language of Articles 9 or 10 of the DSU limits or regulates the participation of complainants as third parties in disputes where multiple complainants present a panel request jointly.[145] In fact, such

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[143] Panel Report on *Turkey – Rice*, para. 6.8.

[144] We again note, as discussed above, that in any case the complainants did not make any third-party written or oral submissions to the Panel, nor did they exercise their capacity as third parties to any significant extent. Furthermore, when asked to clarify its position, the European Communities itself did not formally request the Panel to reject the third party status of the complainants. See also paras. 7.70 and 7.71 above.

[145] We also note that the equivalent provisions in the Working Procedures for Appellate Review (see document WT/AB/WP/3 of 28 February 1997, Rules 23 and 24) do not have any such limitation either. In addition, as noted by the European Communities, co-complainants in a previous dispute have simultaneously participated as third parties to each others' complaints. See, for instance, *EC – Trademarks and Geographical Indications* (DS174 and DS290), in which the United States and Australia were third parties to each others' complaints.

participation may prove desirable for a complainant. For instance, a co-complainant that presented a joint panel request may decide to pursue, in subsequent phases of the panel proceedings, only certain claims that it had jointly included in the panel request. It is possible that a co-complainant under these circumstances would have a legitimate interest in commenting, as a third party, on the claim(s) it had decided *not* to pursue as a joint complainant. We consider; however, that in cases where multiple complainants present a joint panel request, and simultaneously request to participate as third parties, care should be taken to ensure protection of the due process rights of the parties. In this dispute, we have reminded the complainants of the European Communities' due process concerns, and received no specific complaint from the European Communities.

(c) Conclusions

7.79 For all the foregoing reasons, the Panel does not consider that the co-complainants' participation as third parties to each of the two others' disputes for which they are not the main party in any way adversely affected or hampered the panel process, or otherwise impaired the due process rights of any of the parties to this dispute. The Panel therefore confirms the status of the complainants as third parties to each other's complaints.

2. The status of the EC member States as respondents in this dispute

(a) Arguments of the parties

7.80 At the Panel's organizational meeting and in a 4 February 2009 letter addressed to the Panel, the **European Communities** notified the Panel that it would participate as the sole respondent in proceedings before the Panel. To the extent the Panel were to find that any of the measures specified in the joint panel request breach WTO obligations, the European Communities stated it will bear full responsibility for such breach of its Schedule.[146] The European Communities submits that it has had exclusive competence with respect to all tariff matters since 1968, pursuant to Article 133 of the Treaty establishing the European Community ("EC Treaty"). It argues that the role of customs authorities of the EC member States is limited to applying measures previously enacted by the European Communities.[147] Further, it argues that EC member States are required under EC law to apply the implementing measures taken by the European Communities, and are prevented from taking any remedial action on their own until the European Communities has adopted the required implementing measures to comply with any recommendation by the Panel.[148] Because the complainants have only brought "as such" claims against measures enacted by the European Communities[149], the European Communities argues that there is no basis to direct findings against EC member States for measures that EC member States have no power to repeal or amend.[150] Therefore, the European Communities argues that addressing any recommendation to each EC member State would serve no useful purpose.

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[146] Letter from the Delegation of the Commission (4 February 2009).

[147] European Communities' second written submission, para. 149.

[148] European Communities' response to Panel question No. 17. See also statements of the European Communities at the Panel's organizational meeting of 4 February 2009.

[149] European Communities' second written submission, para. 149. In *EC – Computer Equipment*, the European Communities submits, claims were brought against certain measures of the European Communities and certain "practices" of two EC member States, the United Kingdom and Ireland. In contrast, in the case at hand, the European Communities notes that all the claims concern EC measures, and are brought on an "as such" basis. Thus, The European Communities argues that the Panel's consideration neither requires nor justifies the designation of the EC member States as respondents. See European Communities' response to Panel question No. 17 and European Communities' second written submission, paras. 147-152.

[150] European Communities' second written submission, para. 148.

7.81 The **complainants** argue for the inclusion of EC member States as respondents for several reasons. They note that EC member States are WTO Members in their own right, with their own obligations, including under Article II of the GATT 1994. In addition, they argue that both the European Communities and its member States play a role in the application of duties, generally. Therefore, both play a role in the application of duties to the products in question in this dispute. While noting that the European Communities administers the CN and has issued the regulations and CNENs at issue, the complainants argue that national customs authorities in EC member States issue BTIs, interpreting and applying those regulations and CNENs, and apply duties to the products in accordance with the relevant EC regulations and CNENs. As a systemic matter, as reflected in rulings by prior panels, such as *EC – Computer Equipment*[151], the complainants argue that the internal legal relationship between the European Communities and its member States cannot diminish the rights of other WTO Members to exercise their rights under the *WTO Agreement* (including rights under the DSU). Therefore, the complainants submit, they have exercised their rights under the DSU to bring claims against the European Communities as well as the EC member States, and the terms of reference of this Panel reflect this.[152]

(b) Consideration by the Panel

7.82 The issue is whether the Panel should make findings with respect to the actions of the EC member States and address recommendations to EC member States in this dispute, to the extent it finds that any of the measures at issue breach WTO obligations.

7.83 Article 3.3 of the DSU contemplates instances "in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by *measures taken by another Member*" (emphasis added). Article 3.7 of the DSU in turn provides that "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute". Article 11 of the DSU provides that "a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements".

7.84 The Panel notes that the complainants' joint panel request is addressed to the European Communities *and its member States*.[153] In their request, the complainants claim that both the European Communities, and its member States accord tariff treatment to certain information technology products at issue in this dispute that is inconsistent with Articles II:1(a) and II:1(b) of the GATT 1994.

7.85 The complainants acknowledge that they have not challenged any specific prior application of duties by particular EC member States.[154] However, they argue it is appropriate to directly challenge EC member States because the customs authorities of individual member States apply duties to the products in accordance with the relevant EC regulations and CNENs.

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[151] Japan and Chinese Taipei refer to the Panel Report on *EC – Computer Equipment* (para. 8.16) (Japan's response to Panel question No. 17; Chinese Taipei's response to Panel question No. 17). Japan separately cited the Panel Report on *EC - Selected Customs Matters* (paras. 7.136-145), which it argues, observed that Article XXIV:12 of GATT 1994 constitutes neither an exception to nor a derogation from the obligation of uniform administration in Article X:3(a). (Japan's response to Panel question No. 17).

[152] Complainants' responses to Panel question No. 17.

[153] In this regard, the disputes are identically entitled "European Communities and its member States – Tariff Treatment of Certain Information Technology Products". See triple-numbered document WT/DS375/9, WT/DS376/9 and WT/DS377/7 of 26 January 2009, in particular, fn. 1.

[154] See complainants' response to Panel question No. 119.

7.86 It is not in dispute that EC member States are Members of the WTO, either as original Members or as Members that acceded to the WTO following the conclusion of the Uruguay Round.[155] The European Communities does not exclude the possibility that claims of WTO inconsistency may be brought against individual EC member States. However, the European Communities argues that *it* should be treated as the sole respondent, and not individual member States, in *this* dispute. The European Communities focuses both on the fact that the complainants have limited their claims to an "as such" challenge[156], and their view that the role of customs authorities of EC member States is limited to applying measures previously enacted by the European Communities. The European Communities submits that the complainants' claim addressed against these EC member States does not concern the "application" or "practice" of the EC measures at issue.[157] To the extent a violation were determined, upon implementation of the Panel's recommendation by the European Communities, the European Communities attests that EC member States would be required under EC law to apply the implementing measures taken by the European Communities.[158]

7.87 In accordance with Article 3.7 of the DSU, our primary objective is to secure a positive solution to the dispute. To this end, our terms of reference as set forth in paragraph 1.6above direct us "[t]o examine, in the light of the relevant provisions in the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the United States, Japan and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu in document WT/DS375/8, WT/DS376/8 and WT/DS377/6, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements".

7.88 At the outset, our focus concerns the tariff treatment provided for under the measures at issue. As noted by the complainants, the same issue arose before in *EC – Computer Equipment*.[159] That Panel ultimately found it unnecessary to rule on claims directed against EC member States, in light of findings of inconsistency determined with respect to the measures of the European Communities.[160]

7.89 In the circumstances of this case, we do not consider it necessary to determine *at the outset* whether to rule on the claims directed against EC member States. We note the matter in this dispute is directed towards a number of measures promulgated by the European Communities. The complainants have clarified that they are not challenging particular applications of the measures. The

[155] Article XI of the WTO Agreement establishes requirements for qualifying as an "original Member" of the WTO, while Article XII of the WTO Agreement, explains that a State or separate customs territory may accede to the WTO Agreement. For a list of EC member States that are WTO members, see WTO website, available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

[156] European Communities' second written submission, para. 149.

[157] European Communities' second written submission, para. 149. See also the European Communities' response to Panel question No. 17; European Communities' second written submission, paras. 147-152.

[158] European Communities' response to Panel question No. 17. See also the statements of the European Communities at the Panel's organizational meeting of 4 February 2009; Letter from the Delegation of the Commission (4 February 2009).

[159] Panel Report on *EC – Computer Equipment*, para. 8.16. In that dispute, the United Kingdom and Ireland were identified as respondents.

[160] Panel Report on *EC – Computer Equipment*, para. 8.72. In concluding it unnecessary to rule on claims directed against the United Kingdom and Ireland, the Panel in *EC – Computer Equipment* recognized that its terms of reference required it to examine the matters referred to the DSB, including those concerning the United Kingdom and Ireland. That Panel stated that it would consider at the outset whether customs authorities in the European Communities and the United Kingdom and Ireland "have or have not deviated from the obligations assumed under that Schedule". The Panel concluded that the European Communities and its member States are "all bound by their tariff commitments under Schedule LXXX", and stated that the focus of its inquiry was "tariff treatment of LAN equipment and multimedia PCs by customs authorities in the European Communities". See Panel Report on *EC – Computer Equipment*, para. 8.16.

European Communities sought to assure the Panel that the role of customs authorities of the EC member States is limited to applying measures previously enacted by the European Communities. In the context of the claims before us, our analysis of the complainants' claims with respect to the FPDs and STBCs narrative descriptions and the alleged concession pertaining to MFMs, we will consider the extent to which the European Communities and its member States have failed to comply with obligations in the context of EC commitments set forth in the EC Schedule. To the extent the EC member States apply WTO inconsistent measures enacted by the European Communities, we consider there is a reasonable basis to conclude that they have acted inconsistently.

7.90 Accordingly, we refrain on ruling at the outset whether findings against particular EC member States would be necessary to secure a positive solution to the dispute.

3. Order of analysis for the complainants' claims under Articles II and X of the GATT 1994

(a) Arguments of the parties

7.91 The **United States** requests the Panel to begin its analysis with those claims concerning the concessions that appear in the Annex to the EC Schedule. The United States considers it practical and logical to begin with these concessions as they originate from Attachment B of the ITA, which uses general terminology that "often span multiple tariff subheadings"[161]. Furthermore, it submits that the language in the EC headnote[162] or the ITA does not specify a particular order of analysis. **Chinese Taipei** similarly requests the Panel to begin with an analysis of the claims made in connection with the Annex to the EC Schedule, arguing that, if a product falls within the concessions made pursuant to Attachment B, it is no longer necessary to look at specific Attachment A concessions.[163] **Japan** submits that the two claims are legally independent and has not requested the Panel to follow a particular order of analysis.[164] However, Japan requests the Panel to refrain from practising judicial economy with respect to its claims in relation to headings/subheadings listed in Attachment A and B, as reflected in the EC Schedule.[165] The complainants have not requested the Panel to follow a particular order of analysis with respect to their claims in connection with MFMs, under Articles II:1(a) and (b) of the GATT 1994, or any order of analysis as concerns Articles X:1 and X:2 of the GATT 1994[166].

7.92 The **European Communities** argues that it does not see any "added value" in the complainants claims concerning the FPDs narrative description that appears in the Annex to the EC Schedule, in light of the complainants' separate claims under tariff subheading 8471 60 90, which is one of the codes listed next to the narrative description in the Annex to the EC Schedule.[167] While responding to the complainants' arguments concerning the STBCs narrative description, the European

[161] United States' response to Panel question No. 1.

[162] In particular, the United States refers to the language "to the extent not specifically provided for in this Schedule" and "wherever the product is classified" that appears in the EC Schedule (Exhibits US-1; US-7).

[163] Chinese Taipei's response to Panel question No 10(b).

[164] Japan's response to Panel question No. 1.

[165] Japan's second written submission, para. 143; Japan's response to Panel question No. 113.

[166] United States' response to Panel question no. 158; Chinese Taipei's response to Panel question No. 158.

[167] European Communities' response to Panel question No. 10(b). The European Communities states specifically that it "does not see any added value in the latter analysis compared to an analysis under tariff heading 8471 60 90 unless the Panel would agree (quod non) with the overly broad and untenable interpretation by the complainants of the word 'for' in the narrative product definition of 'flat panel displays…'" (European Communities' response to Panel question No. 10(b)).

Communities submits that it does not understand what the United States means through its identification of "the commitment to provide duty-free treatment for set top boxes meeting the description contained in the four individual tariff lines in the EC Schedule ..., HS96 8528 12 91 in particular".[168] Further, it notes that the other complainants have not identified the tariff lines as a separate concession.[169] The European Communities does not address whether a particular order of analysis should be followed with respect to the complainants' MFM claims. It also does not consider that there is a legal requirement in Article X to adopt a particular order of analysis for Articles X:1 and X:2 of the GATT 1994.[170]

(b) Consideration by the Panel

7.93 The **Panel** notes the parties' views regarding the correct order of analysis that the Panel should follow, as set forth in the summary of their views above.

7.94 The Panel will address the complainants' claims relating to the FPDs narrative descriptions as it appears in the Annex to the EC Schedule, followed by their claim in connection with duty-free tariff item number 8471 60 90, as concerns flat panel display devices. Thereafter, the Panel will address the complainants' claims relating to the STBCs narrative description as it appears in the Annex to the EC Schedule, followed by the United States' claims in connection with duty-free tariff item numbers 8517 50 90, 8517 80 90, 8525 20 99 and 8528 12 91, and finally, claims under Articles X:1 and X:2 of the GATT 1994 starting with Article X:1. Finally, the Panel will consider the complainants' MFM claims, first under tariff item number 8471 60 and thereafter tariff item number 8517 21.

7.95 In taking this approach the Panel is mindful that both the United States and Chinese Taipei requested us to consider claims under the narrative descriptions in the Annex to the EC Schedule first, and presented their submissions and arguments accordingly. Japan did not favour any particular order of analysis, but requested us not to exercise judicial economy with its separate claims in relation to tariff item number 8471 60 90, with respect to its claims concerning flat panel display devices.[171] The Panel notes that it may only consider the issue of judicial economy after having considered the claims under the Annex to the EC Schedule. Finally, we do not understand the European Communities to be objecting to an order of analysis that begins with the narrative descriptions in the Annex to the EC Schedule. Rather, the European Communities has raised a number of issues with respect to the clarity of the claims made by the complainants, including the identification of the products at issue, aspects of the measures at issue, and the obligations claimed to be breached. As these arguments, according to the European Communities, relate to the substantive issue of whether the complainants have established a prima facie case, we will address them in other sections of these Reports. In particular, we are not in a position to conclude at the outset that the claims relating to the Annex to the EC Schedule provide no "added value", as suggested by the European Communities, without actually considering the substance of those claims.

7.96 However, prior to considering the complainants particular claims under Articles II and X of the GATT 1994, the Panel will address general issues and several preliminary issues affecting the disputes.

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[168] European Communities' second oral statement, para. 46 (referring to United States' second written submission, para. 23 (italics added by European Communities)).

[169] European Communities' second oral statement, para. 49. In response to question 10 from the Panel, the European Communities states: "the Panel appears to be called upon to examine the claims of the complainants only on the basis of the narrative product definition in light of the products the complainants have (or have failed to) identify" (European Communities' response to Panel question No. 10(b)).

[170] European Communities' response to Panel question No. 158.

[171] Japan's second written submission, para. 143.

4. Characterization of the Panel's task for the complainants' claims under Article II of the GATT 1994

7.97 As indicated in paragraph 7.1 above, the fundamental issue for the Panel's determination in these disputes is whether, in violation of Article II of the GATT 1994, the identified EC measures result in less favourable tariff treatment to imports of FPDs, STBCs and MFMs than that provided for in the EC Schedule, and whether the tariff treatment provided is in excess of that provided for in the EC Schedule.

7.98 Article II:1 of the GATT 1994 provides in relevant part:

> "(a) Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.
>
> (b) The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date."

7.99 In *Argentina – Textiles and Apparel*, the Appellate Body elaborated on the meaning and scope of these provisions:

> "The terms of Article II:1(a) require that a Member 'accord to the commerce of the other Members treatment no less favourable than that provided for' in that Member's Schedule ... Paragraph (a) of Article II:1 contains a general prohibition against according treatment less favourable to imports than that provided for in a Member's Schedule. Paragraph (b) prohibits a specific kind of practice that will always be inconsistent with paragraph (a): that is, the application of ordinary customs duties in excess of those provided for in the Schedule".[172]

7.100 In light of the foregoing, as in previous cases[173], in order to assess the complainants' claims, we will consider the following: (a) the treatment accorded to the products at issue in the EC Schedule; (b) treatment accorded to the products at issue under the challenged measures at issue; and

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[172] Appellate Body Report on *Argentina – Textiles and Apparel*, para. 45. The Appellate Body further explained the relationship between the two provisions as follows:

> "In accordance with the general rules of treaty interpretation set out in Article 31 of the Vienna Convention, Article II:1(b), first sentence, must be read in its context and in light of the object and purpose of the GATT 1994. Article II:1(a) is part of the context of Article II:1(b); it requires that a Member must accord to the commerce of the other Members 'treatment no less favourable than that provided for' in its Schedule. It is evident to us that the application of customs duties *in excess of* those provided for in a Member's Schedule inconsistent with the first sentence of Article II:1(b), constitutes 'less favourable' treatment under the provisions of Article II:1(a) ... ."

(Appellate Body Report on *Argentina – Textiles and Apparel*, para. 47).

[173] Panel Report on *EC – Chicken Cuts*, para. 7.65.

(c) whether the challenged measures result in less favourable treatment of the products at issue than that provided for in the EC Schedule and, more particularly, whether the challenged measures result in the imposition of duties and charges on the products at issue in excess of those provided for in the EC Schedule.

7.101 We are thus required to interpret certain concessions in the EC Schedule. As we have indicated above in paragraph 7.16, the EC Schedule is an integral part of the GATT 1994 and the *WTO Agreement*. Accordingly, we will assess the various aspects of the EC Schedule cited by the complainants applying the principles of treaty interpretation codified in the Vienna Convention in addressing the claims before us.

7.102 In addition, if we were to determine that the applied rate exceeds the bound duty rate, then, in accordance with the aforementioned approach, the application of customs duties would be "in excess" of those provided for in the EC Schedule, and would consequently also violate Article II:1(a) of the GATT 1994 by according to imports of the products at issue treatment less favourable than that provided for those products in accordance with the applicable concession in the EC Schedule.

5. What is required in order to prove an "as such" claim in the circumstances of this case

7.103 In the broader context of this dispute, the parties have discussed what is required to prove an "as such" claim in the circumstances of this case.

7.104 The **European Communities** has argued in the context of the complainants' GATT 1994 Article II claims in connection with flat panel display devices and set top boxes that the complainants failed to identify in sufficient detail the products or aspects in the measures at issue to establish that *all* or *some* of the products identified by the complainants are necessarily treated by the European Communities inconsistently with its concessions. The European Communities argues that the issue of a violation under Article II cannot be determined without consideration of all the relevant characteristics of the particular products at issue that may be involved in an objective classification exercise. In this sense, the European Communities contends that the complainants cannot show that a certain category of existing products is treated in a way inconsistent with the EC commitments because their arguments address an overly broad product description. Thus, in the view of the European Communities, a panel should not reach the requested findings as "it would not be clear with respect to which products the Panel found a violation". The European Communities considers the approach to be consistent with Article II of the GATT 1994 which, it argues, discusses a WTO Member's concessions with respect to a particular product.[174]

7.105 The **complainants** argue that, in order to establish a violation of Article II of the GATT 1994, their task is to demonstrate that the measures necessarily lead EC customs authorities to impose duties on one or more products subject to their commitments to provide duty-free treatment.[175] Citing what they suggest was the approach in *China – Auto Parts*, the complainants argue that they are not required to demonstrate that the measures in question result in the imposition of duties on *every* single model of flat panel display that is imported into the European Communities. Instead, they submit that *any* aspect of the criteria in the measures can lead to a violation.[176] According to the complainants,

[174] European Communities' response to Panel question No. 22.

[175] Complainants' response to Panel question No. 22. In proving an "as such" claim, the United States argues that a complainant may present evidence including the text of the relevant measure, as well as evidence of its application.

[176] Complainants' response to Panel question No. 22 (referring to Panel Report on *China - Auto Parts (US)*, para. 7.540).

the mere fact that a measure might result in the correct duty treatment for a given model of a product in some instances would not "save" the measure from a finding of violation. By demonstrating that a measure excludes from duty-free treatment any display with particular technical characteristics, the measures result in the imposition of duties on products covered by the EC's duty free tariff obligations, thereby violating Article II of the GATT 1994.

7.106 The DSU does not expressly distinguish between "as such" or "as applied" claims of violation, nor does Article 6.2 of the DSU or any other provision of the DSU set forth a particular burden of proof that applies to complainants who raise "as such" claims of violation. We note that the Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews* elaborated on the nature of an "as such" challenge, as follows:

> "By definition, an 'as such' claim challenges laws, regulations, or other instruments of a Member that have general and prospective application, asserting that a Member's conduct—not only in a particular instance that has occurred, but in future situations as well—will necessarily be inconsistent with that Member's WTO obligations. In essence, complaining parties bringing 'as such' challenges seek to prevent Members ex ante from engaging in certain conduct."[177]

7.107 Further, we note that the Appellate Body in *US – Carbon Steel* discussed the burden of proof attributable to the complaining party when bringing an "as such" claim, as follows:

> "[T]he party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations, bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion. Such evidence, will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinion of legal experts and the writings of recognized scholars."[178]

7.108 Thus, in substantiating an "as such" challenge against laws, regulations, or other instruments of a Member that have general and prospective application, a complainant may adduce evidence in the form of the text of the relevant legislation or legal text, and may also submit evidence of the application of such legislation.

7.109 In the present dispute, the complainants have identified a series of generally applicable EC measures pertaining to the tariff classification of products (including certain CN codes, classification regulations and CNENs). Further, in certain cases, the complainants have also presented individual classification decisions by customs authorities as evidence of the application of the measures at issue.[179]

7.110 The European Communities asserts that due to an "overly broad" product description used by the complainants and reference to certain criteria in the measures at issue, the complainants cannot show that a "category of actually existing products" is indeed treated inconsistently with the European Communities' concessions at issue in this dispute.[180] In the European Communities' view, only by

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[177] Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 172.

[178] Appellate Body Report on *US – Carbon Steel*, para. 157 (emphasis added); see also Panel Report on *Mexico – Rice*, para. 6.26.

[179] Complainants' response to Panel question No. 120.

[180] European Communities' response to Panel question No. 22.

knowing the "product model" or "category" therein would it be possible to examine the objective characteristics of that product and determine the applicable tariff treatment.[181]

7.111 We consider that the points made by the European Communities raise two questions in particular: first, is it sufficient to focus on aspects of, or particular criteria within, a broader measure in order to establish an "as such" breach? Second, is it necessary to identify specific product models or categories of products in order to establish an "as such" breach, or is it sufficient to identify products that share a particular characteristic?

7.112 In our view, precisely what is required to establish an "as such" breach will vary from case to case depending on the particular circumstances of the case, including the nature of the measures and obligations at issue. We note that, in general terms, the complainants assert that the measures at issue in this case are designed to specify the characteristics that a product must have in order to fall within a certain duty-free tariff heading, as well as identifying certain characteristics that will disqualify a product from falling within that tariff heading. During the course of these proceedings, the complainants have focused on particular aspects of the measures at issue that, in their view, exclude products with certain characteristics from falling within duty-free tariff headings.

7.113 In this regard, we do not understand the complainants to be arguing that *all* products that have the particular characteristic identified must necessarily receive duty-free treatment. Rather, we understand the complainants to be arguing that the exclusion from duty-free treatment of all products with a certain characteristic, will necessarily result in the application of duties to some products that fall within the EC duty-free commitments. Thus, in order to assess this claim it will be necessary for us to consider whether, as claimed by the complainants, the challenged measures do indeed operate to *automatically* exclude from duty-free treatment products with certain characteristics. Moreover, it is only in the light of the scope of these concessions that the consistency of the measures at issue can be assessed. Specifically, the issue before us is whether the scope of the EC duty-free concessions include some products with characteristics that, by virtue of the EC measures, are excluded from duty-free treatment. If the obligations do include such products, and if the effect of the EC measures is necessarily to deny such products duty-free treatment, then we would consider that an "as such" breach of the EC commitments will have been established.

7.114 In light of the nature of the claims before us, we do not agree with the European Communities that in the present case it is necessary to examine *all* aspects of the measures at issue, or *all* characteristics of a particular product, in order to establish an "as such" breach. Indeed, the essence of the complainants' case, as we understand it, is that the EC measures at issue do not operate in such a manner as to permit such a holistic examination of a product in light of the entirety of its objective characteristics. Rather, we understand the complainants' claim to be that aspects of the measures operate to exclude from particular duty-free tariff headings all products with a certain characteristic irrespective of the other objective characteristics they may possess. Indeed, it is this automatic exclusion of products with certain characteristics that appears to lie at the heart of the claims against the European Communities in the current case. Of course, the complainants' characterisation of the measures will need to be examined in the course of our analysis.

7.115 We note that the Panel in *China – Auto Parts*, referred to by the parties in this dispute, followed a similar approach. As the United States points out[182], that panel explained that "the scope of [its] review in respect of the complainants' claim against China's measures, in particular the essential character determination, under Articles II:1(a) and (b) of the GATT 1994 is limited to a very narrow

[181] See, e.g., European Communities' second written submission, para. 66.
[182] United States' second written submission, fn. 20.

question of whether any aspect of the criteria set out in the measures will necessarily lead to a violation of China's obligations under its Schedule and consequently Articles II:1(a) and (b) of the GATT 1994".[183]

7.116 We also do not accept the European Communities' assertion that particular product models or categories must always be identified in classification cases involving Article II of the GATT 1994. The key issue in this case under Article II is whether certain products that are entitled duty-free treatment under the EC Schedule indeed receive such treatment. If the complainants are able to establish that the measures operate in such a way as to necessarily deny duty-free treatment, then we consider that a breach of Article II has been established. More specifically, in the circumstances of this case, if we were to determine that some products fall within the scope of duty-free concessions in the EC Schedule, then if the challenged measures provide for the application of duties to those products covered by the concession, this would be sufficient to find a breach of Article II. The European Communities also suggests that a ruling on this basis "would not be clear with respect to which products the Panel found a violation." While the particular findings we will make in this case will only be considered after a full examination of the issues before us, we would observe that findings generally focus on measures rather than products. While the obligation under Article II refers to the tariff treatment of products, such treatment results from the effect of certain measures. This means that, in the event that a violation is found, it is the measures at issue that must be brought into conformity. In light of this, we consider that a finding that focuses on certain aspects of the measures at issue would constitute a result that is sufficiently clear.

7.117 In light of the arguments and evidence presented by the complainants throughout the proceedings, we will thus consider whether certain aspects of the measures operate to exclude from particular duty-free tariff headings all products with the identified characteristic(s), irrespective of the other objective characteristics they may possess. To the extent that products with certain characteristics identified by the complainants are automatically excluded, we would not consider it necessary to undertake an examination of all aspects of the measures or all aspects of a particular product.

E. FLAT PANEL DISPLAY DEVICES (FPDS)

7.118 In this section of the Reports, the Panel will consider the **complainants'** claims that certain EC measures are inconsistent with Articles II:1(a) and II:1(b) of the GATT 1994 because they result in less favourable tariff treatment to imports of certain flat panel display devices than that provided for these products under the EC Schedule, and because the tariff treatment provided is in excess of that provided for in the EC Schedule. In the joint Panel request, the complainants indicate that the identified measures at issue cover "certain flat panel displays using LCD technology that are 'capable of reproducing video images from a source other than an automatic data-processing machine'", as well as "flat panel displays with certain attributes, including digital visual interface (DVI)". [184]

7.119 The complainants argue, in their Joint Panel Request, that pursuant to commitments made in the ITA, the European Communities is obliged to provide duty-free treatment to flat panel display devices. In particular, the complainants allege that certain flat panel display devices are covered by

[183] Panel Report on *China - Auto Parts*, para. 7.540 (emphasis added). That panel concluded that "Article 21(2) of Decree 125 has an element that would necessarily lead to a result that 'a chassis fitted with engines' within the scope of tariff heading 87.06 is classified as a complete motor vehicle and consequently assessing them at the tariff rate applicable to a motor vehicle inconsistently with China's concessions contained in the tariff headings of China's Schedule". See Panel Report on *China - Auto Parts*, para. 7.588.

[184] Joint Panel request, WT/DS375/8, 376/8, DS377/6, p. 3.

the duty-free concession set forth in the narrative description "Flat panel display devices (including LCD, Electro Luminescence, Plasma, Vacuum-Fluorescence and other technologies) for products falling within this agreement, and parts thereof", located in the Annex to the EC Schedule, regardless of which tariff line the products are classified under in the EC combined nomenclature.[185] Second, the complainants allege that certain flat panel display devices are covered by the duty-free concession as "[i]nput or output units...Other" in tariff item number 8471 60 90 in the EC Schedule. According to the complainants, despite these duty-free concessions, the challenged measures require that particular flat panel display devices which have a DVI connector, or are capable of reproducing video images from a source other than an automatic data-processing machine, be classified under tariff item number 8528 59 10 or 8528 59 90, which carry a 14 per cent *ad valorem* duty. The application of this 14 per cent duty on imports that they consider should be granted duty-free treatment is the essence of the complainants' claim. The complainants reject that the suspension of the collection of duties on specific flat panel displays pursuant to what they allege to be a temporary measure, resolves the matter.[186]

7.120 The **European Communities** submits that the products referred to by the complainants are new "multifunctional" products for which there is no "specific heading". Thus, these monitors had to be classified on a case-by-case basis, considering their "specific characteristics.[187] Consequently, the European Communities rejects the complainants' Article II claims. To the extent the Panel considers that a product were in an individual case to be treated as duty-free, the European Communities argues that the chance of a breach of Article II would be unlikely, because the European Communities suspends the application of duties which, it argues, reduces the likelihood that customs duties have been "unduly levied".[188]

7.121 The task before the Panel, therefore, is to determine: (a) the scope of duty-free treatment in the EC Schedule; (b) whether the products identified by the complainants fall within the scope of the duty-free tariff concession; (c) whether the challenged measures result in the imposition of duties on the products at issue in excess of those provided for in the EC Schedule; and (d) whether the measures at issue result in less favourable treatment of the products at issue than that provided for in the EC Schedule.

7.122 In light of the approach we have outlined above, we will first identify the measures and products at issue. This is particularly important as the European Communities argues that the complainants have failed to sufficiently identify what products should receive duty-free treatment in order to demonstrate a violation of WTO commitments based on the measures at issue.[189]

1. Preliminary Issues

7.123 During these proceedings, the European Communities has raised various issues with respect to the complainants' claims.[190] The European Communities has argued that one of the challenged

[185] Regarding the complainants' views on the location of the concession, see paras. 7.219 - 7.226 below.
[186] Joint Panel request, WT/DS375/8, 376/8, DS377/6, pp. 2-3.
[187] European Communities' first written submission, para. 92.
[188] European Communities' first written submission, paras. 94, 62-63, 169; European Communities' response to Panel question No. 23.
[189] European Communities' first written submission, para. 32.
[190] We note that the European Communities has not alleged particular violations of Article 6.2 of the DSU or the Panel's terms of reference, but instead alleges that the complainants have failed to make a "prima facie" case. See European Communities' first written submission, para. 32. Nevertheless, the Panel considers it appropriate to address issues raised by the European Communities, as well as additional issues that go to the Panel's terms of reference at the outset. These issues are enumerated in paragraph 7.123 of these Reports.

measures was not legally binding under EC law. In addition, the European Communities has argued that several measures are no longer applicable in practice and are therefore irrelevant to the Panel's analysis. Otherwise, the European Communities considers that the complainants' failed to identify the product or products at issue or aspects of the measures at issue in sufficient detail for the European Communities to defend itself and for the Panel to rule on the matter. Finally, the European Communities has asserted that the complainants failed to identify "with the necessary clarity" the obligation of which the European Communities is allegedly in breach.

7.124 In addition, there is a question of whether the complainants' reference to any amendments or extensions and any related implementing measures was sufficient to bring within the Panel's terms of reference the continuation of a duty suspension on imports of particular flat panel display devices, and versions of the CN adopted by the European Communities subsequent to the consultations request and establishment of this Panel.

7.125 The Panel will address each of these issues in turn. We note that the Appellate Body has explained that together the identification of the specific measures at issue and the legal basis of the complainants comprise the "matter referred to the DSB" which forms the basis for a panel's terms of reference under Article 7.1 of the DSU.[191]

7.126 One of the essential purposes of the terms of reference is to establish the jurisdiction of the panel by defining the precise claims at issue in the dispute.[192] The Appellate Body has also observed that the vesting of jurisdiction in a panel is a fundamental prerequisite for lawful panel proceedings.[193] Therefore, we must address these issues before we can proceed to address the substance of the complainants' claims.

7.127 As the joint Panel request serves as the basis for the terms of reference of this Panel[194], we will start our analysis by first setting forth the relevant text of the joint Panel request.

(a) The measures at issue specifically identified in the Panel request

7.128 In their joint Panel request[195], the **complainants** identified the relevant EC measures at issue as follows:

> "Customs authorities of EC member States impose duties on flat panel displays. The measures at issue through which they do so include:
>
> 1. Council Regulation (EC) No. 493/2005 of 16 March 2005;

[191] Appellate Body Report on *Guatemala – Cement I*, paras. 69-76.
[192] Appellate Body Report on *Brazil – Desiccated Coconut*, DSR 1997: I, p. 186.
[193] Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36.
[194] We recall, as set forth in para. 1.6 above, the Dispute Settlement Body (DSB) established a panel in the present dispute in accordance with Article 6 of the DSU with the following terms of reference:

> "To examine, in the light of the relevant provisions in the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the United States, Japan and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu in document WT/DS375/8, WT/DS376/8 and WT/DS377/6, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

See also Constitution of the Panel Established at the Request of the United States, Japan, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, WT/DS375/9, 376/9, DS377/7, p. 1.
[195] See para. 2.2 above.

2. Commission Regulation (EC) No. 634/2005 of 26 April 2005;

3. Commission Regulation (EC) No. 2171/2005 of 23 December 2005;

4. Council Regulation (EEC) No. 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, including all annexes thereto, as amended;[4] and

5. Explanatory Notes to the Combined Nomenclature of the European Communities, 2008/C 133/01 (May 30 2008), alone or in combination with Council Regulation (EEC) No. 2658/87 of 23 July 1987,

as well as any amendments or extensions and any related or implementing measures.[5]

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[4] Including amendments adopted pursuant to Commission Regulation No. 1214/2007 of 20 September 2007

[5] Including the actual application by customs authorities of EC member States of a 14% customs duty on imports of certain flat panel displays."[196]

7.129 The European Communities has not contested the complainants' specific identification of the measures in its joint Panel request.

(b) Are versions of the CN adopted by the European Communities subsequent to the consultations request and establishment of this Panel within the Panel's terms of reference?

7.130 We note that the complainants' joint Panel request refers to the Council Regulation No. 2658/87, as amended, as one of the measures at issue in this dispute.[197] Footnote 4 of the joint Panel request notes that the Council Regulation includes amendments adopted pursuant to Commission regulation No. 1214/2007, which contains the CN2008[198]. In addition, the complainants identified as part of the measure at issue "any amendments or extensions and any related or implementing measures".[199]

7.131 Pursuant to Article 12 of Council Regulation No. 2658/87, the Commission adopts each year by means of a regulation a complete updated version of the CN[200] together with the corresponding rates of duty of the CCT, as an amendment to Annex I of Council Regulation No. 2658/87.

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[196] Joint Panel request, WT/DS375/8, 376/8, DS377/6, p. 2.
[197] Joint Panel request, WT/DS375/8, 376/8, DS377/6, p. 2.
[198] Commission Regulation No. 1214/2007, Article 1 (Exhibit JPN-3).
[199] Joint Panel request, WT/DS375/8, 376/8, DS377/6, p. 2.
[200] As discussed in paragraphs 7.39-7.45 above, the European Communities established a goods nomenclature, known as the Combined Nomenclature, or CN, which contains HS nomenclature and subheadings, as well as preliminary provisions, additional section or chapter notes and footnotes relating to CN headings.

7.132 Since the complainants filed their joint Panel request on 19 August 2008, the CN has been updated twice: the CN2009 was published in Commission Regulation No. 1031/2008 of 19 September 2008[201], and the current CN2010 was published in Commission Regulation No. 948/2009 of 30 September 2009.

7.133 The question arises whether versions of the CN – such as the CN2009 and CN2010 – which were promulgated subsequent to the panel request may be considered by the Panel. We note that the complainants and the European Communities indicated that they considered the CN2009 version to be the relevant measure at issue.[202] The United States and Chinese Taipei submit that Council Regulation No. 2658/87 is regularly amended to include subsequent amendments, and thus, the relevant measure should be the most recent update. The United States, in particular, submits that Council Regulation No. 2658/87 is regularly amended and reissued without substantive modification.[203]

7.134 We recall that the Appellate Body has held that "panels cannot simply ignore issues which go to the root of their jurisdiction – that is, to their authority to deal with and dispose of matters. Rather, panels must deal with such issues – if necessary, on their own motion – in order to satisfy themselves that they have authority to proceed."[204]

7.135 It is well settled that the identification of the specific measures at issue and the provision of a brief summary of the legal basis of the complaint in the panel request comprise the "matter referred to the DSB", which forms the basis for a panel's terms of reference under Article 7.1 of the DSU.[205] Therefore, to satisfy ourselves whether we have the authority to proceed to make findings on the version of the CN currently in force, we must examine whether that version is included within our terms of reference because it was identified as a specific measure at issue in the joint Panel request.

7.136 The Appellate Body has explained that, pursuant to Article 6.2 of the DSU, a panel request must be "sufficiently precise"[206] in the identification of the measures at issue such that what is referred to adjudication by a panel may be discerned from the panel request.[207]

7.137 Regarding amendments to measures, the Appellate Body in *Chile – Price Band System* stated that:

> "[T]he demands of due process are such that a complaining party should not have to adjust its pleadings throughout dispute settlement proceedings in order to deal with a disputed measure as a 'moving target'. If the terms of reference in a dispute are broad enough to include amendments to a measure – . . . – and if it is necessary to consider an amendment in order to secure a positive solution to the dispute – . . . – then it is

[201] Exhibits US-11; JPN-20; TPKM-21.
[202] Parties' responses to Panel question No. 65.
[203] United States' and Chinese Taipei's responses to Panel question No. 65.
[204] Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 36 and 53.
[205] Appellate Body Report on *US – Zeroing (21.5 - Japan)*, para. 107; Appellate Body Report on *Guatemala – Cement I*, para. 72; Appellate Body Report on *US – Carbon Steel*, para. 125; and Appellate Body Report on *US – Continued Zeroing*, para. 160.
[206] Appellate Body Report on *US – Zeroing (21.5 - Japan)*, para. 108; Appellate Body Report on *US - Continued Zeroing*, para. 161; Appellate Body Report on *US – Carbon Steel*, para. 126; Appellate Body Report on *EC – Bananas III*, para. 142.
[207] Appellate Body Report on *US – Continued Zeroing*, para. 168.

> appropriate to consider the measure as amended in coming to a decision in a dispute."[208]

7.138 The Appellate Body examined in that case the relationship between the original measure and the subsequent amendment to that measure, and determined that the law in question "amend[ed]" Chile's price band system "without *changing its essence*".[209]

7.139 In light of the Appellate Body's earlier enunciations in its reports on *Chile – Price Band System* and *EC – Chicken Cuts*, we understand that a panel's terms of reference may be considered to include "amendments" to measures that are listed in the panel request as long as the terms of reference are broad enough, and second, the new measure does not "change the essence" of the original measures included in the request or have legal implications overly different from those of the original measures. Moreover, it may be relevant to consider whether the inclusion of any amendments within a panel's terms of reference is necessary to secure a positive solution to the dispute. We consider the approach set forth above to be relevant to the issue before us.

> Whether the Panel's terms of reference are broad enough to include subsequent amendments to the CN

7.140 We note that the complainants incorporated the phrase "any amendments or extensions and any related or implementing measures" into their joint Panel request. We recall that the complainants, in the joint Panel request, identified as the specific measure at issue Council Regulation No. 2658/87, "*as amended*" (emphasis added). While we do not consider that the mere incantation of the phrase "any amendments or extensions and any related or implementing measures" in a panel request will permit Members to bring in measures that were clearly not contemplated in the Panel request, it may be used to refer to measures not yet in force or concluded on the date of the panel request, or measures that the complainants were not yet aware of, such as government procedures not yet published that have the same essential effect as the measures that were specifically identified. This is to prevent the possibility that the procedural requirements of WTO dispute settlement result in a situation where measures could completely evade review.[210] This is especially true with the type of measures we have before us, which are amended annually.[211]

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[208] Appellate Body Report on *Chile – Price Band System*, para. 144.

[209] Appellate Body Report on *Chile – Price Band System*, para. 139 (emphasis original). The Appellate Body in *EC – Chicken Cuts* considered the relevance of its earlier findings in its report in *Chile - Price Band System*, in particular the notion of changing the *essence* of the original measure. In considering two measures that had been enacted subsequent to the panel request, the Appellate Body in *EC - Chicken Cuts* noted that the two measures made no reference to the initial measures in that request, and the initial measures continued to be in effect. For these reasons, and having determined that the subsequent measures had legal implications different from those of the two original measures, the Appellate Body concluded that the measures were not, in essence, the same and could not be considered "amendments" as were the measures at issue in *Chile –Price Band System*. The Appellate Body additionally concluded that failure to consider the two subsequent measures in the Panel's terms of reference "would not hinder a positive resolution of this dispute" (Appellate Body Report on *EC – Chicken Cuts*, paras. 155-162).

[210] Appellate Body Report on *Chile – Price Band System*, paras. 139 (also para. 7.175 below) and 144.

[211] Appellate Body Report on *US – Zeroing (21.5 - Japan)*, para. 116. In that dispute, the Appellate Body concluded that a periodic review could be identified for purposes of Article 6.2 of the DSU through the use of the phrase "subsequent closely connected measures". The Appellate Body explained that the phrase "subsequent closely connected measures" in the complainant's panel request was sufficiently precise to identify the review in question, which "formed part of a continuum of events" (Appellate Body Report on *US - Zeroing (21.5 - Japan)*, para. 116).

7.141 As noted above, pursuant to Article 12 of this Council Regulation No. 2658/87, Annex I, which contains the CN, is updated annually and the latest version supersedes the prior one. In our view, the Panel's terms of reference are broad enough to include subsequent amendments to the CN. The complainants' reference to Council Regulation No 2658/87 "as amended" and their use of the phrase "any amendments or extensions and any related or implementing measures" in the Panel request are sufficiently broad to account for the possibility of amendments or extensions of the CN.[212] We will therefore consider whether subsequent amendments change the essence of the preceding version of Council Regulation No. 2658/87 which was identified in the joint Panel request.

Whether subsequent amendments to Council Regulation No. 2658/87 change the essence of the version of that was identified by the complainants

7.142 We note that subsequent amendments to the Council Regulation No. 2658/87 strictly prolong its period of application without modifying any of the terms or headings at issue in this dispute. Accordingly, we conclude that subsequent amendments, including the 2008- 2010 versions, do not change the essence of the version of the CN (2007) set forth in Council Regulation No. 2658/87 that was identified by the complainants. Therefore, we find that the subsequent amendments do not change the essence of the version of Council Regulation No. 2658/87 which was identified in the joint Panel request.

7.143 Finally, we will consider the implications of these measures for the ultimate resolution of the matter before us.

Whether the inclusion of any amendments within a panel's terms of reference is necessary to secure a positive solution to the dispute

7.144 We recall that the complainants have requested the Panel to determine whether their commerce has been accorded treatment less favourable than that provided in the EC Schedules, inconsistently with the obligations of the EC and its member States under Article II of the GATT 1994. The complainants argue that the European Communities fails to accord tariff treatment that is no less favourable than that provided for in its Schedule.[213]

7.145 As noted above, subsequent amendments to Council Regulation No. 2658/87 (set forth in the Annex) maintain the same terms and headings as the measure identified by the complainants in their joint Panel request. Therefore, we consider that a ruling that takes into consideration Council Regulation No. 2658/87, as amended, which includes in Annex I the currently applicable CN[214], would aid in the settlement of the dispute.

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[212] In this respect, we recall, for example in *Chile – Price Band System*, the panel request referred to "Law 18.525, as amended by Law 18.591 and subsequently by Law 19.546, as well as regulations and complementary provisions and/or amendments". The Appellate Body considered that language to reflect a "broad scope of the Panel request in order to include a subsequent amendment within the Panel's terms of reference". Appellate Body Report on *Chile – Price Band System*, para. 135.

[213] Joint Panel request, WT/DS375/8, 376/8, DS377/6, p. 3.

[214] We note that the complainants have presented the CN2009 as Exhibits US-11; JPN-20; TPKM-21. The Panel does not have in the record the CN2010. We understand however that there has been no change to the relevant CN codes in the latest version of the CN.

Conclusions

7.146 For the foregoing reasons, we conclude that Council Regulation No. 2658/87, as amended, which includes in Annex I the currently applicable CN, is the specific measure at issue in this dispute and was properly identified as such in the joint Panel request.

(c) Is CNEN 2008/C 133/01 a measure that can be subject to WTO dispute settlement?

(i) Arguments of the parties

7.147 The **European Communities** argues that CNEN 2008/C 133/01[215] is not "legally binding" in the European Communities' legal order and cannot alter the scope of the CN.[216] In its view, CNENs, like HSENs, "are an important aid for interpreting the scope of the various tariff headings but do not have legally binding force …"[217]. The European Communities argues that CNENs are not "like a regulation", but "reflect a Commission's view on how the CN should be interpreted and applied with respect to a certain product or a category of product at issue".[218] In this respect, it argues that there is no mandatory language in the CNENs that precludes the exercise of discretion in relation to a monitor identified with all of its relevant objective characteristics.[219] To what extent CNENs can create expectations among the public and private actors, the European Communities argues, will depend on the formulation of each relevant CNEN including the "clarity of the Note or parts thereof" and "whether the content of the Note is in accordance with the wording of the relevant subheading and the general interpretative rules and Section and Chapter Notes that are applicable for its interpretation".[220] The European Communities explains that the EC member States, when classifying imported goods, have to base their classification on the CN and the interpretative rules therein (GIR 1-6) and not on the CNENs. The European Communities submits that if some EC member States refer to a CNEN, "it is merely to inform the economic operator that with respect to its product, the Commission has already conducted the interpretative exercise and taken a non-binding view that the CN should be interpreted in a particular way".[221] The European Communities further explains that the CNENs only

[215] Throughout these Reports we will use the abbreviation "CNENs" to indicate Explanatory Notes to the Combined Nomenclature in general, as a group. The abbreviation "CNEN" will be used with reference to a particular Explanatory Note to the Combined Nomenclature.

[216] European Communities' first written submission, paras. 312-314; European Communities' second written submission, para. 55 (referring to European Court of Justice (Kamino), paras. 47-49 (Exhibit TPKM-52)); European Communities' second oral statement, paras. 27-34.

[217] European Communities' second written submission, para. 55; European Communities' second oral statement paras 29-30 (referring to European Court of Justice (Kamino), para. 47 (Exhibit TPKM-52)).

[218] European Communities' response to Panel question No. 23; European Communities' response to Panel question No. 91.

[219] European Communities' first written submission, paras. 66 - 69; European Communities' second written submission, para. 55; European Communities' second oral statement paras. 29-35; European Communities' response to Panel question No. 122. It argues that, simply because "a given sentence" in the CNEN appears to be written with language that sounds mandatory does not mean that a mandatory rule exists in the EC legal order (European Communities' second oral statement, para 35).

[220] European Communities' response to Panel question No. 121.

[221] European Communities' first written submission, para. 315; European Communities' second written submission, para. 55. In its response to Panel question No. 91, the European Communities further clarified that "with some simplification, the flexibility which the Panel asks about can be described as a flexibility to take a view different from that expressed by a non-binding opinion on the interpretation of a binding legislation, with the caveat that the authority expressing the non-binding opinion can try to convince the Member State that it is right before the court.". The European Communities also mentioned that it cannot be excluded that national customs authorities would classify a given product differently from the CNEN but that "[i]n such a case,

come into play at the eight-digit level of the CN[222], and that "the CNEN serves to confirm the classification made on the basis of the CN, but it is not itself the legal reason and basis for that classification".[223] To the extent a conflict arises between the terms of the CNEN and relevant headings in the CN, the European Communities argues that the CNEN is inapplicable and customs officials are obliged not to apply it.[224]

7.148 Notwithstanding its views on the legal value of CNENs, the European Communities argues that it is in the process of amending the relevant parts of the CNENs to be completed in September 2009.[225]

7.149 The **complainants** argue that CNENs set forth rules and norms that are intended to have general and prospective application, that have legal effect and ensure uniformity of administration of the CN. Moreover, they argue that CNENs provide administrative guidance and create expectations among the public and among private actors that they will be applied.[226]

7.150 **Chinese Taipei** argues that despite the repeated claims of the European Communities that CNENs are not legally binding, an examination of their legal status confirms that they are "in fact" legally binding.[227] As the United States and Chinese Taipei note, just because CNENs cannot alter the scope of the CN itself does not mean that EC customs authorities would be free to disregard them.[228] First, a BTI will cease to exist when contrary to a CNEN.[229] Second, certain statements of the Chair of the Customs Code Committee prove that EC customs authorities must follow CNENs.[230] Third, EC member States that deviate from the content of a CNEN, and collect less import duties as a result thereof, are considered liable and the Commission has the option of instituting infringement proceedings against such EC member States.[231] Fourth, since CNENs are "tools for ensuring a uniform classification practice within the EC", they would not be able to ensure such uniformity if EC

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however, there is a range of tools available to unify the classification" (European Communities' response to Panel question No. 23).

[222] See, e.g., European Communities' response to Panel question No. 83 (explaining the classification exercise for set top boxes, and the use of the CNEN).

[223] European Communities' second oral statement, para. 53 (cross-referencing with the European Communities' response to Panel question No. 83).

[224] European Communities' first written submission, para. 98; European Communities' second oral statement, paras. 38-43; European Communities' response to Panel question No. 122.

[225] European Communities' response to Panel questions Nos. 60 and 110. The European Communities submits that draft changes to CNEN 2008/C 133/01 have already been prepared by the services of the Commission and has been the subject of the necessary inter-service consultations, although the specific content has not been revealed.

[226] Complainants' responses to Panel question No. 121.

[227] Chinese Taipei's second written submission, para. 132.

[228] The United States makes a similar point (see United States' second written submission, para. 35).

[229] United States' second written submission, para. 35; Japan and Chinese Taipei's responses to Panel question No. 121. Japan argues that, like a regulation, a CNEN can result in the reclassification of products into a different tariff line in the CN, and the application of a different duty rate.

[230] In particular, the United States and Chinese Taipei referred to the statements of the Chairman of the Customs Code Committee during the 413th, the 432nd and the 433rd meetings: see paras.7.999-7.1008 below.

[231] Chinese Taipei's response to Panel question No. 121 (in particular, referring to the Customs Code Committee's document on the *Nature and Legal Value of Guidelines*, 5.4.2006 (Exhibit TPKM-85, para. 13) which explains that the Commission can initiate infringement proceedings against an administration for breach of Article 10 of the EC Treaty, according to which the Member States must facilitate the achievement of the Community's tasks and abstain from any measure which could jeopardise the attainment of the objectives of the EC Treaty).

member States were free to decide whether to apply them or not.[232] Further, the complainants submit that CNENs are explicitly referenced in legislation implementing the EC domestic nomenclature, and have been recognised by the Court of Justice as an important aid to the interpretation of Community customs law.[233] Moreover, it notes that CNENs may be cited before the Commission or national courts.[234]

7.151 **Japan** and Chinese Taipei argue that CNENs bind officials implementing EC customs tariffs in member States to ensure that they are administered in a uniform manner within the EC customs territory.[235] Chinese Taipei argues that CNENs will not have legal effect only if the Commission expressly amends the CNENs or the European Court of Justice declares the CNEN contrary to the wording of the heading or Chapter or Section Notes.[236]

7.152 The **United States** argues that the European Communities has not offered evidence that the content of the CNENs has changed as a result of rulings before the European Court of Justice or for other reasons.[237] The United States submits that evidence of applications of CNEN by EC customs authorities demonstrated they are binding.[238] The United States further argues that the European Communities has relied on CNENs to assert that it has complied with DSB recommendations and rulings regarding uniformity of administration.[239]

(ii) Consideration by the Panel

7.153 The Panel acknowledges statements by the European Court of Justice that CNENs "are an important aid for interpreting the scope of the various tariff headings but do not have legally binding force...".[240] The European Communities also argues that EC member States may depart from the CNEN where they consider that it conflicts with the CN itself. In other words, the CNENs cannot amend or alter the CN. The argument by the European Communities appears to be that because CNENs are not "binding" or "mandatory", and because EC Member States have "discretion" not to apply them, the CNENs cannot form the basis of an "as such" breach of the European Communities' obligations.

7.154 As an initial point, the Panel does not understand the European Communities to argue that CNENs are not challengeable under WTO dispute settlement. That is, we do not understand the European Communities to contest that CNENs are "acts…attributable to a Member". In our view, the issue is rather whether they can be challenged on an "as such" basis. In this regard, the Panel recalls that "an 'as such' claim challenges laws, regulations, or other instruments of a Member that have general and prospective application, asserting that a Member's conduct — not only in a particular

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[232] Chinese Taipei's second written submission, paras. 61-70 (adding that such "infringement proceedings" would be based on Article 10 of the EC Treaty); and paras. 132 and 261-268.

[233] Complainants' responses to Panel question No. 121.

[234] Chinese Taipei's response to Panel question No. 121.

[235] Japan and Chinese Taipei's responses to Panel question No. 121.

[236] Chinese Taipei's second written submission, paras. 132-134.

[237] See, for instance, United States' second written submission, paras. 73-76; United States' response to Panel question No. 110.

[238] United States' first written submission, para. 127; United States' second written submission, paras. 69, 72; United States' comment on European Communities' response to Panel questions Nos. 121-122.

[239] United States' response to Panel question No. 18; United States' second written submission, para. 35, fn. 65; United States' response to Panel question No. 121.

[240] European Communities' second written submission, para. 55 (referring to European Court of Justice (Kamino), paras. 47-49 (Exhibit TPKM-52), European Court of Justice (DFDS BV), para. 28 (Exhibits US-16; TPKM-37); European Court of Justice (Clees), para. 12 (Exhibits EC-57; US-17)).

instance that has occurred, but in future situations as well — will necessarily be inconsistent with that Member's WTO obligations."[241] It flows from this that, in general, measures challenged "as such" should have general and prospective application, and "necessarily" result in a breach of WTO obligations. The Panel is mindful in this regard of the so-called mandatory/discretionary distinction applied in a number of GATT cases prior to the establishment of the WTO, and in several cases since. We are also mindful that the Appellate Body has cautioned against the mechanistic application of such a distinction.[242] We also recall the following statement by the Appellate Body with respect to the Sunset Policy Bulletin (SPB) of the United States, at issue in *US - Oil Country Tubular Goods Sunset Reviews*:

> "The United States has explained that, within the domestic legal system of the United States, the SPB does not bind the USDOC and that the USDOC 'is entirely free to depart from [the] SPB at any time'. However, it is not for us to opine on matters of United States domestic law. Our mandate is confined to clarifying the provisions of the WTO Agreement and to determining whether the challenged measures are consistent with those provisions. As noted by the United States, in *US - Corrosion-Resistant Steel Sunset Review*, the Appellate Body indicated that 'acts setting forth rules or norms that are intended to have general and prospective application' are measures subject to WTO dispute settlement. We disagree with the United States' application of these criteria to the SPB. In our view, the SPB has normative value, as it provides administrative guidance and creates expectations among the public and among private actors. It is intended to have general application, as it is to apply to all the sunset reviews conducted in the United States. It is also intended to have prospective application, as it is intended to apply to sunset reviews taking place after its issuance. Thus, we confirm - once again - that the SPB, as such, is subject to WTO dispute settlement."[243]

7.155 With this in mind, we move to consider the European Communities' argument that CNENs, by their nature, are not binding or mandatory and therefore cannot breach the obligations at issue "as such".

7.156 Before turning directly to this question, the Panel finds it useful to recall certain features of CNENs. In this respect, we note the explanations from the European Communities that the CNENs are proposed and adopted by the Commission, following discussion amongst the Commission and the customs authorities of the 27 EC member States in the Customs Code Committee.[244] In the European Communities' own words "[CNENs] reflect a Commission's view on how the CN should be interpreted and applied with respect to a certain product or a category of product at issue".[245] In addition, the European Communities stated that CNENs "constitute an important means of ensuring the uniform application of the Common Customs Tariff by the customs authorities of the Member States", and serve as "a valid aid to the interpretation of the tariff".[246] The European Court of Justice has stated that CNEN are "an important aid in the interpretation of the CN".[247] Finally, the European

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[241] Appellate Body Report on *US - Oil Country Tubular Goods Sunset Reviews*, para. 172.

[242] Appellate Body Report on *US - Corrosion Resistant Steel Sunset Reviews*, para. 93.

[243] Appellate Body Report on *US - Oil Country Tubular Goods Sunset Reviews*, para 187 (original footnotes omitted).

[244] European Communities' first written submission, paras. 300-305.

[245] European Communities' response to Panel question No. 91.

[246] European Communities' second written submission, para. 69.

[247] European Communities' second written submission, para. 55; European Communities' second oral statement, paras. 29-30 (referring to European Court of Justice (Kamino), para. 47 (Exhibit TPKM-52)).

Communities has indicated that EC member States "decide on the classification of products in individual cases" and that "in this role", they "consult" the CNENs.[248] We note, in addition, that the complainants have submitted BTIs issued by EC member States in support of their claims under Article II of the GATT 1994, some of which identify the CNENs as a "classification justification".[249] The complainants have also argued that CNEN can have legal consequences for BTIs, such that a BTI becomes invalid where it is determined to contradict guidance set forth in a CNENs.[250] Further, they have argued that "if a Member State deviates in its classification practice from the approach taken in a CNENs, the Commission can institute infringement proceedings before the European Court of Justice against such a Member State".[251]

7.157 In line with the Appellate Body statements above, the Panel does not consider that the status of CNENs under EC domestic law is determinative. In addition, while we note the statement of the European Court of Justice that CNEN are not "legally binding", we understand this to relate, at least in part, to the fact that CNEN cannot amend or alter the CN. In the Panel's view, the legal effect of CNEN on the CN is not the primary issue before it. The issue before it is whether CNEN set forth rules or norms that are intended to have general and prospective application, and whether CNEN have normative value in providing administrative guidance, and create expectations among the public and among private actors. Stated another way, the issue is whether CNEN are "authoritative" such that "per se" requirements set out in the CNEN could validly form the basis of an "as such" claim of a breach of Article II of the GATT.

7.158 We find that CNEN do meet this standard. It is clear that CNENs are important in enabling the European Communities to maintain a uniform application of the Common Customs Tariff within its territory. Although the European Communities has noted that CNENs do not "preclude the exercise of discretion" by member State customs authorities, it is apparent that there is a clear expectation that such discretion will be exercised in a certain fashion and that infringement proceedings may apply in instances where such discretion is not so exercised. The Panel also finds it relevant that CNENs are issued by the Commission, a body with undisputed authority within the European Communities for ensuring the uniform application of the Customs Code Tariff, and with the power to challenge interpretations not consistent with its own. Indeed, according to Regulation No. 2658/87, as amended, the Commission establishes and manages the CN.[252] In addition, according to its Article 9, the Commission adopts Explanatory Notes. Moreover, the Panel notes that BTIs will cease to be valid where they are no longer compatible "at Community level" with "the explanatory notes [...] adopted for the purposes of interpreting the rules".[253]

7.159 In *US – Underwear*, the Appellate Body upheld the Panel's interpretation that an administrative order was of "general application" "to the extent that the restraint affects an unidentified number of economic operators, including domestic and foreign producers."[254] In line therewith, we consider that the CNEN amendments at issue in this dispute are of "general application" because the application of a CNEN is not limited to a single import or a single importer. Rather, they

[248] European Communities' response to Panel question No. 23.

[249] See Exhibits US-28 and TPKM-61 referring to French BTIs that expressly mention as classification justification a "Décision du Comité des douanes lors de la 420ème session des 18, 19 et 20 avril 2007".

[250] See Article 12(5)(a)ii of the CCC (Exhibits US-19; TPKM-16), which provides that BTI shall cease to be valid "where it is no longer compatible with the interpretation of one of the nomenclatures referred to in Article 20(6): at Community level, by reason of amendments to the Explanatory notes to the combined nomenclature".

[251] European Communities' response to Panel question No. 91.

[252] See Council Regulation No. 2658/87, Articles 1; 2 and 6 (Exhibits EC-49; US-13; TPKM-5).

[253] See Article 12(5)(a)ii of the CCC (Exhibits US-19; TPKM-16).

[254] Panel Report on *US - Underwear*, para. 7.65.

set forth rules or norms that are intended to have general and prospective application. The objective of the CNEN is to ensure the uniform application of the Common Customs Tariff to *all* products falling under a specific CN code upon importation into the EU. The CNEN create legitimate expectations among the public and among private actors.

7.160 We therefore conclude that CNEN 2008/C 133/01 identified by the complainants in this dispute may be challenged "as such". We consider its effects in paragraph 7.246 *et seq.* below.

(d) Are Commission Regulation Nos. 634/2005 and 2171/2005 outside the Panel's jurisdiction because they are no longer effectively applicable?

(i) Arguments of the parties

7.161 The **European Communities** argues that Commission Regulation Nos. 634/2005 and 2171/2005 provide for classification of certain LCD monitors within CN codes 8471 60 80 and 8528 21 90 as the CN codes existed at the time in light of the HS2002. However, it argues that these codes were replaced in 2007 by CN codes 8528 41 00 and 8528 59 90. Because CN codes 8471 60 80 and 8528 21 90 no longer exist, the European Communities alleges that Commission Regulation Nos. 634/2005 and 2171/2005 "have effectively lost their relevance". The European Communities states, in addition, that it is in the process of repealing or replacing them as appropriate for reasons of legal certainty.[255]

7.162 The **complainants** argue that Commission Regulation Nos. 634/2005 and 2171/2005 are both still valid and have legal effect.[256] The complainants argue that Commission Regulation Nos. 634/2005 and 2171/2005 would only cease to be valid if they were expressly revoked by the Commission or expressly annulled by the European Court of Justice. They argue that the European Communities has not provided evidence to suggest otherwise, nor has a ruling by the European Court of Justice in *Kamino* demonstrated that the measures were amended or revoked. Moreover, the **United States** and **Chinese Taipei** argue there is no implied annulment under EC Community law or annulment by analogy. The United States argues that the mere fact that the HS codes have changed does not under EC law prevent customs authorities from relying on regulations that predated the change in the codes. **Japan** argues that the measures are still valid "as part of the legal context in which the EC would presumably interpret its more recent measures ...unless and until the EC presents sufficient evidence that the older measures have been formally withdrawn". Finally, the United States and Chinese Taipei argue that Article 12(5) of the CCC provides a further basis to conclude that the classification regulations continue to have effect. They allege that this provision states that BTI will automatically cease to be valid where they conflict with a classification regulation, an explanatory note or a judgment of the European Court of Justice. As a result, absent formal annulment, revocation or amendment, traders cannot rely on conflicting BTI.[257]

(ii) Consideration by the Panel

7.163 The **Panel** is faced with two questions. First, what is the precise status of Commission Regulation Nos. 634/2005 and 2171/2005? Second, if the implementation of the CN2007 did indeed supersede and render ineffective Commission Regulations 634/2005 and 2171/2005, does this mean they can no longer be considered measures at issue in this dispute?

[255] European Communities' first written submission, para. 95; European Communities' second written submission, para. 63.
[256] Complainants' responses to Panel question No. 18.
[257] Complainants' responses to Panel question No. 18.

7.164 We understand the European Communities' argument as follows: the adoption of the CN2007 resulted in these two measures becoming "effectively inapplicable in practice".[258] Accordingly, we understand the European Communities has requested the Panel not to consider them. We first note that the European Communities does not dispute that Commission Regulation Nos. 634/2005 and 2171/2005 were operative prior to implementation to the HS/CN2007. Additionally, although the European Communities has told the Panel that it was in the process of repealing or replacing the measures, the European Communities has submitted no information to the Panel confirming whether this actually occurred.

7.165 Regardless, if the formal repeal of the measures did occur after the Panel was established and its terms of reference set, it would be within our discretion to decide how to take into account subsequent modifications or a repeal of the measures at issue.[259] In exercising that discretion, we note that past panels have ruled on repealed or expired measures if those measures still had lingering effects after the repeal[260] or if they thought such a ruling would aid in securing a positive resolution to the dispute as required by Article 3.7 of the DSU.[261] Panels have also decided to make rulings on repealed or expired measures where the respondent Member had not conceded the WTO inconsistency of the measure and the repealed measure could be easily re-imposed.[262]

7.166 We note that there is no disagreement that the complainants specifically identified Commission Regulation Nos. 634/2005 and 2171/2005 in the joint Panel request. We also note that the complainants argue that the measures continue to have lingering effect as evidenced by BTIs submitted by the complainants.[263] Additionally, the complainants continue to request a finding from the Panel on these measures and are of the belief that a finding from the Panel on the consistency of these measures with the European Communities' obligations under the GATT 1994 would aid in securing a positive resolution of this dispute. Finally, the European Communities has not argued that the envisioned repeal of these measures is because it concedes that they are inconsistent with its WTO obligations. For all the foregoing reasons, the Panel will proceed to make findings with respect to their WTO consistency.

7.167 As noted above, the European Communities indicated to the Panel that it intended to repeal the measures and that "DG TAXUD expects to be able to submit a draft to the Customs Code Committee for a vote in late September or the beginning of October [2009] at the latest"[264]; however, there is no evidence properly before the Panel as to whether that repeal actually took place. In any event, we note that any repeal would have taken place after the panel was established and its terms of reference were set.[265] Therefore, the Panel considers that it may make recommendations with respect to these measures.

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[258] See paragraph 7.161 above.

[259] Appellate Body Report on *EC – Bananas III (Article 21.5 – United States)*, para. 270.

[260] Panel Report on *US – Upland Cotton*, paras. 7.122, 7.128; upheld in Appellate Body Report on *US - Upland Cotton*, para. 274.

[261] Panel Report on *China – Publications and Audiovisual Products*, para. 7.453.

[262] Panel Report on *India – Additional Duties*, paras. 7.69-7.70.

[263] See, for instance, United States' first written submission, para. 127; United States' second written submission, paras. 69 and 72; United States' comment on European Communities' response to Panel questions Nos. 121-122.

[264] European Communities' response to Panel question No. 110; European Communities' response to Panel question No. 60.

[265] The Appellate Body has explained that it would be inappropriate for a panel to make recommendations with respect to measures that were repealed or expired prior to the establishment of the panel.

(e) Whether the Panel may consider the continuation of a duty suspension on imports of particular flat panel display devices subsequent to the consultations request and establishment of this Panel?

(i) Arguments of the parties

7.168 The **European Communities** submits that Council Regulation No. 179/2009 of 5 March 2009[266], which it submits to have replaced Council Regulation No. 493/2005, is the relevant measure for the Panel's consideration.[267]

7.169 The **United States** argues that the extension of the suspension under Council Regulation No.179/2009 should not be considered within the Panel's terms of reference because it was not "in effect" at the time the Panel was established.[268]

(ii) Consideration by the Panel

7.170 In their joint Panel request, the complainants identified Council Regulation No. 493/2005 as a measure at issue in this dispute. This measure expired on 31 December 2006, but was extended under Council Regulation No. 301/2007 until 31 December 2008. These two regulations suspended the application of duties on "monitors with a diagonal measurement of the screen of 48,5 cm or less and with an aspect ratio of 4:3 or 5:4".[269]

7.171 Council Regulation No. 179/2009 replaced Council Regulation No. 301/2007. This regulation suspends the application of duties on certain black and white or other monochrome monitors, and certain colour monitors. Council Regulation No. 179/2009 will expire on 31 December 2010.[270]

7.172 The complainants did not identify Council Regulation No. 301/2007 as a measure at issue in their joint Panel request, but they specifically referred to it in their Panel request when alleging that the EC measures fail to accord tariff treatment that is no less favourable than that provided for in the EC Schedules.[271] None of the complainants argued that Council Regulation No. 301/2007 is outside of the Panel's terms of reference. Similarly, the complainants did not identify Council Regulation No. 179/2009 as a measure, in particular, because it had not yet been promulgated at the date of the Panel request. However, the European Communities[272] as well as Chinese Taipei[273] have acknowledged Council Regulation No. 179/2009 in the context of their arguments. Chinese Taipei argues that

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Appellate Body Report on *US – Certain EC Products*, para. 81; Appellate Body Report on *US - Upland Cotton*, para. 272; and Appellate Body Report on *EC – Bananas III (Article 21.5 – Ecuador II)*, para. 271.

[266] Council Regulation No. 179/2009 (Exhibit EC-9).

[267] European Communities' first written submission, para. 94.

[268] United States' second written submission, paras. 76 and 79.

[269] Articles 1 of Council Regulation Nos. 493/2005 and 301/2007 (Exhibits TPKM-25; US-45 respectively).

[270] Council Regulation No. 179/2009, 3rd and 6th recitals and Article 1.

[271] Joint Panel request, WT/DS375/8, 376/8, DS377/6, p. 3. Chinese Taipei additionally discusses Council Regulation No. 301/2007 in paras. 214-215 of its first written submission.

[272] See, e.g., European Communities' first written submission, para. 94.

[273] Chinese Taipei's response to Panel question No. 18.

Council Regulation No. 179/2009 does not change the essence of the duty suspension.[274] The United States contests its inclusion within the Panel's terms of reference.[275]

7.173 We recall that the complainants referred to "any amendments or extensions and any related or implementing measures", in addition to identifying Council Regulation No. 493/2005, when discussing the measures at issue.[276]

7.174 We note that the European Communities has not contested the inclusion or reference of Council Regulation No. 493/2005. As mentioned, the European Communities has itself discussed the relevance of Council Regulation No. 179/2009.

7.175 Regarding amendments to measures, discussed in the context of the Panel's terms of reference, the Panel recalls the following statement by the Appellate Body in *Chile – Price Band System*, also cited in paragraph 7.137 above:

> "[T]he demands of due process are such that a complaining party should not have to adjust its pleadings throughout dispute settlement proceedings in order to deal with a disputed measure as a 'moving target'. If the terms of reference in a dispute are broad enough to include amendments to a measure – . . . – and if it is necessary to consider an amendment in order to secure a positive solution to the dispute – as it is here – then it is appropriate to consider the measure as amended in coming to a decision in a dispute."[277]

7.176 As we noted above, the Appellate Body examined in that case the relationship between the original measure and the subsequent amendment to that measure, and determined that the law in question "amend[ed]" Chile's price band system "without *changing its essence*".[278]

7.177 In light of the Appellate Body's earlier statements, we recognized that a panel's terms of reference may be considered to include "amendments" to measures that are listed in the panel request as long as the terms of reference are broad enough, and the new measure does not "change the essence" of the original measures included in the request. Moreover, we noted, it may be relevant to consider whether the inclusion of any amendments within a panel's terms of reference is necessary to secure a positive solution to the dispute. The Panel will consider here whether it may properly consider amendments to the duty suspension.

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[274] Chinese Taipei's response to Panel question No. 18.
[275] United States' second written submission, paras. 76 and 79.
[276] See para. 7.128 above.
[277] Appellate Body Report on *Chile – Price Band System*, para. 144.
[278] Appellate Body Report on *Chile – Price Band System*, para. 139 (emphasis original). The Appellate Body in *EC – Chicken Cuts* considered the relevance of its earlier findings in its report in *Chile - Price Band System*, in particular the notion of changing the *essence* of the original measure. In considering two measures that had been enacted subsequent to the panel request, the Appellate Body in *EC - Chicken Cuts* noted that the two measures made no reference to the initial measures in that request, and the initial measures continued to be in effect. For these reasons, and having determined that the subsequent measures had legal implications different from those of the two original measures, the Appellate Body concluded that the measures were not, in essence, the same and could not be considered "amendments" as were the measures at issue in *Chile –Price Band System*. The Appellate Body additionally concluded that failure to consider the two subsequent measures in the Panel's terms of reference "would not hinder a positive resolution of this dispute" (Appellate Body Report on *EC – Chicken Cuts*, paras. 155-162).

Whether the Panel's terms of reference are broad enough to include Council Regulations Nos. 301/2007 and 179/2009

7.178 In the case before us, we note that, in addition to identifying Council Regulation No. 493/2005, the complainants include the phrase "any amendments or extensions and any related or implementing measures".[279]

7.179 The complainants do not expressly identify Council Regulations Nos. 301/2007 or 179/2009 as measures in their joint Panel request, although they do discuss Council Regulation Nos. 301/2007 in their Panel request[280], and subsequently in their submissions.[281] Therefore, we must examine whether the phrase "any amendments or extensions and any related or implementing measures" is sufficiently broad so as to describe Council Regulations Nos. 301/2007 or 179/2009.

7.180 In our view, the main text of the Panel Request is broad enough to include Council Regulations Nos. 301/2007 or 179/2009. The terms of measures in the Panel request before us, like those terms in panel requests in previous disputes that were construed broadly, are sufficiently broad to account for the possibility of amendments or extensions of the identified measures.[282] We will therefore consider whether the new measures that were not enumerated as "measures at issue" in the complainants' joint Panel request, change the essence of Council Regulation No. 493/2005.

Whether the inclusion of Council Regulations Nos. 301/2007 and 179/2009 change the essence of Council Regulation No. 493/2005

7.181 Council Regulation No. 301/2007 expressly states in its seventh recital that "the suspension introduced by this Regulation is a prolongation of a suspension introduced by Regulation 493/2005" and that "it is not in the interest of the Community that there be any interruption of the tariff treatment of the monitors covered by this suspension". Moreover, Council Regulation No. 301/2007 extends for two years a suspension of the application of duties to the same range of products to which Council Regulation No. 493/2005 applied, namely, "monitors with a diagonal measurement of the screen of 48,5 cm or less and with an aspect ratio of 4:3 or 5:4". Article 1 of this regulation sets forth the specific legal obligations to autonomously suspend 14 per cent *ad valorem* duties under CN code 8528 59 90, until 31 December 2008, for "monitors with a diagonal measurement of the screen of 48,5 cm or less and with an aspect ratio of 4:3 or 5:4".

7.182 Because Council Regulation No. 301/2007 simply prolongs the period of application of Council Regulation No. 493/2005 without modifying the scope of applicability of the duty suspension, we consider the measure does not change the essence of Council Regulation No. 493/2005.

7.183 We next consider Council Regulation No. 179/2009. This regulation indicates in its sixth recital that "the suspensions provided for in this Regulation are an *extension* of the suspension introduced by Regulation 301/2007 ...". In its third recital, Council Regulation No. 179/2009 indicates that "it is in the interest of the Community to *extend* the current autonomous duty suspension for two

[279] Joint Panel request, WT/DS375/8, 376/8, DS377/6, p. 2.
[280] Joint Panel request, WT/DS375/8, 376/8, DS377/6, p. 2.
[281] See, for instance, Exhibit US-45; Chinese Taipei's first written submission, para. 89.
[282] In this respect, we recall, for example in *Chile – Price Band System*, the panel request referred to "Law 18.525, as amended by Law 18.591 and subsequently by Law 19.546, as well as regulations and complementary provisions and/or amendments". The Appellate Body considered that language to reflect a "broad scope of the Panel request in order to include a subsequent amendment within the Panel's terms of reference". Appellate Body Report on *Chile – Price Band System*, para. 135.

years starting from 1 January 2009 and to *increase* the diagonal measurement of the screen to 55,9 cm (22 inches) and to add the additional aspect ratios of 1:1 and 16:10". In its fourth recital, the regulation provides "it is also in the interest of the Community to provide for a suspension for two years starting from 1 January 2009 for black and white or other monochrome monitors with a diagonal measurement of the screen not exceeding 77,5 cm (30,5 inches) and with the same aspect ratios as for colour monitors".

7.184 Article 1 of Council Regulation No. 179/2009 sets forth the specific legal obligation to autonomously suspend 14 per cent *ad valorem* duties, until 31 December 2010, for certain products. In particular, under CN code 8528 59 10, duties are to be suspended for:

> "[B]lack and white or other monochrome monitors, using liquid crystal display technology, equipped with either digital visual interface (DVI) or a video graphics array (VGA) connector or both with a diagonal measurement of the screen not exceeding 77,50 cm (i.e. 30,5 inches), with an aspect ratio of 1:1, 4:3, 5:4 or 16:10, with a pixel resolution exceeding 1,92 mega pixels, and with a dot pitch not exceeding 0,3 mm".

7.185 Under CN code 8528 59 90, duties are to be suspended for:

> "[C]olour monitors, using liquid crystal display technology, with a diagonal measurement of the screen not exceeding 55,9 cm (i.e. 22 inches), with an aspect ratio of 1:1, 4:3, 5:4 or 16:10".

7.186 Thus, unlike in the case of Council Regulation No. 301/2007, Council Regulation No. 179/2009 not only prolongs the duration of the initial duty suspension established under Council Regulation No. 493/2005, but also expands the precise terms of the suspension to a broader category of products, including those "black and white or other monochrome monitors" specified above, and "colour monitors" as specified above. Despite such enlarged coverage, we do not consider that this measure operates in such a way as to change the *essence* of its predecessor measures implementing and prolonging the duty suspension. We note that the duty suspension is in essence applicable to "monitors", albeit both black and white or other monochrome and colour ones. However, we consider the suspension operates in a near identical manner within EC law and has similar legal implications. That is, the suspension excludes certain LCD colour monitors from the application of duties arising from classification under CN code 8528 59 90. The latest measure, at least in part, more broadly suspends the application of duties on LCD colour monitors with a diagonal measurement of up to 55,9 cm with various aspect ratios of 1:1, 4:3, 5:4 or 16:10, as opposed to only those with a diagonal measurement of up to 48,5 cm and aspect ratios of either 4:3 or 5:4.[283] Although the precise terms of the suspension point to a broader category of products, we consider Council Regulation No. 179/2009 does not change the essence of Council Regulation No. 493/2005.

7.187 In summary, we have thus far concluded that the Panel's terms of reference are broad enough to include Council Regulations Nos. 301/2007 and 179/2009, due to the complainants' reference to "any amendments or extensions and any related or implementing measures" in their joint Panel request. In addition, we concluded that Council Regulations Nos. 301/2007 and 179/2009 do not

[283] In addition, the latest measure extends coverage to LCD black and white or monochrome monitors with diagonal measurement of the screen not exceeding 77,50 cm (i.e. 30,5 inches), with an aspect ratio of 1:1, 4:3, 5:4 or 16:10, with a pixel resolution exceeding 1,92 mega pixels, and with a dot pitch not exceeding 0,3 mm.

change the essence of Council Regulation No. 493/2005. Finally, we will consider the implications of these measures for the ultimate resolution of the matter before us.

Whether the inclusion of any amendments within a panel's terms of reference is necessary to secure a positive solution to the dispute

7.188 We recall that the complainants have requested the Panel to determine whether their commerce has been accorded treatment less favourable than that provided in the EC Schedules, inconsistently with the obligations of the EC and its member States under Article II of the GATT 1994. The complainants argue that the European Communities fails to accord tariff treatment that is no less favourable notwithstanding the suspension of duties under Council Regulation 493/2005 and Council Regulation 301/2007.[284]

7.189 As noted above, Council Regulations Nos. 493/2005 and 301/2007 have expired. Council Regulation No. 179/2009 is the legislation that is currently in force. Therefore, we consider that a ruling that takes into consideration Council Regulation No. 179/2009 would aid in the settlement of this dispute.

Conclusions

7.190 For the foregoing reasons, we conclude that Council Regulations Nos. 301/2007 and 179/2009, as amendments and extensions of Council Regulation No. 493/2005, are within the Panel's terms of reference.

(f) Did the complainants adequately identify the products at issue in the Panel request?

(i) Arguments of the parties

7.191 In its first written submission, the **European Communities** raised several allegations in the context of arguing that the complainants have "failed to make a prima facie case" for a series of reasons. Among them, the European Communities argues that the complainants have failed to make a prima facie case by "failing to identify the product or products at issue in sufficient detail…".[285] In discussing what is required to succeed in an "as such" claim, the European Communities submits that the Appellate Body in *EC – Computer Equipment* recognized that, in order to identify the 'specific measures at issue', it may also be necessary to identify the products subject to the measures in dispute".[286] While noting the statement by the Appellate Body in *EC – Chicken Cuts*, according to which one can define the products at issue through the challenged measures, the European Communities argues that this approach is inapplicable where the products at issue are "significantly more complex" and the measures at issue do not apply a single criterion when considering their classification.[287]

7.192 The **complainants** indicated that the identified measures at issue apply to, for instance, "certain flat panel displays using LCD technology that are 'capable of reproducing video images from a source other than an automatic data-processing machine'", and "flat panel displays with certain attributes, such as DVI".[288] The complainants reject the European Communities' interpretation of *EC –*

[284] Joint Panel request, WT/DS375/8, 376/8, DS377/6, p. 3.
[285] European Communities' response to Panel question No. 22.
[286] European Communities' response to Panel question No. 22 (citing the Appellate Body Report on *EC – Computer Equipment*, para. 67 (emphasis in original)).
[287] European Communities' response to Panel question No. 22.
[288] Joint Panel request, WT/DS375/8, 376/8, DS377/6, p. 3.

Computer Equipment. Rather, they argue that the approach taken in both *EC - Computer Equipment* and *EC – Chicken Cuts* supports the view that the products at issue "flow from the measures identified in the panel request".[289]

(ii) Consideration by the Panel

7.193 The **Panel** recalls that Article 6.2 of the DSU requires a complainant to "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly".

7.194 Article 6.2 of the DSU does not refer to the identification of the *products* at issue, but instead, only refers to the identification of the specific *measures* at issue. The Appellate Body has explained that under DSU Article 6.2, "the identification of the product at issue is generally not a separate and distinct element of a panel's terms of reference; rather, it is a consequence of the scope of application of the specific measures at issue." Thus, it concluded that it is "the *measures* at issue that generally will define the *product* at issue."[290] At the same time, though, it recognized that it may be necessary to identify the products at issue, in instances where decisions of customs authorities are under challenge, in order to identify the specific measures at issue.[291]

7.195 In their joint Panel request, we recall that the complainants indicated that the identified measures at issue apply to, for instance, "certain flat panel displays using LCD technology that are 'capable of reproducing video images from a source other than an automatic data-processing machine'", and "flat panel displays with certain attributes, such as DVI".[292] The complainants have identified a series of generally applicable EC measures pertaining to the tariff classification of products (including certain CN codes, classification regulations and CNENs) in connection with their claims concerning FPDs. In certain cases, the complainants have also identified individual classification decisions by customs authorities as evidence of the application of the measures at issue.

7.196 The Panel notes that while the European Communities has not argued that the complainants have breached the provisions of Article 6.2 it has argued that the complainants "failed to make a prima facie case" of violation, "as such", by allegedly failing to identify the products with sufficient clarity.[293] To the extent that the European Communities' arguments relate to the issue of what is required to establish an "as such" claim we have dealt with this in paragraphs 7.103-7.117 above. With regard to the issue of whether the complainants have established a prima facie case, this can only be determined after considering the full range of arguments and evidence before the Panel, which we do in subsequent sections. At this stage the Panel confines itself to the issue of whether the products were sufficiently identified for the purposes of Article 6.2. While the European Communities has not raised a claim in these terms, we recall our statement in paragraph 7.134 above that Panels may choose to deal with issues on their own motion where it considers that they go to the heart of their jurisdiction, to satisfy themselves that they may proceed. In the circumstances of this case, we consider it useful to examine at the outset the measures that fall within our terms of reference and the corresponding products at issue.

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[289] United States' second written submission, para. 16; Japan's response to Panel question No. 22.

[290] Appellate Body Report on *EC – Chicken Cuts*, para. 165 (emphasis original).

[291] Appellate Body Report on *EC – Chicken Cuts*, para. 166; Appellate Body Report on *EC – Computer Equipment*, para. 67.

[292] Joint Panel request, WT/DS375/8, 376/8, DS377/6, p. 3.

[293] European Communities' first written submission, paras. 32, 34-49.

7.197 We note here that the contested measures are not individual classification decisions by customs authorities, but, rather, as was the case in *EC – Chicken Cuts*, are generally applicable legal instruments.[294] In our view, the joint panel request focuses on particular aspects of the measures at issue, which in turn identify the products at issue sufficiently for the purposes of Article 6.2 of the DSU. The panel request focuses on flat panel display devices with two characteristics – those capable of reproducing video images both from an ADP and a source other than an automatic data-processing machine, and those with certain attributes, such as a built in DVI interface. Thus, for the purposes of fulfilling the requirements of Article 6.2 of the DSU, we conclude there has been sufficient identification of the products for us to proceed with the dispute at hand.

(g) Have the complainants identified obligations "with the necessary clarity" for the European Communities to defend itself and for the Panel to rule on the complainants' claims under Articles II:1(a) and II:1(b) of the GATT 1994?

(i) Arguments of the parties

7.198 The **European Communities** argues that, in their first submissions, the complainants failed to identify the precise concession that is allegedly breached both in terms of its substantive content and where precisely it is provided for in the Schedule of the European Communities.[295] In particular, the European Communities argues that the complainants' claim in their joint Panel request that "their commerce has been accorded treatment less favourable than that provided *in the EC Schedules*, and that ordinary customs duties, or other duties and charges, in excess of those *set forth in the EC Schedules* have been applied to certain flat panel displays (...)" (emphasis added).[296] The European Communities argues that the United States did not define precisely the text that should be analysed when discussing products that are also listed in Attachment B.[297] The European Communities questions whether Japan considers that the text of the ITA is incorporated by reference into the concessions or whether the language in the Annex to the EC Schedule itself is the concession.[298] The European Communities argues that Chinese Taipei has claimed the concessions are in the EC Schedule and not in the text of the ITA itself. The European Communities continues that Chinese Taipei has ignored the fact that the Annex to the EC Schedule contains a list of tariff item numbers, and further failed to account for the fact that the terms "device" and "vacuum-fluorescence" were incorporated into the final text of the ITA.[299] In sum, the European Communities argues that the complainants "appear to use the terms set forth in the EC Schedule and ITA almost interchangeably without providing a justification for such an approach".[300] Without knowing where the concession actually is, the European Communities claims that it is not clear whether the substantive obligations are identical for all parties, or whether certain differences were allowed to exist. Moreover, the European Communities argues that its ability to defend itself is compromised due to a lack of clarity regarding the concessions' locations.[301]

7.199 The **European Communities** considers that the narrative product definitions in the EC Schedule pursuant to Attachment A, Section 2 and Attachment B and the tariff item numbers next to them reflect the common understanding between WTO Members of the scope of the relevant EC

[294] Appellate Body Report on *EC – Chicken Cuts*, para. 167.
[295] European Communities' first written submission, para. 51.
[296] European Communities' first written submission, para. 50.
[297] European Communities' first written submission, para. 52.
[298] European Communities' first written submission, para. 54.
[299] European Communities' first written submission, para. 56.
[300] European Communities' first written submission, para. 57.
[301] European Communities' first written submission, para. 61.

commitments pursuant to Attachment A, Section 2 and Attachment B.[302] The European Communities recognizes two possibilities: first, that the product descriptions and the headings next to them in the Annex to the EC Schedule are the concession, or second, that the product descriptions in the ITA itself are incorporated into the EC Schedule as a "safety net".[303]

7.200 The European Communities disputes the relevance of document WT/MIN(96)/16/Corr.1.[304] Noting the format and numbering of the document in comparison to other WTO documents, the **European Communities** submits that there is no evidence that the said document was ever officially circulated among all WTO Members. The European Communities asserts that a separate document, G/L/159/Rev.1, states that ITA participants "agreed to amend the description of the products in Attachment B and this amendment is already reflected in the schedules of participants", thus revealing that amendments would be done via the Schedules of ITA participants.[305]

7.201 The **United States** argues that the Panel "must look at Attachment B and the product descriptions contained therein" to determine the scope of the concession as, it argues, the text of the EC headnote expressly directs the reader to Attachment B.[306] In this regard, the United States argues that the chapeau to Attachment B, including its phrases "products described in or for Attachment B", "[p]ositive list of specific products" and "wherever they are classified in the HS" should be evaluated to the extent they provide additional information "on whether a given product is 'described in or for Attachment B'".[307] Moreover, it argues, had the drafters intended to refer only to the list of products reproduced in the EC Schedule, they would have stated so by referring to the list of product descriptions below the EC headnote rather than by referring to Attachment B itself.[308] However, the United States submits that Attachment B was modified to reflect certain technical corrections, including the addition of the terms "devices" and "Vacuum Fluorescence", pursuant to document WT/MIN(96)/16/Corr.1[309], dated 13 October 1997. The United States argues that this document is an official WTO document that reflects a consensus to correct the legal text of the ITA.[310] Thus, it concludes that there are no discrepancies between the description for "flat panel display devices (...)" that appears in the EC Schedule and the one in Attachment B.[311] As such, it considers the relevant language is identical for purposes of the Panel's assessment of the concession.[312]

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[302] European Communities' response to Panel question No. 5.

[303] European Communities' response to Panel question No. 5.

[304] WT/MIN(96)/16/Corr.1 (13 October 1997) (Exhibit US-36). WT/MIN(96)/16/Corr.1 sets out typographical and other corrections to the ITA.

[305] European Communities' comment on the complainants' responses to Panel question No. 115.

[306] United States' response to Panel question No. 5.

[307] United States' and Chinese Taipei's responses to Panel question No. 111.

[308] Complainants' responses to Panel question No. 5.

[309] Exhibit US-36.

[310] The United States submits that the document is formatted as an official WTO document, has an assigned document number, and is not identified as a draft, thus dispelling doubts about its authenticity (see United States' second written submission, para. 66, fn.129). To the extent there are doubts as to its origin, the United States submits that the fact that participants agreed to changes to Attachment B is also supported within G/L/159/Rev. 1 (24 April 1997), which, it contends, states, "In the plurilateral technical discussions held before 31 January 1997, it was agreed to amend the description of the products in attachment B and this amendment is already reflected in the schedules of participants." (See United States' response to Panel question No. 115 (Exhibit US-37)). Finally, in reference to the European Communities' first written submission (para. 186), the United States submits that the European Communities does not dispute that the changes to the FPDs concession were "part of the final agreement." (See United States' response to Panel question No. 115).

[311] United States' responses to Panel questions Nos. 5 and 55.

[312] Complainants' responses to Panel question No. 5.

7.202 **Japan** and **Chinese Taipei** submit that the EC concession, while made pursuant to Attachment B, is located in the Annex to the EC Schedule, and not in Attachment B itself. Thus, they consider that they have clearly identified the precise concession and made clear that these concessions appear in the EC Schedule.[313] The language of the product narrative descriptions contained in Attachment B has been incorporated into the EC Schedule, and thus, constitutes the language of the EC tariff concession[314]. Notwithstanding, Japan and Chinese Taipei agree with the United States that there are no discrepancies between the description for "flat panel display devices (...)" in the EC Schedule and the one in Attachment B as a result of an agreement to include the terms "devices" and "Vacuum Fluorescence", reached pursuant to document WT/MIN(96)/16/Corr.1.[315]

7.203 The **European Communities** contends that it does not have document WT/MIN(96)/16/Corr.1 and consequently concludes that the document was never circulated to WTO Members or ITA participants.[316] Nevertheless, the European Communities submits that the terms "devices" and "vacuum-fluorescence" were incorporated into the final text of the ITA in response to a request by Switzerland during negotiations of the final ITA text, though it considers the agreement was never "formally rectified".[317]

(ii) Consideration by the Panel

7.204 The **Panel** notes that the European Communities has not argued that the complainants' alleged failure to identify the precise concession means that the complainants have failed to satisfy the provisions of Article 6.2 or other provisions of the DSU; instead, the European Communities argues that the complainants failed to make a prima facie case of violation by allegedly failing to identify the precise concession with respect to its claims concerning flat panel display devices.

7.205 The Panel considers that two issues arise in light of the European Communities' contention that the complainants did not identify the obligations "with the necessary clarity" for the European Communities to defend itself: first, have the complainants sufficiently referred to the concessions at issue in their joint Panel request, and second, what is the location of the concession arising under the FPDs narrative description for the purposes of the Panel's analysis.

7.206 We recall again our statement in paragraph 7.134 above that Panels may choose to deal with issues on their own motion that they consider to go to the heart of their jurisdiction, to satisfy themselves that they may proceed.[318] We will thus first address whether the complainants sufficiently identified the obligations in their Panel request to permit the Panel to proceed. Second, we will

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[313] Japan's second written submission, para. 133; Chinese Taipei's second written submission, paras. 100-111.

[314] Japan's and Chinese Taipei's responses to Panel question No. 5.

[315] Japan's and Chinese Taipei's response to Panel question No. 55. Japan argues that it "assumes that the said document was not a draft and was circulated" because it has document WT/MIN(96)/16/Corr.1 in its archives. (Japan's response to Panel question No. 115). Chinese Taipei agrees with the United States that document WT/MIN(96)/16/Corr.1 is an official WTO document that was circulated among WTO Members, in light of its format and designation with a WTO document number (Chinese Taipei's response to Panel question No. 115).

[316] The European Communities contends that document WT/MIN(96)/16/Corr.1 is possibly an unused draft. (see European Communities' response to Panel question No. 55).

[317] See European Communities' first written submission, para. 186; Trade in Information Technology Products: Result of Bilateral Consultations, Communication from Switzerland (Geneva 21 January 1997) (Exhibit EC-29).

[318] Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 36 and 53.

address the issue of precisely where the concession arising under the narrative product description for "flat panel display devices" is located.

Whether the complainants sufficiently identified the obligations in their Panel request to permit the Panel to proceed

7.207 We recall that Article 6.2 of the DSU requires a complainant to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly".

7.208 In *US – Oil Country Tubular Goods Sunset Reviews*, the Appellate Body found that the term "legal basis" in Article 6.2 of the DSU refers to the claim made by the complaining party.[319] The Appellate Body has clarified that a claim sets forth the complainant's view that "the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement".[320]

7.209 While a claim sets forth the complainant's view that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement, arguments are adduced by a complaining party to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision.[321] The arguments in support of a claim may be set out and progressively clarified in the first written submission, the rebuttal submission and the first and second panel meetings with the parties.[322]

7.210 The Appellate Body has additionally explained that the requirements in Article 6.2 to identify the specific measures at issue and to provide a brief summary of the legal basis of the complaint "are intended to ensure that the complaining party 'present[s] the problem clearly' in its panel request."[323]

7.211 The "problem" is not solely the obligations in the covered agreements nor the respondent Member's measures but rather whether the respondent Member's measures comport with those obligations. Therefore, to sufficiently present the problem clearly, a complaining Member must "plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed, so that the respondent party is aware of the basis for the alleged nullification or impairment of the complaining party's benefits."[324] As the Appellate Body has explained, "[o]nly by such connection between the measure(s) and the relevant provision(s) can a respondent 'know what case it has to answer, and ... begin preparing its defence'.[325]".[326]

7.212 This understanding is consistent with the essential purpose of the panel request to give the parties and third parties sufficient information concerning the claims at issue in the dispute to enable them to respond to the complainant's case[327]; this speaks to the due process rights of the respondent.[328] It is worth recalling that due process protections are "inherent in the WTO dispute settlement

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[319] Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 162.
[320] Appellate Body Report on *Korea – Dairy*, para. 139.
[321] Appellate Body Report on *Korea – Dairy*, para. 139.
[322] Appellate Body Report on *EC – Bananas III*, para. 141.
[323] Appellate Body Report on *US – Continued Zeroing*, para. 160.
[324] Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 162.
[325] (*footnote original*) Appellate Body Report on *Thailand – H-Beams*, para. 88.
[326] Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 162; see also Appellate Body Report on *Brazil – Desiccated Coconut*, DSR 1997:I, p.186.
[327] Appellate Body Report on *Brazil – Desiccated Coconut*, DSR 1997:I, p.186.
[328] Panel Report on *China – Publications and Audiovisual Products*, para. 7.28.

system"[329] and are "fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings".[330]

7.213 We recall that the complainants discussed the EC obligations concerning its FPDs claims as follows in their joint Panel request:

> "On 2 July 1997, the EC modified Schedule LXXX – European Communities to the *Marrakesh Agreement Establishing the World Trade Organization* (the Marrakesh Agreement). Those concessions include the concession for '[i]nput or output units...Other' as in HS item 8471 60 90. This subcategory carries a zero duty rate. The Schedule also provides in a headnote that '[w]ith respect to any product described in or for Attachment B to the Annex to the Ministerial Declaration on Trade in Information Technology Products, to the extent not specifically provided for in this Schedule, the customs duties on such product, as well as any other duties and charges of any kind … shall be bound and eliminated, as set forth in paragraph 2(a) of the Annex to the Declaration, wherever the product is classified.' Attachment B includes '[f]lat panel display devices (including LCD, Electro Luminescence, Plasma, Vacuum-Fluorescence and other technologies) for products falling within this agreement and parts thereof.' The bound duty rate for this product, as set forth in HS items 8471 60 90, 8473 30 10, 8473 30 90, 8531 20 30, 8531 20 51, 8531 20 59, 8531 20 80, 8531 80 30, 8531 90 10, 8531 90 30, 9013 80 11, 9013 80 19, 9013 80 30 and 9013 90 10, and as specified in the headnote, is zero.
>
> As a result of these concessions, the EC and its member States are obliged to grant duty-free treatment to flat panel displays. Nevertheless, the EC and its member States impose duties on these products, as explained below."[331]

7.214 In addition, as reflected in the summary of the parties' arguments above, the parties have discussed the location of the concession arising under the narrative product description for "flat panel display devices".

7.215 The European Communities appears not to have taken issue with the complainants' identification of "the concession for '[i]nput or output units...Other" as in HS item 8471 60 90'", as specified in the text in the preceding paragraph.

7.216 However, the European Communities has taken issue with the complainants' reference to the headnote in the EC Schedule and the description for FPDs as it appears both in the Annex to the EC Schedule and in Attachment B itself.

7.217 In the Panel's view the joint Panel request does sufficiently identify the concessions at issue. It is clear that the complainants' claim relates to the narrative description for flat panel displays, read in association with the headnote in the EC's Schedule. The European Communities can have been in no doubt as to the legal basis of the case against it, and indeed provided substantive arguments in response. In the Panel's view, and as discussed further below, while the panel request could have been clearer in terms of where the obligations were "located" (that is, incorporated by reference or set

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[329] Appellate Body Report on *Chile – Price Band System*, para. 176. See also Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, para. 107.

[330] Appellate Body Report on *Thailand – H-Beams*, para. 88.

[331] Joint Panel Request WT/DS375/8, WT/DS376/8, WT/DS377/6, p. 2.

out independently in the Annex to the EC Schedule), this has not prejudiced the ability of the European Communities to defend itself in this case.

7.218 Accordingly, we conclude that the complainants identified the obligations "with the necessary clarity" in their Panel request for the European Communities to defend itself and for the Panel to rule on the complainants' claims. We now address the "location" of the narrative product description for "flat panel display devices" for purposes of addressing the complainants' claims in this case.

> Is the commitment arising under the narrative product description for "flat panel display devices" located in the Annex to the EC Schedule, Attachment B, or both?

7.219 The issue, as reflected in the parties' arguments above, is whether the product description for "flat panel display devices (...)" is that reproduced separately in the Annex to the EC Schedule, that contained in Attachment B, or whether both texts are relevant.

7.220 The United States argues that that the Panel must look at the descriptions in Attachment B in light of the EC headnote. Japan and Chinese Taipei submit that the EC concession made pursuant to Attachment B has been incorporated by reference and is therefore found in the Annex to the EC Schedule, and not in Attachment B itself.

7.221 The European Communities appears to recognize both possibilities: that the product descriptions and the headings next to them in the Annex to the EC Schedule are the concession, or second, as a "safety net" that the product descriptions in the ITA itself are incorporated into the EC Schedule.[332]

7.222 Setting aside the parties' views, we note that the EC headnote found in the Annex to the EC Schedule refers 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)". In addition, the Annex to the EC Schedule reproduces, separately, product descriptions that clearly have their origins in Attachment B of the ITA, though the text of the narrative descriptions for "flat panel display devices (...)" in the Annex to the EC Schedule is not identical with that appearing in Attachment B. Looking at Attachment B contained in WT/MIN(96)/16, as the parties have discussed, the terms "devices" and "vacuum-fluorescence" appear in the text of the Annex to the EC Schedule, but not in the ITA text.

7.223 There is some dispute between the parties on the precise status of the Corrigendum document. The complainants consider that a formal correction to the ITA was agreed to and circulated in document WT/MIN(96)/16/Corr.1 of 13 October 1997.[333] The United States and Chinese Taipei, in particular, highlight that the document itself is formatted as an official WTO document, has an assigned document number, and is nowhere identified as a draft. The United States submits additionally that document G/L/159/Rev.1 discusses changes to the narrative descriptions for flat panel display devices.[334] Noting the differences in format and numbering of the document in comparison to other WTO documents, the European Communities rejects the claim that a formal document with an amendment was circulated and considers status of this document to be "unclear and, therefore, in dispute".[335] Notwithstanding this view, the European Communities submits that an

[332] European Communities' response to Panel question No. 5.
[333] Complainants' responses to Panel questions Nos. 5 and 55.
[334] United States' second written submission, para. 66, fn. 129 (Exhibit US-37).
[335] European Communities' response to Panel question No. 115. The European Communities additionally asserts that the language in document G/L/159/Rev.1, "agreed to amend the description of the

informal agreement to this effect took place during the implementation phase of the ITA pursuant to a request by Switzerland.[336]

7.224 We note that document WT/MIN(96)/16/Corr.1 contains a product description for "flat panel display devices (...)" that corresponds exactly to that reproduced in the EC schedule.

7.225 Whatever the formal status of document WT/MIN(96)/16/Corr.1, or the relevance of document G/L/159/Rev.1, it is evident to the Panel that the ITA participants intended to modify the product descriptions contained in the ITA, and that these modified product descriptions should form the basis of the ITA participants' commitments with regard to that product. Evidence for this is found in the fact that the European Communities used this version of the narrative product description in the Annex to its Schedule. The Panel also notes that, of those ITA participants that have included narrative descriptions in their schedules, all of them have used the modified language contained in document WT/MIN(96)/16/Corr.1 for the FPDs commitment. Indeed, we note that it is not disputed by the parties here that ITA participants agreed to amend some of the product descriptions in Attachment B, including that for "flat panel display devices (...)", and that these were reflected in the amendments to the WTO schedules of its participants.

7.226 In light of our view that ITA participants intended to and did modify the product description for "flat panel display devices (...)", we find that there are no discrepancies between the modified narrative product description for flat panel display devices contained in Attachment B of the ITA, as referred to in the EC headnote, and that which is reproduced in the list in the Annex *to the EC* Schedule. Accordingly, we will not address further the question of whether the focus should be on the narrative descriptions in Attachment B of the ITA, or those reproduced separately in the Annex to the EC Schedule. To the extent that the product descriptions themselves define the scope of the obligations (a point that we will return to below), the identical language used in these narrative product descriptions in the ITA on the one hand, and as reproduced in the EC Schedule on the other, would give rise to obligations of identical scope.

2. The measures at issue and their effects

7.227 The Panel will now consider the measures at issue specifically identified by the complainants, as set forth in paragraph 7.128 above, and their effect. In addition, we will consider Council Regulation No. 179/2009 that we determined in paragraph 7.190 above to be an amendment to Council Regulation No. 493/2005. As we explained, we will not consider Council Regulation No. 493/2005 since it has been replaced by Council Regulation No. 179/2009. We recall that the European Communities has not contested consideration of any of these measures.

(a) Council Regulation No. 2658/87, as amended by Commission Regulation No. 948/2009

7.228 As discussed in paragraphs 7.39-7.45 above, Council Regulation No. 2658/87 establishes the CN and CCT.[337]

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products in Attachment B and this amendment is already reflected in the schedules of participants", reveals that amendments would be done via the WTO Schedules of ITA participants, and not in the ITA, contrary to the United States' and Chinese Taipei's view (European Communities' comment on the complainants' responses to Panel question No. 115).

[336] See para. 7.203 above.

[337] Council Regulation No. 2658/87, Article 1 (Exhibits EC-49; US-13; TPKM-5).

7.229 We recall that we concluded in paragraph 7.146 above that the Council Regulation No. 2658/87, including its Annex I, as it has been most recently amended, is the specific measure at issue in this dispute and was properly identified as such in the joint Panel request.

7.230 The CN1997[338] included the following descriptions for CN subheadings 8471 60 and CN heading 8528:

CN code	Description	Rate of duty		Supplementary unit
		autonomous (%)	conventional (%)	
1	2	3	4	5
8471	Automatic data-processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included:			
8471 60	- Input or output units, whether or not containing storage units in the same housing:			
8471 60 10	- - For use in civil aircraft (1):	11	Free	p/st
	- - Other:			
8471 60 40	- - - Printers	11	2	p/st
8471 60 50	- - - Keyboards	11	2	p/st
8471 60 90	- - - Other	11	1	p/st

CN code	Description	Rate of duty		Supplementary unit
		autonomous (%)	conventional (%)	
1	2	3	4	5
8528	Reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus; video monitors and video projectors			
	- Reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus			
8528 12	- - Colour			
8528 13 00	- - Black and white or other monochrome	22	6.8	p/st
	- Video monitors			
8528 21	- - Colour:			
	- - - With cathode-ray tube:			
8528 21 14	- - - - With a screen width/height ratio less than 1,5	22	14	p/st
	- - - - Other:			
8528 21 16	- - - - - With scanning parameters not exceeding 625 lines	22	14	p/st
8528 21 18	- - - - - With scanning parameters exceeding 625 lines	22	14	p/st
8528 21 90	- - - Other	22	14	p/st
8528 22 00	- - Black and white or other monochrome	22	14	p/st

7.231 The CN2007 first introduced the duty-free CN codes 8528 41 00 and 8528 51 00 to replace duty-free CN code 8471 60 80[339], and dutiable CN code 8528 59 90 to replace CN code 8528 21 90.[340]

[338] Exhibit TPKM-22.
[339] CN code 8471 60 80 replaced the duty-free heading CN code 8471 60 90 in previous CN versions.
[340] CN2007 (Exhibits US-47; JPN-2; TPKM-34).

7.232 The CN2010 maintains the same structure and CCT as the CN2007 version, as follows[341]:

CN code	Description	Conventional rate of duty (%)	Supplementary unit
1	2	3	4
8528	Monitors and projectors, not incorporating television reception apparatus; reception apparatus for television, whether or not incorporating radiobroadcast receivers or sound or video recording or reproducing apparatus:		
	- Cathode-ray tube monitors:		
8528 41 00	- - Of a kind solely or principally used in an automatic data-processing system of heading 8471	Free	p/st
8528 49	- - Other:		
8528 49 10	- - - Black and white or other monochrome	14	p/st
	- - - Colour:		
8528 49 35	- - - - With a screen width/height ratio less than 1,5	14	p/st
	- - - - Other:		
8528 49 91	- - - - - With scanning parameters not exceeding 625 lines .	14	p/st
8528 49 99	- - - - - With scanning parameters exceeding 625 lines	14	p/st
	- Other monitors:		
8528 51 00	- - Of a kind solely or principally used in an automatic data-processing system of heading 8471 .	Free	p/st
8528 59	- - Other:		
8528 59 10	- - - Black and white or other monochrome	14 ([1])	p/st
8528 59 90	- - - Colour	14([2])	p/st

([1]) Customs duty autonomously suspended, until 31 December 2010, for black-and-white or other monochrome monitors, using liquid crystal display technology, equipped with either a digital-visual-interface (DVI) or a video-graphics-array (VGA) connector or both, with a diagonal measurement of the screen not exceeding 77,50 cm (i.e. 30,5 inches), with an aspect ratio of 1:1, 4:3, 5:4 or 16:10, with a pixel resolution exceeding 1,92 mega pixels, and with a dot pitch not exceeding 0,3 mm (TARIC code 8528 59 10 10).
([2]) Customs duty autonomously suspended, until 31 December 2010, for colour monitors using liquid crystal display technology, with a diagonal measurement of the screen not exceeding 55,9 cm (i.e. 22 inches), with an aspect ratio of 1:1, 4:3, 5:4 or 16:10 (TARIC code 8528 59 90 40).

7.233 Under the CN2010 version, CN code 8528 59 90 is assigned a 14 per cent duty rate, which is subject to an autonomous duty suspension, until 31 December 2010, "for colour monitors using liquid crystal display technology, with a diagonal measurement of the screen not exceeding 55,9 cm (i.e. 22 inches), with an aspect ratio of 1:1, 4:3, 5:4 or 16:10 (TARIC code 8528 59 90 40)".[342]

(i) Arguments of the parties

7.234 The **complainants** submit that Council Regulation No. 2658/87, in particular, its Annex I, as amended, sets forth the basic EC measure on tariffs, wherein all monitors are classified under CN heading 8528. The complainants argue that the relevant CN headings since the entry into force of the CN2007 are CN code 8528 51 00 applicable to "other monitors" "of a kind solely or principally used in an automatic data-processing system of heading 84.71" and those classified under CN heading

[341] The terms and applicable duty rates of CN code 8528 41 00 and CN code 8528 51 00 are identical in the CN2007, the CN2008, the CN2009 and the CN2010.

[342] CN2010, p. 574, footnote "(2)". Under the CN2008, CN code 8528 59 90 is assigned a 14 per cent duty rate subject to an autonomous duty suspension, until 31 December, "for monitors with a diagonal measurement of the screen of 48,5 cm or less and with an aspect ratio of 4:3 or 5:4 (TARIC code 8528 59 90 30)" (CN2008, p. 575, footnote "(1)"). Under the CN 2009, CN code 8528 59 90 is also assigned a 14 per cent duty rate, although no duty suspension is specified. (CN2009, p. 574).

8528.59 applicable to "other".[343] They argue that products classified under these headings were previously classified as under CN heading 8471 (in either CN code 8471 60 90 or 8471 60 80), prior to the CN2007. Japan additionally argues that CN codes 8528 59 10, 8528 72 20 to 8528 72 99, and 8528 73 00 are also relevant.[344]

7.235 The **European Communities** argues that CN codes 8528 51 00 and 8528 41 00 in the current CN are the relevant provisions implementing obligations pursuant to the ITA, both of which extend duty-free treatment to monitors "of a kind solely or principally used in an automatic data-processing system of 8471".[345] The European Communities said that it is not entirely clear what the basis is for considering that the European Communities would be in breach of its obligations under the claim based on HS1996 subheading 8471 60 (CN code 8471 60 90) because the combined scope of CN codes 8528 51 00 and 8528 41 00 under the HS2007 is at least as wide as CN code 8471 60 90 in the EC Schedule, despite differences in the wording of the headings.[346] Thus, presumably, the European Communities contends that any alleged violation could only arise from the alleged interpretative effect of certain criteria in CNEN 2008/C 133/01 when applied in connection with the CN.[347] The European Communities contends that it is not clear how the CN is considered to breach Article II of the GATT 1994 in relation to the complainants' claim pursuant to the narrative description for FPDs. In its view, it is not clear how to determine where certain products, such as televisions or video monitors, should be classified.[348]

(ii) Consideration by the Panel

7.236 The parties do not appear to dispute the content of Council Regulation No. 2658/87.

7.237 The complainants have identified duty-free CN codes 8528 41 00 and 8528 51 00, and dutiable CN code 8528 59 90 as those relevant to its claims. The current CN2010 includes reference to an autonomous duty suspension, until 31 December 2010, "for colour monitors using liquid crystal display technology, with a diagonal measurement of the screen not exceeding 55,9 cm (i.e. 22 inches), with an aspect ratio of 1:1, 4:3, 5:4 or 16:10 (TARIC code 8528 59 90 40)".

7.238 The European Communities has not contested that CN codes 8528 41 00 and 8528 51 00 replace duty-free CN code 8471 60 90. Moreover, the European Communities has not asserted any other relevant headings.

7.239 The **Panel** therefore understands that the European Communities now classifies products that were previously classified in CN code 8471 60 90 under CN codes 8528 41 00 and 8528 51 00.

7.240 Based on the terms of the descriptions for these CN codes, it appears evident that under the CN 'monitors of a kind solely or principally used in an automatic data-processing system of heading 8471' are classifiable under duty free CN codes 8528 41 00 and 8528 51 00. These include CRT-based monitors (under CN code 8528 41 00) and "[o]ther" types of monitors (under CN code 8528 51 00).

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[343] Complainants' response to Panel question No. 66.
[344] Japan's response to Panel question No. 66.
[345] European Communities' second written submission, paras. 44-45.
[346] European Communities' second written submission, para. 46.
[347] European Communities' second written submission, para. 46; European Communities' second oral statement, paras. 25-26.
[348] European Communities' second written submission, para. 47.

7.241 Non-CRT, "monitors" that are black and white or other monochrome are classifiable under the dutiable CN code 8528 59 10, and subject to a 14 per cent *ad valorem* duty, and colour "monitors" are classifiable under CN code 8528 59 90, and subject to a 14 per cent *ad valorem* duty In accordance with an autonomous duty suspension identified in the CN2010, black and white or other monochrome LCD monitors "equipped with either a digital-visual-interface (DVI) or a video-graphics-array (VGA) connector or both, with a diagonal measurement of the screen not exceeding 77,50 cm (i.e. 30,5 inches), with an aspect ratio of 1:1, 4:3, 5:4 or 16:10, with a pixel resolution exceeding 1,92 mega pixels, and with a dot pitch not exceeding 0,3 mm" are exempt from duties. Colour LCD monitors "with a diagonal measurement of the screen not exceeding 55,9 cm (i.e. 22 inches), with an aspect ratio of 1:1, 4:3, 5:4 or 16:10" are similarly exempt from duties.

(b) CNEN 2008/C 133/01

7.242 On 30 May 2008, the European Communities published a new consolidated version of the CNENs in the EU Official Journal, i.e., CNEN 2008/C 133/01.[349]

7.243 CNEN 2008/C 133/01 includes, *inter alia*, the following CN breakouts of HS heading 8528:

> "**8528 41 00** **Of a kind solely or principally used in an automatic data-processing system of heading 8471**
>
> Monitors of this subheading work with the cathode ray tube (CRT) display technology.
>
> The characteristics of monitors of this subheading generally facilitate prolonged periods of viewing at close proximity.
>
> Monitors of this subheading have the following characteristics:
>
> 1. they are capable of accepting a signal only from the central processing unit of an automatic data-processing machine of heading 8471:
> 2. they have generally an aspect ratio of 4:3 or 5:4;
> 3. they frequently incorporate tilt and swivel adjusting mechanisms and glare-free surfaces;
> 4. they may incorporate up to two loudspeakers.
>
> Monitors of the CRT type have the following specific characteristics:
>
> 1. they are fitted with particular connectors such as SUB-D connectors;
> 2. their dot screen pitch starts at 0,41 mm for medium resolution and gets smaller as the resolution increases.
>
> Monitors of this subheading cannot:
>
> - be connected to a video source such as a DVD recorder or reproducer, a camera or a video camera recorder, a satellite receiver or a video game machine;

[349] Foreword of CNEN 2008/C 133/01. The foreword clarifies that "[t]his version of the CNENs includes and, where appropriate, replaces those published in the Official Journal of the European Union, C series, up to 11 April 2008. CNENs published in the Official Journal, C series, subsequent to that date remain in force and will be incorporated in the CNENs when revised".

- incorporate components (for example, a chroma decoder, a Y/C separator) which enable the monitor to display an image from a composite video baseband signal (CVBS) or composite video signal (whose waveform conforms to a television broadcast standard such as NTSC, SECAM, PAL, D-MAC) or S-Video signal or when they are capable of reproducing an image by accepting signals such as component video (for example, YUV, YC_BC_R, YP_BP_R), Serial Digital Interface (SDI), High-Definition-SDI (HD-SDI) and digital video 'DV' (for example, MPEG1, MPEG2, MPEG4);
- be equipped with an infrared receiver for the reception of signals from an infrared remote control;
- have a programme channel up/down button;
- be fitted with interfaces such as DVI-D, DVI-I and High-Definition Multi-media Interface (HDMI) even if these interfaces do not support high-bandwidth digital content protection (HDCP) encryption;
- be fitted with interfaces for 'slot-in' modules or for other devices which enable a connection to a video source or the reception of television signals;
- be used in systems other than automatic data-processing systems (for example, home cinema systems, video editing systems, systems for medical imaging or systems of the printing or graphics industry for pre-press colour proofs).

This subheading does not include indicator panels of heading 8531.

8528 49 10 **Black and white or other monochrome**

The Explanatory Notes to subheadings 8528 49 35 to 8528 49 99 apply, *mutatis mutandis.*

8528 49 35 to 8528 49 99 **Colour**

Monitors fall within these subheadings unless it can be demonstrated that they are of a kind solely or principally used in an automatic data-processing system.

The characteristics of monitors of these subheadings generally facilitate prolonged periods of viewing at a distance, for example, at exhibitions and in home cinema systems, television studios and video surveillance systems.

Some monitors facilitate viewing at close proximity, for example, for measuring, checking or medical applications, rear view camera surveillance for vehicles or radio navigational aid apparatus.

Certain monitors are fitted with connectors or interfaces such as Cinch/RCA, BNC, SCART, Mini DIN 4-pin/Hosiden, DVI-D, DVI-I and High-Definition Multi-media Interface (HDMI). These connectors or interfaces allow for the reception of a signal from a video source such as a DVD recorder or reproducer, a camera or a video camera recorder, a satellite receiver or a video game machine. These monitors may also be fitted with interfaces for automatic data-processing machines of heading 8471.

Some monitors may have interfaces that allow for the reception of signals from sources such as a cash register, an automatic teller machine (ATM), a radio navigational aid apparatus, a numerical control panel or a programmable memory controller, apparatus for measuring, checking or medical applications of Chapter 90.

They may have separate inputs for red (R), green (G) and blue (B) signals, or they may incorporate components (for example, a chroma decoder, a Y/C separator) which enable the monitor to display an image from a composite video baseband signal (CVBS) or composite video signal (whose waveform conforms to a broadcast standard such as NTSC, SECAM, PAL, D-MAC) or S-Video signal or when they are capable of reproducing an image by accepting signals such as component video (for example, YUV, YC_BC_R, YP_BP_R), Serial Digital Interface (SDI), High-Definition-SDI (HD-SDI) and digital video 'DV' (for example, MPEG1, MPEG2, MPEG4).

They may be fitted with connectors for the reception of audio signals.

These subheadings do not include:

(a) videophones (subheading 8517 69 10);
(b) indicator panels of heading 8531.

8528 51 00 to 8528 59 90 **Other monitors**

Monitors of these subheadings work on display technologies such as liquid crystal display (LCD), organic light emitting diode (OLED) or plasma.

These subheadings include monitors comprising a projector and a screen in the same housing.

8528 51 00 **Of a kind solely or principally used in an automatic data-processing system of heading 8471**

The Explanatory Notes to subheading 8528 41 00 apply, *mutatis mutandis*.

Monitors falling within this subheading generally have a diagonal measurement of the screen of 48.5 cm (19 inches) or less.

8528 59 10 and 8528 59 90 **Other**

The Explanatory Notes to subheadings 8528 49 35 to 8528 49 99 apply, *mutatis mutandis.*

For the monitors of these subheadings the aspect ratio is often 16:9 or 16:10."

(i) Arguments of the parties

7.244 The **complainants** argue that CNEN 2008/C 133/01 limits duty-free coverage under CN code 8528 51 00 to "monitors" that "are capable of accepting a signal only from the central processing unit of an automatic data-processing machine of heading 84.71", those that "cannot ... be connected to a

video source such as a DVD recorder or reproducer, camera or a video camera recorder, a satellite receiver or a video game machine", and thus can *only* accept a signal from a CPU of an automatic data-processing machine; and otherwise, those that are not fitted with interfaces such as DVI. Subject to the condition in the note to CN code 8528 51 00 that "[m]onitors within this subheading generally have a diagonal measurement of the screen of 48,5 cm (19 inches) or less", the complainants submit that monitors that are principally for use with automatic data-processing systems or other ITA products are excluded from duty-free treatment under CN code 8528 51 00.[350] The **United States** and **Chinese Taipei** contend that these criteria apply under CN code 8528 51 00 on the basis of the "*mutatis mutandis*" language in the explanatory notes that refers to CN code 8528 41 00.[351] The United States, in addition, observes that the language in the note to CN code 8528 59 90 in CNEN 2008/C 133/01 states that monitors classifiable under the CN code 8528 59 90 "*may also* be fitted with interfaces for automatic data-processing machines of heading 8471."[352] In its view, a DVI connector is such an interface. Thus, the United States argues, even if a monitor is "for" an automatic data-processing machine, it is classified under 8528 59 90 and subject to a 14 per cent duty.[353]

7.245 The **European Communities**' arguments concerning whether the CNENs are "not legally binding" or otherwise "inapplicable" to the extent they conflict with the CN, are set forth in paragraphs 7.147-7.148 above. In addition, the European Communities argues that the complainants have limited their challenge to the *mutatis mutandis* language in the CNEN to CN code 8528 51 00. While it argues that the CNEN to CN code 8528 41 00 provide for a list of relevant classification criteria, the CNEN to CN code 8528 41 00 are not in themselves challenged under either of the claims. [354] Due to the language in the CNEN to CN code 8528 41 00 "monitors of this subheading work with the cathode ray tube (CRT) display technology", the European Communities argues that, in order to apply the CNEN to other technologies *mutatis mutandis*, it is necessary to distinguish between the technical criteria that are relevant only in relation to CRT technology. Thus, it argues, the words *mutatis mutandis* do not incorporate all of the CNEN to CN code 8528 41 00 into the CNEN to CN code 8528 51 00.[355] For instance, it notes the language "[m]onitors of the CRT type have the following specific characteristics ...". In addition, the European Communities argues that the language of the CNEN does not preclude the exercise of discretion in the classification of monitors based on objective characteristics.[356] To the extent the criteria were even applied rigidly, the European Communities asserts that the criteria are no longer applicable under EC law in light of the European

[350] United States' first written submission, para. 124; Japan's first written submission, paras. 226 and 250; Chinese Taipei's first written submission, paras. 84 and 180. The United States refers to several BTIs issued by EC member States in support of its arguments that monitors have been classified (or reclassified) as under a dutiable heading due to the presence of DVI. It refers in particular, to a BTI issued by one EC member State stating that duty-free computer monitors "must be capable of receiving a signal from a computer and no other source", and that a "LCD monitor with DVI inputs and a diagonal measurement of the screen of [19 inches] or less and with an aspect ratio of 4:3 or 5:4" "with video or DVI inputs" is classified in CN code 8528 59 90 and subject to duties (United States' first written submission, para. 127 (Exhibit US-50)).

[351] United States' second oral statement, para. 30; Chinese Taipei's second oral statement, para. 31. The United States argues that the BTI demonstrate that EU member States have applied the DVI and connectability criteria in the CNEN in classifying goods under CN code 8528 59 90 on the basis of the "*mutatis mutandis*" language appearing in that code. (United States' second oral statement, para. 31).

[352] United States' first written submission, para. 126 (emphasis added).

[353] United States' first written submission, para. 126 (emphasis added).

[354] European Communities' second written submission, para. 50.

[355] European Communities' second written submission, para. 51.

[356] European Communities first written submission, paras. 66-69; European Communities' second written submission, para. 55.

Court of Justice's *Kamino* judgment.[357] Finally the European Communities argues it is in the process of repealing or amending CNEN 2008/C 133/01 in light of the judgment.

(ii) Consideration by the Panel

7.246 The **Panel** recalls its finding in paragraph 7.160 above that CNENs identified by the complainants in this dispute are measures that may be challenged "as such".

7.247 The complainants have identified language in the CNEN to CN code 8528 51 00 in CNEN 2008/C 133/01 pertaining to monitors "[o]f a kind solely or principally used in an automatic data-processing system of heading 8471". They note the language that "monitors falling within this subheading generally have a diagonal measurement of the screen of 48.5 cm (19 inches) or less" as well as language appearing in the CNEN to CN code 8528 51 00 stating that "[t]he Explanatory Notes to subheading 8528 41 00 apply, *mutatis mutandis*". Within the heading to CN code 8528 41 00, the complainants note the conditions that "[m]onitors of this subheading cannot: - be connected to a video source such as a DVD recorder or reproducer, a camera or a video camera recorder, a satellite receiver or a video game machine ... – be fitted with interfaces such as DVI-D, DVI-I and High Definition Multi-media Interface (HDMI) even if these interfaces do not support high-bandwidth digital content protection (HDCP) encryption".

7.248 In addition, the Panel notes that language in the CNEN to CN codes 8528 59 10 to 8528 59 90 states that "[t]he Explanatory Notes to subheadings 8528 49 35 to 8528 49 99 apply, *mutatis mutandis*". This Note states that "[m]onitors fall within these subheadings unless it can be demonstrated that they are of a kind solely or principally used in an automatic data-processing system".

7.249 In respect of CN codes 8528 51 00 and 8528 59 10 to 8528 59 90, the text of CNEN 2008/C 133/01 states that the Explanatory Notes to other subheadings apply, "*mutatis mutandis*". The dictionary definition of the Latin term "*mutatis mutandis*" is literally "things being changed that have to be changed", or otherwise "making the necessary changes; with due alteration of details".[358] In the context of its use in the identified section of CNEN 2008/C 133/01, we understand this reference to indicate that the entirety of the CNEN of the referenced CN code should apply to the extent possible, except for *necessary* changes, wherein due alteration of appropriate details would be made.

7.250 We understand this to mean that the complete CNEN to CN code 8528 41 00 would apply to the CNEN to CN code 8528 51 00, except for elements or criteria that would no longer make sense in the context of CN code 8528 51 00. This would exclude, for instance, the reference under CN code 8528 41 00 to "cathode ray tube (CRT) display technology". Thus, reference to CRT technology would be substituted with display technology referred to in the context of CN code 8528 51 00, including for instance, "liquid crystal display (LCD), organic light emitting diode (OLED) or plasma". Otherwise, the essence of the CNEN to CN code 8528 41 00 would apply. The same approach applies under CN code 8528 59 10. Accordingly, the Panel will proceed on this basis, making changes only where necessary.

7.251 We begin with reference to duty-free CN code 8528 51 00 "Of a kind solely or principally used in an automatic data-processing system of heading 8471" that falls under the subheading for "Other monitors". This heading is described as applying to monitors that "work on display

[357] European Communities' second written submission, paras. 56-61 (referring to European Court of Justice (Kamino), para. 47 (Exhibit TPKM-52)).

[358] The *Shorter Oxford Dictionary* (2003), p. 1870.

technologies such as liquid crystal display (LCD), organic light emitting diode (OLED) or plasma". The CNEN to CN code 8528 51 00 applies the CNEN to CN code 8528 41 00, *mutatis mutandis*, and further indicates that monitors falling within the heading "generally have a diagonal measurement of the screen of 48.5 cm (19 inches) or less". In addition to the guidance provided for diagonal measurement, monitors of this heading thereby have the "capab[ility] of accepting a signal only from the central processing unit of an automatic data-processing machine of heading 8471", among other characteristics. Further, these monitors "cannot ... be connected to a video source such as a DVD recorder or reproducer, a camera or a video camera recorder, a satellite receiver or a video game machine", "cannot ... be fitted with interfaces such as DVI-D, DVI-I and High-Definition Multi-media Interface (HDMI) ...", and "cannot ... be used in systems other than automatic data-processing systems ...".[359]

7.252 The Panel considers that, under the CN, read in conjunction with the CNEN, a display based on LCD, OLED or plasma technology that is classified under CN code 8528 51 00, like those classifiable in 8528 41 00, cannot be capable of connecting to other sources. Thus, these monitors may accept a signal *only* from an automatic data-processing machine. In addition, a monitor that is classified under CN code 8528 51 00 *cannot* be fitted with DVI-D or DVI-I interfaces and other like interfaces, including HDMI, and potentially other connectors that serve similar purposes (as the notes state that covered monitors "cannot ... be fitted with interfaces *such as* DVI-D, DVI-I ...").

7.253 In our view, due to the definitive and absolute nature of the cited language, the particular CNEN may be said to operate on a "*per se*" basis. In other words, these aspects of the CNEN provide no room for discretion for customs authorities. The mere presence, for example, of a DVI, or the capability to accept signals from a source other than an automatic data-processing machine results in a subject monitor being excluded from CN code 8528 51 00 (due to the operation of the *mutatis mutandis* condition in the CNEN to that provision).

7.254 We note that this restrictive language contrasts with less restrictive language used in other aspects of the CNENs. For instance, the CNEN to CN code 8528 41 00 (which is applicable to products classified under CN code 8528 51 00, via the *mutatis mutandis* condition appearing in the CNEN to CN code 8528 51 00) states that "the characteristics of monitors of this subheading *generally* facilitate prolonged periods of viewing at close proximity"; "they have *generally* an aspect ratio of 4:3 or 5:4"; "they *frequently* incorporate tilt and swivel adjusting mechanisms and glare-free surfaces"; and "they *may* incorporate up to two loudspeakers". Nothing in the text of the CNEN, for example, automatically precludes classification simply because a monitor does not facilitate prolonged viewing at close proximity, or have an aspect ratio of 4:3 or 5:4.

7.255 CN codes 8528 59 10 and 8528 59 90 apply to "other" monitors than those classifiable under CN code 8528 51 00 that "work on display technologies such as liquid crystal display (LCD), organic light emitting diode (OLED) or plasma". The CNEN to CN code 8528 59 10 and 8528 59 90 applies the CNEN to CN codes 8528 49 35 to 8528 49 99, *mutatis mutandis*, which apply exclusively to "[c]olour" monitors.[360] The CNEN to these headings indicates that monitors fall under these headings "*unless* it can be demonstrated that they are of a kind solely or principally used in an automatic data-processing system". Moreover, it is indicated that certain monitors classifiable under this CN code are fitted with interfaces, including *inter alia* DVI-D, DVI-I and HDMI, that "allow for the reception

[359] CNEN 2008/C 133/01 (Exhibits US-49; JPN-18; TPKM-23).

[360] The same Explanatory Notes apply *mutatis mutandis* to CRT-monitors of CN code 8528 49 10, i.e. black and white or monochrome CRT-based monitors that are not of a kind solely or principally used in an ADP-system of heading 8471.

of a signal from a video source such as a DVD recorder or reproducer, a camera or a video camera recorder, a satellite receiver or a video game machine".

7.256 Therefore, the Panel concludes that the CNEN to CN code 8528 51 00 requires that monitors be excluded from that subheading if they are capable of receiving signals from sources other than automatic data-processing machines, as well as monitors that are fitted with DVI, HDMI or other interfaces capable of similar function.

7.257 The European Communities has confirmed that CN code 8528 51 00 is the only possible duty-free CN code available for non-CRT-based colour, flat panel monitors.[361]

7.258 Therefore, we conclude that monitors that match one or both criteria, i.e., that are capable of receiving signals from sources other than an automatic data-processing machine, or are fitted with DVI, HDMI or similar connectors may not be classified under the duty-free subheading 8528 51. These criteria work as mandatory, "per se", or "automatic" rules. Subject monitors therefore would have to be classified under CN code 8528 59 10 or 8528 59 90, which carries a 14 per cent duty.

(c) Commission Regulation Nos. 634/2005 and 2171/2005

7.259 Commission Regulation No. 634/2005, which was adopted on 26 April 2005 and published in the EU Official Journal on 27 April 2005, concerns the classification of certain "colour monitor[s]" using LCD technology.

7.260 Item 4 of the Annex to this Regulation concerns the classification under CN code 8528 21 90 of the following product:

> "A colour monitor of the liquid crystal device (LCD) type with a diagonal measurement of the screen of 38,1 cm (15") and overall dimensions of 30,5 (W) × 22,9 (H) × 8,9 (D) cm with: - maximum resolution of 1 024 × 768 pixels [and] scan frequencies of 30-80 kHz (horizontal) and 56-75 Hz (vertical). The product has the following interfaces: - VGA in[;] - DVI in[;] - BNC in and out[;] - S-video (Y/C) in and out[;] - Audio in and out. The product can display signals received from various sources, such as an automatic data-processing machine, a closed circuit television system, a DVD player or a camcorder."

7.261 Item 4 of the Annex indicates that "[c]lassification under subheading 8471 60 is excluded, as the monitor is not of a kind solely or principally used in an automatic data-processing system (see Note 5 to Chapter 84), in view of its capabilities to display signals from various sources."

7.262 Commission Regulation No. 2171/2005, which was adopted on 23 December 2005 and published in the Official Journal of the European Communities on 29 December 2005, concerns the classification of certain "colour monitor[s]" using LCD technology.

7.263 Item 1 of the Annex to this Regulation concerns the classification under CN code 8471 60 80[362] of the following product:

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[361] See para. 7.235 above; European Communities second written submission, para. 44.

[362] We recall from para. 7.231 above that CN code 8471 60 80 replaced the duty-free heading CN code 8471 60 90 in the CN2006. CN codes 8528 41 00 and 8528 51 00, which replaced CN code 8471 60 80, were introduced in the CN2007.

> "A colour monitor of the liquid crystal device (LCD) type with a diagonal measurement of the screen of 38,1 cm (15″) and overall dimensions of 34,5 (W) × 35,3 (H) × 16,5 (D) cm (aspect ratio 5:4) with: - a maximum resolution of 1 024 × 768 pixels at 75 Hz, - a pixel size of 0,279 mm. The product has a mini D-sub 15 pin interface only. It is designed for working only in conjunction with a product classifiable under heading 8471".

7.264 Item 1 of the Annex indicates that "[t]he intended use of the monitor is that of accepting signals from the central processing unit of an automatic data-processing system". The following further explanation is provided:

> "The product is also capable of reproducing both video and sound signals. Nevertheless, in view of its size and its limited capability of receiving signals from a source other than an automatic data-processing machine via a card without video processing features, it is considered to be of a kind solely or principally used in an automatic data-processing system".

7.265 Item 2 of the Annex to this Regulation concerns the classification under CN code 8528 21 90 of the following product:

> "A colour monitor of the liquid crystal device (LCD) type with a diagonal measurement of the screen of 50,8 cm (20″) with overall dimensions of 47,1 (W) × 40,4 (H) × 17,4 (D) cm (aspect ratio 16:10) with: - a screen pixel density of 100 dpi, - a pixel size of 0,25 mm, - a maximum resolution of 1 680 × 1 050 pixels, - a fixed band width of 120 MHz. The product is designed for use in the development of sophisticated graphics (CAD/CAM systems) and video film editing and production. The product is equipped with a DVI interface enabling the product to display signals received from an automatic data-processing machine via a graphic card capable of processing video signals (for example for purposes of video film editing and production). The product also displays texts, spread sheets, presentations and the like."

7.266 Item 2 of the Annex indicates that "[c]lassification under subheading 8471 60 is excluded as the monitor is not of a kind solely or principally used in an automatic data-processing system (see Note 5 (B) to Chapter 84)."

7.267 Item 3 of the Annex to this Commission Regulation No. 2171/2005 concerns the classification under CN code 8528 21 90 of the following product:

> "A colour monitor of the liquid crystal device (LCD) type with a diagonal measurement of the screen of 54 cm (21″) and overall dimensions of 46,7 (W) × 39,1 (H) × 20 (D) cm (aspect ratio 4:3) with: - a maximum resolution of 1 600 × 1 200 pixels at 60 Hz, - a pixel size of 0,27 mm. The product has the following interfaces: - mini D-sub 15 pin, - DVI-D, - DVI-I, - audio in and out. The product can display signals received from various sources such as a closed circuit television system, a DVD player, a camcorder or an automatic data-processing machine."

7.268 Item 3 of the Annex indicates that "[c]lassification under subheading 8471 60 is excluded as the monitor is not of a kind solely or principally used in an automatic data-processing system (see Note 5 to Chapter 84), but is capable of displaying signals from various sources."

7.269 Item 4 of the Annex to Commission Regulation No. 2171/2005 concerns the classification under CN code 8528 21 90 of the following product:

> "A colour monitor of the liquid crystal device (LCD) type with a diagonal measurement of the screen of 76 cm (30″) and overall dimensions of 71 (W) × 45 (H) × 11 (D) cm (aspect ratio 15:9) with: - a maximum resolution of 1 024 × 768 pixels, - a pixel size of 0,50 mm. The product has the following interfaces: - 15-pin mini DIN, - BNC, - 4-pin mini DIN, - RS 232 C, - DVI-D, - Stereo and PC audio. The product can display signals received from various sources such as a closed circuit television system, a DVD player, a camcorder or an automatic data-processing machine."

7.270 Item 4 of the Annex indicates that "[c]lassification under subheading 8471 60 is excluded as the monitor is not of a kind solely or principally used in an automatic data-processing system (see Note 5 to Chapter 84), but is capable of displaying signals from various sources."

(i) Arguments of the parties

7.271 The **complainants** argue that the cited items in Commission Regulation Nos. 634/2005 and 2171/2005 determine tariff treatment based on a monitor's "capabilities to display signals from various sources", whether the monitor "is not of a kind solely or principally used in an automatic data-processing system", or whether the monitor "is capable of displaying signals from various sources". In other words, classification is determined based on whether or not a monitor is exclusively for use with an automatic data-processing system.[363] The **United States** argues that, the fact that the European Communities concluded that the display devices in item 4 in the Annex to Commission Regulation No. 634/2005 and items 3 and 4 of Commission Regulation No. 2171/2005 were classified in a dutiable heading, fails to support the conclusion that the presence of a DVI connector is not dispositive. The United States claims that the European Communities has conceded, with respect to item 2 of Council Regulation No. 2171/2005, that the presence of a DVI connector is dispositive of classification.[364] The complainants additionally reject that item 1 of Commission Regulation No. 2171/2005 provides a basis to argue that displays capable of connecting to multiple sources may be extended duty-free treatment. In this respect, the complainants argue that the device is *not* equipped with a DVI interface or any other connector that would permit the device to be used with sources other than an automatic data-processing machine.[365] Finally, the United States submits BTIs of EC customs authorities classifying such devices in a dutiable heading[366], and argues that the European Communities has cited no evidence from decisions of customs authorities to demonstrate that a device with DVI or a device capable of receiving signals from a source other than an automatic data-processing machine could be classified in a duty-free heading.[367]

7.272 As addressed in paragraphs 7.161-7.167 above, the **European Communities** argues that Commission Regulation Nos. 634/2005 and 2171/2005 "have effectively lost their relevance" and that it is in the process of repealing or replacing them.[368] Apart from this, the European Communities

[363] United States' first written submission, paras. 125-126; United States' second written submission, para. 69; Japan's first written submission, para. 245; Chinese Taipei's first written submission, paras. 69 and 77.

[364] United States' second written submission, para. 70.

[365] United States' second written submission, para. 71; complainants' response to Panel question No 145.

[366] Exhibit US-50.

[367] United States' second written submission, para. 71 (referring to BTIs IE06NT-14-501-01, IE06NT-14-501-02 and IE06NT-14-501-03 (Exhibit US-50)).

[368] European Communities' first written submission, para. 95; European Communities' second written submission, para. 63.

specifically argues that item 1 in the annex to Commission Regulation No. 2171/2005 demonstrates that a monitor which is capable of reproducing both video and sound signals, was classified under duty-free CN code 8471 60 80.[369] Thus, it argues, it is not correct that the European Communities would in all cases "limit the scope of the FPDs covered by the concession to those that can *only* be used with an ADP machine".[370] In addition, the European Communities argues that these Commission Regulations demonstrate that the existence of a DVI has not been necessarily dispositive. In particular, the European Communities argues that DVI is merely listed among many other technical characteristics in item 4 in the Annex to Commission Regulation No. 634/2005, and items 3 and 4 in the Annex to Commission Regulation No. 2171/2005. In its view, only item 2 in the annex to Commission Regulation No. 2171/2005 could be argued as demonstrating that the presence of a DVI connector was decisive for classification.[371]

(ii) Consideration by the Panel

7.273 The **Panel** recalls from paragraphs 7.166-7.167 above that it is appropriate to proceed to make findings and recommendations with respect to the WTO consistency of Commission Regulation Nos. 634/2005 and 2171/2005.

7.274 We now consider the effect of the relevant items of the two Commission Regulations.

7.275 We note that Commission Regulation Nos. 634/2005 and 2171/2005 provide for classification of certain LCD monitors within CN codes 8471 60 80 and 8528 21 90 as these codes existed under the HS2002.[372] As the European Communities has explained, these were replaced by CN codes 8528 41 00 and 8528 59 90, respectively, in the CN2007, following implementation of the HS2007.[373] In the context of this dispute, Japan and Chinese Taipei have argued that national customs authorities within the European Communities can still determine the appropriate customs classification by relying on a "conversion table" that relates back to pre-existing CN headings. Thereby, for example, they argue that customs officials may conclude that an apparatus previously classified under a superseded CN code would now fall under the updated CN code.[374] In addition, the United States submitted a BTI on record, claiming that French customs authorities relied on a classification regulation based on a repealed CN code to justify classifying a product under the relevant updated CN code.[375] In response, the European Communities argues that the conversion table "has not been adopted by the Commission", and "reflects exclusively the views of the Commission services responsible for customs matters".[376] In addition, it argues that, in the BTI referred to by the United States, the discussed classification regulation was referred to "merely as additional authority supporting interpretation of Council Regulation 2658/87".[377]

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[369] European Communities' first written submission, para. 67.

[370] European Communities' first written submission, para. 68; European Communities' second oral statement para. 36.

[371] European Communities' response to Panel question No. 23.

[372] Articles 1 of Commission Regulation Nos. 634/2005 and 2171/2005.

[373] See European Communities' first written submission, para. 95.

[374] Japan's and Chinese Taipei's responses to Panel question, No. 24; Chinese Taipei's second written submission, paras. 52 and 53.

[375] The United States, e.g., refers to BTI FR-E4-2007-002262-R (31 January 2007) (Exhibit US-62), issued by France on 13 January 2007, in which French customs officials classified a multifunctional digital machine in CN code 8443 31 99 while referring to Commission Regulation No. 517/1999, which itself referenced CN code 9009 12 00. (United States' response to Panel question, No. 18, fn. 43).

[376] European Communities' second written submission, para. 156.

[377] European Communities' second written submission, para. 158.

7.276 We note the European Communities' view that CN codes 8471 60 80 and 8528 21 90 no longer appear within the CN. However, apart from a change in CN codes, there is no evidence before us to suggest that the classification guidance contained in the Classification Regulations has changed. Moreover, there is some evidence that at least in some instances national authorities continue to support their classification decisions with reference to classification measures using older CN codes.[378] On this basis, the Panel will continue its assessment of the effect of these classification regulations.

7.277 The products in item 4 of Commission Regulation No. 634/2005, and items 3 and 4 of Commission Regulation No. 2171/2005 describe LCD colour displays with diagonal screen measurements of 15, 21 and 30 inches. All three items refer to displays that are fitted with a DVI interface.[379] In addition, all three items described displays that are capable of displaying signals received from "various sources" in addition to an automatic data-processing machine. Notably, the product in item 4 of Commission Regulation No. 634/2005 is excluded from classification under subheading 8471 60 because "the monitor is not of a kind solely or principally used in an automatic data-processing system (see Note 5 to Chapter 84), i*n view of its capabilities to display signals from various sources*" (emphasis added). Each of the products described in items 3 and 4 of Commission Regulation No. 2171/2005 is excluded from classification under subheading 8471 60 because "the monitor is not of a kind solely or principally used in an automatic data-processing system (see Note 5 to Chapter 84), *but is capable of displaying signals from various sources*" (emphasis added).

7.278 In light of the juxtaposition of the language "solely or principally used in an automatic data-processing system" with the capability to display signals from "various sources", we understand that the mere capability to display signals from other sources, and, *ergo*, connect to those other sources, is enough to exclude the particular display from duty-free treatment. The language "but is" that is used in items 3 and 4 of Commission Regulation No. 2171/2005 strongly suggests that monitors simply capable of displaying signals from various sources are not considered to be "solely or principally" for use in an ADP. The language in item 4 of Commission Regulation No. 634/2005, "in view of its capabilities", while not quite as definitive, suggests a similar approach.

7.279 We note that the product in item 2 of Commission Regulation No. 2171/2005 – a LCD colour monitor with a 20 inch diagonal screen measurement – is also fitted with a DVI interface. However the reason given for excluding the product is distinct from the reason provided for excluding the above products. In this case, the product is excluded from classification under subheading 8471 60 because "the monitor is not of a kind solely or principally used in an automatic data-processing system". Absent is any reference to the capability to display signals from "various" sources other than an automatic data-processing machine.[380] We consider, however, that this does not support the European Communities' view that displays with DVI, capable of connecting to sources other than an automatic data-processing machine, may be granted duty-free treatment.

7.280 Finally, we note that the product described in item 1 of Commission Regulation No. 2171/2005 – an LCD monitor with a 15 inch diagonal screen measurement, having "a mini D-sub 15

[378] See, for example, fn. 375 above.

[379] Item 4 of Commission Regulation No. 634/2005, refers to "DVI in"; item 3 of Commission Regulation No. 2171/2005 refers to both "DVI-D" and "DVI-I" (US-46; JPN-16; TPKM-19); and its item 4 refers to "DVI-D" (Exhibits US-15; JPN-17; TPKM-20) .

[380] We note, item 2 of Commission Regulation No. 2171/2005 provides that "[t]he intended use of the product is that of displaying video signals for development of graphics or video film editing and production in a CAD/CAM system or a video editing system (see Note 5 (E) to Chapter 84)", without reference to the capability to connect to other sources than such a system or an automatic data-processing machine.

pin interface only", and "designed for working only in conjunction with a product classifiable under heading 8471" – does not have a DVI interface. We are unclear to what extent the product may be used with other devices due to the indication that it is "designed for working only in conjunction with a product classifiable under heading 8471" and has "limited capability of receiving signals from a source other than an automatic data-processing machine". In addition, we understand that the application of item 1 Commission Regulation No. 2171/2005 is limited to products of a certain diagonal screen measurement.[381] Furthermore, we explained above that items 3 and 4 clearly exclude certain displays from classification under a duty-free heading based on their ability to connect to sources other than an automatic data-processing machine.

7.281 Taken together, we consider that Commission Regulation Nos. 634/2005 and 2171/2005 have the general effect of excluding from duty-free treatment certain LCD colour monitors because they are capable of displaying signals from sources other than an automatic data-processing machine. According to these regulations, those products described in item 4 of Commission Regulation No. 634/2005 and items 3 and 4 of Commission Regulation No. 2171/2005 in connection with CN code 8528 21 90 are excluded from *duty-free* classification because they are "not of a kind solely or principally used in an automatic data-processing system". Only the product described in item 1 of Commission Regulation No. 2171/2005 is described as "of a kind solely or principally used in an automatic data-processing system", with emphasis given to the fact that it is "designed for working only in conjunction with a product classifiable under heading 8471" and its "limited capability of receiving signals from a source other than an automatic data-processing machine...". Moreover, we note that this product is described as having a "mini D-sub 15 pin interface only".

7.282 Under these regulations, the determination of whether to exclude the products from duty-free treatment appeared to be independent of the diagonal screen measurement of the particular product. At a minimum, we note that a monitor with a 15-inch diagonal screen measurement and a "DVI in" interface described in item 4 of Commission Regulation No. 634/2005 was excluded, whereas item 1 of Commission Regulation No. 2171/2005 was not, despite also having a 15-inch diagonal screen measurement, though no DVI interface.

7.283 The measures do not expressly indicate whether the presence of DVI connectability is dispositive in determining classification under a dutiable heading. However, we note, of the five items considered, those four that were excluded from classification under a duty-free heading were described as possessing some variation of a DVI (where a "DVI in", both "DVI-D" and "DVI-I", or "DVI-D") interface. The product classified under duty-free CN code 8471 60 80 under item 1 of Commission Regulation No. 2171/2005 was described as having a "mini D-sub 15 pin interface only".[382]

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[381] We note item 1 of Commission Regulation No. 2171/2005 provides "in view of its size and its limited capability of receiving signals from a source other than an automatic data-processing machine via a card without video processing features, it is considered to be of a kind solely or principally used in an automatic data-processing system" In light of this rationale, we understand that size is a relevant consideration in determining whether such a product would qualify for duty-free treatment under subheading 8471 60.

[382] While the linkage between the presence of a DVI interface and connectability to sources other than an automatic data-processing machine is not express, it appears to be implied, in particular, when Commission Regulation No. 2171/2005 is read in its entirety. Other than describing the dimension, resolution and pixel size, item 1 of this Regulation otherwise indicates that the "[t]he product has a mini D-sub 15 pin interface only". Immediately thereafter, item 1 indicates that "[the product] is designed for working only in conjunction with a product classifiable under heading 8471". In addition to the fact that these two sentences appear in sequence, the sentences further appear directly related due to the fact that the first sentence refers to "The product" while the second sentence begins with the indefinite "It". In contrast, for instance, item 3 of Commission Regulation No.

7.284 Accordingly, the Panel concludes that item 4 in the Annex of Commission Regulation Nos. 634/2005 and items 2, 3 and 4 in the Annex of 2171/2005 require that LCD monitors that are capable of displaying signals from sources other than an automatic data-processing machine, as described in those items, shall be classified in a dutiable heading, which sets a 14 per cent duty. Under the current CN2010, such products would thus be excluded from CN code 8528 51 00.

(d) The continuation of the duty suspension under Council Regulation No. 179/2009

7.285 The **Panel** recalls its finding in paragraph 7.190 above that Council Regulations Nos. 301/2007 and 179/2009 were implemented as either an extension or amendment of Council Regulation No. 493/2005, and are within the Panel's terms of reference. Because Council Regulation No. 179/2009 replaced Council Regulation No. 301/2007 in the EC legal order, effective 1 January 2009, as explained, we will limit our assessment to the effects of Council Regulation No. 179/2009.

7.286 We also explained in paragraph 7.184 above that Article 1 of Council Regulation No. 179/2009 sets forth the specific legal obligation to autonomously suspend 14 per cent *ad valorem* duties, until 31 December 2010 for certain products. In particular, under CN code 8528 59 10, duties are to be suspended for:

> "[B]lack and white or other monochrome monitors, using liquid crystal display technology, equipped with either digital visual interface (DVI) or a video graphics array (VGA) connector or both with a diagonal measurement of the screen not exceeding 77,50 cm (i.e. 30,5 inches), with an aspect ratio of 1:1, 4:3, 5:4 or 16:10, with a pixel resolution exceeding 1,92 mega pixels, and with a dot pitch not exceeding 0,3 mm".

7.287 Under CN code 8528 59 90, duties are to be suspended for

> "[C]olour monitors, using liquid crystal display technology, with a diagonal measurement of the screen not exceeding 55,9 cm (i.e. 22 inches), with an aspect ratio of 1:1, 4:3, 5:4 or 16:10".

(i) Arguments of the parties

7.288 The **European Communities** explains that Council Regulation No. 493/2005 expired on 31 December 2008, and was thereafter replaced by Council Regulation No. 179/2009, beginning on 1 January 2009. It thus considers that Council Regulation No. 179/2009 is relevant to the Panel's analysis.[383] The European Communities argues that the legal effect of Council Regulation No. 179/2009 is to suspend the application of duties through 31 December 2010 on certain flat panel colour video monitors having *inter alia* an aspect ratio 1:1, 4:3, 5:4 or 16:10 and sizes up to 22 inches.

2171/2005 notes that "[t]he product can display signals received from various sources...", immediately after specifying a multitude of interfaces that include a "mini D-sub 15 pin" as well as "DVI-D" and DVI-D". In our view, the language strongly suggests that the presence of a DVI interface has been a leading factor in establishing whether a product is "of a kind solely or principally used in an automatic data-processing system". We note, in addition, as the complainants have indicated, that there have been at least three BTI in which customs officials exclusively noted the presence of a DVI within the description of the product in reaching a decision to classify a product under dutiable CN code 8528 21 90 (currently 8528 59 10) (See, e.g., IE06NT-14-501-01, IE06NT-14-501-02 and IE06NT-14-501-03 (Exhibit US-50)).

[383] European Communities' first written submission, para. 94 (Exhibit EC-9). The Panel recalls its determination in paragraph 7.190 above that Council Regulation No. 179/2009 amended Council Regulation No. 493/2005 and would therefore form the basis of the Panel's assessment of the duty suspension.

The European Communities explains further that duties are suspended for black and white or other monochrome LCD monitors up to the size 30,5 inches equipped *inter alia* with a DVI or VGA connector.[384] The European Communities argues that the duty suspension assists customs officials in providing uniform classification of different monitor models in light of the "number and complexity of the different technical criteria that are relevant in the tariff classification of LCD monitors".[385] The European Communities argues further that the application of the duty suspension effectively results in a zero applicable tariff and removes any breach of Article II of the GATT 1994.[386]

7.289 The **complainants** do not dispute the legal status of the duty suspension under Council Regulation No. 493/2005 or under successor provisions, or its application to the particular products described in the measure. The complainants, however, argue that the duty suspension is temporary and conditional because it has a finite period of validity, limited application and may be terminated unilaterally.[387] For these reasons, they reject the notion that the duty suspension for certain imported display products is "legally sufficient" or adequate to eliminate inconsistency with Article II of the GATT 1994. They also observe that the suspension does not cover all products covered by the concessions at issue, but only those that match criteria up to a particular screen size.[388]

(ii) Consideration by the Panel

7.290 In this section, the **Panel** will address the legal effect of the duty suspension in the context of the EC legal order. In a later section, we will discuss whether the duty suspension removes any breach of Article II of the GATT 1994.

7.291 In our view, it is clear from Article 1 of Council Regulation No. 179/2009 that the sole legal effect of the measure is to suspend the application of 14 per cent duties, for the period 1 January 2008 through 31 December 2010, for monitors falling within the terms described within the text of the regulation. In particular we explained above that, under CN code 8528 59 10, duties are to be suspended for:

> "black and white or other monochrome monitors, using liquid crystal display technology, equipped with either digital visual interface (DVI) or a video graphics array (VGA) connector or both with a diagonal measurement of the screen not exceeding 77,50 cm (i.e. 30,5 inches), with an aspect ratio of 1:1, 4:3, 5:4 or 16:10, with a pixel resolution exceeding 1,92 mega pixels, and with a dot pitch not exceeding 0,3 mm".

7.292 Further, under CN code 8528 59 90, duties are to be suspended for:

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[384] European Communities' first written submission, para. 94.
[385] European Communities' response to Panel question No. 23.
[386] European Communities' first written submission, para. 63.
[387] United States' first written submission, paras. 124 and 142; United States' second written submission, para. 77; Japan's first written submission, para. 230; Japan's first oral statement, para. 45; Japan's second written submission, para. 141; Chinese Taipei's first written submission, paras. 183, 353-354; Chinese Taipei's first oral statement, para. 15; Chinese Taipei's second written submission, para. 212. The complainants contend that the duty suspension has been extended once until 31 December 2006, under Council Regulation No. 493/2005, and later until 31 December 2008 by Council Regulation No. 301/2007, and is currently set to expire on 31 December 2010 under Council Regulation No. 179/2009.
[388] United States' first written submission, para. 124; United States' second written submission, paras. 78, 79; Chinese Taipei's second written submission, para. 213.

> "colour monitors, using liquid crystal display technology, with a diagonal measurement of the screen not exceeding 55,9 cm (i.e. 22 inches), with an aspect ratio of 1:1, 4:3, 5:4 or 16:10".

7.293 We note that duties are thus suspended on certain LCD colour monitors with aspect ratios of 1:1, 4:3, 5:4 or 16:10 and a diagonal screen measurement of up to 22 inches; and certain LCD black and white or other monochrome monitors with aspect ratios of 1:1, 4:3, 5:4 or 16:10, with a pixel resolution exceeding 1,92 mega pixels, with a dot pitch not exceeding 0,3 mm, and with a diagonal screen measurement of up to 30,5 inches. Accordingly, duties are not suspended on all LCD colour or black and white or other monochrome monitors classifiable under either CN code 8528 59 10 or 8528 59 90.

7.294 Hence, not all monitors presently classifiable under CN code 8528 59 10 or 8528 59 90 and capable of reproducing video images from automatic data-processing systems and sources other than automatic data-processing systems, are eligible for duty suspension under Council Regulation No. 179/2009. This is, for example, the case for either LCD colour monitors, or black and white or other monochrome monitors, exceeding respectively 22 and 30.5 inches in diagonal measurements, respectively, even if they meet all other requirements set forth in Article 1 of that regulation.

7.295 In addition, we note that the measures only specified that duties are suspended until 31 December 2010.

(e) The application of a 14 per cent customs duty on imports of certain flat panel display devices

7.296 In addition to the above measures at issue, in their joint Panel request, the complainants specified that the measure at issue includes "the actual application by customs authorities of EC member States of a 14 per cent customs duty on imports of certain flat panel displays".[389] In response to a question from the Panel, the complainants indicated that they were not challenging the application of any EC measures.[390] Accordingly, the Panel will not consider particular applications by EC member State customs officials, or reach findings with respect to particular applications.

(f) Conclusions

7.297 In our analysis of the measures above, we concluded that tariff item number 8528 41 00 and 8528 51 00 implement the European Communities' obligations with respect to tariff item number 8471 60 90 in the *EC Schedule*. Further we conclude that, under CNEN 2008/C 133/01, monitors that are capable of receiving signals from sources other than an automatic data-processing machine, or are fitted with DVI, HDMI or similar connectors are automatically excluded from classification under the duty-free CN code 8528 51 00. We concluded that Commission Regulation Nos. 634/2005 and 2171/2005, similarly have the effect of excluding from duty-free treatment under CN code 8528 51 00 LCD certain colour monitors that are capable of displaying signals from sources other than an automatic data-processing machine. Finally, we concluded that Council Regulation No. 179/2009 suspends the application of duties under CN code 8528 59 90 on certain LCD colour and black and white or other monochrome monitors that meet the technical criteria set forth in the regulation. The duty suspension applies until 31 December 2010.

[389] Joint Panel request, WT/DS375/8, 376/8, DS377/6, fn. 5.
[390] Complainants' responses to Panel question No. 119.

3. The complainants' further identification of the products at issue

7.298 We found in paragraph 7.197 above that the complainants sufficiently identified the products at issue in their joint Panel request in order for us to proceed with the dispute. In particular, we noted that the measures at issue describe the products sufficiently in terms of two criteria, i.e., (i) those capable of reproducing video images from a source other than an automatic data-processing machine, and (ii) those with certain attributes, such as, for example, a built in DVI interface.

7.299 In their first submissions, the complainants discussed the products at issue in additional detail. In the European Communities' view, the Panel should limit its analysis to those products specifically discussed by the complainants and to the particular products listed in the identified measures at issue.

7.300 The Panel will now consider the implications of the complainants' identification of the products and particular measures at issue on our assessment of the concessions in the EC Schedule at issue.

(a) Arguments of the parties

7.301 The **United States** submits that a "flat panel display device" is "a type of monitor that is thin and typically uses less energy than devices using conventional cathode ray tube (CRT) technology". In its view, these devices may rely on a "variety of technologies", including liquid crystal display (LCD) or plasma technology.[391] The United States submits that computer displays at the outset were primarily based on analogue CRT technology, requiring that a digital signal generated by an automatic data-processing machine be converted to analogue before being received by the display.[392] Today, it contends that "virtually all computer monitors marketed and sold" use LCD technology. These displays are capable of receiving and processing digital signals without analogue conversion.[393] The United States contends that flat panel display devices may connect to an automatic data-processing machine using "various technologies" that accept digital signals, including, for instance the Digital Visual Interface (DVI) connector.[394]

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[391] United States' first written submission, para. 50.

[392] The United States submits that digital-to-analogue conversion was handled by a Video Graphics Array (VGA) connector, also referred to as an "RGB connector", "D-sub 15 connector", or "mini-sub D15" connector. United States' first written submission, para. 51, fn. 64.

[393] The United States submits that development of LCD technology used in computer displays began in the early 1970s, began to be commercialized in the 1980s, and were "an increasingly important part of the market during the mid-1990s". United States' first written submission, para. 52.

[394] The United States submits that the DVI, which it describes as a connector that typically consists of three rows of pins arrayed on a plug with a screw on either side, has become the industry standard for connecting a computer to a flat panel display device (United States' first written submission, paras. 53-54). The complainants jointly submit that the DVI interface was developed in 1998 by the Digital Display Working Group (DDWG) industry group, which they describe as an "open industry group" comprising leading computer manufacturers such as Intel, Compaq, Fujitsu, Hewlett Packard, IBM, NEC and Silicon Image. The complainants refer to a statement by the DDWG that the DVI standard "provides a high-speed digital connection for visual data types that is display technology independent … is primarily focused at providing a connection between a computer and its display device … and meets the needs of all segments of the PC industry (workstation, desktop, laptop, etc) and will enable these different segments to unite around one monitor interface standard" See Digital Display Working Group, Digital Visual Interface (DVI) Revision 1.0, p. 5 (March 30, 1999) ("DDWG Paper") (Exhibit US-35). See generally: United States' first written submission, para. 53; Chinese Taipei's first written submission, para. 13.

7.302 **Japan** submits that this dispute concerns "flat panel display devices" including "the [LCD] type commonly referred to, in numerous EC and other documents, as 'LCD monitors'".[395] While stating that it would "focus[] on LCD monitors with a 'digital visual interface' or DVI", Japan submits that the scope of the dispute covers "flat panel display devices 'for' [automatic data-processing] machines".[396] Japan submits that LCD monitors with DVI are the most common type of flat panel display device.[397] Japan further submits a list of specific products that it considers illustrative of the types of LCD monitors that are subject to duties.[398]

7.303 **Chinese Taipei** submits that "flat panel display devices" are devices capable of receiving signals from automatic data-processing machines and other sources that are lighter and much thinner than traditional displays due to their use of technologies other than CRT, such as LCD, Electro Luminescence, Plasma, Vacuum-Fluorescence or Organic Light Emitting Diode (OLED) technologies. Chinese Taipei contends that flat panel display devices can have "varying sizes" and "various technical specifications", and may rely on a "variety of connectors", including DVI. In its view, displays with DVI technologies are "most affected" by the measures at issue in this dispute. Chinese Taipei submits that the DVI interface is specifically designed for automatic data-processing machines.[399] Chinese Taipei submits that flat panel display devices are "generally used in connection with [automatic data-processing] machines or as part of computer networks in office, industrial or home environments."[400]

7.304 The **European Communities** argues that the complainants' descriptions of the products in their first submissions assume that the product at issue is synonymous with "computer monitors" or "LCD monitors with a DVI", or otherwise display devices capable of receiving signals from automatic data-processing machines only, or from both automatic data-processing machines and other sources.[401] It notes that the United States describes monitors and display technology generally, using terms such as "LCD monitors", "LCD flat panel display devices" "LCD monitors with a DVI", "LCD monitors 'for' a computer", "LCD monitors that are 'for' ITA products", "LCD computer monitor, whether or not equipped with DVI and whether or not solely capable of being used with a computer".[402] The European Communities contends that Japan has limited its description to displays using LCD technology and incorporating a DVI connector, which may be used with automatic data-processing machines only, or with both automatic data-processing machines and other sources.[403] Finally, the European Communities argues that Chinese Taipei has limited its legal arguments to flat panel display devices using LCD technology that can be used with automatic data-processing machines only, or with automatic data-processing machines and other apparatus.[404] Accordingly, the

[395] Japan's first written submission, para. 216.
[396] Japan's first written submission, para. 216.
[397] Japan otherwise states that it "supports the arguments of" the United States and Chinese Taipei that the measures at issue limit duty-free coverage under HS1996 heading to devices that can display information only from an automatic data-processing machine (Japan's first written submission, para. 216).
[398] Exhibit JPN-15. Japan argues that this list is illustrative only, and not comprehensive (Japan's first written submission, para. 218).
[399] Chinese Taipei's first written submission, paras. 11-12 (citing the DDWG website, available at http://www.ddwg.org and http://www.ddwg..org/faqs.asp).
[400] Chinese Taipei states that flat panel display devices are also used in Points of Information (PoI) or Points of Sale (PoS) (Chinese Taipei's first written submission, para. 14).
[401] European Communities' first written submission, para. 42.
[402] European Communities' first written submission, para. 41 (referring to United States' first written submission, paras. 56, 58, 59, 61, 132, 135 and 137.)
[403] European Communities' first written submission, paras. 39-40.
[404] European Communities' first written submission, paras. 36-37.

European Communities considers the complainants' descriptions inadequate to establish a prima facie case.

7.305 To the extent that the Panel considers that the complainants have identified "some" of the displays with sufficient clarity, the European Communities argues that the Panel should limit its findings to the LCD monitors described in item 4 in the annex to Commission Regulation No. 634/2005, and items 1, 2, 3 and 4 in Commission Regulation 2171/2005.[405] It argues that the five displays in these measures are capable of being used with both video monitors and monitors of automatic data-processing machines. However, the European Communities additionally requests the Panel to make findings with respect to LCD monitors that can accept a signal *only* from an automatic data-processing machine, since, it argues, the complainants have specified monitors that can accept a signal *only* from automatic data-processing machines. Moreover, because the complainants did not refer to HDMI technology at all in their first written submissions, but only mentioned this category of product in response to a question from the Panel, the European Communities argues that displays utilizing HDMI technology should not be considered within the scope of the claims before the Panel.[406]

7.306 In response, the **United States** submits that it has used terms to describe each product, and provided definitions as well as technical background information sufficient to identify the products.[407] In particular, the United States submits that it adequately set forth its claim by identifying at least two types of flat panel display devices that are affected by the measures at issue: "flat panel display devices with a DVI interface (whether or not the product can be used with devices other than an automatic data-processing machine)"; and "flat panel display devices that are not 'solely' for use with an ADP machine, but which are nonetheless 'for' an ADP machine".[408] The United States additionally argues that displays that have an HDMI interface fall within its claims because these products are "capable of connecting to a device other than a computer (whether through an HDMI interface or another technology)".[409]

7.307 **Japan** rejects the view that it has limited the scope of its claim by referring to LCD technologies, or to the presence of DVI, or that it has limited its claim based on whether a display can also operate with some other non-ITA device, such as a television receiver. In its view, reference to the DVI connector is illustrative, as opposed to delimiting the products at issue.[410] In light of its claim regarding displays "for" automatic data-processing machines, Japan considers that a display with an HDMI interface would fall within the scope of its claim as long as the device is capable of receiving signals from and operating with an automatic data-processing machine or other ITA product. Moreover, Japan submits that the HDMI interface was developed for audio-visual appliances on the basis of the DVI standard.[411]

7.308 **Chinese Taipei** similarly rejects that its claims are limited to LCD monitors with DVI connectors.[412] While submitting that the display types most affected by the EC measures are LCD displays with a DVI connector, Chinese Taipei considers that displays with HDMI interfaces fall

[405] European Communities' first written submission, paras. 47-48.
[406] European Communities' second written submission, para. 39.
[407] United States' second written submission, para. 16 (referring to United States' first written submission, paras. 42, 50-54, 68-71) (Exhibits US-22 to 25; US-31 to 35, US-53 to 56).
[408] United States' response to Panel question No. 48; United States' second oral statement, para. 27.
[409] United States' response to Panel question No. 49.
[410] Japan's second written submission, para. 132.
[411] Japan's response to Panel question No. 49.
[412] Chinese Taipei's second written submission, para. 98.

under its claim.[413] Chinese Taipei further submits that it has clearly indicated the scope of the product covers flat panel display devices that can only reproduce and receive signals from an automatic data-processing machine.[414] Chinese Taipei argues that it included both of these products because certain devices that can only receive signals from an ADP machine have nevertheless been subject to duties by the European Communities merely due to the presence of certain connectors.[415]

(b) Consideration by the Panel

7.309 We recall from above that the task before us in respect of the complainants' claims based on Article II of the GATT 1994, is to determine whether the measures at issue result in duties being levied on certain products, in excess of the tariff treatment provided for those products under the EC Schedule. In doing so, we explained our understanding of the complainants' claim to be that aspects of the measures operate automatically to exclude from particular duty-free tariff headings *all* products with a certain characteristic irrespective of the other objective characteristics they may possess. Thus, we concluded that, if we were to determine that some products fall within the scope of duty-free concessions in the EC Schedule, then if the challenged measures provided for the application of duties to those products covered by the concession, this treatment would be sufficient to find a breach of Article II.

7.310 Accordingly, we disagree with the European Communities that the complainants were obliged to identify the particular models or precise products at issue in order to succeed at their claim. We consider that the measures within our terms of reference determine the products that are within our terms of reference. The Panel will consider below these and other aspects of the measures in its assessment in determining whether the complainants have met their burden to demonstrate inconsistency of the measures at issue under Article II of the GATT 1994.

7.311 As argued above by the parties, the European Communities notes that the complainants have referred to aspects of the measures at issue which describe particular products or attributes of products, in particular, items in the Annex to Commission Regulation Nos. 634/2005 and 2171/2005. In addition, we note that the complainants have referred to various products or categories of products in framing their arguments to the Panel.

7.312 The United States, for instance, describes a "flat panel display device" as a type of monitor that is thinner and typically uses less energy than devices using CRT technology. It contends that these devices rely on a "variety of technologies", "including liquid crystal or plasma".[416] The United States emphasizes that these devices are capable of connecting to automatic data-processing machines using "various connectors", including notably a DVI interface.[417]

7.313 Japan describes "LCD monitors", in particular those with DVI interfaces, as the "most common type" of flat panel display devices that are capable of displaying information from an automatic data-processing machine, regardless of their ability to connect to other units. Japan additionally indicates that other products may fall within the scope of this dispute.[418]

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[413] Chinese Taipei's response to Panel question No. 49.
[414] Chinese Taipei's first written submission, para. 234.
[415] United States' first written submission, para. 130 (Exhibit US-78); Chinese Taipei's response to Panel question No. 48.
[416] United States first written submission, para. 50.
[417] United States first written submission, para. 53.
[418] Japan's first written submission, paras. 216 and 218.

7.314 Chinese Taipei submits that "flat panel display devices" are those devices "capable of receiving signals from automatic data-processing machines only or from both ADP machines and other sources". Chinese Taipei submits further that these devices rely on "various different technologies" such as LCD, Electro Luminescence, Plasma, Vacuum-Fluorescence or OLED, have "varying" sizes and "various" specifications, and incorporate "a variety of connectors", including DVI as well as "VGA connectors". It considers that "LCD displays with a DVI connector" are "most affected" by the measures at issue.[419]

7.315 On the basis of the Panel request, our assessment of the measures, and the complainants' views on the products at issue set forth in their submissions, we understand it is not in dispute that the claims relate to devices using non-CRT technology.

7.316 With regard to specific display technology, some of the aspects of the measures challenged, in particular Commission Regulation Nos. 634/2005 and 2171/2005 identified above, relate expressly to LCD technology. However, the complainants have additionally argued that the measures apply to display devices based on other technologies. The relevant provisions of CNEN 2008/C 133/01 are expressly applicable to technologies other than merely LCD. In addition, the joint Panel request identifies both display devices using LCD technology as well as "flat panel display devices" generally. While the complainants have for the most part focused their arguments on LCD devices, the Panel does not consider that the particular technology used by a flat panel display is dispositive to assessing whether the complainants have, or have not, established a prima facie case of violation. The central issue, in our view, is the permissibility of excluding from duty-free treatment flat panel display devices with certain characteristics that are unrelated to the particular display technology used. Therefore, the Panel considers that the aspects of the measures at issue challenged are broad enough to encompass flat panel display devices with certain characteristics that are unrelated to the particular display technology used, irrespective of the precise display technology used.

7.317 In light of the complainants' Panel request, and their arguments discussed above, the Panel considers that the Panel's inquiry is limited to the following aspects of the measures: (i) the exclusion of flat panel display devices from duty-free treatment on the basis that they are able to receive and display signals from sources other than automatic data-processing machines, in addition to being able to receive and display signals from an automatic data-processing machine and (ii) the exclusion of flat panel display devices from duty-free treatment on the basis of the presence of a DVI connector. As recognized by the European Communities and complainants, the Appellate Body in *EC - Chicken Cuts* found:

> "the identification of the products at issue must flow from the specific measure identified in the panel request. [...] [It] is the *measure* at issue that generally will define the *product* at issue".[420]

7.318 In our view, it flows from this that the products at issue are: (i) flat panel display devices that are capable of receiving and reproducing video images both from an automatic data-processing machine and from a source other than an automatic data-processing machine, and (ii) flat panel display devices that have a DVI interface, whether or not they are capable of receiving signals from another source.

7.319 With regard to display devices incorporating an HDMI connector, we consider that these products also fall within our terms of reference. While the complainants did not refer to HDMI

[419] Chinese Taipei's first written submission, paras. 11, 12 and 14.
[420] Appellate Body Report on *EC – Chicken Cuts*, para. 165 (emphasis in original).

technology in their respective sections identifying the "products at issue", we note that the complainants referred to "flat panel displays with certain attributes, *such as* DVI" within their joint Panel request.[421] In addition, we note that the relevant text of the identified CNEN 2008/C 133/01 states that "Monitors of this subheading cannot ... be fitted with interfaces such as DVI-D, DVI-I and High-Definition Multi-media Interface (HDMI) even if these interfaces do not support high-bandwidth digital content protection (HDCP) encryption".[422] Finally, even if we were to consider that products with HDMI were not covered, to the extent that HDMI are used to connect a flat panel display device to sources other than an automatic data-processing machine, we consider that flat panel display devices with HDMI would be included in the scope of the complainants' claim relating to this aspect of the measure.

7.320 Accordingly, we will consider below whether the products as specified by the complainants and that flow from the criteria identified by the complainants, fall within the scope of the EC concessions at issue.

4. Whether the European Communities' tariff treatment of particular flat panel displays is consistent with its obligations under Article II of the GATT 1994

7.321 The European Communities made duty-free concessions on certain information technology products as part of its implementation of the ITA, which are reflected in the EC Schedule. The complainants' claim with respect to the tariff treatment of certain flat panel display devices relates to two concessions in the EC Schedule: (i) the concession embodied in the narrative description "Flat panel display devices (including LCD, Electro Luminescence, Plasma, Vacuum-Fluorescence and other technologies) for products falling within this agreement, and parts thereof", in the Annex to the EC Schedule[423]; and (ii), the concession embodied in EC Schedule under tariff item number 8471 60 90 listed therein. The complainants argue that by not affording duty-free treatment to products which are within the scope of these tariff concessions, the European Communities is acting inconsistently with its obligations under Article II of the GATT 1994, which requires that Members not treat products coming from another Member less favourably than in their schedules or charge duties in excess of the bound rates set forth in the Schedule.

7.322 As noted above, we will start by determining the scope of the FPDs concession in the Annex to the EC Schedule. We will then turn to determining the scope of tariff item number 8471 60 90. Having determined the scope of the relevant obligations in the EC Schedule, we will then consider whether the effect of the measures at issue noted above is such that products that fall within the scope of the European Communities' obligations do not receive duty-free treatment.

(a) The ordinary meaning of the relevant concession: The EC headnote and narrative product description for FPDs in the Annex to the EC Schedule

7.323 The **complainants** submit that FPDs are covered by the duty-free concession in the narrative description for FPDs in the Annex to the EC Schedule ("Flat panel display devices (including LCD, Electro Luminescence, Plasma, Vacuum-Fluorescence and other technologies) for products falling within this agreement, and parts thereof").[424] They argue that the ordinary meaning of the terms of the

[421] Joint Panel request, WT/DS375/8, 376/8, DS377/6, p. 3 (emphasis added).
[422] Exhibits US-49; JPN-18; TPKM-23 (emphasis added).
[423] Regarding the complainants' views on the location of the concession, see paras. 7.219 - 7.226 above.
[424] The following third parties also take this view: see, for instance, Australia's oral statement, paras. 8, 13; China's executive summary of its third party submission, para. 3; Costa Rica's third party submission, para. 5, 22-23; Hong Kong (China)'s third party statement, paras. 4-5; Korea's third party submissions, paras. 10-11,

FPDs narrative description, when read in the context of the EC headnote, requires the European Communities to extend duty-free coverage to all products described by the narrative description for FPDs, wherever those products are classified.[425] In their view, the tariff item numbers listed beside the narrative descriptions cannot limit the concession's scope to only those products classifiable in the listed codes.[426] The United States even describes the EC headnote as a "separate" commitment, *additional* to the commitments associated with individual tariff lines in the EC Schedule.[427] Within the terms of this narrative description, they indicate that the term "for" is key to the ordinary meaning analysis under the Vienna Convention.

7.324 The **European Communities** accepts that the EC headnote is part of its Schedule[428], but rejects the complainants' allegations on the ordinary meaning of the terms in the EC headnote[429] as well as the FPDs narrative description.[430] The European Communities argues that the fourteen tariff item numbers listed next to the FPDs narrative description determine the scope of the FPDs commitment made pursuant to Attachment B and therefore should not be "read out from the EC's Schedule".[431]

7.325 As explained above[432], the Annex to the EC Schedule contains (i) the EC headnote, and (ii) a table listing 55 narrative descriptions (including the FPDs narrative description) in a left-hand column with one or more specific tariff item numbers listed next to each narrative description in the table's right-hand column (including 14 codes associated with the FPDs narrative description).

7.326 We recall that the EC headnote provides as follows:

22; Philippines' third party submission, para. 3; Philippines' third party statement, pp. 5-6; Singapore's oral statement, paras. 9 and 48.

[425] Complainants' response to panel question No. 100. The United States and Chinese Taipei submit that the ITA itself does not provide for the inclusion of a headnote; however, they argue that participants agreed, during the implementation phase, to incorporate a headnote into their Schedules as part of the process of implementing their Attachment B concessions. They argue that such a headnote was to include the language "wherever they are classified in the HS" (United States' and Chinese Taipei's responses to panel question No. 100). Japan argues that the ITA does not require the incorporation of a headnote when inscribing duty-free concessions on products described in Attachment B into ITA participants' Schedules. It argues that participants had discretion concerning how to reflect this commitment into their own Schedules subject to review and approval by the Members. While arguing that no requirement exists to incorporate a particular headnote, Japan submits it included a note that is "almost the same" as the EC headnote (Japan's response to panel question No. 100).

[426] The following third parties also take this view: see, for instance, Australia's third party oral statement, para. 8; Philippines third party oral statement, p. 8; and Singapore's third party submission, para. 22.

[427] United States' comments to the European Communities' response to Panel questions Nos. 100 and 103 and questions 1-3 of the United States.

[428] European Communities' first written submission, para. 18.

[429] European Communities' first oral statement, para. 20.

[430] European Communities' first written submission, paras. 104-118.

[431] European Communities' first written submission paras. 50-61; European Communities' response to Panel question No. 10; European Communities' second written submission, paras. 13 and 18. The European Communities argues that the CN codes that appear next to the product description for FPDs "appear twice" in its Schedule, as those codes listed next to the narrative descriptions in the Annex to the EC Schedule are also listed elsewhere in the EC Schedule and carry a zero duty. Thus, the European Communities considers that the CN codes in the Annex to the EC Schedule "exhaust" the headnote, in particular the language "wherever the product is classified" that appears therein. Accordingly, the European Communities does not consider the headnote adds to its commitments (see, for instance, European Communities' first oral statement, para. 19; European Communities' response to questions from the United States during second meeting, para. 1).

[432] See paragraphs 7.24 - 7.25 above.

> "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 as 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".[433]

7.327 The text of the FPDs narrative description, that appears below the EC headnote, provides as follows:

> "Flat panel display devices (including LCD, Electro Luminescence, Plasma, Vacuum-Fluorescence and other technologies) for products falling within this agreement, and parts thereof".[434]

7.328 The following 14 tariff item numbers are associated with the FPDs narrative description:

> "84716090, 84733010, 84733090, 85312030, 85312051, 85312059, 85312080, 85318030, 85319010, 85319030, 90138011, 90138019, 90138030, 90139010".[435]

7.329 The complainants have identified both the FPDs narrative description and the EC headnote in discussing the concession that they consider to arise under the Annex to the EC Schedule. Because the EC headnote appears at the outset of the Annex to the EC Schedule and thus precedes the narrative descriptions, we consider it appropriate to begin our analysis with the EC headnote before turning to the narrative description. Pursuant to Article 31 of the Vienna Convention, we will consider the ordinary meaning of the EC headnote.

(i) The meaning of the terms of the EC headnote

Arguments of the parties

7.330 The complainants' arguments with respect to the EC headnote focus on the language "wherever the product is classified" and "to the extent not specifically provided for in this Schedule". There arguments are reflected below:

> wherever the product is classified

7.331 The **complainants** argue that the phrase "wherever the product is classified" means that the product must be accorded duty-free treatment no matter where the Member chooses to classify it in its customs tariff under national law.[436] The **United States** considers that the function of the EC headnote is to "affirm" the duty-free treatment to be accorded to products falling within the general description of products in Attachment B.[437] It argues that a Member "is not excused" from providing duty-free treatment to an Attachment B product "merely because it is classifiable in a dutiable heading".[438] **Japan** argues that the phrase "wherever the product is classified" indicates that the narrative product descriptions "take precedence" over the HS headings used by the ITA participants to classify these

[433] Exhibit US-7.
[434] Exhibit US-7.
[435] Exhibit US-7.
[436] Complainants' response to Panel question No. 10(b).
[437] United States' first written submission, para. 8.
[438] United States' response to Panel question No. 10(b).

products in the past, and thus determine the scope of the tariff concessions on Attachment B products.[439] If tariff item numbers were intended to define the scope of the concession, it argues, it would have been unnecessary to include the EC headnote that explicitly provides for duty-free treatment wherever the product is classified.[440] **Chinese Taipei** considers that the meaning of the words "wherever the product is classified" is "both crucial and self-explanatory" as it means that a listed product is entitled to duty-free treatment regardless of the specific tariff line under which a particular product falls in the EC Schedule.[441]

7.332 The **European Communities** argues that the phrase "wherever the product is classified" was included in the EC headnote because the product definitions in Attachment B "could cut across" multiple different tariff lines.[442]

to the extent not specifically provided for in this Schedule

7.333 The **United States** argues that the phrase "to the extent not specifically provided for in this Schedule" acknowledges that products may be covered by a concession associated with a particular tariff line or by the Attachment B description, or both. Even if the product is classifiable in a dutiable heading, the United States argues, the Members must nonetheless accord duty-free treatment to the product if it meets the Attachment B description.[443] **Japan** argues that the phrase when read with the phrase "shall be bound and eliminated" means that Attachment B concessions grant a duty-free treatment to certain products that are not given duty-free treatment by any other specific concessions.[444] **Chinese Taipei** argues that the phrase relates to the term "product" and clarifies that the Attachment B concessions are additional to any concessions already resulting from Attachment A.[445]

7.334 The **European Communities** argues that the phrase "to the extent not specifically provided for in this Schedule" refers to all product definitions in the entire EC Schedule, including those in the tariff headings that follow the HS nomenclature, and "those that do not follow the HS nomenclature but rather copy into the Schedule the product definitions contained in Attachment B to the ITA.[446]

Consideration by the Panel

7.335 In terms of its structure, the EC headnote can be subdivided into five main elements or grammatical phrases:

(a) "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),"

(b) "to the extent not specifically provided for in this Schedule"

[439] Japan's response to Panel question No. 10(b).
[440] Japan's second written submission, para. 221.
[441] Chinese Taipei's response to Panel question No. 7.
[442] European Communities' response to Panel question No. 10(b).
[443] United States' response to Panel question No. 10(b).
[444] Japan's response to Panel question No. 10(b).
[445] Chinese Taipei's response to Panel question No. 10(b).
[446] European Communities' response to Panel question No. 10(b).

(c) "the customs duties on such product, as well as 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)"

(d) "shall be bound and eliminated as set forth in paragraph 2(a) of the Annex to the Declaration"

(e) "wherever the product is classified".

7.336 We first analyse these grammatical phrases on their own and thereafter consider the implications of these elements taken together.

7.337 The opening segment of the EC headnote refers to any product that is either described "in" Attachment B, or otherwise, is "for" Attachment B. We recall that certain HS headings listed in Attachment A, Section 2 are identified by the comment "*For* Attachment B"[447] (emphasis added). As we will discuss below, the EC Schedule reproduces these product descriptions both from (or "in") Attachment B and from Attachment A, Section 2 directly below the EC headnote, in accordance with the modalities set out in the ITA. We also concluded above that, for our purposes[448], there are no discrepancies between the FPDs narrative description in Attachment B and the FPDs narrative description in the Annex to the EC Schedule.[449]

7.338 The segment of the EC headnote "to the extent not specifically provided for in this Schedule", introduces two main elements. We consider the reference to "in *this* Schedule" (emphasis added), can only refer to the EC Schedule, because the EC headnote appears within the EC Schedule. Furthermore, there is no reference to any particular section of the EC Schedule. With regard to the terms "to the extent not specifically provided for", the adverb "specifically" is defined as, "(a) in respect of specific or distinctive qualities; (b) peculiarly; (c) in a clearly defined manner, definitely, precisely". The adjective "specific" is defined as, *inter alia*, "A. *adjective* 1 Having a special determining quality. (...) 2 Specially or peculiarly pertaining to a particular thing or person, or a class of these; peculiar (*to*)". The term "provide" as a verb is defined as, *inter alia*, "3 *verb trans.* Stipulate in a will, statute, etc., *that*."[450]

7.339 In view of the terms "specifically" and "provided for", and the reference to "this Schedule", the Panel considers that this segment addresses the provision of or inclusion of a specific element within the EC Schedule as a whole. In the Panel's view, the phrase "to the extent not specifically provided for" relates to the requirement to eliminate customs duties and charges on the products subject to the EC headnote in accordance with the rate reductions specified in the ITA. In the Panel's view the phrase "to the extent not specifically provided for in this Schedule" cannot have been intended to simply relate back to the word "product" that precedes it. Such an interpretation would indicate that the requirement to provide duty free treatment to products subject to the headnote would apply only to the extent that a product is not already "provided for" elsewhere in a Member's WTO

[447] ITA (Exhibits US-1; TPKM-1).
[448] See para. 7.226 above.
[449] We recognized above that the product description for FPDs in the Annex to the EC Schedule is clearly not identical with that appearing in Attachment B, noting in particular the addition of the words "devices" and "vacuum-fluorescence" in the Annex. Nevertheless, we concluded that the description in the EC Schedule clearly has its origins in Attachment B, based on similarities between the two descriptions, and we noted that the parties do not disagree that the text in Attachment B was intended to be modified to reflect what is now reproduced in the Annex to the EC Schedule. See paras. 7.222-7.226 above.
[450] See the *Shorter Oxford Dictionary* (2003), p. 2946 for "specifically" and "specific", and p. 2382 for "provide".

schedule. Most, if not all, products described in or for Attachment B are classifiable somewhere within the EC's Schedule. If the headnote were to apply only to products that were not already "provided for" in the EC Schedule, the duty free treatment provided for in the Annex to the EC Schedule would have extremely limited, if any, application. Such a limited interpretation would defeat the clear objective to provide duty-free treatment to products described in or for Attachment B. We thus consider that the phrase "to the extent not specifically provided for" must relate to the requirement to bind and eliminate customs duties and other charges. In other words, the phrase acknowledges that there may be some repetition in terms of product coverage between the products "in or for" Attachment B and the rest of the EC Schedule, including the two other ITA-related sections of the EC Schedule. It also reaffirms that such products are now subject to new duty-free, ITA-related, tariff obligations, notwithstanding any overlap in product coverage.[451]

7.340 The next segment of the EC headnote – "the customs duties on such product, as well as 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)" – expressly refers to "customs duties" or "any other duties and charges of any kind" that are "within the meaning of Article II:1(b) of the [GATT 1994]". In our view, these terms are self explanatory. Moreover, we note that the meaning of these terms is not in dispute. Thus, we do not address this aspect in further detail here.

7.341 The next segment of the EC headnote provides that customs duties and any other duties and charges of any kind "shall be bound and eliminated as set forth in paragraph 2(a) of the Annex to the Declaration". In combination with the preceding segment, the obligation to "bind and eliminate" duties and charges clearly commits the European Communities to provide duty-free treatment to the products under the concession, and this by 1 January 2000 and as provided for in paragraph 2(a) of the ITA Annex. The third and fourth segment thus integrate in the EC Schedule a key objective of the ITA, i.e., to eliminate all duties and charges for Attachment B products, in the manner and time-frame prescribed by paragraph 2(a) of the ITA Annex. The Panel notes that, without this particular segment of the EC headnote, there appears to be nothing in the remainder of the EC headnote, nor in the product descriptions or the tariff item numbers that follow, that on its face, could be interpreted to indicate that duty-free treatment must be provided in respect of those products. One of the key functions of the EC headnote is therefore to expressly provide that duty-free treatment be provided to the products covered in this part of the EC Schedule.

7.342 The EC headnote concludes with the phrase "wherever the product is classified".[452] The term "wherever" is defined, *inter alia*, as "II *rel. adverb & conjunction*. 2 At, in, or to any or every place in or to which (...) III 3 Introducing a qualifying dependent clause: in or to whatever place: no matter where. 4 In any case or circumstances in which".[453] The expression "no matter" is defined as "be of no

[451] The Panel notes that the phrase "to the extent not specifically provided for in this Schedule" may also have been intended to clarify that, where products already received duty-free treatment in the Schedule of a Member, such products would not be subject to the "staging" provisions of the ITA, whereby customs duties where reduced to zero through rate reductions in equal steps from 1997 to 2000. In this respect, products already receiving duty-free treatment under a Schedule, would continue to receive duty-free treatment during this "staging" period. The Panel notes further that the EC headnote refers explicitly to paragraph 2(a) of the ITA Annex, which contains the "staging" provisions in the ITA.

[452] We note this language is highly similar to language that appears in two separate locations in the ITA Annex. The chapeau to the ITA Annex provides "Attachment B lists specific products to be covered by an ITA wherever they are classified in the HS". The chapeau immediately preceding Attachment B provides "Positive list of specific products to be covered by this agreement wherever they are classified in the HS". However, in this Section of the Reports, we address the plain meaning of the terms.

[453] The *Shorter Oxford Dictionary* (2003), p. 3622.

consequence or importance; (b) colloq. it is of no consequence or importance, never mind."[454] The verb "classify" is defined generally as "1 Arrange in classes; assign to a class".[455] In terms of the structure of the EC headnote, we understand this concluding phrase is tied to the condition that customs duties (and any other duties and charges) shall be bound and eliminated for products in or for Attachment B as provided in paragraph 2(a) of the ITA Annex. Initially, on the basis of the dictionary definitions provided above, the plain meaning of the phrase implies that the classification of the product is not dispositive, not important, or even not relevant. When read together with the rest of the text of the EC headnote that precedes it, the Panel considers that the language "wherever the product is classified" indicates that customs duties should be bound and eliminated on products in Attachment B, as well as the products "for" Attachment B[456], and that this should be so no matter where that product is classified in the EC Schedule.

7.343 Our initial analysis of the text of the EC headnote suggests that products described in or for Attachment B must be granted duty-free treatment irrespective of where those products are classified. This interpretation has implications for the meaning and significance of the tariff item numbers appearing alongside the product descriptions in the EC Schedule. In particular, whatever significance the tariff item numbers would have, they would not have the effect of controlling or determining the scope of coverage arising from the ordinary meaning of the product descriptions themselves. In other words, the plain meaning of the phrase "wherever the product is classified" is not consistent with a view that the tariff item numbers notified by the European Communities operate to limit the scope of the EC concessions strictly to products that are classified or classifiable in the particular tariff item numbers listed next to a given product description in the Annex to the EC Schedule.

7.344 The European Communities has argued that the language "wherever the product is classified" is intended to refer to the tariff item numbers in the EC Schedule where zero duties would apply for a particular product (as the Member would itself specify in its Schedule in the lead up to implementation of its ITA obligations).[457] Accordingly, in its view, the tariff item numbers notified alongside the product descriptions in its Schedule would effectively "exhaust" the headnote, which is to say that the tariff item numbers appearing next to the product descriptions indicate where the product will be classified by the European Communities. However, the Panel finds it difficult to agree with this interpretation, at least on the basis of the plain meaning of the text of the EC headnote, when considered in full. As the Panel has interpreted above, the phrase "wherever the product is classified" refers to the condition that customs duties and other duties and charges shall be bound and eliminated for products in or for Attachment B. This phrase is open-ended; it cannot reasonably be read to refer only to the list of products and tariff item numbers listed in the Annex to the EC Schedule alongside the narrative description. While recognizing that the European Communities notified a finite list of 14 tariff item numbers next to the description for flat panel display devices in the Annex to the EC

[454] The *Shorter Oxford Dictionary* (2003), p. 1721.
[455] The *Shorter Oxford Dictionary* (2003), p. 420.
[456] We recall again that certain HS headings listed in Attachment A, Section 2 are identified by the comment "For Attachment B". As a result, we understand that descriptions in Attachment A, Section 2 were included in Members' schedules along with those narrative descriptions from Attachment B, in accordance with the modalities set out in the ITA (see para. 7.337).
[457] The European Communities argues that ITA participants had a reason for doing so, in particular, that it was necessary to do so because products described in Attachment A, Section 2 and Attachment B cut across several HS headings, as the headings existed at the time of the HS1996, and it was not possible to agree on a single appropriate heading to classify the product.

Schedule, there is no basis, on an analysis of the plain meaning of the language of the EC headnote, to conclude that these tariff item numbers "exhaust" the FPDs product descriptions.[458]

7.345 In summary, in the Panel's view, an initial textual analysis of the key terms and phrases appearing in the EC headnote strongly supports the conclusion that products initially described in or for Attachment B, which in the case of flat panel displays is the same as that reproduced in the Annex to the EC Schedule, must be granted duty-free treatment irrespective of where they are classified in the EC Schedule.

7.346 Such a conclusion suggests that the product descriptions in Attachment B determine the scope of the products for which the European Communities is required to extend duty-free treatment, and *not* the tariff item numbers that are listed next to each of the product descriptions in the Annex to the EC Schedule. The alternative interpretation, that the tariff item numbers define the scope of the obligation, would appear to read out the phrase "wherever the product is classified" from the headnote.

7.347 The Panel stresses that, at this stage of its analysis, these observations regarding the interpretation of the EC headnote are preliminary in nature. They are based on the plain meaning of the text of the EC headnote, which is the starting point, but not the end point, for interpreting treaty text.

(ii) The terms of the EC headnote in their context

7.348 The **complainants** have argued that the plain meaning of the terms in the EC headnote is "straightforward"[459], but that the ITA as context provides further support to interpret the EC concession based on the FPDs narrative description.[460] The **complainants** argue that the ITA provides relevant context for interpreting the EC Schedule within the meaning of Article 31(2)(b) of the Vienna Convention, as an instrument which was made by one or more parties in connection with the conclusion of the treaty.[461] In addition, the complainants have discussed the meaning of the EC

[458] To the extent the specific eight-digit CN codes listed next to the product description for FPDs were to have some function, for instance to inform its interpretation of the ordinary meaning of the terms of the narrative product description for FPDs, their function will be considered below at the time of our assessment of the ordinary meaning of the FPDs product description.

[459] See, for instance, United States second written submission, para. 94.

[460] United States second written submission, paras. 59 and 94; Japan's second written submission, para. 18; Chinese Taipei's second written submission, para. 6. Chinese Taipei argues that the reference in the headnote shows that all WTO Members have accepted the ITA as related to the concessions made in their Schedules (Chinese Taipei's second written submission, para. 8).

[461] Complainants' responses to Panel question No. 2; Japan's response to Panel question No. 1. The United States argues that the ITA is not *the* treaty at issue in this dispute; it considers the ITA is an "instrument" related to the GATT 1994 (United States' response to Panel question No. 1). The United States argues that WTO Members acknowledged the relationship between the ITA and the GATT 1994 by formally accepting the modifications to the Schedules of those ITA participants who were WTO Members shortly after its conclusion. Second, it submits that WTO Members acknowledged the ITA during the Ministerial Declaration in Singapore by taking note of and welcoming the agreement (United States' response to Panel question No. 2). Japan argues the ITA is a "political declaration", but generally agrees with the United States that the ITA is not treaty text for purposes of interpreting the EC concessions (Japan's response to Panel question Nos. 1, 2 and 5; Japan's second written submission, para. 18). Japan considers that the substantive content of the ITA that was subsequently included in the concessions of the EC Schedule should be given less interpretative weight (Japan's second written submission, para. 18). Chinese Taipei submits that the ITA was "accepted" by all WTO Members as an instrument related to the Schedule of Concessions, as demonstrated by the fact that the ITA was negotiated and agreed upon within the framework of the WTO during the Ministerial Conference in Singapore on 13 December

headnote in terms of modifications made to the EC Schedule, as well as concessions in other ITA participants' Schedules of concessions.

7.349 The **European Communities** argues that the ITA is "closely related" to the schedules of ITA participants, and as such, can be considered as context in the sense of Article 31(2)(b) of the Vienna Convention.[462] To the extent the ITA does provide relevant context to interpret the EC Schedule, the European Communities argues, however that the ITA itself must be interpreted in accordance with the Vienna Convention.[463] The European Communities considers that interpretation of the ITA does not support the complainants' case, despite the fact that the complainants have limited their arguments to "artificially selected ITA provisions".[464]

7.350 The Panel will address each of the possible sources of context, in turn.

The terms of the EC headnote and Annex to the EC Schedule read in the context of the ITA

Arguments of the parties

7.351 The **complainants** submit that various provisions in the ITA, in particular, its preamble, paragraphs 1 and 2 of the main text, and paragraphs 2, 3 and 5 of the Annex, support their interpretation that products initially described in the Annex to the EC Schedule must be granted duty-free treatment irrespective of where they are classified in the EC Schedule.

7.352 To the contrary, the **European Communities** argues that various provisions of the ITA support an interpretation that the tariff item numbers in the Annex to the EC Schedule effectively "exhaust" the commitments it has undertaken.

7.353 The parties' views with respect to these provisions are considered below.

The preamble *and paragraph 1 of the ITA*

7.354 The **complainants** argue that the language in the preamble and paragraph 1 of the ITA support their interpretation of the EC headnote. In particular, the complainants refer to provisions such as the aim of "achieving maximum freedom of world trade in information technology products"; that the ITA endeavours "to encourage the continued technological development of the information

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1996 (Chinese Taipei's second written submission, para. 8; Chinese Taipei's response to Panel question No. 2). Chinese Taipei considers the reference in the chapeau to the ITA is an additional element that shows that all WTO Members have accepted the ITA in connection with concessions in the Members' Schedules. In addition, Chinese Taipei notes that modifications to the Schedules of Concessions for all ITA participants were implemented in accordance with the "Procedure for Modification and Rectification of Schedules of Tariff Concessions", to which all WTO Members were parties (Chinese Taipei's second written submission, para. 8).

[462] European Communities' response to Panel question No. 1.

[463] European Communities' responses to Panel questions Nos. 1 and 2. According to the European Communities, the ITA is a "full-fledged" international treaty in the sense of Article 2(1) of the Vienna Convention, as it clearly contains "unambiguously worded legal obligations" which are binding under public international law on all the parties to the declaration. The European Communities considers it irrelevant that the ITA is designated as a "ministerial declaration", noting that the first paragraph of the preamble to the ITA uses the term "agreement" (European Communities' response to Panel question No. 1). The European Communities submits that, before relying on any part of the ITA as context, one must first determine the meaning of that text under the ITA (European Communities' response to Panel question No. 2).

[464] European Communities' response to Panel question No. 2.

technology industry on a world-wide basis", and that trade regimes "should evolve in a manner that enhances market access opportunities for information technology products".[465]

7.355 The **United States** argues that these provisions reflect that the ITA participants contemplated a "positive evolution in market access". This shows, the United States argues, that the ITA participants were interested in ensuring that duty-free treatment would be maintained, even as technology evolved and "a single digital product came to have additional purposes previously assigned to other products".[466] The United States argues, the full provisions of the ITA, including Attachment B, should be read consistently with the language of encouraging expanded trade and technological development. In its view, if every advance in technology necessitated renegotiating, economic operators would be discouraged from innovating, as doing so would compromise duty-free access.[467]

7.356 **Japan** argues that the objectives embodied in the preamble and paragraph 1 of the ITA reflect an attempt to encourage "technological development" and "evolution," not to create disincentives for them. In its view, it would not be consistent with these objectives to reduce tariffs on certain products, only to re-impose them on the basis of changes to products through technological development.[468]

7.357 **Chinese Taipei** argues that the cited provisions of the preamble or paragraph 1 of the ITA establish that "trade regimes" should evolve in a way that enhances market opportunities. It argues that nothing in those provisions indicates that the coverage provided under Attachments A and B should be read "restrictively" or "strictly interpreted", or that products should be excluded from the scope of the ITA just because they are more technologically advanced than those that existed at the time the ITA was negotiated.[469]

7.358 The **European Communities**, however, submits that the "artificially selected" ITA provisions referred to by the complainants do not support their case.[470] It considers that the cited provisions cannot be read in isolation from the rest of the ITA.[471] The European Communities recalls that paragraph 1 of the ITA uses the word "should" and not "shall" and is, therefore, not mandatory.[472] Further, the European Communities argues that paragraph 1 of the ITA also refers to "each party's trade regime" rather than specifically to the interpretation of a given tariff concession.[473] The European Communities disagrees that the reference to "trade regime" in paragraph 1 indicates that the ITA covers the "now ever-evolving information technology industry".[474] The European Communities considers that the Preamble and paragraph 1 of the ITA are important to understand paragraph 3 of the ITA Annex[475], which, it argues, is the only provision that addresses questions regarding enlargement

[465] See United States' first written submission, para. 28; United States' second written submission, para. 60; Japan's first written submission, para. 175; Chinese Taipei's second written submission, para. 14.
[466] United States' first written submission, para. 107.
[467] United States' second written submission, para. 61.
[468] Japan's first written submission, para. 175.
[469] Chinese Taipei's second written submission, paras. 15-16.
[470] European Communities' response to Panel question No. 2.
[471] European Communities' response to Panel question No. 2. The European Communities argues that the ITA includes a "carefully negotiated scope of products" and "detailed procedures for the review and updating of that scope, including in the light of technological development."
[472] European Communities' response to Panel question No. 2.
[473] European Communities' response to Panel question No. 2 .
[474] European Communities' comments on responses by complainants to Panel question No.101.
[475] European Communities' response to Panel question No. 2.

of the product scope as a result of technological development.[476] In its view, the ITA Annex reflects the notion that the information technology industry has a "rapidly advancing nature" and that the language of the ITA was not intended to "cover every new product that may come along in the rapidly developing, converging information technology sector".[477]

Paragraph 2 of the ITA and paragraph 2 of the ITA Annex

7.359 The **complainants** argue that paragraph 2 of the ITA and paragraph 2 of the ITA Annex establish a "dual approach" for tariff liberalization, under which ITA participants agreed to bind and eliminate duties for products that were either classifiable under HS headings listed in Attachment A, or were described within a list of products in Attachment B.[478] They consider that products could be covered by either Attachment, or both.[479] In the complainants' view, paragraph 2 of the ITA establishes the obligations, while paragraph 2(b) of the ITA Annex sets forth modalities for binding and eliminating duties on ITA products.[480] The complainants submit that paragraph 2(b) of the ITA Annex directs participants to attach an "annex" to their WTO Schedules, including all products in Attachment B, and to "provide a list of the detailed HS headings involved for products specified in Attachment B".

7.360 Under paragraph 2 of the ITA and paragraph 2 of the ITA Annex, the **United States** argues that each Member was instructed to specify the particular HS headings that the Member considered applicable at the time of implementing ITA concessions. The United States argues that the list of tariff item numbers in the Annex to the EC Schedule (notified on the basis of Article 2 of the ITA) refer to other descriptions in a separate part of the EC Schedule, which only indicate the types of products that were considered to be covered at that time by its Attachment B concessions.[481] Thus, the United States considers that the codes beside the Attachment B product descriptions cannot limit the coverage to

[476] European Communities' comments on responses by complainants to Panel question No. 101. The European Communities considers that paragraph 1 of the ITA is more relevant to other provisions, such as those addressing non-tariff barriers referred to in paragraph 3 of the ITA Annex, than to the consideration of other parts of the ITA that establish the scope of tariff concessions. Similarly, it argues that the text of the preamble of the ITA "can only be understood" as referring to the procedures provided for in the ITA for liberalization and "future" expansion of trade in information technology (European Communities' response to Panel question No. 2).

[477] European Communities' first written submission, para. 15.

[478] United States' first written submission, paras. 8 and 23; Japan's first written submission para. 143 (stating that the obligations in tariff concessions made pursuant to Attachment A and Attachment B are legally independent of each other); Chinese Taipei's first written submission, para. 24 (stating that there are two categories of products covered in the ITA: those which are listed in Attachment A to the Annex to the Declaration and those which are listed in Attachment B to the Annex to the Declaration).

[479] United States' first written submission, para. 23. In the United States' view, the dual approach sought to ensure that classification developments would not undermine the goal of ensuring duty-free treatment (United States' first written submission, para 29); United States' response to Panel question No. 10(b), para. 24; Japan's first written submission, para. 263; Chinese Taipei's response to Panel question No. 10(b).

[480] Complainants' response to Panel question No. 103. Japan argues that, since paragraphs 2(a) and 2(b) of the ITA define the scope of the participants' duty-free commitments by referring only to narrative descriptions and HS headings without referring to the modalities set forth in paragraph 2 of the ITA Annex, the main paragraphs have priority, and those in the ITA Annex are ancillary. Therefore, the Annex cannot "trump" commitments in the main provisions. In its view, paragraph 2 of the ITA Annex should be read "within the context of" paragraph 2(b) of the ITA itself. Chinese Taipei argues that Paragraph 2 of the ITA Annex cannot add to or reduce the commitments resulting from paragraph 2(b) of the ITA, which aim to eliminate customs duties and other duties and charges for those products listed in Attachment B (Chinese Taipei's response to Panel question No. 103).

[481] United States' responses to Panel question Nos. 7, 82 and 116.

Attachment B products classifiable in those codes.[482] The United States argues that, were the codes to determine the coverage for those products described in Attachment B products, this would be inconsistent with the text of the EC headnote (and headnotes included in other ITA participants' Schedules) which requires duty-free treatment for all Attachment B products wherever they are classified. It argues that the headnote would also be inutile as ITA participants could have bound their headings at zero without including a headnote at all.[483] The United States further considers it relevant that the Attachment B narrative product descriptions are generally not based on the HS.[484]

7.361 **Japan** argues that the requirement to include an "annex" including all products in Attachment B means that the narrative descriptions of all Attachment B products were intended to be included and to define the scope of the concession.[485] Japan considers that their inclusion confirms the primacy of the language of the narrative product descriptions over the codes listed beside them.[486] Japan further considers that the reference in paragraph 2(a) of the ITA to products that are "classified (or classifiable)" confirms that the duty-free commitments pursuant to Attachment B cover all products falling within the narrative description, regardless of their classification by national customs authorities.[487] Japan also argues that the use of approval on a "consensus basis" makes more sense if HS headings are treated as non-binding, since it is easier to reach consensus on something that "does not have the potential to change or redefine the scope of the concession".[488]

7.362 **Chinese Taipei** explains that the terms "classified (or classifiable)" in paragraph 2 of the ITA indicates that the "negotiators intended to define the scope of products in Attachment A on the basis of the HS" and that accordingly, the HS1996 plays a role in the interpretation of the scope of concessions in relation to products listed in Attachment A. However, it argues that no such reference can be found in paragraph 2(b) of the ITA which refers to "all products specified in Attachment B to the Annex to this Declaration, whether or not they are included in Attachment A."[489] **Chinese Taipei** argues that paragraph 2(b) of the ITA sets forth the general commitment to eliminate customs duties and other duties and charges with respect to the products described in narrative descriptions listed in Attachment B. It considers that paragraph 2 of the ITA Annex sets out the implementation procedure to be followed, namely specifying HS codes for the products listed in Attachment B.[490] By doing so, it argues, ITA participants agreed that the scope of the concession would be defined by the relevant product description and not the notified HS headings.[491] Thus, the HS headings would not restrict the scope of the concession, as defined by the product descriptions.[492] Chinese Taipei argues that, while paragraph 2(b) of the ITA defines the scope of the tariff commitments, paragraph 2 of the ITA Annex

[482] United States' response to Panel question No. 103; United States' comments to European Communities' responses to Panel question No. 102.
[483] United States' comments on European Communities' responses to Panel question Nos. 103-104.
[484] United States' first written submission, para. 23.
[485] Japan's response to Panel question No. 103.
[486] Japan's response to Panel question No. 104.
[487] Japan's response to Panel question No. 104. Japan submits that a reference to the HS is made only for Attachment A products and not for Attachment B products.
[488] Japan's response to Panel question No. 103. Japan further argues that the "review and approval" process referenced in the chapeau of paragraph 2 of the ITA Annex was based on the lack of any mechanism to impose uniformity on how countries would illustrate the scope of the concessions. Notably, Japan points out that ITA participants notified different headings, including HS tariff lines in some cases and national tariff lines in others, or no headings at all (in the case of Japan). Japan argues that the uniformity, instead, comes from the use of the same narrative descriptions to describe the concession (Japan's response to Panel question No. 103).
[489] Chinese Taipei's response to Panel question No. 104.
[490] Chinese Taipei's response to Panel questions Nos. 100 and 103.
[491] Chinese Taipei's second written submission, para. 103.
[492] Chinese Taipei's responses to the Panel's question No 7.

identifies the HS describing it as a tool for implementing the concessions in each participant's Schedule. Paragraph 2 of the ITA Annex cannot add to or reduce the commitments resulting from paragraph 2(b) of the ITA. It explains that the commitments set out in the ITA are substantive and that they aim at elimination of customs duties and other duties and charges with regard to, *inter alia*, products listed in Attachment B. In contrast, it argues, the commitments established in the Annex are procedural, setting out the modalities in which the substantive commitments are to be implemented. Therefore, Chinese Taipei submits that the nature and scope of the commitments in the ITA and its Annex are different and both must be read together.[493]

7.363 The complainants argue that the codes are "illustrative" only.[494] **Japan** argues that the HS headings notified in accordance with subparagraph 2(b)(ii) of the ITA Annex were intended "to clarify as far as possible" what headings are included in the narrative descriptions as "illustration" or "limited context", rather than to narrow the scope or to exhaust the meaning of the narrative description.[495] Thus, the reference to "detailed HS headings involved for products specified in Attachment B" was intended to refer to headings that concern or relate to the narrative product description, but not to define the scope of the concession.[496] **Chinese Taipei** argues that the codes listed are "evidence" of how the European Communities considered the Attachment B concession should be translated into the CN and the CCT. It argues, however, that this cannot substitute for the determination of the common intention of all WTO members. Therefore, it argues, an analysis of the tariff item numbers listed beside the product description may only help to ascertain what the European Communities considered to be included in the concession without such list constituting an exhaustive description.[497]

7.364 The **European Communities** argues the codes notified in accordance with paragraph 2 of the ITA Annex, which were accepted by consensus and certified, represent a common agreement between WTO Members[498], and "exhaust" the European Communities' commitment with respect the narrative product descriptions to which they relate.[499] The European Communities argues that the ITA through paragraphs 2 of the main ITA text and paragraph 2 of its Annex directs members to extend duty-free coverage to products under Attachment A, where there was no disagreement as to proper classification of products described by HS headings, or products under Attachment B, where participants did not oppose the inclusion of products in the ITA, but disagreed with respect to classification.[500] The European Communities considers the descriptions in Attachment B as "sometimes deliberately broad" and other times "described very narrowly" in order to exclude products, such as televisions.[501] While noting that the language of the narrative product definitions is

[493] Chinese Taipei's response to Panel question No. 103.

[494] United States' response to Panel question Nos. 7 and 82 (para. 113); Japan's response to Panel question No. 6; Chinese Taipei's response to Panel question No. 7.

[495] Japan's responses to Panel question Nos. 103 and 107. Japan argues that the codes thus "can help illustrate the range of products that fall within the narrative product descriptions". It considers that reading them this way "preserve[s] the integrity of the Attachment B approach as going beyond the HS nomenclature" (Japan's response to Panel question No. 116).

[496] Japan's response to Panel question No. 103.

[497] Chinese Taipei's response to Panel question No. 116.

[498] European Communities' first oral statement, para. 21.

[499] European Communities' response to Panel question No. 10(c), para. 31.

[500] European Communities' first written submission, para. 18. The European Communities argues that the ITA Annex, including its Attachments are integral parts of the ITA as a whole. This is also demonstrated by the chapeau of paragraph 2 of the main text, which reads "[p]ursuant to the modalities set forth in the Annex ...". It argues that there is no hierarchy between the main text of the ITA, the ITA Annex and the Attachments and the provisions should be read holistically (European Communities' response to Panel question No. 104).

[501] European Communities' first written submission, paras. 19-20.

not HS language *per se*, the European Communities argues that "it was explicitly foreseen that they would be implemented by means of HS headings", in particular, by the fact that paragraph 2 of the ITA Annex requires parties to identify the "detailed HS headings involved for products specified in Attachment B". Thus, it argues, the language of the ITA including the Attachments is influenced by the HS.[502] The European Communities is of the view that, since reference is made to HS headings both in the language of the ITA and in the ITA Annex, the ITA commitments had to be made specifically in relation to products identified with their HS headings.[503]

7.365 The European Communities explains that it could be possible to interpret provisions of the ITA such that the headnote provides for a "safety net" in respect of products defined in Attachment B whereby there could, at least in principle, be other products than those identified with headings in the EC Schedule that fulfil a given product definition.[504] Under this scenario, the European Communities contends that the product definitions in Attachment B of the ITA itself would arguably provide for a separate obligation. Thus, on this basis there would formally be two sets of commitments pursuant to Attachment B in the EC Schedule, one that combines the product descriptions and the headings next to them and another that incorporates the product descriptions in the ITA itself into the EC Schedule as a "safety net".[505] In this safety-net scenario, a particular product may fall within a heading other than those identified next to the description. However, the European Communities argues that it would be necessary for a complainant to demonstrate through "overwhelming evidence" that there are other such products, and therefore other headings that would correspond to such a product description.[506]

7.366 The complainants reject the European Communities' allegation that the complainants are required to demonstrate that there are headings other than those identified in the Annex to the EC Schedule that would correspond to that definition, and that "overwhelming evidence" would need to be provided to prove that a specific product falling within the terms of the description of FPDs is not being given duty-free treatment.[507]

Paragraph 3 of the ITA Annex

7.367 The **complainants** argue that paragraph 3 of the ITA Annex pertains to new or "additional" products and does not limit the scope of existing concessions in the ITA. The **United States** argues

[502] European Communities' response to Panel question No. 21.

[503] European Communities' response to Panel question No. 21 (stating that "the HS96 and its rules are therefore necessarily relevant and applicable also in relation to the commitments made pursuant to Attachment A, Section 2 and Attachment B of the ITA"). In light of its view that the CN codes in the Annex to the EC Schedule establish the binding obligations, the European Communities argues that the obligations should be interpreted in accordance with the relevant language of those CN codes and the corresponding HS1996 rules (European Communities' response to Panel question Nos. 21 and 112).

[504] European Communities' responses to Panel question Nos. 3 and 5.

[505] In light of the language contained in the headnote, the product descriptions in Attachment B would arguably prevail over any discrepancies with the language in the Schedule. The European Communities argues has not been able to identify any differences between the language used in the relevant parts of the Schedule and the product definitions in Attachment B except for the identification of the specific headings in the EC Schedule (European Communities response to Panel question No. 5, para. 18).

[506] European Communities' second written submission, para. 19; European Communities' response to question 1 from the United States during the second meeting.

[507] United States' comments on European Communities' response to Panel question Nos. 100-103 and questions 1-3 of the United States during the second meeting (rejecting the European Communities' argument imposing a "strict burden of proof"); Japan's second oral statement, para. 64 (referring to European Communities' second written submission, para. 19).

that paragraph 3 of the ITA Annex pertains to "additional products", not to products that fall within the terms of the concessions.[508] **Japan** argues that paragraph 3 is "largely irrelevant" to the present dispute as it "simply states the obvious", i.e., that participants can meet again to increase the product coverage.[509] Japan considers that the European Communities has "dramatically overstated" the interpretative significance of paragraph 3 of the ITA Annex regarding future negotiations based on its view that the possibility for future negotiations "somehow narrows" the scope of the original concessions.[510] **Chinese Taipei** submits that the European Communities gives too much significance and weight to the procedure for future negotiations envisaged in paragraph 3 of the ITA Annex. Chinese Taipei submits that paragraph 3 addresses future negotiations and that it is thus "largely irrelevant" to the determination of the existing product coverage of the ITA, because it pertains to future potential negotiations. Paragraph 3, it argues, "only, and logically, envisages a procedure to extend the scope of the ITA that does not impose or ask for a restrictive interpretation of the products covered by the ITA".[511]

7.368 The **European Communities** submits that the ITA Annex shows that the parties were well aware of the rapidly advancing nature of the IT industry and considers that the ITA's language "was not expected to cover every new product that may come along in the rapidly developing, converging information technology sector".[512] To capture the object and purpose of the ITA, it argues, all these parts have to be interpreted in such a way that all of them are given meaning and none of them is rendered ineffective.[513] In its view, paragraph 3 of the ITA Annex provides a mechanism for updating the Annex and a framework for resolving the ambiguities that convergence and rapid development were expected to bring to customs classification in this sector.[514]

Paragraph 5 of the Annex

7.369 The **complainants** argue that paragraph 5 of the ITA Annex pertains to matters of classification harmonization, and does not limit the scope of existing concessions in the ITA. The **United States** argues that paragraph 5 of the ITA Annex simply establishes a mechanism for working toward common classification of information technology products.[515] **Japan** argues that paragraph 5 (and 6) of the ITA Annex would not have been necessary, had the implementation of the ITA, including specifically the selection of tariff lines in the national tariff schedules, not been exclusively or conclusively addressed under paragraph 2 of the ITA.[516] **Chinese Taipei** considers that paragraph 5 relates to "divergences in the classification of products for which commitments are already made". Therefore, it argues that the procedure is "not aimed at 'enlarging' commitments but at removing classification divergences for products which are already covered by existing concessions."[517]

7.370 Chinese Taipei is of the view that the negotiators of the ITA were "crystal clear" about the difference between the issue of modification of product coverage and the issue of classification.[518] Chinese Taipei alleges that classification divergences would only happen after the scope of product

[508] See, for instance, United States' response to Panel question No. 118.
[509] Japan's second written submission, para. 20.
[510] Japan's second written submission, para. 19.
[511] Chinese Taipei's second written submission, para. 17.
[512] European Communities first written submission, para. 15.
[513] European Communities' first written submissions, para. 22.
[514] European Communities' first written submission, para. 16.
[515] United States' comments to European Communities' responses to Panel question No. 107.
[516] Japan's response to Panel question No. 103.
[517] Chinese Taipei's response to Panel question No. 109.
[518] Chinese Taipei's comment on European Communities' response to Panel question No. 118.

coverage has been defined and, therefore, the mandates of paragraph 3 and paragraph 5 "are different and separate and should not be mixed up".[519]

7.371 The **European Communities** argues that paragraph 5 of the ITA Annex addresses divergences in product classification within the HS nomenclature, including those in Attachment B.[520]

Consideration by the Panel

Does the ITA qualify as context within the meaning of Article 31 of the Vienna Convention*?*

7.372 Prior to considering the parties' arguments with respect to the substance of the ITA, the **Panel** will address whether the ITA may serve as context within the meaning of the Vienna Convention to interpret the concessions in the EC Schedule. In light of the parties' unanimous views that the ITA falls within Article 31(2)(b) of the Vienna Convention, we will begin our analysis with this provision.[521]

7.373 We recall that Article 31(2) of the Vienna Convention provides that:

> "The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty."

7.374 In addition to the text of the treaty, including its preamble and annexes, Article 31(2) mentions certain "agreements" and certain "instruments" that must also be taken into account as context by a treaty interpreter. As the Panel in *EC – Chicken Cuts* observed:

> "Regarding other agreements or instruments that may qualify under Article 31(2), the International Law Commission stated that:
>
> '[T]he principle on which [Article 31(2)] is based is that a unilateral document cannot be regarded as forming part of the context [...] *unless not only was it made in connexion with the conclusion of the treaty, but its relation to the treaty was accepted in the same manner by the other parties.* [...] What is proposed in paragraph 2 is that, for purposes of interpreting the treaty, these categories of documents should not be treated as mere evidence to which recourse may be had

[519] Chinese Taipei's comment on European Communities' response to Panel question No. 118.
[520] European Communities' first written submission, para. 17.
[521] See United States' response to Panel question No. 2; Japan's response to Panel questions Nos. 1 and 2; Chinese Taipei's response to Panel question No. 2; European Communities' response to Panel question Nos. 1 and 2. We note, in addition, certain third parties agree that the ITA provides relevant context: see, for instance, Australia's third party oral statement, para. 12; China's third party oral statement, para. 6; Costa Rica's third party submission, paras. 7-13.

> for the purpose of resolving an ambiguity or obscurity, but as part of the context for the purpose of arriving at the ordinary meaning of the terms of the treaty.'[255] (emphasis added)

> Further, a leading international law commentator suggests that, in order to be related to the treaty, and thus be part of the 'context' as opposed to the negotiating history, which is dealt with in Article 32 of the Vienna Convention, an instrument 'must be concerned with the substance of the treaty and clarify certain concepts in the treaty or limit its field of application. It must equally be drawn up on the occasion of the conclusion of the treaty.'[256]

[255] Yearbook of the International Law Commission, 1966, Vol. II, p. 221, para. 13.
[256] Ian Sinclair, *The* Vienna Convention *on the Law of Treaties*, Manchester University Press, 2nd edition (1984), p. 129." [522]

7.375 The parties to this dispute have debated whether the ITA is a "full-fledged treaty"[523] or a "political declaration".[524] We note that Article 2(1)(a) of the Vienna Convention defines "treaty" to mean:

> "[A]n international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".

7.376 Setting aside for the moment whether the ITA is a treaty or not, Article 31(2) recognizes that both "agreements" and "instruments" may qualify as context as long as they meet certain conditions. The Vienna Convention refers to the concepts of "agreement" and "instrument" within the definition of "treaty" above.[525] The statement by the International Law Commission above implies that a qualifying "instrument"[526] may even be a unilateral "document" so long as it complies with the additional requirements in Article 31(2)(b) that it was "made in connection with the conclusion of the treaty", and "its relation to the treaty was accepted in the same manner by the other parties". In light of this, it is useful to consider whether the ITA is concerned with the substance of the treaty, clarifies concepts in the *WTO Agreement*, or otherwise limits its field of application, and the extent to which it was drawn up on the occasion of the conclusion of the treaty.

7.377 At a minimum, the ITA qualifies as an "instrument" for the purposes of Article 31(2)(b).[527] The ITA was proposed, drafted and agreed to by a subset of WTO Members and states or separate

[522] Panel Report on *EC – Chicken Cuts*, paras. 7.153-7.154.
[523] European Communities' response to Panel question No. 1.
[524] Japan's response to Panel question Nos. 1 and 2.
[525] Specifically, the definition in Article 2(1) seems to imply that an "agreement" may itself be composed of one or more "instruments".
[526] Panel Report on *EC – Chicken Cuts*, para. 7.154 (citing Ian Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester University Press, 2nd edition (1984), p. 129.
[527] In *US – FSC* (para. 7.58), the panel considered the ordinary meaning of the term "instrument" as follows:
"In this respect, we note that the word "instrument" has been defined by one dictionary as follows: 'Law. A formal legal document whereby a right is created or confirmed, or a fact recorded; a formal writing of any kind, as an agreement, deed, charter, or record, drawn up and executed in legal form".[footnote omitted] Similarly, a legal dictionary has defined the word "instrument" to mean, inter alia, '[a] document or writing which gives formal expression to a legal act or agreement, for the purpose of creating, securing, modifying or

customs territories in the process of acceding to the WTO. ITA participants in turn modified their WTO Schedules, which themselves form part of the WTO Agreement, following the conclusion and signing of the ITA. In this sense, the parties recognized the ITA as an "instrument" as we understand that term.

7.378 The ITA also represents an instrument "made by one or more parties in connection with the conclusion of the treaty", where the term "parties" refers to WTO Members. The ITA (formally the Ministerial Declaration on Trade in Information Technology Products) was agreed upon on 13 December 1996 by 15 WTO Members (counting the then 15 EC member States as one), as well as States or separate customs territories in the process of acceding to the WTO. Pursuant to the provisions in the ITA, participants modified their schedules of concessions, which themselves form part of the *WTO Agreement*.[528] Because the original ITA participants expressly agreed to a process for incorporating ITA-related concessions into their WTO Schedules, the Panel considers that the ITA was clearly made "in connection with the conclusion of the treaty", as the WTO Members amended their Schedules (which form part of the WTO Agreement) in order to give effect to the ITA.

7.379 The ITA also meets the requirement of having being "accepted by the other parties as an instrument related to the treaty." At least three elements demonstrate this. First, the ITA was recognized under paragraph 18 of the Singapore Ministerial Declaration of 13 December 1996 which was adopted by *all* WTO Members:

> "Taking note that a number of Members have agreed on a Declaration on Trade in Information Technology Products, *we welcome* the initiative taken by a number of WTO Members and other States or separate customs territories which have applied to accede to the WTO, who have agreed to tariff elimination for trade in information technology products on an MFN basis ..."[529] (emphasis added)

7.380 This express reference to the ITA in a WTO Ministerial Declaration adopted by consensus by all WTO Members constitutes, in our view, acceptance by WTO Members that the ITA is an instrument related to the *WTO Agreement*.

7.381 Second, following the ministerial declaration, ITA participants modified their WTO Schedules of concessions to reflect commitments undertaken pursuant to the ITA.[530] No objections were raised by other WTO Members within the three-month period provided for such purpose to the ITA-related modifications that were proposed by the European Communities[531] and these were, therefore, certified by the Director General of the WTO in document WT/Let/156.

7.382 Third, the EC headnote of the Annex to the EC Schedule, which forms part of the *WTO Agreement*, makes express reference to the ITA, further suggesting that the ITA is related to the *WTO Agreement*.

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terminating a right; a writing executed and delivered as the evidence of an act or agreement'.[footnote omitted] Thus, the term 'legal instrument' in its ordinary meaning involves the existence of a formal legal text that has a binding effect in determining the rights and/or obligations of the parties thereto, which in this case would be all GATT 1947 contracting parties.[footnote omitted]"

[528] The document in which the European Communities requested the modification of its schedule pursuant to obligations assumed under the ITA contains a sentence that reads: "[p]lease find attached the modifications to the EC Schedule ... *which incorporate the commitments under the ITA*" (emphasis added) (/MA/TAR/RS/16, 2 April 1997).

[529] WT/MIN(96)/DEC (18 December 1996) (Exhibit US-95).

[530] See paras. 7.18 and 7.21 above.

[531] G/MA/TAR/RS/16 (2 April 1997).

7.383 For the reasons discussed above, the Panel concludes that the ITA qualifies as an instrument that was made by one or more parties in connection with the conclusion of the treaty and accepted by WTO Members as an instrument related to the treaty. The ITA may thus serve as context within the meaning of Article 31(2)(b) of the Vienna Convention.

7.384 Finally, the Panel notes the point raised by the European Communities that the ITA, which the European Communities considers is a full-fledged treaty, must be interpreted following the rules of the Vienna Convention first, after which its terms may be relied upon as context to interpret the EC Schedule. The Panel has not addressed the question of whether the ITA is in its own right a treaty within the sense of Article 2 of the Vienna Convention or any other relevant provision. We agree that a treaty is to be interpreted according to the rules codified in the Vienna Convention, which require that a treaty be interpreted in good faith in accordance with the ordinary meaning to be given to its terms. In our view, in considering the terms of the ITA as context, this will in any event involve ascertaining the ordinary meaning of the terms of the ITA, regardless of its nature as a treaty or other instrument. Hence, the Panel does not consider it necessary to reach a finding on whether the ITA is a treaty or some other kind of agreement or declaration.

The EC headnote considered in the context of the ITA

7.385 The **Panel** will now consider whether the ITA informs its preliminary conclusion that products initially described in the Annex to the EC Schedule must be granted duty-free treatment irrespective of where they are classified in the EC Schedule. In so doing, it is appropriate to look at the ITA in a holistic manner, ensuring that all the provisions in the ITA are given meaning and none of them is rendered meaningless. Therefore, we will analyse the ITA, looking not only at its main provisions, but also at relevant provisions in the preamble, Annex and Attachments, as well as the text that immediately precedes each Attachment.

7.386 We begin with the phrases in the preamble which have been addressed by the parties and paragraph 1 of the ITA. We note that the parties have made reference to two phrases in the ITA preamble that read "*Desiring* to achieve maximum freedom of world trade in information technology products" and "*Desiring* to encourage the continued technological development of the information technology industry on a world-wide basis" as well as the language in paragraph 1 of the ITA that reads "Trade regimes should evolve in a manner to enhance market access opportunities of IT products". The use of the word "desiring" at the beginning of the sentences in the preamble and the use of the word "should" in paragraph 1 reflects that these opening provisions of the ITA represent non-mandatory provisions. This language contrasts with the use of the word "shall" in ITA paragraph 2, which we discuss below. We do not see grounds, based on these provisions alone, to find that the ITA mandates a particularly expansive approach to product coverage or to interpret the specific duty-free commitments made pursuant to the ITA.[532] Indeed, we do not consider that these non-mandatory provisions should bear in any specific way on the interpretative task before the Panel, namely interpreting the meaning of the Annex to the EC Schedule, and the EC headnote in particular.

7.387 The non-mandatory nature to expanding the product coverage is reinforced and made explicit by paragraph 3 of the ITA Annex, which provides as follows:

[532] We see no basis, as the European Communities seems to argue in its response to Panel question No. 2, to conclude that the non-mandatory provisions encouraging the evolution of the participants' trade regime "in a manner to enhance market access opportunities of IT products" has more significance for work on non-tariff barriers than on tariff concessions. We observe that both the tariff and non-tariff aspects are part of the trade regime that should evolve in a manner that enhances market access opportunities for information technology products.

> "Participants shall meet periodically under the auspices of the Council on Trade in Goods to review the product coverage specified in the Attachments, *with a view to agreeing, by consensus, whether* in the light of technological developments, experience in applying the tariff concessions, or changes to the HS nomenclature, *the Attachments should be modified to incorporate additional products*, and to consult on non-tariff barriers to trade in information technology products. Such consultations shall be without prejudice to rights and obligations under the WTO Agreement." (emphasis added)

7.388 This explicit provision for future reviews of product coverage affirms that the ITA participants were aware that the product coverage in the ITA was not comprehensive. The European Communities argues that paragraph 3 of the ITA Annex is *the* mechanism envisaged by negotiators for updating the product coverage of the ITA *and* part of the framework for resolving the ambiguities that convergence and rapid development were expected to bring to customs classification in this sector.[533] We agree that paragraph 3 of the ITA Annex is about "updating" the product coverage and including "additional" products in the ITA, as this is explicit in the text. However, nothing in that provision suggests that paragraph 3 was envisaged as a way to deal with ambiguities arising from convergence and rapid development of products *currently covered* by the ITA, as the European Communities seems to suggest.[534] Paragraph 3 of the ITA Annex discusses modification of the ITA Attachments to "incorporate additional products". Since such incorporation would require the "modification of the Attachments", we understand the phrase "additional products" necessarily refers to the inclusion of products which are *not* currently covered by Attachment A and Attachment B. It is not possible to determine whether a product is an "additional" product within the parameters of paragraph 3 of the ITA Annex without first determining whether a product is covered by the terms of an existing concession. Absent a common interpretation by the Members, and in the context of dispute settlement proceedings, the Appellate Body has explained that determination of whether the terms of a Member's Schedule describe a certain product is a question that should be interpreted in accordance with the rules of the Vienna Convention.[535]

7.389 For the above reasons, we conclude that paragraph 3 of the ITA Annex does not pertain to products described by the HS1996 headings that are listed in Attachment A, or specified in Attachment B. Rather, paragraph 3 pertains to products that fall outside the current coverage of the ITA. As a consequence, the Panel is of the view that paragraph 3 provides little guidance on the key interpretative issue before it, namely whether ITA participants intended the products in and for Attachment B to be liberalized "wherever the product is classified", as claimed by the complainants, or to be "exhausted" by the tariff lines included in the Annex to their Schedules, as claimed by the European Communities. For this reason, we see no need to consider this provision any further.

7.390 Turning to other provisions of the ITA, we recall that paragraph 2 of the ITA, provides as follows:

> "Pursuant to the modalities set forth in the Annex to this Declaration, each party shall bind and eliminate customs duties and other duties and charges of any kind, within the meaning of Article II:1(b) of the General Agreement on Tariffs and Trade 1994, with respect to the following:

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[533] European Communities' first written submission, paras. 14-15.

[534] European Communities' first written submission, paras. 16-17; European Communities' response to Panel question No. 2.

[535] Appellate Body Report on *EC – Computer Equipment*, para. 106.

> (a) all products classified (or classifiable) with Harmonized System (1996) ("HS") headings listed in Attachment A to the Annex to this Declaration; and
>
> (b) all products specified in Attachment B to the Annex to this Declaration, whether or not they are included in Attachment A;
>
> through equal rate reductions of customs duties beginning in 1997 and concluding in 2000, recognizing that extended staging of reductions and, before implementation, expansion of product coverage may be necessary in limited circumstances."

7.391 Paragraph 2 of the ITA is unequivocal in distinguishing between the approach taken for products classified (or classifiable) in HS1996 headings "listed" in Attachment A, and for products "specified" in Attachment B, "whether or not" they were also included in Attachment A. The chapeau to the paragraph establishes that ITA participants "shall bind and eliminate customs duties and other duties and charges of any kind, within the meaning of Article II:1(b) of the General Agreement on Tariffs and Trade 1994". Thus, we agree with the complainants' characterization of the ITA as an instrument seeking to achieve its objectives through a "dual approach". The obligation to liberalize clearly applies both to all products classified (or classifiable) in HS1996 headings "listed" in Attachment A and to all those products "specified" in Attachment B, whether or not included in Attachment A.

7.392 Paragraph 2 of the ITA states that such tariff elimination is "pursuant to the modalities set forth in the Annex to this Declaration." In turn, the ITA Annex sets out "modalities" through which the goals of paragraph 2 of the ITA would be achieved.[536] Paragraph 1 of the ITA Annex indicates that each participant "*shall* incorporate the measures described in paragraph 2 of the Declaration" into its WTO schedule of concessions, as well as in its applied national tariff schedule. When read together with paragraph 2 of the main text and the chapeau to the ITA Annex[537], it is clear that the modalities in the ITA Annex serve as a means to fulfil the main obligations that are established in paragraph 2 of the ITA. In light of the defined relationship described in paragraph 1 of the Annex, we will consider paragraph 2 of the main text of the ITA, in combination with paragraph 2 of the ITA Annex, which relate to the product coverage set out in the Attachments. We see no basis to conclude that the specific modalities in paragraph 2 of the ITA Annex (the "how") could modify or diminish the obligations that are stated in a definitive manner in paragraph 2 of the ITA (the "what").[538]

7.393 Paragraph 2(a) of the ITA provides for the liberalization of all products "classified (or classifiable)" in HS1996 headings listed in Attachment A, which is subdivided in two sections. The

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[536] This is evident from the fact that the ITA Annex is entitled "Modalities and Product Coverage".

[537] The chapeau provides that "[a]ny Member of the World Trade Organization, or State or separate customs territory in the process of acceding to the WTO, may participate in the expansion of world trade in information technology products in accordance with the following modalities:"

[538] We find textual basis for this in paragraphs 1 and 2 of the ITA Annex. We note that paragraph 1 of the ITA Annex instructs participants that are WTO Members to "incorporate the measures described in paragraph 2 of the Declaration" into its schedule. Non-members are instructed to implement them "on an autonomous basis, pending completion of its WTO accession, and shall incorporate these measures into its WTO market access schedule for goods". Paragraph 2 of the ITA Annex continues with the phrase "[t]o this end...". Textually, therefore, these provisions define the relationship between paragraph 2 of the main ITA text and paragraph 2 of its Annex. In addition, we note that one phrase of paragraph 2(b) of the ITA Annex addresses binding and eliminating "customs duties on information technology products", leaving out the reference in paragraph 2 of the ITA to the "other duties and charges" as provided in Article II:1(b) of the GATT 1994. Clearly, a truncated reference in the modalities is not meant to strike out the broader obligation elaborated in paragraph 2 of the ITA.

notion of "classified (or classifiable)" expressly relates to the 1996 version of the HS. Following the main text and modalities provisions in the Annex, Attachment A, Section 1 includes several HS1996 headings, subheadings and ex-outs in a left-hand column[539], and HS based descriptions for the listed headings and subheadings in a right-hand column, as well as more specific descriptions that were negotiated for the ex-outs.[540] Similarly, Attachment A, Section 2, which is entitled "Semiconductor manufacturing and testing equipment and parts thereof", includes HS1996 subheadings or ex-outs in left-hand columns[541], and HS based descriptions for the listed subheadings in a right-hand column, as well as more specific descriptions that were negotiated for the ex-outs.[542] Section 2 also indicates whether a particular "HS Code," and its associated "Description," is "For Attachment B".[543]

7.394 In contrast, paragraph 2(b) of the ITA provides for the liberalization of all products "specified" in Attachment B "whether or not they are included in Attachment A". The choice of language in paragraph 2(b) of the ITA, in particular the use of the term "specified", indicates that this latter provision referred to something other than products classified (or classifiable) in the HS headings listed in Attachment A.[544]

7.395 Attachment B strictly contains product descriptions and makes no reference to HS1996 headings, subheadings or ex-outs. The descriptions are, for the most part, not taken from the HS1996 and are, generally speaking, not based on HS language (this is certainly true for the products at issue in this dispute).[545] A chapeau in the Annex that precedes the Attachments indicates that "Attachment B lists specific products to be covered by an ITA wherever they are classified in the HS".[546] A second chapeau that immediately precedes Attachment B in the Annex states "Positive list of specific products to be covered by this agreement wherever they are classified in the HS". This latter phrase clearly reinforces the view that the intention is to cover a "positive list of specific products"... "wherever they are classified in the HS". Nothing in this phrase suggests that specific tariff item numbers would define the specific products that follow.

7.396 It appears clear, therefore, that ITA drafters felt the need to resort to a set of product descriptions that were not generally based on the HS. Otherwise, they could have resorted to the same terminology used in paragraph 2(a), or have omitted paragraph 2(b) altogether. As will be explained below, ITA participants were required to include these descriptions in their Schedules. In the Panel's view, this explicit recognition of a limited role for the HS in the context of Attachment B is consistent

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[539] The HS headings and subheadings, and whether or not they are ex-outs, are indicated in three left-hand columns, labelled "HS96".

[540] We recall that the right-hand column to Attachment A, *Section 1* is labelled "HS description". A headnote that precedes the ITA Attachments indicates that "Attachment A lists the HS headings or parts thereof to be covered".

[541] The left-most column indicates whether the HS subheadings is an ex-out or not, while the adjacent column, labelled "HS Code" indicates the HS subheading at the six-digit level.

[542] The third column to Attachment A, Section 2 is labelled "Description" and includes the HS description for the indicated HS subheading.

[543] The right-most column to Attachment A, Section 2 is labelled "Comments".

[544] The verb "to specify" is defined *inter alia* as "1 *verb intrans*. Speak or treat of a matter etc. in detail; give details or particulars. (...) 2 *verb trans*. Mention or name (a thing, that) explicitly; state categorically or particularly." The *Shorter Oxford Dictionary* (2003), p. 2946.

[545] Some descriptions in Attachment B indeed make reference to HS codes. But this seems to be the exception that confirms the rule.

[546] ITA, page 6. The full text of the chapeau reads: "There are two attachments to the Annex.
Attachment A lists the HS headings or parts thereof to be covered.
Attachment B lists specific products to be covered by an ITA wherever they are classified in the HS."

with, and underlines, a broader intention that the products specified therein are to be covered "wherever they are classified in the HS".

7.397 We next consider paragraph 2 of the ITA Annex, which addresses the implementation of the main obligation set forth in paragraph 2 of the ITA main text. We recall that paragraph 2 of the ITA Annex provides:

> "To this end, as early as possible and no later than 1 March 1997 each participant shall provide all other participants a document containing (a) the details concerning how the appropriate duty treatment will be provided in its WTO schedule of concessions, and (b) a list of the detailed HS headings involved for products specified in Attachment B. These documents will be reviewed and approved on a consensus basis and this review process shall be completed no later than 1 April 1997. As soon as this review process has been completed for any such document, that document shall be submitted as a modification to the Schedule of the participant concerned, in accordance with the Decision of 26 March 1980 on Procedures for Modification and Rectification of Schedules of Tariff Concessions (BISD 27S/25).
>
> (a) The concessions to be proposed by each participant as modifications to its Schedule shall bind and eliminate all customs duties and other duties and charges of any kind on information technology products as follows:
>
> > (i) elimination of such customs duties shall take place through rate reductions in equal steps, except as may be otherwise agreed by the participants. Unless otherwise agreed by the participants, each participant shall bind all tariffs on items listed in the Attachments no later than 1 July 1997, and shall make the first such rate reduction effective no later than 1 July 1997, the second such rate reduction no later than 1 January 1998, and the third such rate reduction no later than 1 January 1999, and the elimination of customs duties shall be completed effective no later than 1 January 2000. The participants agree to encourage autonomous elimination of customs duties prior to these dates. The reduced rate should in each stage be rounded off to the first decimal; and
> >
> > (ii) elimination of such other duties and charges of any kind, within the meaning of Article II:1(b) of the General Agreement, shall be completed by 1 July 1997, except as may be otherwise specified in the participant's document provided to other participants for review.
>
> (b) The modifications to its Schedule to be proposed by a participant in order to implement its binding and elimination of customs duties on information technology products shall achieve this result:
>
> > (i) in the case of the HS headings listed in Attachment A, by creating**,** where appropriate**,** sub-divisions in its Schedule at the national tariff line level; and
> >
> > (ii) in the case of the products specified in Attachment B, by attaching an annex to its Schedule including all products in

> Attachment B, which is to specify the detailed HS headings for those products at either the national tariff line level or the HS 6-digit level.
>
> Each participant shall promptly modify its national tariff schedule to reflect the modifications it has proposed, as soon as they have entered into effect."

7.398 In general terms, paragraph 2 of the ITA Annex sets out a series of steps for participants to prepare, review, and assess the specific commitments by the ITA participants, and to then modify their WTO schedules of concessions. The chapeau of paragraph 2 of the ITA Annex provides *inter alia* that "[...] each participant shall provide all other participants a document containing (a) the details concerning how the appropriate duty treatment will be provided in its WTO schedule of concessions, and (b) a list of the detailed HS headings involved for products specified in Attachment B".[547] One dictionary definition of "involved" is "contained by implication, implicit".[548] In this context, we understand that ITA participants were expected to present a list of HS headings they considered to be associated with the products in Attachment B. Paragraph 2 thereafter envisaged that the proposed amendments to ITA participants' Schedules would go through a "review and approval" process, before 1 April 1997, and would then follow the steps for incorporation into each ITA participant's schedule through the 1980 procedures.[549] Thus, ITA participants were given the responsibility of ensuring that their counterparts in the ITA had correctly prepared a draft modification to their Schedule before such amendments were formally submitted for consideration by the WTO membership at large.

7.399 Paragraph 2(a) of the ITA Annex then defines the manner in which ITA participants would eliminate the tariffs and "other duties and charges". We do not consider that these provisions bring much clarity to the interpretation of the EC headnote. On the other hand, paragraph 2(b) of the ITA Annex is of particular importance to interpret the concessions in the Annex to the EC Schedule and to clarify the meaning of the EC headnote. This provision elaborates on the "dual approach" introduced by paragraph 2 of the ITA main text, and specifies the elements that would need to be contained in the modifications that participants would make to their schedules.

7.400 Paragraph 2(b)(i) of the ITA Annex directs participants to create sub-divisions in their WTO Schedules reflecting their national tariff line level in order to liberalize the HS headings listed in Attachment A. The parties do not dispute this approach. However, this approach does not inform our interpretation of the EC headnote. Paragraph 2(b)(ii) of the ITA Annex, on the other hand, instructs participants to attach an "annex" to their respective WTO Schedules which shall include "all products in Attachment B" and "specify the detailed HS headings for those products at either the national tariff line level or the HS 6-digit level."

7.401 On a plain reading of paragraph 2(b)(ii) of the ITA Annex, the identification of HS Headings is clearly considered an important requirement in relation to the products specified in Attachment B. Paragraph 2(b)(ii) explicitly gives participants the option to specify what they consider to be the relevant headings, either at "the national tariff line level or the HS 6-digit level". Unlike the approach taken for Attachment A products, we observe that there is no requirement to create sub-divisions in the Schedule at the national tariff level to liberalize products specified in Attachment B.

7.402 This difference in approaches must be given meaning. While paragraph 2(b)(ii) of the ITA Annex requires specification of HS headings for Attachment B products, in our view, the absence of any requirement to harmonize the particular subheadings or national tariff lines to be specified for a

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[547] ITA Annex, para. 2, Chapeau.
[548] The *Shorter Oxford Dictionary* (2003), p. 1419.
[549] See para. 7.18 above.

particular Attachment B narrative description demonstrates that the descriptions were intended to govern in determining product coverage, and not the HS subheadings or national codes that participants might have selected. The products that shall be liberalized are those "specified" in Attachment B, independently of the headings or codes that participants might have considered to be "involved" with a particular narrative description. Had the ITA participants intended that the tariff lines would define the concession, given that no HS headings correspond fully with the Attachment B narrative descriptions, the requirement to create sub-divisions in the Schedule at the national tariff level would have been a key requirement. Instead, the provisions suggest that the ITA sought to liberalize a *specific* set of products that all participants could agree to, embodied in Attachment B, even if they could not agree on *where* to classify them under the HS.

7.403 We recall the European Communities' argument that the HS headings to be included in a schedule, which ITA participants would self-designate, serve to determine the coverage of the concession. Because the tariff headings (either based on HS six-digit codes or national nomenclature) set the boundaries of the concession, the European Communities argues that the codes therefore "exhaust" the headnote by specifying the relevant headings. We will now consider the implications of this argument in light of paragraph 2(b) of the ITA Annex. In the alternative, the European Communities appeared to accept that the product descriptions could in principle provide for a separate obligation, such that the product descriptions in the ITA alone could provide the basis for the concession. However, the European Communities argues that a complainant would be required to demonstrate through "overwhelming evidence" that the products did not fall under the particular headings that had been notified by the European Communities.[550]

7.404 Under the terms of paragraph 2(b) of the ITA Annex, one participant could have chosen the option to specify headings at the "HS 6-digit level" next to a particular narrative description, while another participant could have chosen to identify a different subheading, or could have designated an eight-digit national code next to the same product description. Such eight-digit tariff code could pertain to the subheading listed by other ITA participants (e.g., as a breakout incorporating the subheading as its first six digits), or it could pertain to an altogether different subheading. We observe that the logical consequence of the European Communities' "exhaustion" approach is that different ITA participants would have had liberalized more or fewer products, depending on which HS codes were included in their Attachment B-related section of their schedules. Under this approach ITA participants could have disparate commitments, given that either HS six-digit codes or the more detailed national nomenclatures could be used. An ITA participant notifying an HS six-digit code would be committing to *fully* liberalize the entire HS Subheading, whereas a ITA participant notifying an eight-digit code in the same subheading would only be committing to liberalize *part* of the same HS Subheading. In our view, the two options provided under paragraph 2(b)(ii) do not allow for an interpretation that the codes determine the precise concession and "exhaust" the headnote. Permitting such variations in coverage would have allowed Members to carve-out or redefine for themselves what products would be covered by their concessions under Attachment B, which would run contrary to the objective established in paragraph 2(b) of the main ITA text, i.e., to bind and eliminate duties for *all* those products *specified* in Attachment B. In our view, the European Communities' interpretation fails to explain how the divergences that would arise under the "exhaustion" theory, with the different codes notified by different ITA participants, would be consistent with the clear intention to cover "all products specified in Attachment B".

7.405 The question arises why ITA participants were required to specify detailed HS headings in connection with Attachment B narrative descriptions, if the codes did not define the scope of the

[550] European Communities' second written submission, para. 19; European Communities' response to question 1 from the United States during the second meeting.

obligation. We find further support for our interpretation of the relevance of the specified HS headings or national codes in paragraph 5 of the ITA Annex, which provides:

> "Participants shall meet as often as necessary and no later than 30 September 1997 *to consider any divergence among them in classifying* information technology products, beginning with the products specified in Attachment B. Participants agree on the *common objective of achieving, where appropriate, a common classification for these products within existing HS nomenclature*, giving consideration to interpretations and rulings of the Customs Co-operation Council (also known as the World Customs Organization or "WCO"). In any instance in which a divergence in classification remains, participants will consider whether a joint suggestion could be made to the WCO with regard to updating existing HS nomenclature or *resolving divergence in interpretation of the HS nomenclature*." (emphasis added)

7.406 This provision directs ("shall") participants to meet following the modifications to their Schedules to consider divergences in classification, beginning with, as stated, divergences related to products specified in Attachment B. It is apparent that the ITA negotiators foresaw different ITA participants classifying some of the covered products in different ways, and established a mechanism for trying to reduce such divergences in classification.[551] Paragraph 5 of the ITA Annex confirms that ITA participants could not agree on the appropriate HS *classification* of some of the IT products they wanted to liberalize, even if they agreed on what the description of those products was (hence their inclusion in Attachment B).[552] These included products in Attachment B, plus those identified in Attachment A, Section 2, having the comment "[f]or Attachment B".

7.407 If we again turn to the "exhaustion" interpretation by the European Communities, we note that, had the HS codes notified by each ITA participant been intended to have the effect of defining the scope of the commitments undertaken by that ITA participant (therefore "exhausting" them), the meetings stipulated in paragraph 5 would essentially involve a renegotiation of commitments. Yet, there is no reference in this paragraph to amending the schedules of concessions as a result of the discussions nor to considering the tariff treatment of Attachment B products in the participants' schedules. On the contrary, the emphasis throughout the entire paragraph is on the "HS classification" of those products. Paragraph 5 even encourages participants to suggest updates of the nomenclature to the WCO, which clearly cannot modify the concessions in participant's schedules. Moreover, tariff treatment is not explicitly nor implicitly mentioned in this paragraph. In the Panel's view, therefore, it is clear that ITA paragraph 5 is concerned with harmonizing classification practices amongst participants, and is not concerned with renegotiating tariff concessions.[553] As such, it is inconsistent with the European Communities' "exhaustion" approach, and informs our view that the scope of Attachment B-related commitments is determined by the product descriptions and not by the notified tariff item numbers.

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[551] In this respect, we note that ITA participants notified different HS subheadings or codes within their domestic nomenclatures in connection with the Attachment B narrative descriptions that were incorporated into their Schedules. The Schedules of other ITA participants are discussed in further detail in paras 7.424 *et seq*. below.

[552] The European Communities holds a similar view, having stated that Attachment B includes some products "on the classification of which the participants could not, at least immediately, agree but did not oppose their inclusion" (European Communities' first written submission, para. 18).

[553] We note as well that, under the exhaustion theory by the European Communities, ITA participants would have reasonably been expected to have an interest in reviewing not only the HS headings notified, but also the classification practice concerned prior to approving the draft ITA related amendments. It would have been otherwise impossible to determine whether "all" products specified in Attachment B had been fully liberalized as mandated by paragraph 2 of the ITA. We observe that there is no such a provision in the ITA.

7.408 Although there are several provisions in the ITA which remain unaddressed in our analysis, we observe that we have covered all those raised by the parties in their arguments. We do not consider it necessary to address the remaining provisions, as they do not appear to be relevant to our task.

7.409 Taking into account our analysis of the provisions in the ITA so far, and looking at them in a holistic manner, the Panel is of the view that the drafters of the ITA considered that the traditional approach of listing HS codes was inadequate to address the full scope of the product coverage that was intended by participants to the ITA, in particular given the then prevailing divergences in the classification of products in and for Attachment B. Consequently, ITA participants agreed to implement their commitments though a "dual" approach that included binding and eliminating duties for both: (i) products classified or classifiable in HS codes listed in Attachment A, and (ii) products specified in Attachment B. While the approach under Attachment A is straightforward and "traditional" in WTO terms, ITA participants were directed under Attachment B to eliminate duties on all products "specified' in that Attachment. This approach was taken because ITA participants could not agree on precise headings for the products identified through the narrative descriptions in Attachment B. Since the narrative descriptions must determine the scope of coverage of those products, duty-free treatment must be extended to products specified in Attachment B "wherever they are classified". Otherwise, ITA participants would have ended up with diverging product coverage, which runs contrary to the intent to provided duty-free coverage for specified "products" in Attachment B, and not headings of tariff lines under which products are classified. We explained that, if the "exhaustion" interpretation were correct, the potentially significant differentiation in the scope of commitments undertaken by ITA participants would be a significant feature of ITA-related concessions. An intention to create such a differentiated approach to commitments should be clearly evident from the language in the ITA. However, it is not. We also do not see a basis to conclude that a unique or elevated burden of proof would be required to demonstrate that a product fell within the scope of a particular concession that is defined by the narrative description.

7.410 Paragraph 3 of the ITA Annex provides an avenue to negotiate the inclusion of "additional" products. However, the determination of whether a product is in fact currently covered, would involve an assessment of the existing concession pursuant to the ITA, including the narrative descriptions in and for Attachment B. We recall again our view that, ITA negotiators foresaw different ITA participants classifying some of the covered products in different ways, and established a mechanism for trying to reduce such divergences in classification.

7.411 The Panel, therefore, considers that the ITA provisions discussed above inform our preliminary view based on the text of the headnote that products described in or for Attachment B must be granted duty-free treatment irrespective of where they are classified in the EC Schedule. In other words, the product descriptions in and for Attachment B should be considered and interpreted in determining which products would receive duty-free treatment.

The terms of the EC headnote and Annex to the EC Schedule considered in the context of other sections of the EC Schedule

7.412 In their discussions regarding the meaning of the EC headnote and the concessions at issue in this dispute, the complainants have discussed several aspects of the EC Schedule, including modifications made to the Annex to the EC Schedule pertaining to the narrative descriptions for "Computers" and STBCs, in an effort to explain their interpretation of the EC headnote, in the context of the provisions of the ITA. The complainants consider these actions by the European Communities confirm their view that the tariff item numbers listed in the Annex to the EC Schedule are of limited relevance to determine the scope of coverage of the narrative descriptions. We consider these aspects

of the EC Schedule below, in view of our earlier assessment of the EC headnote and the ITA as context, and in view of the parties' discussions on the matter, to see whether they shed light on our understanding of the EC headnote.

> Do the modifications made to certain ITA-related concessions in the EC Schedule inform our interpretation on the relevance of the tariff item numbers?

7.413 The complainants have discussed two particular modifications made to the EC Schedule in connection with ITA-related commitments. One included a 1998 communication of the tariff item numbers listed in the Annex to the EC Schedule via G/MA/TAR/RS/47 in relation to the narrative descriptions for "Computers etc." and "Network equipment" (the "1998 notification").[554] The complainants additionally referred to the European Communities' 2000 notification to include tariff item number 8528 12 91 next to the STBCs narrative description in the Annex to the EC Schedule (the "2000 notification").[555]

Arguments of the parties

7.414 In response to a question from the Panel[556], the **European Communities** argued that communication of an additional code in 2000 in connection with the narrative description for STBCs, supports its view that the codes next to the narrative description indeed exhaust the EC headnote. It argues that the codes notified by the European Communities in 1997 and then reviewed in 1998 were accepted by consensus and certified in accordance with the procedures of paragraph 2 of the ITA Annex and paragraph 2 of the ITA Implementing Decision, and exhausted the EC's commitment with respect to set top boxes which have a communication function. However, it argues, the code notified in 2000 (tariff item number 8528 12 91 (now 8528 71 13)) served to "enlarge" its commitment for set top boxes which have a communication function. It notes that through a communication notified along with the modification, the European Communities effectively recognized that products classifiable in this new code would also qualify for duty-free treatment.[557] The European Communities argues, however, that a parallel cannot be drawn between its 2000 notification and a separate 1998 notification (also referred to by the Panel in question 109 to the European Communities) made in respect of "Computers etc." and "Network equipment". It argues that the 1998 notification resulted from the European Communities' implementation of the classification approach reflected in the WCO opinion on the classification of PCTV products.[558] Under this modification, the European Communities argues that it harmonized its classification approach for multimedia computers (computers with television and other multimedia capabilities such as audio, video, telecommunication) under HS heading 8471, instead of HS headings 8471, 8528 and 8543, as had been done formerly. To do so, the European Communities argues that it transferred classification of the products (with duty rates unchanged) to the new heading, as specified by the WCO. In its view, this modification (reflected in the 1998 notification) did not extend duty-free treatment available

[554] Complainants' responses to Panel question No. 109; United States' comment to European Communities' response to question by the Panel No. 109.

[555] United States' first written submission, para 45 (Exhibit US-26); Japan's first written submission, para. 352; Chinese Taipei's first written submission, para. 361.

[556] European Communities' response to Panel question No. 109.

[557] European Communities' response to Panel question No. 109. The European Communities argues that the exhaustion of the commitment on STBCs in 1997 and the communication of a new code for another group of products in 2000 are thus two independent processes which do not affect one another.

[558] European Communities' response to Panel question No. 109; WCO Classification Opinion concerning the classification of PCTV in subheading 8471.49, as discussed and adopted by the HS Committee during its 19th and 22nd sessions (Exhibit EC-125).

under the ITA to a new group of products, but were merely consequential changes resulting from a reclassification decision.[559]

7.415 The **complainants** dispute the European Communities characterization of these two modifications to the EC Schedule. Regardless of the fact that one change was brought about by decisions of its own customs authorities, whereas the other resulted from the implementation of a WCO classification opinion, the **United States** argues that both reflect "classification" changes that are incompatible with the European Communities' exhaustion theory. The United States argues that the 2000 notification can only be understood to mean that products included in tariff item number 8528 12 91 were among the products meeting the description of STBCs. However, it argues, if the headnote was "exhausted", there would be no reason for the European Communities to modify the codes listed in the table.[560]

7.416 **Japan** considers the European Communities' argument that it "enlarged" its concession for STBCs to be inconsistent with the fact that concessions made in the WTO do not change despite customs classifications changes. Japan argues that such changes cannot modify the scope of the WTO concessions as this would fundamentally undermine the stability and predictability of the rights and obligations of Members under the WTO Agreement.[561]

7.417 **Chinese Taipei** considers the statement by the European Communities in the 2000 notification that it had "decided to join some other ITA participants in classifying certain types of ITA set-top boxes under HS sub-heading 8528 12" to be inconsistent with the exhaustion theory.[562] Chinese Taipei submits that procedures under paragraph 5 of the ITA are not aimed at "enlarging" ITA commitments, but rather at removing classification divergences for products already covered by existing ITA concessions. Had the European Communities intended to unilaterally "enlarge" its commitment, it argues, the European Communities would not have notified the modification to its Schedule related to ITA products, nor specified that the corresponding codes to Attachment B description of "set-top boxes" had been replaced. Instead, it argues, the European Communities could have simply modified its national tariff code to implement its obligations under the ITA.[563]

Consideration by the Panel

7.418 The parties' discussion regarding the 1998 and 2000 notifications centre on documents issued in conjunction with changes made to the EC Schedule.[564]

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[559] European Communities' response to Panel question No. 109.

[560] United States' comment to European Communities' response to Panel question No. 109 (The United States notes that, in both cases, the European Communities maintained the duty-free treatment for the product in question, notwithstanding the fact that the subheadings in which it considered the product classified were not originally included in the Annex to the EC Schedule).

[561] Japan's response to Panel question No. 109; Japan's comment to European Communities' response to Panel question No. 109.

[562] Chinese Taipei's comment to European Communities' response to Panel question No. 109.

[563] Chinese Taipei's comment to European Communities' response to Panel question No. 109.

[564] Although the parties did not themselves identify these documents in the context of discussing the Annex to the EC Schedule, the complainants raised the issue of the 2000 notification in the context of discussing their claims concerning STBCs, and they discussed the 1998 notification in response to a question put to the European Communities by the Panel. The explanations in the documents discussed by the parties in connection with the 1998 notification were not incorporated into the EC Schedule at the time of certification (see document WT/Let/261). Practically all the contents of the 2000 notification, including the explanations by the European Communities which have been referred to by the parties, were certified on 19 March 2010 in document

7.419 At the time of the 1998 notification made *inter alia* in respect of "Computers etc." and "Network equipment", the European Communities circulated the following communication, in document G/MA/TAR/RS/47 of 10 February 1998:

> "I attach herewith a notice concerning rectifications and modifications to our Schedule CXL related to ITA products (5 pages).
> ...
> RECTIFICATION AND MODIFICATIONS OF SCHEDULES
> SCHEDULE CXL - EUROPEAN COMMUNITIES
> INFORMATION TECHNOLOGY AGREEMENT (G/MA/TAR/RS16)
> CORRIGENDUM
> [...]
>
> Following a review of the documents submitted under G/MA/TAR/RS/16 of 2 April to incorporate in Schedule CXL the commitments under the Information Technology Agreement, the attached corrections should be made.
>
> [...]
>
> 4. The World Customs Organisation has debated the classification of multimedia personal computers and the general view, which prevailed, was that such products no matter what their principal function are to be classified within 8471. The EC has implemented this classification opinion by transferring the products concerned, together with their accompanying rates of duty, from 8528 and 8543 to 8471.
> The consequential changes for the ITA Schedule means that the all references 8471.30.00, 8471.41.90, 8471.49.90, 8471.50, 8528.12.10, 8528.13.10 and 8543.89.17 should be deleted and replaced by the following:
> ...
> 5. As a result of the above the following changes should be made to the tariff references against product descriptions in Attachment B:
>
> Computers etc. Replace by following reference: 8471.10.90 (unchanged), 8471 30 10, 8471.30.91, 8471.30.99, 8471.41.30, 8471.41.91, 8471.41.99, 8471.49.30, 8471.49.91, 8471.49.99, 8471.50.30, 8471.50.91, 8471.50.99
>
> Network equipment replace 8471.50.90 by 8471.50.99"[565] (footnotes omitted)

7.420 At the time of the 2000 modification made in respect of STBCs, the European Communities circulated the following communication, in document G/MA/TAR/RS/74 of 15 December 2000:

> "I attach herewith a notice concerning rectifications and modifications to our Schedule CXL related to ITA products.

WT/Let/667. We also note the Appellate Body's statement that "nothing in the DSU limits the faculty of a panel freely to use arguments submitted by any of the parties -- or to develop its own legal reasoning -- to support its own findings and conclusions on the matter under its consideration." Appellate Body Report on *EC - Hormones*, para. 156. See also Appellate Body Report on *Korea – Dairy*, para. 138; Panel Report on *Egypt – Steel Rebar*, para. 7.58. We thus consider it appropriate to address the parties' comments as we assess the role of the CN codes that are listed in the Annex to the EC Schedule.

[565] Document G/MA/TAR/RS/47 (10 February 1998), certified in document WT/Let/261 (25 November 1998).

[...]

RECTIFICATION AND MODIFICATIONS OF SCHEDULES
SCHEDULE CXL - EUROPEAN COMMUNITIES
INFORMATION TECHNOLOGY AGREEMENT (G/MA/TAR/RS16)

When the European Communities notified their commitments under the Information Technology Agreement in doc. G/MA/TAR/RS/16 of 2 April 1997, they indicated that the EC would classify "set-top boxes", an Attachment B product, under the following tariff lines: 8517 50 90, 8517 80 90 and 8525 20 99, all duty-free from 1 January 2000.

Customs experts from ITA participants have met several times to discuss classification divergences on ITA products, as mandated by paragraph 5 of the Annex to the Ministerial Declaration of 13 December 1996. Their recommendations to the Committee of Participants to the Agreement are contained in doc. G/IT/14 of 6 September 2000.

As indicated in that document, the European Communities have decided to join some other ITA participants in classifying certain types of ITA set-top boxes under HS sub-heading 8528 12. The European Communities have created a new tariff line for such set-top boxes, as follows:

		Base rate	Final rate	Implementation
8528 12 91	------- Apparatus with a microprocessor-based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange, capable of receiving television signals ("Set-top boxes with a communication function")	New line	0.0	2000

This change took effect from 1 October 2000. It is without prejudice to other possible changes in ITA product classification that may be necessary once the Committee of Participants to the Agreement has completed its examination of the recommendations from customs experts.

Consequently, the tariff references shown against product descriptions in Attachment B of the ITA Schedule of the European Communities should be modified as follows:

Set-top boxes: Replace by following reference: 8517.50.90 (unchanged), 8517.80.90 (unchanged), 8525.20.99 (unchanged), **8528.12.91 (new)**."[566] (footnotes omitted, emphasis original)

[566] Document G/MA/TAR/RS/74 (15 December 2000) (Exhibit US-26), certified in WT/Let/667 (19 March 2010).

7.421 Both the complainants and the European Communities have put forward competing interpretations of the motivations and effects of these modifications which, not surprisingly, support their respective positions regarding the key interpretative issue described above.

7.422 Although the European Communities claims that the purposes of these two modifications were different – arguing that the 1998 notification was undertaken to reflect a change of classification practice endorsed by the WCO, whereas the 2000 notification was undertaken to unilaterally "enlarge" commitments – the Panel is struck by the similarity in the explanations and language in the two notifications themselves. While the European Communities has explained to us that its 2000 notification was a unilateral expansion of commitments, we find little evidence of this in the words used to describe the change at the time that it was made. We note that the European Communities emphasized "classification" as the basis for both of the modifications.

7.423 In addition, the 1998 amendment appears to us to undermine the "exhaustion" approach proposed by the European Communities, under which HS or national codes notified exhaust obligations. It is apparent from the 1998 amendment that views on the appropriate classification of products can evolve over time. This may occur multilaterally (for example by agreement at the WCO), but may also occur as a result of plurilateral discussions where a number of countries agree to a harmonized approach to classifying particular goods, or indeed unilaterally by individual WTO Members. It could even result from discussions under paragraph 5 of the ITA Annex where clarifying the classification of an Attachment B product could eventually lead to a formal agreement to modify the schedules of all ITA participants. One consequence is that, as views on proper classification evolve, it is possible that the codes that were notified by a particular WTO Member as corresponding to a particular narrative description would no longer be considered to apply to the products that were intended to be covered by that narrative description. Despite this, the ITA does not expressly envisage or require an ITA participant to update its Schedule to take account of classification changes that may affect the codes listed next to the narrative product descriptions of products in or for Attachment B. While the European Communities did, in fact, modify its codes in this particular case, we are unaware of any obligation on the European Communities to do so. Had the European Communities not modified the tariff item numbers, under the "exhaustion" approach, the European Communities may no longer have had an obligation to extend duty-free treatment to products that the European Communities itself would admit should receive duty-free treatment pursuant to its original obligations undertaken in implementing Attachment B.

Do the WTO Schedules of concessions of other ITA participants inform our interpretation on the relevance of the tariff item numbers?

7.424 In response to a question from the Panel[567], the United States and Chinese Taipei explained that their respective WTO Schedules of concessions include either "identical" or "virtually identical" headnotes to the EC headnote. Japan explained that its WTO Schedule contains a "note corresponding to" the EC headnote.[568] The complainants have explained that headnotes in ITA participants' WTO Schedules serve to ensure that Members would provide duty-free treatment on all products described

[567] Complainants' response to Panel question No. 9.

[568] Japan submits that the note in its Schedule is "not identical, but are almost the same", but considers that the note functions the same as the EC headnote, notably, indicating "how to eliminate customs duties in respect of the products provided 'for' and 'in' Attachment B, with the condition 'wherever the products are classified'" (Japan's response to Panel question No. 9).

in or for Attachment B, regardless of which codes are associated with those descriptions, or even if no codes were associated with the description (as in the case of Japan's WTO Schedule).[569]

7.425 We recall that the Appellate Body found in *EC – Computer Equipment* that the terms of the treaty being interpreted when dealing with a tariff concession in a schedule are those of the WTO Agreement.[570] It subsequently found in *EC – Chicken Cuts* that other Members' Schedules of concessions could form part of the "broader context" to interpret a Member's tariff concessions.[571] We will therefore consider below whether the schedules of other WTO Members, and in particular the schedules of other ITA participants, may shed further light on our understanding of the EC headnote.

7.426 The Panel begins by observing that the ITA-related concessions of some ITA participants are included in "rectifications and modifications" to their Uruguay Round Schedules, whereas others are included in Protocols of Accession.[572] It is apparent from these documents that ITA participants attempted to standardize the format that would be used to incorporate these concessions into their Schedules, as practically all of them include specific sections for Attachment A-related and Attachment B-related concessions, as well as a "staging matrix" providing a detailed description of the maximum duties that would be applicable for each of the relevant tariff lines, per year, until their final elimination.[573] Attachment A concessions are normally presented using a format that follows, to a large extent, the one used by most Members in their Uruguay Round Schedules, and consolidates in a single list the HS headings listed under both Sections 1 and 2 of Attachment A.[574] Similarly, all ITA participants included in their schedule an annex or section listing products identified as "in or for" Attachment B, with some relatively minor variations.[575]

7.427 Counting the EC-27 as one, there are 35 Schedules of ITA participants in the English language[576], seven in Spanish[577] and one in French.[578] The panel observes that these schedules share

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[569] See, for instance, United States' comments on European Communities' response to question Panel question Nos. 100 and 103, and United States' questions No. 1-3, para. 5; Japan's response to Panel question No. 100.

[570] Appellate Body Report on *EC – Computer Equipment*, para. 84.

[571] Appellate Body Report on *EC – Chicken Cuts*, para. 193. We note that the European Communities has recognized in its own arguments that the Schedules of concession of other WTO Members that were ITA participants may serve as "broader context" to interpret the concessions as contained in the Annex to the EC Schedule (European Communities' first written submission, paras. 142 and 242).

[572] ITA participants reflecting concessions in their Protocols of Accession (P.A.) include Albania, China, Croatia, Georgia, Jordan, Moldova, Oman, Saudi Arabia, Chinese Taipei, Ukraine, and Viet Nam.

[573] The Panel recalls from its assessment of the ITA that two of these sections appear to have been foreseen in Paragraph 2(b) of the ITA Annex. It should be noted, in addition, that Japan's ITA-related modification in WT/Let/138 (17 April 1994) does not conform to this description.

[574] This is the case of ITA-related concessions incorporated through the 1980 procedures. It should, however, be noted that the Protocols of Accession of ITA participants merged ITA- with their non-ITA-related concessions, resulting in Attachment A concessions appearing undistinguishable from the "traditional" tariff concessions determined under participants' respective accession processes.

[575] The Panel notes that at least one schedule (Egypt's ITA-related modification in WT/Let/459) appears to be missing one of the product descriptions ("Apparatus for stripping or cleaning semiconductor wafers" that appears in ex 8456 91 of Attachment A, Section 2). Other Members' Schedules (Korea's in WT/Let/249, Egypt's in WT/Let/459, Israel's in WT/Let/174, Jordan's Protocol of Accession and Viet Nam's Protocol of Accession) do not incorporate the changes concerning FPDs (i.e. the addition of the words " devices" and "vacuum-fluorescence"). Finally, at least one Schedule (the United States') incorporates product descriptions (eight in total) that are not expressly specified in Attachment B or taken from Attachment A, Section 2.

[576] The following Members used the English language to reflect their ITA-related concessions into their schedules: Albania (P.A.); Australia (WT/Let/248); Bahrain (WT/Let/488); Canada (WT/Let/158); China

many common features and could be grouped according to certain traits, including the language used in preparing them, whether they included a headnote and whether they listed tariff headings next to narrative descriptions. Thirty of the 35 Schedules in the English language incorporate a headnote that is identical to the EC headnote, and list tariff codes next to the product descriptions that appear below the headnote.[579] Most of these Schedules also have in common the fact that they share the same product descriptions in the Attachment B-related sections. The seven WTO Schedules in Spanish include identical headnotes, which the Panel considers to be equivalent to those in the English version[580], each of which lists tariff codes next to the product descriptions. Taking into account the above, in total, 38 of 43 Schedules of ITA participants either contain exactly the same language as the EC headnote, or language which is equivalent to it.

7.428 Although the headnote was not explicitly provided for in the ITA, this substantial uniformity in approach with regard to the inclusion of a headnote and as to its terms, strongly suggests that the headnote was envisaged to play an important role in implementing the ITA. The Panel will return to this point to below. We will now turn to examine the schedules of participants that differ somewhat from the EC Schedule.

7.429 As mentioned above, Japan's Schedule contains a "note" that is different from the EC headnote that appears in the Annex to the EC Schedule and the headnotes that were included in the WTO Schedules of other participants. Japan's Schedule contains a note that reads as follows:

(P.A.); Croatia (P.A.); Egypt (WT/Let/459); European Communities (WT/Let/156); Georgia (P.A.); Hong Kong, China (WT/Let/160); Iceland (WT/Let/159); India (WT/Let/181); Indonesia (WT/Let/157); Israel (WT/Let/174); Japan (WT/Let/138); Jordan (P.A.); Korea (WT/Let/249); Kyrgyz Republic (P.A.); Macao, China (WT/Let/177); Malaysia (WT/Let/176); Mauritius (WT/Let/334); Moldova (P.A.9; New Zealand (WT/Let/295); Norway (WT/Let/153); Oman (P.A.); Philippines (WT/Let/303); Saudi Arabia (P.A.); Chinese Taipei (P.A.); Singapore (WT/Let/175); Thailand (WT/Let/250); Turkey (WT/Let/173); Ukraine (P.A.); United Arab Emirates (WT/Let/585); United States (WT/Let/182); and Viet Nam (P.A.).

[577] The following Members used the Spanish language to reflect their ITA-related concessions into their schedules: Costa Rica (WT/Let/196); Dominican Republic (WT/Let/557); El Salvador (G/MA/TAR/RS/45+Add.1, not certified); Guatemala (WT/Let/544); Honduras (WT/Let/511); Nicaragua (WT/Let/512); and Peru (WT/Let/640).

[578] Switzerland/Liechtenstein used the French language to reflect their ITA-related concessions in their joint schedule (WT/Let/253).

[579] These are: Albania; Australia; Canada; China; Croatia; Egypt; Georgia; Hong Kong, China; Iceland; India; Indonesia; Israel; Jordan; Kyrgyz Republic; Macao, China; Malaysia; Mauritius; Moldova; New Zealand; Norway; Oman; Philippines; Saudi Arabia; Chinese Taipei; Singapore; Thailand; Turkey; Ukraine; United Arab Emirates; and Viet Nam. Two of the other Schedules in English have similar headnotes to the EC headnote, with minor variations. For example, the Schedule of the United States employs the word "on" instead of "in and for" before the reference to "Attachment B" (See document WT/Let/182). Similarly, Bahrain's Schedule does not contain the words "to the Annex" between "Attachment B" and "to the Ministerial Declaration on Trade in Information Technology Products" (See document WT/Let/488).

[580] The headnote appears in those Members' WTO Schedules drafted in Spanish as follows:

> "Con respecto a cualquier producto designado en el Apéndice B de la Declaración Ministerial sobre el Comercio de Productos de Tecnología de la Información (WT/MIN(96)/16), o designado para dicho Apéndice, en la medida en que no esté específicamente previsto en esta Lista, los derechos de aduana aplicables a ese producto, así como los demás derechos o cargas de cualquier clase (en el sentido del apartado b) del párrafo 1 del artículo II del Acuerdo General sobre Aranceles Aduaneros y Comercio de 1994) quedarán consolidados y eliminados de conformidad con lo enunciado en el apartado a) del párrafo 2 del Anexo a la Declaración, cualquiera sea la clasificación en que figure el producto."

See, for example, Costa Rica's modification in WT/Let/196.

> "Notwithstanding the provision of paragraph 3 of the Notes to the Schedule, the tariff reductions from the bound rate as of 1 January 1997 to free in respect of the products in Lists III and IV, *wherever they are classified*, shall be implemented in three equal rate reductions as follows: (a) The first reduction shall be implemented on the date that this instrument becomes effective; (b) The second reduction shall be implemented on 1 January 1998; (c) The third reduction shall be implemented on 1 January 1999." (emphasis added)[581]

7.430 "List IV" reproduces the product descriptions specified in Attachment B, without assigning any tariff code next to them.[582]

7.431 Japan's Schedule thus contains language that is very similar to the reference "wherever the product is classified" in the EC headnote. In addition, the product descriptions "for Attachment B" are reproduced in List IV. Based on these two elements, Japan's Schedule may be understood as providing duty-free access to products "in or for Attachment B" irrespective of where they are classified.[583]

7.432 In the Panel's view the terms of Japan's "Note" clearly reflects the fact that Japan did not consider that the inclusion of HS codes was necessary in order to implement ITA Attachment B commitments. To this extent, it lends support to the view that the scope of commitments is determined by the narrative descriptions of products "wherever they are classified" rather than by the HS codes. However the Panel is mindful that Japan took a unique approach to scheduling its Attachment B-related commitments. Moreover, Japan's Schedule is not the subject of this dispute. Accordingly, the Panel chooses not to attach much weight to it beyond noting that in significant respects it mirrors key aspects of the headnotes appearing in the vast majority of ITA participants schedules.

7.433 We note that two Schedules (those of Korea and Switzerland/Liechtenstein, jointly)[584] lack a "headnote" or any provision that contains language equivalent to the phrase "wherever the product is classified". The Attachment B-related sections of these Members' schedules include only a table listing the product descriptions and HS codes that the participants chose to notify during the implementation period.

7.434 We do not have before us sufficient information to enable us to understand the basis for not including a headnote, as the product descriptions lack any indication of the applicable bound duty, other duties and charges or any relevant term or conditions on the concession, making it difficult to

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[581] Japan's ITA-related concessions are reflected in document WT/Let/138 (17 April 1994).

[582] Japan's ITA-related concessions, document WT/Let/138 (17 April 1994).

[583] As another difference, the Panel observes that the phrase "to the extent not specifically provided for in this Schedule" is absent in Japan's note. As the Panel discussed above, we determined this phrase to refer to the requirement to eliminate customs duties and charges on products "in or for" Attachment B in accordance with the ITA regardless of whether they are already covered by existing commitments in the relevant WTO Schedule. Thus, products in or for Attachment B would now be subject to duty-free, ITA-related, tariff obligations, notwithstanding any overlap in product coverage. Despite the absence of this phrase from Japan's Schedule (and ITA-related commitments), the Panel considers that Note 3 in the Japanese Schedule (see above) addresses this same objective through the language "the tariff reductions from the bound rate as of 1 January 1997 to free in respect of the products in Lists III and IV, *wherever they are classified*, shall be implemented". Despite this difference in text between the note appearing in Japan's Schedule and the EC headnote, the Panel finds no basis to suggest that the commitment to extend duty-free treatment to products wherever classified is any different.

[584] See Schedules of Korea (WT/Let/249) and Switzerland/Liechtenstein (WT/Let/253).

understand on the face of the Schedule what is the obligation assumed by the Member in respect of those products. This unquestionably creates difficulty in interpreting these two Schedules as concerns the product descriptions in or for Attachment B that are included. In our view, this underlines the fact that without a headnote, key elements of the Attachment B-related concessions, in particular the tariff treatment of those products or the relationship with the ITA, would remain unaddressed.

7.435 Finally, the Panel notes the assertion put forth by the European Communities that a number of WTO Members participating in the ITA would necessarily have "either made commitments without there being an obligation pursuant to the ITA and/or there are a number of WTO breaches because of the differences in classification" if the complainants' position regarding the predominance of the product descriptions in the Annex to the EC Schedule were accepted. As discussed above, the headnote refers to the product descriptions "in and for" Attachment B *wherever* they are classified in the ITA participant's schedule. For this reason, we are not convinced that differences in classification would necessarily result in breaches in concessions in a Schedule concerning a product description "in or for" Attachment B. We also consider that the HS headings and national codes listed by ITA participants in their Attachment B-related sections were intended to facilitate the implementation of those concessions, including *inter alia* the consultations to be held by ITA participants pursuant to paragraph 5 of the ITA Annex for the purpose of eliminating divergences in classification and, possibly, to assist participants in phasing out the applicable duties. However, as the terms of reference of this Panel do not go beyond specific terms in the EC Schedule, we will not elaborate further on this issue.

7.436 Based on the foregoing, the Panel considers that the substantial uniformity in approach with regard to the inclusion of a relatively standardized headnote in the schedules of ITA participants is fully consistent with the notion that the headnotes were meant to play an important role in interpreting the Attachment B-related concessions. However, we consider that other participants' schedules do not provide much guidance in interpreting the terms of the EC headnote, beyond highlighting the importance of the headnotes in determining the corresponding tariff treatment for products in or for Attachment B.

What is the relevance of the HS to our interpretation of the concession in the Annex to the EC Schedule?

Arguments of the parties

7.437 The **complainants** argue that HS interpretative materials, including HS section and chapter notes, HSENs and GIRs are *not* relevant context for interpreting the concessions at issue that arise under the Annex to the EC Schedule.[585] With respect to products described in or for Attachment B, the complainants note that the duty-free obligation extends to these products "wherever ... classified." Furthermore, the complainants note that paragraph 2(b) of the ITA refers to "products *specified* in Attachment B" (emphasis added), while the reference to products "classified (or classifiable) with Harmonized System (1996) ("HS") headings" in paragraph 2(a) of the ITA, pertains to coverage under Attachment A.[586] Based on this distinction, they argue that HS materials, while relevant to interpretation of concessions arising pursuant to Attachment A[587], are not relevant to interpret

[585] Complainants' responses to Panel question No. 104.

[586] United States' response to Panel question No. 104; Japan's first written submission, para. 16; Japan's response to Panel question Nos. 20 and 21; Chinese Taipei's response to Panel question No. 104.

[587] The United States acknowledges that prior Appellate Body reports indicate that the HS materials may be relevant to interpret HS-derived language in the description of a tariff concession in a Member's Schedule where the drafters relied on HS terminology or expressly provided for the application of HS

narrative descriptions, that were incorporated into the Annex to the EC Schedule pursuant to Attachment B. **Japan** submits that "the very point of the concessions made pursuant to Attachment B was to use product descriptions in those areas where the existing headings provided by the HS nomenclature were deemed insufficient."[588]

7.438 The **European Communities** considers that the HS1996 interpretive materials are relevant to the assessment of the concessions in the Annex to its Schedule. It argues that the language in paragraph 2 of the ITA Annex, which refers to "a list of the detailed HS headings involved for products specified in Attachment B", provides a basis to consider these materials in its assessment of whether the measures at issue for flat panel display devices are WTO-inconsistent.[589] In addition, the European Communities argues that these materials are also relevant for the Panel's analysis of concessions reached pursuant to Attachment A.[590]

Consideration by the Panel

7.439 The Appellate Body confirmed in *EC – Chicken Cuts* that the HS constituted relevant "context" to interpret a Member's schedule of concessions:

> "The above circumstances confirm that, prior to, during, as well as *after* the Uruguay Round negotiations, there was broad consensus among the GATT Contracting Parties to *use* the HS as the basis for their WTO Schedules, notably with respect to agricultural products. In our view, this consensus constitutes an 'agreement' between WTO Members 'relating to' the WTO Agreement that was 'made in connection with the conclusion of' that Agreement, within the meaning of Article 31(2)(a) of the Vienna Convention. As such, this agreement is 'context' under Article 31(2)(a) *for the purpose of interpreting the WTO agreements*, of which the EC Schedule is an integral part. In this light, we consider that the HS is relevant for purposes of interpreting tariff commitments in the WTO Members' Schedules." [591]

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interpretative rules to Attachment B concessions, for instance, those made in accordance with Attachment A (United States' first written submission, para. 24; United States' second written submission, para. 14; United States' response to Panel question Nos. 104 and 116) Japan submits more broadly that HS materials that address directly the meaning of the language of a concession may be relevant to interpret concessions that use HS terminology (Japan's response to Panel question No. 104). Chinese Taipei similarly submits that the HS1996 "plays a role" in the interpretation of the scope of concessions in relation to products listed in Attachment A in light of the reference in paragraph 2(a) of the ITA (Chinese Taipei's response to Panel question No. 104).

[588] Japan's second written submission, para. 173.

[589] European Communities' first written submission, para. 146; European Communities' response to Panel questions No. 104.

[590] The European Communities argues that the use of the terms "classified (or classifiable)" in paragraph 2(a) is an express indication that ITA participants intended HS classification rules to have an important role in the interpretation of the scope of the concessions made pursuant to the ITA (European Communities' response to Panel questions No. 104).

[591] Appellate Body Report on *EC – Chicken Cuts*, para. 199. See also Appellate Body Report on *EC - Computer Equipment*, para. 89. In that dispute, the Appellate Body stated:

"We are puzzled by the fact that the Panel, in its effort to interpret the terms of [the EC Schedule], did not consider the Harmonized System and its Explanatory Notes. We note that during the Uruguay Round negotiations, both the European Communities and the United States were parties to the Harmonized System. Furthermore, it appears to be undisputed that the Uruguay Round tariff negotiations were held on the basis of the Harmonized System's nomenclature and that requests for, and offers of, concessions were normally made in terms of this nomenclature." (Appellate Body Report on *EC - Computer Equipment*, para. 89).

7.440 In establishing that the HS provided relevant "context" for the interpretation of a Member's schedule, the Appellate Body took into consideration a number of factors. While noting that the HS was not formally part of the WTO Agreement and was not incorporated, in whole or in part, into that Agreement, the Appellate Body observed that the vast majority of WTO Members are also contracting parties to the HS and identified what it considered was a "close link" between the HS and the WTO Agreement.[592] Specifically, the Appellate Body observed that a number of WTO agreements resulting from the Uruguay Round, including the Agreement on Rules of Origin (in Article 9), the Agreement on Subsidies and Countervailing Measures (in Article 27), and the Agreement on Textiles and Clothing (in Article 2 and the Annex thereto), refer to the HS for purposes of defining product coverage within the agreement or the products subject to particular provisions.

7.441 The Appellate Body explained that, besides considering the headings and subheadings of the HS, a treaty interpreter may also resort to elements which are binding on the contracting parties of the HS (i.e. the Section, Chapter and Subheading Notes and the GIRs), as well as other elements which are *not* binding for the contracting parties of the HS, such as the HS Explanatory Notes.[593]

7.442 The Appellate Body cautioned in *China – Auto Parts*, however, that context provided by the HS may not always be relevant to the issue at hand:

> "[C]ontext is relevant for a treaty interpreter to the extent that it may shed light on the interpretative issue to be resolved, such as the meaning of the term or phrase at issue. Thus, for a particular provision, agreement or instrument to serve as relevant context in any given situation, it must not only fall within the scope of the formal boundaries identified in Article 31(2), it must also have some pertinence to the language being interpreted that renders it capable of helping the interpreter to determine the meaning of such language. Because WTO Members' Schedules of Concessions were constructed using the nomenclature of the Harmonized System, the Harmonized System is apt to shed light on the meaning of terms used in these Schedules. It does not, however, automatically follow that the Harmonized System was context relevant to the interpretative question faced by the Panel in its analysis of the threshold issue in this dispute."[594]

7.443 In our view, while the HS would always qualify as context for interpreting concessions in a Member's schedule that are based on that nomenclature, or that explicitly or implicitly make reference to it, the relevance of the HS will depend on the interpretative question at issue. Moreover, it does not follow from the Appellate Body jurisprudence that the HS will *necessarily* qualify as context or be relevant in interpreting *all* tariff concessions, including concessions which are not based on the HS.

7.444 We are of the view that the HS, including headings and subheadings of the HS, Section, Chapter and Subheading Notes and the GIRs, and potentially HSENs, are not relevant for interpreting the concessions based on narrative descriptions in the Annex to the EC Schedule. The terms of the EC

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[592] Appellate Body Report on *EC – Chicken Cuts*, paras. 195-197.

[593] See Appellate Body Report on *EC – Chicken Cuts*, para. 224. While the Appellate Body agreed with the general proposition that "the Chapter Notes to the Harmonized System, which are binding, may have greater probative value than the Explanatory Notes to the Harmonized System, which are non-binding" it also recognized that the "probative value of a Note will, however, also depend on how relevant it is to the interpretative question at issue; as a result, it cannot be excluded that an Explanatory Note that directly addresses a given interpretative question will be more probative than a Chapter Note that does not relate specifically to that interpretative question." (See Appellate Body Report on *EC – Chicken Cuts*, para. 224, fn. 431).

[594] Appellate Body Report on *China – Auto Parts*, para. 151.

headnote are evidently not based on the HS, nor do they make explicit or implicit reference to it. Similarly, although some of the product descriptions in the Annex to the EC Schedule make use of certain HS terminology, this is not the case for the concessions at issue in this dispute, namely the FPDs and STBCs narrative descriptions. For this reason, we consider that the HS will not inform our interpretation of the terms of the EC headnote or narrative descriptions at issue.

Preliminary conclusions: The Panel's interpretation of the role of the EC headnote in the Annex to the EC Schedule

7.445 On the basis of the plain meaning of the key terms and phrases appearing in the EC headnote, we preliminarily concluded that the EC headnote requires the European Communities to extend duty-free treatment to products described in the Annex to the EC Schedule, irrespective of where they are classified in the EC Schedule. As corollaries to this finding the Panel further concluded that the tariff item numbers notified next to the product descriptions, while "illustrative" of the locations where the European Communities considered those products should have been classified at the time of implementation of the ITA, cannot delimit the scope of coverage of the concessions. We further explained that the HS, including chapter and explanatory notes and GIRs, are not relevant to our assessment of the scope of product coverage in any of the narrative descriptions at issue in this case. We concluded that the provisions of the ITA provide context for interpreting the headnote, and support our preliminary conclusions.

7.446 We will consider the FPDs narrative concession below in light of the object and purpose of the WTO Agreement; however, we would note at present that the substantial uniformity with which ITA participants included a headnote with highly similar language, including identical language in many cases, is fully consistent with the notion that the headnote was intended to play an important role in those Members' schedules.

(iii) The meaning of the terms of the FPDs narrative description in the Annex to the EC Schedule

7.447 We next examine the ordinary meaning of the FPDs narrative description, including consideration of its text, taken in its context and in light of the Agreement's object and purpose. We recall that the FPDs narrative description provides:

> "Flat panel display devices (including LCD, Electro Luminescence, Plasma, Vacuum-Fluorescence and other technologies) for products falling within this agreement, and parts thereof".[595]

The meaning of the terms of the FPDs narrative description

Arguments of the parties

7.448 The complainants have structured their arguments to address the ordinary meaning of the terms "Flat panel display devices" separately from the text "for" and "products falling within this agreement, and parts thereof". The complainants have not addressed at length the significance of the parenthetical language "(including LCD, Electro Luminescence, Plasma, Vacuum-Fluorescence and other technologies)" in the narrative description.

[595] Exhibit US-7.

The meaning of the term "Flat panel display devices "

7.449 The **United States** describes a "flat panel display device" as "a type of monitor that is thinner and typically uses less energy than devices using conventional cathode ray tube (CRT) technology".[596] In particular, the United States notes that "flat panel display" has been defined as "a video display with a shallow physical depth, based on technology other than CRT (cathode ray tube). Such displays are typically used in laptop computers. Common types of flat panel displays are the electroluminescent display, the gas discharge display, and the LCD display."[597] In addition, the United States refers to the definition "[a]n electronic display in which a large orthogonal array of display devices, such as electroluminescent devices or light emitting diodes, form a flat screen."[598] According to the United States, these displays rely on a variety of technologies to achieve a thinner profile including LCD or plasma.[599] Moreover, the United States claims that FPDs process digital signals directly, including those from an automatic data-processing machine, via a DVI interface or other connector.[600]

7.450 The United States argues that the term "devices" was inserted based on a proposal by Switzerland shortly after the conclusion of the ITA. In the United States' view, the inclusion of this word "simply makes clear" that a "device" or the finished product containing a flat panel display and not just the display itself, is covered by the concession.[601]

7.451 The United States notes that the concession in the Annex to the EC Schedule specifically identifies LCD flat panel display devices as one of the covered types. Since "computers" are "automatic data-processing machines", which themselves are products falling within the agreement,

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[596] United States' first written submission, para. 50 (referring to Energy Star, LCD Basics, http://www.energystar.gov/index.cfm?c=monitors.lcd (Exhibit US-31)).

[597] United States' first written submission, paras. 50 and 121, fn. 166 (referring to Microsoft Computer Dictionary, 2002 (5th edition), p. 155).

[598] United States' first written submission, paras. 50 and 121, fn. 166 (referring to *McGraw Hill Dictionary*, p. 1437).

[599] United States' first written submission, para. 50. The United States notes in particular that LCD technology is commonly used for computer monitors and involves aligning material suspended in a liquid under the influence of a low voltage to reflect ambient light. See Hirohisa Kawamoto, The History of Liquid-Crystal displays, Proceedings of the IEEE (Vol.90, No. 4 (April 2002), p. 466 (Exhibit US-32); Definition of "LCD" in Newton's Telecom Dictionary, p. 555 (24th ed., 2008) (Exhibit US-33). The United States refers to a definition for LCDs as "[a]n alphanumeric display using liquid crystal sealed between two pieces of glass. The display is divided into hundreds or thousands of individual dots, which are charged or not charged, reflecting or not reflecting external light to form characters, letters and numbers". See Newton's Telecom Dictionary (24th ed. 2008), p. 545 (Exhibit US-33); see also Carmen Carmack and Jeff Tyson, How Computer Monitors Work, p. 1 ("Most desktop displays use liquid crystal display (LCD) or cathode ray tube (CRT) technology, while nearly all portable computing devices such as laptops incorporate LCD technology. Because of their slimmer design and lower energy consumption, monitors using LCD technology (also called flat panel or flat screen displays) are replacing the venerable CRT on most desktops.").

[600] United States' first written submission, paras. 52-53 (citing to "How Monitors Work", p. 4: A DVI connector consists of three rows of pins arrayed on a plug with a screw on either side. DVI was developed in 1998 by the Digital Display Working Group (DDWG), which included leading computer manufacturers. The DVI connector was intended to provide digital-to-digital connection standard for personal computers and digital displays. See Digital Display Working Group, Digital Visual Interface (DVI) Revision 1.0p, p. 5 (30 March 1999) (Exhibit US-35)).

[601] United States' response to Panel question No. 54.

the United States argues that LCD monitors are therefore covered under the product descriptions for FPDs.[602]

7.452 **Japan** submits that LCD monitors with DVI are the most common type of flat panel display devices "for" automatic data-processing machines.[603] Japan provides an "illustrative" although "not comprehensive" list of products it believes to be at issue.[604] As the narrative description in Attachment B and the Annex to the EC Schedule explicitly identify "LCD" technology in discussing flat panel display devices, Japan argues that "LCD monitors are 'flat panel display devices' for display of data from an ADP machine".[605]

7.453 Japan argues that the addition of the term "device" to the description does not "materially change the meaning" of the concession. Japan refers to the definition of "device" as ""a thing designed for a particular function or adapted for a purpose."[606] Japan argues that a flat panel display for an automatic data-processing machine serves to perform the function of displaying a signal from an automatic data-processing machine. Therefore, it argues that the addition of the term "devices" does not change the original meaning of "flat panel displays".[607]

7.454 **Chinese Taipei** argues that "flat panel display devices" are products with specialized definitions. Therefore, it submits that dictionaries specialized in IT sector terminology may be relevant in examining the terms "flat", "panel", "display" and "devices".

7.455 Chinese Taipei refers to the definition of "flat" as "(3) Even, smooth, unbroken, without projection; (of the face, features, etc.) without prominence, not projecting; (of land) not undulation; (of a surface) smooth, level. B. Deflated, punctured. C. (Electronic) Uniform in behaviour over a given range of frequencies; responding equally to signals of all frequencies."[608] It refers to "panel" as "(5) A thin board such as might form a panel of a door etc.; esp. One used as a working surface. B. A rigid support for a painting (as opp. to a canvas); a painting on such a support. C. A leaf or section of a folding screen or triptych."[609]

7.456 Chinese Taipei refers to a number of definitions of "display", such as "(2) Something intended for people to look at: an exhibition, a show. B. A visual presentation of data or signals on the screen of a cathode-ray tube etc.; a device or system used for this."[610]; "1. a visible representation of information, in words, numbers, or drawings, as on the cathode-ray tube screen of a radar set, navigation system, or computer console. 2 The device on which the information is projected. Also

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[602] United States' first written submission, para. 121.
[603] Japan's first written submission, para. 216.
[604] Exhibit JPN-15.
[605] Japan's first written submission, para. 266; Japan's second written submission, para. 150.
[606] Japan's response to Panel question No. 54 (referring to the *Shorter Oxford Dictionary* (2003) p. 655 (Exhibit JPN-27).
[607] Japan's response to Panel question No. 54. Japan argues that this view is confirmed from the grammatical standpoint. When the phrase "flat panel display" is inserted in front of the word "devices," it argues, the phrase "flat panel display" serves to modify and describe the neutral term "devices." Thus, whether this phrase "flat panel displays" is used as the noun, or at modifies the noun "devices," it argues that the meaning does not change.
[608] Chinese Taipei's first written submission, para. 223 (citing the *Shorter Oxford Dictionary* (1993), p. 968).
[609] Chinese Taipei's first written submission, para. 224 (citing the *Shorter Oxford Dictionary* (1993), p. 2083).
[610] Chinese Taipei's first written submission, para. 225 (citing the *New Shorter* (1993), p. 699).

knows as display device. 3. The image of the information."[611]; "[a] generic term for a computer subsystem. Printers, serial ports, and disk drives are often referred to as devices; such subsystems frequently require their own controlling software, called device drivers."[612]; as "a thing designed for a particular function or adapted for a purpose; an invention, a contrivance."[613]; and "(1) any electronic or electromechanical machine or component from a transistor to a disk drive. The term "device" always refers to hardware, never software."[614]

7.457 Chinese Taipei refers to "panel display" as "an electronic display in which a large orthogonal array of display devices, such as electro-luminescent devices or light-emitting diodes, form a flat screen. Also known as flat-panel display."[615] It refers to the definition "flat panel display" as "[a] video display with a shallow physical depth, based on technology other than CRT (cathode ray tube). Such displays are typically used in laptop computers. Common types of flat panel displays are the electroluminescent display, the gas discharge display, and the LCD display"[616] or "[a] thin display screen for computer and TV usage. The first flat panels appeared on laptop computers in the mid-1980s, and the LCD technology became the standard. Stand-alone LCD screens became available for desktop computers in the mid-1990s and exceeded sales of CRTs for the first time in 2003. For TV viewing, LCD and plasma are the two competing technologies, and many flat panel TVs can also display computer output."[617] When these terms are considered together, Chinese Taipei considers the ordinary meaning of "flat panel display device" is a "smooth and thin board used as a visual presentation of data or signals on that board".[618]

7.458 Based on these definitions, Chinese Taipei concludes that a flat panel display device is "a thin display screen employing plasma, LCDs and other technologies for use with computers or other apparatus"[619]; or "thin screen devices to visualize data or signals" "employ[ing] various technologies, such as LCD and plasma, with the exception of CRT technologies" and "hav[ing] a variety of applications including reproduction of signals from ADP machines" as well as "visualiz[ing] data from other sources".[620] Chinese Taipei argues that these definitions "confirm that flat panel display devices are for use with computers or for any other apparatus since no limitation is included in the definitions." In addition, it argues that the terms "display" and "display device", as well as "panel display" and "flat panel display" are synonymous.[621]

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[611] Chinese Taipei's second written submission, paras. 150-153 (referring to *McGraw-Hill Dictionary* (1993), p. 593; see also *McGraw-Hill Dictionary* (2003), p. 629.

[612] Chinese Taipei's first written submission, para. 227; Microsoft Computer Dictionary, (5th ed., 2002), p. 155.

[613] Chinese Taipei's first written submission, para. 226 (referring to the *Shorter Oxford Dictionary* (1993), p. 655).

[614] *Techweb On-line Dictionary* (visited on 4 December 2008), available at: http://www.techweb.com/encyclopedia/defineterm.jhtml?term=flatpaneldisplay.

[615] Chinese Taipei's second written submission, paras. 150-153 (referring to *McGraw-Hill Dictionary* (1993), p. 1437; see also *McGraw-Hill Dictionary* (2003), p. 1522.

[616] Chinese Taipei's first written submission, para. 227; Microsoft Computer Dictionary (5th ed., 2002), p. 217.

[617] *Techweb On-line Dictionary* (visited on 4 December 2008), available at http://www.techweb.com/encyclopedia/defineterm.jhtml?term=flatpaneldisplay.

[618] Chinese Taipei's first written submission, para. 227; Microsoft Computer Dictionary (5th ed., 2002).

[619] Chinese Taipei's first written submission, para. 233.

[620] Chinese Taipei's first written submission, para. 234.

[621] Chinese Taipei's second written submission, para. 154.

7.459 Chinese Taipei also argues that the use of the plural "devices" rather than the singular form "device" does not change the ordinary meaning of the concession.[622] Instead, it argues, the use of the plural serves to clarify that "any flat panel display devices are covered provided they are for 'any' product falling within the ITA agreement rather than just for certain products covered by the ITA".[623] Chinese Taipei argues that the last-minute inclusion of the term "devices", in addition, confirms that the product description "covers both semi-finished and finished products".[624]

7.460 The **European Communities** criticizes the complainants' approaches to defining the terms in the phrase "flat panel display devices". It argues that the United States "does not examine the ordinary meaning of the relevant term" and that "the ordinary meaning of the relevant term is entirely mixed up with vague fact-like statements and ostensible contextual assertions without any structured legal analysis".[625] The European Communities further criticizes the United States' citation to the *Microsoft Computer Dictionary* that dates from 2002, arguing that this definition post-dates when product coverage was established in the ITA.[626] The European Communities also criticizes Chinese Taipei's inclusion of various dictionary definitions dating from a time-frame after the negotiation of the ITA.[627]

7.461 The European Communities argues that the meaning of adding the word "devices", which it submits was added on the basis of a request by Switzerland[628], is "less clear" and has led to "debates" in the ITA committee whether the definition covers finished products and/or semi-finished products. It argues that the term "devices" might have been added as "a spill-over effect from the reference to CRT technology in the definition of 'monitors'", such that the addition of the word would mean that those genuine ADP monitors that used flat panel technology could come within the scope of the ITA.[629] However, it also recognizes the possibility of a more "technical" meaning. In response to a question from the Panel, the European Communities submits that the word "devices" was added as it "was necessary because the product definition was intended to cover many different display devices mainly for incorporation into other ITA covered products".[630] Furthermore, the European Communities argues that the use of the plural in the term "devices" indicates that the term is not "synonymous" with "computer flat panel monitors". The European Communities submits that the narrative description provides no guidance about the scope of possible relevant technology applications, such as use of a display in a car radio or an airplane entertainment display. For this reason, the European Communities argues that it is unclear what the product coverage should be.[631]

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[622] Chinese Taipei's second written submission, paras. 158-159; Chinese Taipei argues that "all products included in Attachment B" are listed in the plural, such as "computers", "projection type flat panel display units" and "monitors".

[623] Chinese Taipei's second written submission, paras. 158-159.

[624] Chinese Taipei's response to Panel question No. 54.

[625] European Communities' first written submission, para. 104.

[626] European Communities' first written submission, para. 104.

[627] European Communities' first written submission, para. 110.

[628] European Communities' first written submission, para. 186 (referring to Trade in Information Technology Products: Result of Bilateral Consultations, Communication from Switzerland, Geneva (21 January 1997) (Exhibit EC-29).

[629] European Communities' first written submission, paras. 186-187.

[630] European Communities' response to Panel question No. 54.

[631] European Communities' first written submission, para. 113.

The meaning of the term "for"[632]

7.462 The **complainants** refer to the term "for" as "to be received by, to belong to; to be used with, or in connection with."[633] In addition, the **United States** refers to the definition "a function word to indicate purpose."[634]

7.463 The United States argues that the term "for" does not impose the "limitation" suggested by the EC measures, such that a display would fall outside the concession due to the "mere possibility" that it is capable of connecting to something other than an ITA product means.[635] **Japan** argues that the ordinary meaning of the word "for" is "extremely broad, noting that the *Shorter Oxford Dictionary* provides over 20 definitions for the term.[636] Japan argues that the concept of "for" should encompass being "capable of operating with a computer", for instance. In its view, this means more than whether the device can merely receive signals from computers, but that such a device "must be designed to be used with computers, thereby providing an acceptable level of operational quality".[637] **Chinese Taipei** argues that the word "for" is "extremely wide and covers many different possible situations".[638]

7.464 Japan and Chinese Taipei additionally argue that the term "for" should not be interpreted by adding any limiting language in the product description, such as "only for", "mainly for" or "also for".[639] Japan also argues that the absence of limiting terms demonstrates that the word "for" should not be limited by any words, such as, "solely" or "principally".[640] Japan argues that the mere fact that a device is "for" one type of machine does not, by virtue of the word alone, impose any kind of exclusivity of use.[641]

7.465 The **European Communities** argues that the complainants' interpretation of "for" is "overly broad".[642] The European Communities acknowledges that "for" is a function word indicating purpose[643] and that computers fall within the ITA[644]; however, it contends that an analysis of the word

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[632] Chinese Taipei, unlike the other complainants, examines the phrase "for products falling under this agreement" as context to inform the ordinary meaning of the phrase "[f]lat panel display devices" (Chinese Taipei's first written submission, paras. 236-246). Here, we will consider its arguments in this section, consistent with the other complainants' approach.

[633] United States' first written submission, para. 132, referring to the *Shorter Oxford Dictionary* (1993), p. 997 (Exhibits US-79; US-80); Japan's first written submission, para. 268; Chinese Taipei's first written submission, para. 241.

[634] United States' first written submission, para. 132 (Exhibits US-79; US-80).

[635] United States' first written submission, para. 132.

[636] Japan's first written submission, para. 268.

[637] Japan's second oral statement, para. 71. Japan argues that, even a flat panel display with a DVI connector may not necessarily be "for" a computer, if for instance, it can receive and display television signals. It argues that other factors would help determine this, such as the resolution of such a flat panel display device (Japan's second oral statement, para. 71).

[638] Chinese Taipei's first oral statement, para. 28.

[639] Japan's first written submission, para. 269; Japan's second written submission, para. 151; Chinese Taipei's first written submission, para. 242; Chinese Taipei's second written submission, para. 163. Japan argues that no "modifier" or "restriction" appears before or after the term "for", which confirms the term "for" is used "without limitation". Japan argues that the addition of the words "only" or "mainly", which are not part of the text, have the effect of "stand[ing] the ordinary meaning of [the word 'for'] on its head".

[640] Japan's second written submission, para. 152; Japan's second oral statement, para. 59.

[641] Japan's first written submission, para. 268.

[642] European Communities' responses to Panel question No. 10.

[643] European Communities' responses to Panel question No. 64.

[644] European Communities' first written submission, para. 19.

"for" is ineffective when examined in isolation, since the ITA covers a variety of products. The European Communities argues, the ordinary meaning of "for" could denote "only for", "mainly for" or "also for".[645] Based on the number of different flat panel display products included in the ITA, the European Communities argues that the term "for" serves to imply "a number of *different* products" "rather than whether or not a given flat panel display could have multiple usages".[646] In its view, the term "for" indicates that "a given flat panel display device is always *only* for a product that falls within the scope of the agreement".[647]

The meaning of the term "products falling within this agreement"

7.466 **Chinese Taipei** argues that the phrase "for products falling within this agreement, and parts thereof" is "self explanatory", such that only flat panel display devices for products falling within this agreement ... benefit from the duty-free treatment.[648] Chinese Taipei argues that the term "agreement" refers to the ITA. Thus, it argues that a flat panel display device may fall within the concession if it is used with products falling within the ITA, including at least automatic data-processing machines.[649]

7.467 The **European Communities** argues that the qualification "for products falling within this agreement, and parts thereof" necessarily means that not all flat panel display devices can fall within the scope of the concessions.[650] It notes that "products falling within this agreement and parts thereof" is in the plural. Thus, it argues that the ordinary meaning of the term is therefore "of very limited importance" because it explicitly refers to many other products covered by the agreement and necessitates thus a contextual analysis to be understood".[651]

Consideration by the Panel

7.468 The **Panel** notes that in their arguments about the meaning and scope of the concession at issue, the complainants have relied on various dictionary definitions of the relevant terms of the concession including technical dictionaries as well as more general dictionaries of the English language. Given the terms involved, we are of the view that this is appropriate.

7.469 Before we begin our analysis of the specific terms used in the concession based on these dictionary definitions, we recall the Appellate Body's statement that, while dictionaries are a "useful starting point" for the analysis of "ordinary meaning" of a treaty term they "are not necessarily dispositive".[652]

7.470 As noted above, the complainants have focused their discussion on the phrase "flat panel display devices", the word "for" and the phrase "products falling within this Agreement". We will address these in turn.

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[645] European Communities' first written submission, para. 116.
[646] European Communities' first written submission, paras. 135-136 (emphasis original).
[647] European Communities' first written submission, para. 136 (emphasis original).
[648] Chinese Taipei's second written submission, para. 162.
[649] Chinese Taipei's first written submission, paras. 241 and 243-245.
[650] European Communities' first written submission, para. 114.
[651] European Communities' first written submission, para. 115.
[652] Appellate Body Report on *EC – Chicken Cuts*, para. 175 (citing the Appellate Body Reports on: *US - Softwood Lumber IV*, para. 59; *US – Offset Act (Byrd Amendment)*, para. 2487; *US – Gambling*, para. 166). See also the Appellate Body Reports on: *China – Publications and Audiovisual Products*, para. 348; *India - Additional Import Duties*, para. 167, fn. 324; and *US – Offset Act (Byrd Amendment)*, para. 248.

7.471 We note that the parties have not addressed to any degree the phrase "(including LCD, Electro Luminescence, Plasma, Vacuum-Fluorescence and other technologies)" that appears in the concession, except to note the reference to "LCD" technology when interpreting the meaning of the descriptor "flat panel display devices"[653]. Thus, we will not address it here. In addition, the parties did not specifically address the term "and parts thereof" that appears at the end of the of the FPDs narrative description. The parties have agreed that the focus in this dispute should be on finished or complete products.[654] As semi-finished products are not at issue, and based on the parties' comments regarding semi-finished products, we will not address the question of what tariff treatment should be extended to semi-finished displays or component parts. Accordingly, we will not evaluate the term "and parts thereof" in the narrative description.

"Flat panel display devices"

7.472 The complainants have offered a number of definitions from both ordinary and technical dictionaries to define the terms "Flat panel display devices". Dictionary definitions should not be considered as the sole basis for establishing the ordinary meaning of a term or terms in a treaty. However, the Panel does note a high degree of consistency among the definitions of the individual terms and the technical definitions that have been provided by the parties. Based on a technical definition from the 2002 *Microsoft Computer Dictionary* and a government website reference[655], the United States offers that a "flat panel display device" is "a type of monitor that is thinner ... than devices using conventional cathode ray tube (CRT) technology".[656] In reference to individual definitions of the terms "flat", "panel", "display" and "devices" as well as a technical definition of the compound word "panel display" from the *McGraw-Hill Dictionary of Scientific and Technical Terms*, and technical definitions of "flat panel display" and "device" from the *Microsoft Computer Dictionary* and the *Techweb On-line Dictionary*, Chinese Taipei submits that a "flat panel display device" is among other things a "thin board" or "display" that is designed for "visual presentation of data or signals" or "reproduction of signals from ADP machines".[657]

7.473 In the Panel's view, both the ordinary and technical dictionary definitions support the United States' and Chinese Taipei's descriptions.[658] We note in addition that the European Communities has not proposed an alternative definition of these terms.

7.474 The European Communities criticises the complainants' reliance on some dictionaries in particular, the United States' and Chinese Taipei's reliance on the 2002 edition of the *Microsoft Computer Dictionary*, arguing that a definition established more than five years after the conclusion of ITA negotiations is not reflective of the meaning of that term during that time. However, as Chinese Taipei points out, the Panel notes that both the 1993 and 2003 *McGraw-Hill Dictionary of Scientific and Technical Terms*, that pre- and post-date, the conclusion of the ITA, provide comparable definitions of the terms in the phrase "Flat panel display devices" to support the

[653] See, for instance, United States' first written submission, para. 121; Japan's first written submission, para. 266; Japan's second written submission, para. 150.

[654] See complainants' response to Panel question No. 51. Japan and Chinese Taipei expressed the view that the EC concession for FPDs covers both finished and semi-finished products, but have focused only on finished products. The European Communities stated that it considered "no legal argument is advanced claiming that the European Communities would be in breach of its obligations in respect of semi-finished flat panel display devices" (European Communities' response to Panel question No. 51).

[655] Energy Star, LCD Basics, http://www.energystar.gov/index.cfm?c=monitors.lcd (Exhibit US-31).

[656] United States' first written submission, para. 50.

[657] Chinese Taipei's first written submission, para. 227.

[658] The definition of "panel display" from the *McGraw-Hill Dictionary* refers to an "electronic display ... such as, electro-luminescent devices or light-emitting diodes" that form a "flat screen".

complainants' interpretation. The description from this dictionary is similar to that in the disputed *Microsoft Computer Dictionary*. In particular, the *McGraw-Hill Dictionary of Scientific and Technical Terms* refers to "an electronic display" in which "devices, such as electro-luminescent devices or light-emitting diodes, form a flat screen", noting this may be referred to as a "flat-panel display". The *Microsoft Computer Dictionary* refers to "[a] video display with a shallow physical depth, based on technology other than CRT (cathode ray tube)", of which the "LCD display" is a "[c]ommon type of flat-panel display". Moreover, we note that the 1993 edition of the *Shorter Oxford Dictionary*, through its description of a "panel" as a "thin board", and *Techweb On-line Dictionary*, through its indication that "[s]tand-alone LCD screens became available for desktop computers in the mid-1990s", support these definitions.

7.475 We note the definitions of the term "device" provided by the complainants – that of "a thing designed for a particular function or adapted for a purpose"[659]. As noted by the parties[660], the fact that the word was added based on a late proposal by Switzerland does not clarify the intentions behind the inclusion of this word. Regardless, the parties have agreed here that the focus in this dispute should be on finished or complete products and that the term "device" appears in the EC Schedule.[661] Thus, we do not consider it necessary to address the implications of the language for semi-finished products.

7.476 We disagree with the European Communities' contention that the inclusion of the plural of the term "devices" somehow calls into question the complainants' conclusions on the textual analysis of the terms "Flat panel display devices". We consider that the definition of "devices" is broad enough to encompass the kind of finished products that are at issue in this dispute when interpreted in accordance with the Vienna Convention. The parties have recognized that the concession is intended to cover finished products, in addition to semi-finished ones.

7.477 Therefore, in light of the several dictionary definitions presented by the complainants, that both pre- and post-date the time-frame in which the European Communities included the concession for FPDs in the Annex to the EC Schedule, we conclude that the plain meaning of the terms "Flat panel display devices" refers to a type of apparatus that has a flat display and is generally thinner than conventional CRT displays or monitors, and is designed for visual presentation of data or signals. We further observe, based solely on our assessment of the terms "Flat panel display devices", that there is no limitation on technical characteristics, such as screen size, dimension, refresh rate, dot-pixel ratio, or other technical characteristics. There is also no limitation on the type of connector sockets it may possess, such as VGA, s-video, DVI-I, DVI-D or HDMI. Moreover, we do not consider that the terms "Flat panel display devices" in isolation, set any limitation on whether the apparatus may only display or reproduce signals from automatic data-processing machines, or whether it may display signals from multiple sources. This is reinforced by the parenthetical language that immediately follows it providing examples of the different technologies to be covered by the concession, including "LCD, Electro Luminescence, Plasma, Vacuum-Fluorescence and other technologies." We now consider the remaining terms in the description.

[659] The *Shorter Oxford Dictionary* (1993), p. 655.

[660] See the parties' response to Panel question No. 54; European Communities' first written submission, para. 186, referring to Trade in Information Technology Products: Result of Bilateral Consultations, Communication from Switzerland, Geneva, 21 January 1997 (Exhibit EC-29).

[661] See complainants' response to Panel question No. 51.

"for"

7.478 We recall that the complainants have focused on a limited category of finished flat panel display devices.[662] We will confine our analysis of the terms as they would apply to such types of devices. While it is not obvious why the word "for" would have a different meaning in other contexts, the Panel does not consider it is necessary to make a ruling in this regard.

7.479 The complainants have indicated that the term "for", among other meanings, can mean "a function word to indicate purpose" and "to be received by, to belong to". The European Communities has not proposed alternatives to the definitions provided by the complainants.

7.480 In our view, use of the word "for" in the narrative description at issue is intended to limit the coverage of the concession to those flat panel display devices that have as a purpose operation with products described in the concession as "products falling within this agreement". We note the complainants have limited their arguments to discussing automatic data-processing machines. We therefore focus our analysis here on automatic data-processing machines, and not other products. Flat panel displays must be "designed for use" with an automatic data-processing machine. In the Panel's view, the mere capability of a flat panel display device to connect to an automatic-data-processing machine, for example, would not necessarily mean that the flat panel display device was "for" use with an automatic-data-processing machine. Japan has argued that the concept of "for" should encompass being "capable of operating with a computer". In our view, mere use, or capability to connect to an automatic data-processing machine would not fit within the notion of "for products within this Agreement". As Japan explained[663], if a device is capable of connecting to a device in some minimal respect, i.e., it receives and reproduces signals for viewing, but the displayed image or signal is not of acceptable quality or of practical use, that would not be enough to satisfy the concession. Thus, under the concession, we consider an objective assessment of the product would be required, taking into consideration elements such as image quality, resolution, screen size in relation to the particular product range of applications, and so forth.

7.481 Such an interpretation does not in our view imply exclusivity, such that a device must be "solely" for, or "only" for use with an automatic data-processing machine. In our view, it is not appropriate to read in such words, as the European Communities suggests[664]. Had the drafters intended such exclusivity then they would have included those terms or similar ones. However, they have not.

"products falling within this Agreement"

7.482 We explained in the preceding section that the word "for" in this context means "designed for" and encompasses the capability to operate with products falling within the ITA, including automatic data-processing machines. We said that this implies an ability to operate with an acceptable or functional level of operation, as opposed to mere incidental ability to achieve a connection. However, we explained that the concession does not provide that flat panel display devices must exclusively connect with an automatic data-processing machine or other product covered by the ITA, nor the manner in which that connection should be achieved. We also indicated that we would limit

[662] See para. 7.471 above.

[663] Japan's second oral statement, para. 71. Japan argues that, even a flat panel display with a DVI connector may not necessarily be "for" a computer, if for instance, it can receive and display television signals. It argues that other factors would help determine this, such as the resolution of such flat panel display device (Japan's second oral statement, para. 71).

[664] European Communities' first written submission, para. 116.

our analysis of the terms as they apply to these products, and would not address semi-finished or other products, or parts of products.

7.483 We thus do not consider it relevant or necessary to assess the full gamut of products within the ITA Agreement that would be subject to the concession. In other words, we do not consider it our task to determine all the products that would be capable of operating with the products at issue in this dispute. Rather, we consider our task to be to determine whether the concession covers those products at issue, namely those that are designed for use with automatic data-processing machines (which, undisputedly, fall within the ITA), as well as, potentially, with sources other than automatic data-processing machines.

7.484 Based on our assessment of the plain meanings of the terms above, we disagree that the use of the plural in the term "products" limits the "importance" of ascertaining the ordinary meaning of the phrase because it refers to many products covered by the agreement.[665] In our view, the phrase is self-explanatory and refers to all products falling within the ITA.

Preliminary conclusion on the meaning of the FPDs narrative description

7.485 Based on the foregoing assessment, we preliminarily conclude that the concession refers to certain apparatus or devices that have a flat display and are generally thinner than conventional CRT displays or monitors, and are designed for visual presentation of data or signals from products falling with in the ITA, including notably, automatic data-processing machines. We find preliminarily that there is no express limitation on technical characteristics, such as screen size, dimension, refresh rate, dot-pixel ratio, or other technical characteristics, including no express limitation on the type of connection or sockets it may possess, such as DVI. Moreover, we conclude that while the flat panel display devices at issue must be designed for use with an automatic data-processing machine there is no requirement for exclusivity, such that the concession would be limited to apparatus that only display or reproduce signals from products falling within the ITA, including automatic data-processing machines.

(iv) The terms of the FPDs narrative description in their context

7.486 The **complainants** have argued that other narrative descriptions that appear in the Annex to the EC Schedule provide relevant context that further supports their interpretation of the FPDs narrative description.

7.487 The **European Communities** has referred to other parts of its Schedule, including descriptions in the tariff item numbers notified in connection with the FPDs narrative description, and the concessions in other ITA participants' WTO Schedules in support of their interpretation of the FPDs narrative description as it appears in the Annex to the EC Schedule.

Other parts of the EC Schedule as context

7.488 The Panel recalls that the Appellate Body explained in *EC – Chicken Cuts*, that context in a Member's Schedule may include "other terms" in the same heading or chapter.[666] We will consider the parties' arguments surrounding whether various elements found in the EC Schedule, including other descriptions in the Annex to the EC Schedule, inform the interpretation of the FPDs narrative description.

[665] See European Communities' first written submission, para. 115.
[666] Appellate Body Report on *EC – Chicken Cuts*, para. 193.

The descriptions in the 14 tariff item numbers in connection with the FPDs narrative description as context

7.489 The European Communities argues that the 14 tariff item numbers that were notified in connection with the FPDs narrative description in the Annex to the EC Schedule provide relevant context for the Panel's interpretation. The tariff item numbers provide as follows:

> " 8471 60 90: Automatic data-processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included; - Input or output units, whether or not containing storage units in the same housing; -- Other; --- Other
>
> 8473 30 10: Parts and accessories (other than covers, carrying cases and the like) suitable for use solely or principally with machines of heading Nos 8469 to 8472; - Parts and accessories of the machines of heading No 8471 -- Electronic assemblies
>
> 8473 30 90: Parts and accessories (other than covers, carrying cases and the like) suitable for use solely or principally with machines of heading Nos 8469 to 8472; - Parts and accessories of the machines of heading No 8471; -- Other
>
> 8531 20 30: Electric sound or visual signalling apparatus (for example, bells, sirens, indicator panels, burglar or fire alarms), other than those of heading No 8512 or 8530 - Indicator panels incorporating liquid crystal devices (LCD) or light emitting diodes (LED); --Other; --- Incorporating light emitting diodes (LED)
>
> 8531 20 51: Electric sound or visual signalling apparatus (for example, bells, sirens, indicator panels, burglar or fire alarms), other than those of heading No 8512 or 8530 - Indicator panels incorporating liquid crystal devices (LCD) or light emitting diodes (LED); --Other; --- Incorporating liquid crystal devices (LCD); ---- Incorporating active matrix liquid crystal devices (LCD); ----- Colour
>
> 8531 20 59: Electric sound or visual signalling apparatus (for example, bells, sirens, indicator panels, burglar or fire alarms), other than those of heading No 8512 or 8530 - Indicator panels incorporating liquid crystal devices (LCD) or light emitting diodes (LED); --Other; --- Incorporating liquid crystal devices (LCD); ---- Incorporating active matrix liquid crystal devices (LCD); ----- Black and white or other monochrome
>
> 8531 20 80: Electric sound or visual signalling apparatus (for example, bells, sirens, indicator panels, burglar or fire alarms), other than those of heading No 8512 or 8530 - Indicator panels incorporating liquid crystal devices (LCD) or light emitting diodes (LED); -- Other; --- Other
>
> 8531 80 30: Electric sound or visual signalling apparatus (for example, bells, sirens, indicator panels, burglar or fire alarms), other than those of heading No 8512 or 8530; - Other apparatus; -- Other; ---Flat panel display devices
>
> 8531 90 10: Electric sound or visual signalling apparatus (for example, bells, sirens, indicator panels, burglar or fire alarms), other than those of heading No 8512 or 8530; - Parts; -- Of apparatus of subheading No 8531 20

8531 90 30: Electric sound or visual signalling apparatus (for example, bells, sirens, indicator panels, burglar or fire alarms), other than those of heading No 8512 or 8530; - Parts; -- Of apparatus of subheading 8531 80 30

9013 80 11: Liquid crystal devices not constituting articles provided for more specifically in other headings; lasers, other than laser diodes; other optical appliances and instruments, not specified or included elsewhere in this Chapter; - Other devices, appliances and instruments; -- Liquid crystal devices; --- Active matrix liquid crystal devices; ---- Colour

9013 80 19: Liquid crystal devices not constituting articles provided for more specifically in other headings; lasers, other than laser diodes; other optical appliances and instruments, not specified or included elsewhere in this Chapter; - Other devices, appliances and instruments; -- Liquid crystal devices; --- Active matrix liquid crystal devices; ---- Black and white or other monochrome

9013 80 30: Liquid crystal devices not constituting articles provided for more specifically in other headings; lasers, other than laser diodes; other optical appliances and instruments, not specified or included elsewhere in this Chapter; - Other devices, appliances and instruments; -- Liquid crystal devices; --- Other

9013 90 10: Liquid crystal devices not constituting articles provided for more specifically in other headings; lasers, other than laser diodes; other optical appliances and instruments, not specified or included elsewhere in this Chapter; - Parts and accessories; -- For liquid crystal devices (LCD)"

7.490 The Panel will consider the parties' arguments below.

Arguments of the parties

7.491 The **European Communities** argues that the descriptions in the 14 tariff item numbers that were notified in connection with the FPDs narrative description in the Annex to the EC Schedule demonstrate that the FPDs concession covers many different headings, which in turn cover many different products. In terms of coverage, the European Communities points out that the list does not include HS1996 subheadings 8528 12 and 8528 13, or 8528 21 and 8528 22, which, it argues reflects its dutiable concessions concerning televisions and video monitors. The European Communities argues that only tariff item number 8471 60 90 is relevant for the Panel's consideration of the products in question because, it argues, this code is the sole code where the complainants claim multifunctional LCD monitors belong in the EC Schedule. By identifying this code next to the narrative description for FPDs, the European Communities argues that it is committed to applying no duties on these devices "to the extent some of them would be considered to fall within this tariff heading". It notes, in addition, that tariff item number 8471 60 90 was notified next to four other narrative descriptions: for "Network equipment (...)", "Monitors: (...)", "Plotters whether input or output units (...)" and "Projection type flat panel display units (...)".[667]

7.492 The **United States** argues that the tariff item numbers next to the product descriptions in the Annex to the EC Schedule merely reflect the types of products the European Communities at the time considered were covered by its Attachment B concessions. It argues that the mere fact that HS codes may indicate some products covered by the EC concessions does not mean however, the codes

[667] European Communities' first written submission, paras. 125-127.

themselves are the concession. Furthermore, the United States notes that participants identified different codes, indicating no consensus with regard to classification.[668]

7.493 **Japan** argues that the tariff item numbers listed in the Annex to the EC Schedule may only serve to illustrate the range of products that might fall within the scope of the narrative description or provide limited context.[669] Japan submits that any other interpretation would defeat the purpose of Attachment B, since the HS was viewed as too limiting for defining the scope of Attachment B-related concessions.[670] In its view, the fact that different countries included different codes cannot mean that the language of concessions means different things to different countries. Instead the codes are limited to showing that different countries have different national systems for classifying the same underlying product scope defined by the language of the concessions. By viewing the HS codes as illustrative, Japan argues that the Panel will "preserve the integrity of the Attachment B approach as going beyond the HS nomenclature". Otherwise, it argues, countries could "trump or restrict" the meaning of the language of the concession that had been agreed upon.[671]

7.494 **Chinese Taipei** argues that the 14 tariff item numbers are the headings which the European Communities considers to be affected by the concession within the FPDs narrative description. However, it argues the scope of the concessions pursuant to Attachment B cannot be defined by the scope of specific HS headings or tariff item numbers.[672] The codes, it argues, are "evidence" of how the European Communities considered the Attachment B concession should be "translated" into the CN, or to clarify the meaning. Chinese Taipei considers the fact that the European Communities included "such an extensive list" of tariff item numbers in its Schedule "demonstrates that the parties considered that the product description in Attachment B covers a very broad range of products based on flat panel display technology".[673] It argues that how an individual WTO Member gives examples of the scope of its WTO commitments, however, cannot substitute for the determination of the common intention of all WTO members.[674] Chinese Taipei argues that none of the 14 tariff item numbers can be interpreted to exclude flat panel display devices that are capable of receiving signals both from an ADP machine and other sources.[675] Thus, it argues that the tariff item numbers do not support the proposition that FPDs are not covered by that concession if they are able to be connected to apparatus other than automatic data-processing machines.[676]

Consideration by the Panel

7.495 The **Panel** recalls its preliminary finding that the FPDs narrative description determines the scope of the concession, no matter where it is classified in the EC Schedule, and that the tariff item numbers appearing alongside the product descriptions do not have the effect of controlling the scope of coverage arising from the ordinary meaning of the product descriptions.[677]

7.496 Aside from their reference in the Annex to the EC Schedule, these CN codes also appear elsewhere in the EC Schedule together with their associated six-digit HS subheading descriptions.

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[668] United States' response to Panel question No. 116.
[669] Japan's second written submission, para. 160.
[670] Japan's response to Panel question No. 116.
[671] Japan's second written submission, para. 161.
[672] Chinese Taipei's response to Panel question No. 116.
[673] Chinese Taipei's first written submission, paras. 256-257.
[674] Chinese Taipei's response to Panel question No. 116.
[675] Chinese Taipei's first written submission, paras. 259-263, 272-279.
[676] Chinese Taipei's first written submission, paras. 279-280.
[677] See para. 7.343 above.

7.497 As we noted above, the CN codes address a different issue - they assist in the implementation of Attachment B-related commitments by reflecting the classification intended by the European Communities at that time. This was necessary due to the participants' view that the approach taken in Attachment A, namely specifying HS headings, was not feasible for products described in Attachment B. As ITA participants notified different codes next to the descriptions in many cases, we explained that reliance on interpretation of those codes would not reflect the common intentions of participants and could run contrary to an assessment of the objective meaning of the terms. We accordingly decline to consider them further.[678]

The narrative description for "monitors" as context

Arguments of the parties

7.498 The **European Communities** argues that the narrative description for "monitors" in its Schedule is relevant context for determining the scope of the FPDs narrative description. In particular, it argues that the exclusion of "televisions" in the concession for "monitors" is not limited to CRT televisions but should be understood categorically to exclude all monitors which are able to function as televisions because of their ability to receive and process televisions or video signals, irrespective of the technology used. It submits that CRT technology was mentioned specifically in the monitors concession because this was the technology that was used by televisions and monitors at the time when the concessions were made.[679] Finally, the European Communities notes that the last sentence of the definition of monitors explicitly excludes "High Definition (HD)" televisions. In view of this, it argues that it would not make sense to interpret the last sentence of the text relating to the definition of 'monitors' as excluding only HD monitors that use the CRT technology from the scope of the concessions while including HD monitors using other technologies because, it states "[m]ost multifunctional LCD monitors in the market today are 'HD Ready'".[680]

7.499 The **complainants** argue that a separate concession for "monitors" that appears in the Annex to the EC Schedule is expressly limited to CRT monitors, which are not at issue in this dispute. They submit that the use of the term "therefore" in the sentence referring to the exclusion of televisions indicates that the exclusion "is *only* to be read in conjunction" with the description of the CRT monitor.[681] Thus, the complainants reject the idea that the exclusion of televisions is a "categorical" exclusion, that also applies to "video monitors" or "monitors able to function as televisions because of their ability to receive and process television or video signals".[682]

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[678] See para. 7.404 above. We note, nevertheless, that a cursory review of the remaining CN codes and their descriptions does not inform us as to whether products falling under this heading must be used *only with* an automatic data-processing machine or other products within the product scope of the ITA, or may include "flat panel displays" with DVI or other interfaces that may receive or reproduce signals from multiple sources. At a minimum, the codes generally confirm the view that the FPDs narrative description was envisioned to cover certain displays as finished products, in addition to semi-finished products. We recall from above however, that semi-finished products are not in dispute. We therefore do not consider them in this dispute.

[679] European Communities' first written submission, paras. 128-131.

[680] European Communities' response to Panel question No. 53.

[681] United States 'second written submission, para. 82; United States' response to Panel question No. 52; Japan's first oral statement, para. 50; Chinese Taipei's second written submission, para. 171; Chinese Taipei's response to Panel question No. 52. If a general exclusion for televisions had been intended to apply generally to the ITA, the United States argues that the exclusion would have been incorporated into Attachment B independently (United States 'second written submission, para. 82).

[682] United States 'second written submission, para. 83; United States' second oral statement, para. 32; Japan's first oral statement, para. 50. The United States notes in addition that the ITA concession incorporated

7.500 **Japan** submits that the concession for "monitors" provides a specific carve-out for products capable of receiving and processing television signals or other non-computer input signals.[683] It argues that CRT technology is "distinct" from digital technology employed in flat panel display devices, thus preventing the carve-out from being applied to flat panel display devices.[684] In Japan's view, the limitation to CRT-based technology demonstrates that drafters used restrictive language when they intended to restrict the scope, which, it argues, is not the case for the concession for FPDs.[685]

7.501 **Chinese Taipei** considers that both CRT and digital technology existed at the time of the concessions; thus, it submits there is no basis to conclude that the exclusion of televisions also applies to the concession for FPDs.[686]

Consideration by the Panel

7.502 The parties have identified the following language that appears in the Annex to the EC Schedule:

> "Monitors: display units of automatic data-processing machines with a cathode ray tube with a dot screen pitch smaller than 0,4 mm not capable of receiving and processing television signals or other analogue or digitally processed audio or video signals without assistance of a central processing unit of a computer as defined in this agreement. The agreement does not, therefore, cover televisions, including high definition televisions."[687]

7.503 As evident from the text, the device must be CRT-based, and cannot be capable of receiving and processing signals independent of connection with an automatic data-processing machine. The Panel notes that this restriction is limited to CRT monitors, and does not appear in the concession relating to flat panel display devices for automatic data-processing machines.

7.504 We also note the concluding text "[t]he agreement does not, therefore, cover televisions, including high definition televisions".[688] On its face, this statement relates directly to the concession

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from Attachment B expressly covers "computers capable of receiving and processing television and other video signals", thus calling into question the basis for a categorical exclusion of monitors able to function as televisions (United States 'second written submission, para. 84).

[683] Japan's first oral statement, para. 50.

[684] Japan's second written submission, para. 165; Japan's response to Panel question No. 52. Japan also finds support for the distinction historically, submitting that CRT monitors capable of receiving and processing televisions signals existed in 1996, such that "the desire explicitly to exclude televisions made sense" (Japan's second written submission, para. 166).

[685] Japan's second written submission, paras. 163-164; Japan's first oral statement, para. 50; Japan's response to Panel question No. 52.

[686] Chinese Taipei's second written submission, para. 173.

[687] Exhibit US-7. The Panel notes that the description as it appears in the ITA is drafted differently, with the sentence referring to the exclusion of televisions in a separate paragraph from the description of monitors. In addition, the exclusion concludes with a footnote which indicates that the "[p]articipants will conduct a review of this product description in January 1999 under the consultation provisions of paragraph 3 of the Declaration".

[688] The Panel takes note of footnote 3 to the last sentence of the "Monitors" description, as it appears in Attachment B of the ITA, which provides: "Participants will conduct a review of this product description in January 1999 under the consultation provisions of paragraph 3 of the Declaration". The European Communities argues that a "restrictive interpretation seems to be confirmed by the presence of [this footnote]" and that the definition of monitors appearing in Attachment B "constitute[d] the common denominator upon which all parties could agree by the time of signature of the Agreement" (see European Communities' response to Panel

immediately preceding it, namely CRT monitors with particular characteristics. While the term "television" is not defined in the ITA, or in the Annex to the EC Schedule, the use of the word "therefore" implies a definition of "television" that is limited to CRT technology, and which is incapable of receiving and processing television signals or other analogue or digitally processed audio or video signals without the assistance of a central processing unit of an automatic data-processing machine. While this may be a limited definition of the word "television", the Panel notes that the drafters of the ITA had the option of adding similar restrictions on the concession relating to FPDs for ADPs but yet did not.

7.505 We observe that a Member, when making a commitment pursuant to Article II of the GATT 1994, may choose precise, even exclusive, terms and conditions to qualify or limit the scope of coverage. These include terms and conditions that would limit coverage to a particular product based on its physical attributes, dimensions, technical characteristics or features. A Member may also refer to a particular classification or tariff heading to define or limit the scope of a concession. The determination of the scope of coverage comes from the meaning of the terms of that commitment. For this reason, a panel should not read qualifications into a commitment that are not there.

7.506 We recall our preliminary conclusion, based on the text of the FPDs narrative description that flat panel display devices that are "for" products falling within the ITA, are covered by the FPDs narrative concession. We preliminarily concluded based on the plain meaning of the term "for" that such devices must be "designed for" or capable of providing an acceptable level of operation, to fall within the concession. We did not find, however, that the text of the concession imposed any exclusivity requirement pertaining to which sources a flat panel display device could connect to, nor did we determine a requirement as to with which connectors such a display may be fitted.

7.507 In contrast, we note that the "monitors" narrative description in the Annex to the EC Schedule is detailed and limited to CRT monitor units of automatic data-processing machines with a precise dot screen pitch that are not capable of receiving and processing television signals or other analogue or digitally processed audio or video signals without assistance of a central processing unit of an automatic data-processing machine as defined in the ITA.

7.508 We do not understand the complainants to claim that all display devices or monitors, such as televisions using LCD or other non-CRT technologies, necessarily, would fall within the meaning of the FPDs narrative concession. Rather, the complainants have requested the Panel to find that the measures at issue are inconsistent with the European Communities' obligations under Article II of the

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question No. 61). The inclusion of this footnote in connection with the statement that "[t]he agreement does not, therefore, cover televisions, including high definition televisions" suggests that the ITA drafters perhaps envisioned that the product description would be inadequate to fully address the objective of excluding "televisions" from coverage under the agreement and should therefore, be subject to review. In this sense, it is foreseeable that the drafters anticipated that technologies other than CRT-based displays may be incorporated into televisions, and that televisions with different technologies, such as LCD or plasma, might also need to be excluded. It is also possible however, that this footnote refers to the description in its entirety, and was simply placed at the end of the full description. This may suggest that ITA participants were uncertain as to whether the full gamut of possible "monitor" technologies were discussed, or that the scope of the description was reflected as intended. However, neither interpretation is supported by the text in isolation, nor have parties provided any persuasive evidence to substantiate either view. The European Communities contends that Japan requested such a review in accordance with footnote 3 of the ITA Annex, but this "led to no change" (see European Communities' response to Panel question No. 61). Finally, we note that the Annex to the EC Schedule does not include this footnote or any reference to it. In light of the foregoing, the Panel is unable to draw broad conclusions on the exclusion for televisions, and its applicability beyond the description for "Monitors".

GATT 1994 because they apply *per se* rules, requiring that all devices that are fitted with a DVI, for instance or those that are capable of receiving or reproducing signals from sources other than an automatic data-processing machine are *necessarily* excluded from duty-free coverage. The complainants have not indicated that they are challenging the European Communities' treatment of "televisions" or products that are capable of receiving and processing television signals or other analogue or digitally processed audio or video signals without assistance of a central processing unit of an automatic data-processing machine. Nor do we understand them to argue that all "televisions" necessarily qualify as flat panel display devices under the concession.

7.509 The importance of the "exclusion" of televisions "categorically" in other descriptions would require a treaty interpreter to assess whether "television" would refer to products that are capable of receiving and processing *television* signals without the assistance of a central processing unit of an automatic data-processing machine. Thus, in addition to taking the step of treating the exclusion as categorical and broadly applicable, the Panel would also be required to make a determination on the intended meaning of the term "television". This analysis would take use beyond the complainants' claims as well as the arguments before us. We do not consider it necessary to address this issue.

The narrative description for "network equipment" as context

Arguments of the parties

7.510 **Japan** argues that the language of the "network equipment" narrative description within Attachment B confirms a "broad and inclusive" interpretation of the concession for flat panel display devices. In particular, Japan argues that the inclusion of limiting language "dedicated for use solely or principally" in the description reflects the idea that, where parties intended to require that the equipment be dedicated for use solely or principally with ADP machines, such language was included. In its view, the absence of this language in the concession for FPDs is a reflection that the limitation was not intended.[689]

7.511 The **European Communities** argues that Japan's "*a contrario*" argument, based on the fact that the narrative description for network equipment uses the words "solely or principally" in its description, whereas the description for FPDs does not, fails to consider that the FPDs narrative description explicitly refers to products "falling within this agreement". Further, it argues that the term "for" does not necessarily exclude "solely or principally" in relation to a specific product.[690]

Consideration by the Panel

7.512 The parties have identified the following language that appears in the Annex to the EC Schedule:

> "Network equipment: Local Area Network (LAN) and Wide Area Network (WAN) apparatus, including those products dedicated for use solely or principally to permit the interconnection of automatic data-processing machines and units thereof for a network that is used primarily for the sharing of resources such as central processor units, data storage devices and input or output units including adapters, hubs, in line repeaters, converters, concentrators, bridges and routers, and printed circuit

[689] Japan's first written submission, paras. 281-283; Japan's second written submission, paras. 168-170.
[690] European Communities' first written submission, para. 136.

> assemblies for physical incorporation into automatic data-processing machines and units thereof."[691]

7.513 Japan and the European Communities highlight the terms "solely or principally" in the concession.

7.514 We recall again that the complainants have requested the Panel to find that the measures at issue are WTO-inconsistent because they apply *per se* rules, requiring that all devices that are fitted with a DVI, for instance or those that are capable of receiving or reproducing signals from sources other than an automatic data-processing machine, are *necessarily* excluded from duty-free coverage. The complainants argue that the products they have identified fall within the scope of the FPDs narrative description. In particular, they argue that the ordinary meaning of the term "for" in the concession does not require that devices operate exclusively with an automatic data-processing machine to qualify for duty-free treatment under the concession.

7.515 Our task in this dispute is not to determine the meaning of the terms "solely or principally", as these terms do not appear in the FPDs narrative description. Rather, Japan argues that these terms in the context of the "network equipment" description in the Annex to the EC Schedule serve to emphasize that the drafters used exclusionary language where it was intended.

7.516 In the preceding section, we explained that WTO Members may choose precise, exclusive terms and conditions to define a concession or to limit the scope of coverage. However, Members may otherwise choose broad language to define a concession. We preliminarily concluded based on the plain meaning of the terms in the FPDs concession, that coverage was at least broad enough to include flat panel display devices that could connect to sources other than automatic data-processing machines, as long as those displays were "for" products falling within the ITA.

7.517 The network equipment concession shows that negotiators were well aware of concepts such as "solely" and "principally", which are also concepts used in the HS. These terms do not appear in the FPDs narrative description, however, and we have taken that into consideration in our assessment of the text of the FPDs description. Notably, we consider the absence of the terms "solely" or "principally" to suggest a broader reading.

> The narrative descriptions for "projection type flat panel display units used with automatic data-processing machines..." and "multimedia upgrade kits for automatic data-processing machines..." as context

Arguments of the parties

7.518 **Japan** argues that the word "can" used in the concession for "projection type flat panel display units..." in the Annex to the EC Schedule informs the interpretation of the FPDs narrative description. In particular, it argues that "can" means that "dual or multiple usages for the unit is contemplated"[692], or that any device that "'can' display digital information from the computer will be covered".[693] In its view, both devices under the FPDs and "projection type flat panel display units..." concessions are "for" computers if they have the "ability to display information from an ADP machine".[694] Japan additionally argues that the language of the description for projection type flat

[691] Exhibit US-7.
[692] Japan's first written submission, para. 285.
[693] Japan's second written submission, para. 171.
[694] Japan's first written submission, para. 287; Japan's second written submission, para. 172.

panel display units does not include express limitations like in the concessions on "Monitors" or "Network equipment.[695]

7.519 **Chinese Taipei** considers that because the concession for "projection type flat panel display units..." is limited to those that are "used with ADP machines..." means that the phrase "for products falling within this agreement" includes FPDs, even though they may be able to be connected to apparatus other than ADP machines. It considers this is the case because the scope of products "falling within the ITA" is broader than "ADP machines". Chinese Taipei argues that it is "sufficient that the display unit can, i.e., is able to, display information from an ADP machine in order to fall under the scope of the ITA". It argues "there is no reason why a stricter requirement would be applicable to the FPDs concerned in this dispute, which also rely on flat panel display technology".[696]

7.520 The **European Communities** disputes that the use of the word "can" in the "projection type flat panel display units..." concession contemplates dual or multiple usages, and that such an interpretation can be extended to interpret the FPDs concession.[697] The European Communities contends that the concession for projection type flat panel display units refers to a "very specific finished product" used with automatic data-processing machines". Therefore, it considers that, even if a projection type flat panel display unit could display signals from sources other than an automatic data-processing machine, it remains covered by the description for projection type flat panel display provided that the display is solely or principally of a kind used with an automatic data-processing machine.[698]

7.521 **Chinese Taipei** additionally argues that because the concession for "multimedia upgrade kits for automatic data-processing machines..." is limited by the terms "for automatic data-processing machines", means that the phrase "for products falling within this agreement" within the FPDs description, is broader. It considers this is the case because the scope of products "falling within the ITA" is broader than "ADP machines".[699]

Consideration by the Panel

7.522 The "projection type flat panel display units..." narrative description provides as follows:

> "Projection type flat panel display units used with automatic data-processing machines which can display digital information generated by the central processing unit."[700]

7.523 The multimedia upgrade kits for automatic data-processing machines' narrative description provides as follows:

> "Multimedia upgrade kits for automatic data-processing machines, and units thereof, put up for retail sale, consisting of, at least, speakers and/or microphones as well as a

[695] Japan's second written submission, para. 172.
[696] Chinese Taipei's first written submission, paras. 248-249.
[697] European Communities' first written submission, para. 137.
[698] European Communities response to Panel question No. 61. The European Communities argues that it would be more appropriate to compare the definition of "projection type flat panel displays" and "monitors" because these definitions are both specifically defined as "display units" of or used with computers".
[699] Chinese Taipei's first written submission, para. 248.
[700] Exhibit US-7.

printed circuit assembly that enables the ADP machines and units thereof to process audio signals (sound cards)."[701]

7.524 The "projection type flat panel display units..." narrative description contains the terms "*used with* automatic data-processing machines". (emphasis added) The "multimedia upgrade kits for automatic data-processing machines..." narrative description contains the terms "*for* automatic data-processing machines". (emphasis added)

7.525 We are of the view that the phrase "automatic data-processing machines" in both of these concessions is in principle narrower than the phrase "products falling within this agreement" that appears in the FPDs narrative description. However, the issue before us, as reflected in the preliminary conclusions reached above requires us to assess the ordinary meaning of the term "for" in the FPDs narrative concession. We concluded that the term "for" in the description meant that such devices must be designed for or capable of providing an acceptable level of operation, to fall within the concession. Furthermore, we concluded preliminarily that the text of the FPDs concession does not impose any exclusivity requirement with regard to which sources a flat panel display device could connect, nor did we determine a requirement as to with which connectors such a display may be fitted.

7.526 In the context of interpreting the FPDs narrative description we are not required to interpret the terms "used with" as they appear in the "Projection type flat panel display units..." concession. Rather we are asked to consider whether they inform or shed light on our interpretation. We consider that the term "used with" is quite similar to "for", but the term "can" seems broader. We also observe that the phrase "products falling within this agreement" is broader than the term "automatic data-processing machines".

7.527 With respect to the use of "for" in the "multimedia upgrade kits for automatic data-processing machines...", we note that the concession is elaborated in significant detail, referring not only to automatic data-processing machines, but specifically to those types of automatic data-processing machines that fully comply with the terms of the concession, e.g., those put up for retail sale, consisting of, at least, speakers and/or microphones as well as a printed circuit assembly that enables the ADP machines and units thereof to process audio signals. We again recall, WTO Members frequently choose to draft both precise, even exclusive terms and conditions to define a concession, as well as to draft concessions in broader terms. In our view, given the considerable detail in which the concession is expressed as compared to the approach used for the FPDs narrative description, we do not consider that this description assists us with the interpretative issue before us.

The WTO Schedules of other WTO Members

7.528 The European Communities argues that the Schedules of other ITA participants provide relevant context to interpret the FPDs narrative description.[702] The Panel recalls that the Appellate Body explained in *EC – Chicken Cuts*, that other WTO Members' Schedules may provide relevant context to interpret the terms in a particular Member's Schedule.[703] We will thus consider the European Communities' arguments concerning the HS subheadings that other ITA participants notified in the Schedules when implementing their ITA commitments. The European Communities refers to a table summarizing the classification up to the HS subheading level (six digits) notified by

[701] Exhibit US-7.
[702] European Communities' first written submission, paras. 142-145.
[703] Appellate Body Report, *EC – Chicken Cuts*, para. 193.

ITA participants based on modifications made via WTO document G/IT/2/Add.1 of 17 October 1997:[704]

Classification of "Flat panel display devices (including LCD, Electro Luminescence, Plasma, Vacuum-Fluorescence and other technologies) for products falling within this agreement and parts thereof" by ITA participants in 1997		
Sub-heading	Number of participants classifying in that subheading	Main parties to the dispute
842490	1	-
847149	7	US
847160	24	EC, JA, TPKM, US
847310	1	-
847321	1	-
847329	1	-
847330	23	JA, US
847340	1	-
847350	1	-
851790	1	-
852290	1	-
852821	3	JA
852822	3	JA
852990	3	JA
853120	27	EC, JA, TPKM, US
853180	15	EC, US
853190	26	EC, JA, TPKM, US
854389	6	US
854390	8	US
854890	1	-
901320	4	JA
901380	22	EC, JA, TPKM, US
901390	22	EC, JA, TPKM, US
901790	1	-

Arguments of the parties

7.529 The **European Communities** argues that the ITA participants' classification at the six-digit level of "flat panel display devices" in 1997 (as reflected in the above table) demonstrates what ITA participants "understood" when commitments were made and approved by consensus. The European Communities argues that the table shows that ITA participants considered not only HS subheading 8471 60 which covers *inter alia* "ADP monitors", but also HS subheadings 8528 21 and 8528 22 which cover "video monitors", as the "most relevant" codes for classifying FPDs. It submits further that no ITA participant identified the codes for televisions, whether 8528 12 or 8528 13, and that only Japan, Iceland and Macao consider that "flat panel display devices" covers "video monitors".[705]

[704] WTO document G/IT/2/Add.1 (17 October 1997) (Exhibit EC-14).

[705] European Communities' first written submission, para. 144. According to the European Communities, if the Panel were to adopt the complainants' view that the FPDs narrative description determines the scope of the concession, and not the HS headings/CN codes that were notified in connection with the description, then the table demonstrates a number of WTO and ITA members have either made commitments without there being an obligation pursuant to the ITA, or there are a number of WTO breaches because of the differences in classification. In its view, almost all parties would either have made unnecessary commitments

7.530 The **complainants** maintain the view that the language of the FPDs narrative description, and not the HS headings or tariff item numbers notified by ITA participants in their respective WTO Schedules, determines the scope of coverage of those products described in the concessions.[706]

Consideration by the Panel

7.531 The **Panel** recalls from paragraph 7.445 above that the 14 tariff item numbers next to the narrative descriptions in the EC Schedule do not limit the concession. They only illustrate where the European Communities considered relevant FPDs were classifiable at the time of implementation of the ITA. Accordingly, we will only make a few points regarding the table presented by the European Communities.

7.532 The European Communities submitted as exhibits two separate WTO Secretariat reports that summarize the HS subheadings listed by ITA participants: the table above, describing the situation in 1997, as well as a document assessing the practice of ITA parties between 1997 and 1999.[707] Both the WTO Secretariat reports and the tables submitted by the European Communities, however, wrongly mention that Japan notified HS headings next to narrative product descriptions. Japan's schedule, however, did not make mention of the headings.[708]

7.533 In light of this error, the Panel conducted its own assessment of the information as presented below:[709]

HS subheading (up to six digits)	Number of schedules listing the relevant subheading	WTO Members/ITA participants that have listed at least one tariff line in their respective schedule:
842490	1	Korea
847149	14	Australia; Bahrain; Hong Kong, China; El Salvador; Indonesia; Korea; Oman; Peru; Philippines; Saudi Arabia; UAE; Ukraine; United States; Viet Nam
847150	1	Saudi Arabia
847160	33	Australia; Bahrain; Canada; Costa Rica; Croatia; Dominican Rep.; El

and/or would be in breach of their obligations in respect of some product descriptions. (European Communities' first written submission, para. 145).

[706] United States' response to Panel question No. 116; Japan's second written submission, para. 160; Chinese Taipei's first written submission, para. 256; Chinese Taipei's second written submission, para. 178. Japan submits that any notified codes or headings many at most serve to "illustrate" the range of products that might fall within the scope of the narrative description. Chinese Taipei argues that the codes may be used at most to "clarify" the meaning of the FPDs narrative description.

[707] These are WTO document G/IT/2/Add.1 (17 October 1997) (Exhibit EC-14) and document G/IT/2/Add.1/Rev.1 (29 July 1999) (Exhibit EC-20). Both documents were prepared based on the ITA participants' schedules of commitments, while the latter document contains updated information, including the addition of data for participants that had joined the ITA following the issuance of the first report, as well as changes that were implemented by participants as rectifications or modifications.

[708] See paragraph 7.432 above.

[709] The Panel followed the same methodology used by the WTO Secretariat in preparing this table. A particular Member is listed next to those HS subheadings if that Member has listed at least one national tariff line in its schedule that falls under that HS subheading. The following table summarizes the HS subheadings listed by the relevant 43 Members in their schedules of concessions, but does not include information on the schedules of those EC member States that are jointly represented by the EC-27. These are: Bulgaria, Cyprus, Czech Republic, Estonia, Latvia, Lithuania, Poland, Romania, Slovak Republic and Slovenia.

HS subheading (up to six digits)	Number of schedules listing the relevant subheading	WTO Members/ITA participants that have listed at least one tariff line in their respective schedule:
		Salvador; European Communities; Egypt; Guatemala; Hong Kong, China; Honduras; Indonesia; India; Iceland; Jordan; Kyrgyz Rep.; Korea; Macao, China; Moldova; Nicaragua; New Zealand; Oman; Peru; Philippines; Saudi Arabia; Chinese Taipei; Singapore; Switzerland/Liechtenstein; Turkey; Ukraine; UAE; United States
847190	1	Egypt
847310	1	Korea
847321	2	Honduras; Norway
847329	2	Honduras; Norway
847330	31	Albania; Australia; Bahrain; Canada; Costa Rica; Croatia; El Salvador; European Communities; Georgia; Hong Kong, China; Honduras; Indonesia; India; Iceland; Jordan; Kyrgyz Rep.; Korea; Macao, China; Moldova; Nicaragua; Norway; New Zealand; Oman; Peru; Saudi Arabia; Singapore; Switzerland/Liechtenstein; Turkey; Ukraine; UAE; United States
847340	1	Korea
847350	2	Honduras; Norway
851790	1	Hong Kong, China
852290	1	Korea
852821	2	Iceland; Macao, China
852822	2	Iceland; Macao, China
852990	2	Iceland; Macao, China
853120	40	Albania; Australia; Bahrain; Canada; China; Costa Rica; Croatia; Dominican Rep.; El Salvador; European Communities; Georgia; Guatemala; Hong Kong, China; Honduras; Indonesia; India; Iceland; Israel; Jordan; Kyrgyz Rep.; Korea; Macao, China; Moldova; Malaysia; Nicaragua; Norway; New Zealand; Oman; Peru; Philippines; Saudi Arabia; Chinese Taipei; Singapore; Switzerland/Liechtenstein; Thailand; Turkey; Ukraine; UAE; United States; Viet Nam
853180	22	Albania; Australia; Bahrain; Canada; Croatia; El Salvador; European Communities; Georgia; India; Israel; Kyrgyz Rep.; Moldova; Norway; New Zealand; Oman; Saudi Arabia; Switzerland/Liechtenstein; Turkey; Ukraine; UAE; United States; Viet Nam
853190	37	Albania; Australia; Bahrain; Canada; China; Costa Rica; Croatia; Dominican Rep.; El Salvador; European Communities; Georgia; Guatemala; Hong Kong, China; Honduras; Indonesia; India; Iceland; Israel; Jordan; Kyrgyz Rep.; Macao, China; Moldova; Malaysia; Nicaragua; Norway; New Zealand; Oman; Peru; Saudi Arabia; Chinese Taipei; Singapore; Switzerland/Liechtenstein; Turkey; Ukraine; UAE; United States; Viet Nam
854190	1	Mauritius
854389	11	Australia; Bahrain; El Salvador; Hong Kong, China; Indonesia; Oman; Philippines; Saudi Arabia; UAE; United States; Viet Nam
854390	12	Australia; Bahrain; El Salvador; Hong Kong, China; Indonesia; Korea; Oman; Philippines; Saudi Arabia; Singapore; UAE; United States
854890	2	Canada; Viet Nam
901320	3	Iceland; Macao, China; Norway
901380	28	Albania; Australia; Bahrain; Canada; Croatia; El Salvador; European Communities; Georgia; India; Iceland; Israel; Jordan; Kyrgyz Rep.; Korea; Macao, China; Moldova; Malaysia; Norway; New Zealand; Oman; Saudi Arabia; Chinese Taipei; Switzerland/Liechtenstein; Turkey; Ukraine; UAE; United States; Viet Nam

HS subheading (up to six digits)	Number of schedules listing the relevant subheading	WTO Members/ITA participants that have listed at least one tariff line in their respective schedule:
901390	28	Albania; Australia; Bahrain; Canada; Croatia; El Salvador; European Communities; Georgia; India; Iceland; Israel; Jordan; Kyrgyz Rep.; Korea; Macao, China; Moldova; Malaysia; Norway; New Zealand; Oman; Saudi Arabia; Chinese Taipei; Switzerland/Liechtenstein; Turkey; Ukraine; UAE; United States; Viet Nam
901790	1	Korea

7.534 This table demonstrates considerable divergence in the HS subheadings listed by ITA participants next to the FPDs narrative description. HS1996 subheading 8531 20, for instance, appears in most of the ITA participants' Schedules.[710] This subheading pertains to "Electric sound or visual signalling apparatus (for example, bells, sirens, indicator panels, burglar or fire alarms), other than those of headings 8512 or 8530 - Indicator panels incorporating liquid crystal devices (LCD) or light emitting diodes (LED)". The following HS1996 subheadings also appear in many of participants' Schedules:

> 8471 60: Automatic data-processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included; - Input or output units, whether or not containing storage units in the same housing.
>
> 8473 30: Parts and accessories of the machines of heading 8471.
>
> 8531 90: Electric sound or visual signalling apparatus (for example, bells, sirens, indicator panels, burglar or fire alarms), other than those of heading 8512 or 8530; - Parts.
>
> 9013 80: Liquid crystal devices not constituting articles provided for more specifically in other headings; lasers, other than laser diodes; other optical appliances and instruments, not specified or included elsewhere in this Chapter; - Other devices, appliances and instruments.
>
> 9013 90: Liquid crystal devices not constituting articles provided for more specifically in other headings; lasers, other than laser diodes; other optical appliances and instruments, not specified or included elsewhere in this Chapter; - Parts and accessories.

7.535 The Panel's assessment of ITA participants' Schedules reveals that HS1996 subheading 8471 60 was one of the subheadings that appears most frequently in connection with the FPDs narrative description.[711] Their inclusion of subheading 8471 60 supports the view that a substantial proportion of ITA participants considered that at least *some* flat panel display devices were "input or output units" of automatic data-processing machines, but it also shows that many Members considered that flat panel display devices were classifiable under other headings. As emphasized by the European

[710] Egypt, Japan and Mauritius did not list HS subheading 8531 20 as relevant for FPDs.

[711] The following Members did not list HS Subheading 8471 60 in connection with the FPDs narrative description: Albania; China; Georgia; Israel; Japan; Malaysia; Mauritius; Norway; Thailand; and Viet Nam.

Communities, none of the ITA participants notified HS subheadings 8528 12 or 8528 13 pertaining to televisions. Two Members listed HS subheadings 8528 21 and 8528 22 pertaining to video monitors, however, suggesting that at least some Members considered the ITA covered certain video monitors.

7.536 We confirm that we do not consider the tariff item numbers listed next to the product descriptions as definitive with respect to the concession for FPDs. The information above, demonstrating the varied approaches for classifying FPDs supports our approach that it is the product description that governs for Attachment B products.

(v) Object and purpose

Arguments of the parties

7.537 The **complainants** note that a recognized object and purpose of the *WTO Agreement* and GATT 1994 is providing security and predictably in the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and barriers to trade.[712] The complainants also note that both the *WTO Agreement* and the GATT 1994 recognize "expanding the production and trade in goods" as another core object and purpose that is furthered by reciprocal reductions in tariffs.

7.538 In addition, the complainants argue that the ITA may be relevant in analysing the object and purpose of the GATT 1994 because the ITA is an instrument related to the GATT 1994.[713] The **United States** argues that provisions in the ITA contradict the view that a digital product should no longer be entitled to duty-free treatment simply because technology advances and that product acquires additional features previously associated with other products. In its view, the ITA contains a number of mechanisms to encourage technological development, including broad product coverage and Attachment B.[714] **Japan** submits that the overarching object and purpose of the *WTO Agreement* and the GATT 1994 has been reinforced in the specific context of the ITA. In particular, Japan cites the Ministerial Declaration on Trade in Information Technology Products which expressed the desire "to achieve maximum freedom of world trade in information technology products."[715] Japan considers that, it would be inconsistent with the object and purpose of the *WTO Agreement* and the GATT 1994 to reduce tariffs on a particular product, only to permit the re-imposition of those tariffs simply because of some evolution in that product.[716]

7.539 Furthermore, the complainants argue that the objectives of security and predictability also require that concessions cover products even if they did not exist in that form at the time the concessions had been granted to the extent that they comply with the wording of the concessions concerned. Japan posits that the concession must cover all devices that fit squarely within its terms regardless of how their other functionality may change or improve over time.[717] **Chinese Taipei**

[712] Complainants' response to Panel question No. 1; Japan's first written submission, paras. 172 (citing paragraph 3 of the Preamble to the Marrakesh Agreement; Panel Report on *China – Auto Parts*, para. 7.460 and Appellate Body Report on *EC – Chicken Cuts*, para. 243) and 288; Japan's second written submission, paras. 409-410; Chinese Taipei's first written submission, paras. 144-145; Chinese Taipei's second written submission, para. 282.

[713] United States' response to Panel question No. 1; Chinese Taipei's response to Panel question No. 1; Chinese Taipei's second written submission, para. 15.

[714] United States' second written submission, paras. 60-61.

[715] Japan's first written submission, paras. 173 (citing Ministerial Declaration, WT/MIN(96)/16 adopted 13 December 1996, at Preamble, Page 1, Clause 4) and 290; Japan's response to Panel question No. 1; Japan's second written submission, para. 411.

[716] Japan's first written submission, paras. 290-292; Japan's second written submission, paras. 411-413.

[717] Japan's first written submission, para. 177.

argues that to promote such security and predictability, in the first place, the interpretation of a concession is to be limited by the terms used in that concession.[718] Chinese Taipei argues that it would run counter to such objectives if the European Communities could exclude from the scope of its concessions some apparatus just because they are more complete or more developed than when they initially existed.[719]

7.540 The **European Communities** argues that the Panel should not conflate the object and purpose of the ITA with that of the *WTO Agreement*. Furthermore, the European Communities argues that the expansion of trade must be achieved through mutually advantageous arrangements. The European Communities submits that there is no interpretative principle whereby tariff concessions must be broadly construed in order to promote the expansion of trade between Members. The European Communities considers the complainants' interpretative approach is overbroad and compromises the legal certainty and predictability of tariff concessions, creating the risk that Members will become reluctant to pursue the ITA liberalization process. [720]

Consideration by the Panel

7.541 Article 31(1) 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 the light of its object and purpose."

7.542 Article 31(1) of the Vienna Convention thus requires that a treaty must be interpreted in light of that particular treaty's object and purpose. The Appellate Body in *EC – Chicken Cuts* explained that the "starting point for ascertaining 'object and purpose' is the treaty itself, in its entirety.[721] As we stated in paragraph 7.16 above, under Article II:7 of the GATT 1994 and Article II:2 of the *WTO Agreement*, the concessions contained in the EC Schedule, including the Annex to the EC Schedule, are treaty terms of the GATT 1994 and the *WTO Agreement*.

7.543 Accordingly, the Panel considers that the object and purpose that is relevant to our analysis is the object and purpose of the treaty that is the subject of this dispute, namely the *WTO Agreement*, of which the GATT 1994 and the EC Schedule are an integral part. As stated in the preamble of the *WTO Agreement*, one of the purposes is to "expand[] ... trade in goods and services". Members should contribute to this objective "by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade".

7.544 Although the concessions in the EC Schedule are an integral part of the treaty, we also recall the Appellate Body's explanation that treaty interpreters should not place too much weight on the object and purpose of a particular concession in a Member's schedule, because "one Member's unilateral object and purpose for the conclusion of a tariff commitment cannot form the basis' for an interpretation of that commitment, because interpretation in the light of Articles 31 and 32 of the Vienna Convention must focus on ascertaining the common intentions of the parties."[722]

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[718] Chinese Taipei's first written submission, paras. 289-290; Chinese Taipei's second written submission, para. 444.
[719] Chinese Taipei's first written submission, paras. 627-630.
[720] European Communities' first written submission, paras. 170-172.
[721] Appellate Body Report on *EC – Chicken Cuts*, paras. 238-239.
[722] Appellate Body Report on *EC – Chicken Cuts*, paras. 238-239.

7.545 With respect to the relationship between the object and purpose of the GATT 1994 generally and a Member's tariff concessions in particular, the Appellate Body held in *Argentina - Textiles and Apparel* that:

> "a basic object and purpose of the GATT 1994, as reflected in Article II, is to preserve the value of tariff concessions negotiated by a Member with its trading partners, and bound in that Member's Schedule. Once a tariff concession is agreed and bound in a Member's Schedule, a reduction in its value by the imposition of duties in excess of the bound tariff rate would upset the balance of concessions among Members."[723]

7.546 In *EC – Computer Equipment*, the Appellate Body confirmed that the security and predictability of the reciprocal and mutually advantageous arrangements directed toward the substantial reduction of tariffs and other barriers to trade is a recognized object and purpose of the *WTO Agreement*, generally, as well as of the GATT 1994.[724]

7.547 We thus consider that tariff concessions made by WTO Members should be interpreted in such a way as to further the objectives of preserving and upholding the "security and predictability" of "the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other trade barriers to trade". This includes consideration of the general objective of the expansion of trade and the substantial reduction of tariffs. However, a panel should take care not to disturb the balance of reciprocal and mutually advantageous concessions negotiated by parties.[725]

7.548 In this case, the complainants have also argued that provisions of the ITA, a plurilateral agreement that is separate from the *WTO Agreement*, are relevant in determining the object and purpose of the *WTO Agreement*.[726] We do not agree. While the *WTO Agreement* represents a mutual agreement among all WTO Members, the ITA constitutes a separate plurilateral arrangement made among a subset of WTO Members and states and customs territories acceding to the WTO. Due to the application of the MFN principle and Article II of the GATT 1994, the duty bindings and eliminations agreed to by the ITA participants were also extended to all WTO Members. However, that does not mean that the objectives of the ITA participants of having participants' tariff regimes "evolve" in a manner that "enhances market access for information technology products"[727], or "achiev[ing] maximum freedom of world trade in information technology products" and "encourag[ing] the continued technological development of the information technology industry on a world-wide basis"[728] – can be considered a basis for determining the object and purpose of the *WTO Agreement* and the GATT 1994. The ITA participants are a subset of the membership as a whole and their intentions with respect to an agreement amongst themselves, while relevant context for understanding the concessions they have made, are not material to a determination on the object and purpose of the *WTO Agreement* and the GATT 1994.

7.549 In summary, the relevant object and purpose is the general object and purpose of the *WTO Agreement* as a whole, including the GATT 1994, which is to provide security and predictability in the reciprocal and mutually advantageous concessions negotiated by parties for the reduction of tariffs

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[723] Appellate Body Report on *Argentina – Textiles and Apparel*, para. 47; Panel Report on *EC - Chicken Cuts*, para. 7.319.

[724] Appellate Body Report on *EC – Computer Equipment*, para. 82; Panel Report on *EC - Chicken Cuts*, para. 7.318.

[725] See also Panel Report on *EC – Chicken Cuts*, para. 7.320.

[726] Japan's first written submission, paras. 173-176. complainants' responses to Panel question No. 1.

[727] Para.1 of the ITA.

[728] Preamble of the ITA.

and other barriers to trade. In the Panel's view, the interpretation of the FPDs narrative description described above is fully consistent with this object and purpose.

(vi) Subsequent practice (Article 31(3)(b) of the Vienna Convention*)*

7.550 The European Communities argues that the specific classification practice of the United States and the practice of ITA participants between 1997 and 1999 provide other relevant means to interpret the FPDs narrative description.[729] The European Communities compares the table that appears in paragraph 7.528 above, which refers to HS subheadings notified by ITA participants made in 1997, with the following table reflecting the HS subheadings notified by ITA participants in connection with the FPDs narrative description in 1999:[730]

Classification of "Flat panel display devices (including LCD, Electro Luminescence, Plasma, Vacuum-Fluorescence and other technologies) for products falling within this agreement, and parts thereof" by ITA participants in 1999		
Sub-heading	Number of participants classifying in that subheading	Main parties to the dispute
8424 90	1	-
8471 49	7	US
8471 60	28	EC, JA, TPKM, US
8473 10	1	-
8473 21	1	-
8473 29	1	-
8473 30	27	EC, JA, US
8473 40	1	-
8473 50	1	-
8517 90	1	-
8522 90	1	-
8528 21	3	JA
8528 22	3	JA
8529 90	3	JA
8531 20	32	EC, JA, TPKM, US
8531 80	18	EC, US
8531 90	29	EC, JA, TPKM, US
8541 90	1	-
8543 89	6	US
8543 90	8	US
8548 90	1	-
9013 20	4	JA
9013 80	26	EC, JA, TPKM, US
9013 90	26	EC, JA, TPKM, US
9017 90	1	-

7.551 In addition, Chinese Taipei argues that the European Communities had consistently classified LCD flat panel displays in duty-free heading 8471 until 2004.[731] Since 2004 and 2005, however,

[729] European Communities' first written submission, paras. 174-177.
[730] Exhibit EC-20.
[731] Chinese Taipei's first written submission, paras. 291 and 295 (referring to BTIs classifying FPDs in duty-free heading 8471) (Exhibit TPKM-54).

Chinese Taipei argues, the European Communities gradually began imposing duties on these products.[732] Chinese Taipei submits that not all EC member States conformed with this approach.[733]

7.552 The Panel will consider the parties' views below.

Arguments of the parties

Classification practice of the United States

7.553 Citing a publication entitled "*What Every Member of the Trade Community Should Know About: Classification of Flat Panel Displays*"[734], the **European Communities** argues that the United States has taken the same approach to limit classification of ADP monitors to certain sizes and pixel size configurations. The European Communities submits that the United States itself classifies the kind of monitors that the European Communities understands to be relevant to this case as *video monitors or televisions* and not as output units of an ADP machine. In this respect, the European Communities submits that "customs officials of the United States have previously classified a number of different multifunctional LCD monitors as video monitors pursuant to GIR 3(c)", including products of various sizes, with or without a TV tuner, and with DVI connectors.[735]

7.554 The **United States** argues that its supposed classification practice provides no support for the European Communities' view that its measures are consistent with its obligations, nor does it indicate any particular "practice" on the part of the United States regarding monitors.[736]

Classification practice of ITA participants between 1997 and 1999

7.555 The **European Communities** argues that the classification practice of ITA participants between 1997 and 1999, as referred to in WTO document G/IT/2/Add.1/Rev.1 of 29 July 1999[737], provides information on classification divergences, including those of new participants that joined the ITA since 1997. The European Communities argues that these data demonstrate a tendency towards an increasing agreement on classification, with the exception of HS1996 subheading 8541 90.[738]

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[732] Chinese Taipei's first written submission, para. 292 (referring to Commission Regulation Nos. 754/2004 and 2147/2004 for plasma FPDs).

[733] Chinese Taipei's first written submission, paras. 291, 298-299 and 304.

[734] Exhibit EC-18.

[735] European Communities' first written submission, paras. 174-175 (referring to Ruling of the Commercial and Trade Facilitation Division, US Customs and Border Protection (15 December 2006) (Exhibit EC-19)).

[736] United States' second written submission, para. 96 (The United States argues that the classification of "LCD modules" – identified by the European Communities in Exhibit EC- 18 – is not at issue in this dispute. Second, it argues, the reference to a single classification ruling by Customs and Border Protection in Exhibit EC-18, strictly illustrates that United States' customs authorities apply the "principal use" test when considering the objective characteristics of a product. The United States argues that application of a principal use test is not allowed under the EC measures at issue. Moreover, it argues that one classification instance does not support the view that the EC measures at issue are consistent, nor does it indicate a particular "practice" on the part of the United States regarding monitors).

[737] Exhibit EC-20.

[738] European Communities' first written submission, para. 177. In concluding on the data, the European Communities states:

> "[T]he number of participants identifying sub-headings 8471 60, 8473 30, 8531 20, 8531 80, 8531 90, 9013 80 and 9013 90 had increased while all the other headings where the number of participants was below 10 and often only one or a few remained stable. Still no participants

7.556 The **complainants** argue that the European Communities' description of where it or other ITA participants classify products that fall within the FPDs narrative description is irrelevant since the concession applies to a product wherever that product is classified.[739] In addition, **Japan** argues that the presented data cannot be "subsequent practice" in the sense of Article 31(3)(b) of the Vienna Convention because too few countries are involved and the practice is not consistent.[740] **Chinese Taipei** argues that the only conclusion that can be taken from this "so-called" practice of ITA parties is that ITA participants did not share a common classification.[741]

Consideration by the Panel

7.557 Article 31(3)(b) of the Vienna Convention states:

> "3. There shall be taken into account, together with the context:
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."

7.558 The Appellate Body in *EC – Chicken Cuts* observed that "'subsequent practice' in the application of a treaty may be an important element in treaty interpretation because 'it constitutes objective evidence of the understanding of the parties on the meaning of the treaty'."[742] The Appellate Body based its comments on its earlier interpretation in *Japan – Alcoholic Beverages II* that "subsequent practice" within the meaning of Article 31(3)(b) entails "...'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties [to a treaty] regarding its interpretation".[743] Moreover, the Appellate Body noted in *US – Gambling* that "subsequent practice" involves two elements: "...(i) there must be a common, consistent, discernible pattern of acts or pronouncements; *and* (ii) those acts or pronouncements must imply *agreement* on the interpretation of the relevant provision".[744] We recall the statement by the Appellate Body in *EC – Computer Equipment* that "[i]nconsistent classification practice, however, cannot be relevant in interpreting the meaning of a tariff concession".[745]

7.559 In establishing what may qualify as "common" and "concordant" practice, the Appellate Body stated that, although *not each and every party* must have engaged in a particular practice for it to qualify as a "common" and "concordant" practice, it would be *difficult* to establish a "concordant, common and discernible pattern" on the basis of acts or pronouncements of *one, or very few parties to*

> identified the relevant sub-headings for televisions and only Japan, Iceland and Macao continued to identify video monitors as falling within the scope of the product definition of 'flat panel display devices (…)'. The continued important classification differences between the complainants are also noteworthy."
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> (European Communities' first written submission, para. 177).

[739] United States' second written submission, paras. 95-96; Japan's second written submission, para. 32; Japan's second written submission, paras. 180-181; Chinese Taipei's second written submission, para. 205. Japan recalls its view that the codes are "illustrative" only, and represent a "range of products covered by the concession itself" (Japan's second written submission, para. 181).

[740] Japan's second written submission, para. 32; Japan's second written submission, para. 180.

[741] Chinese Taipei's second written submission, paras. 205-206.

[742] Appellate Body Report on *Chicken Cuts*, para. 255 (citing *Yearbook of the International Law Commission* (1966), Vol. II, page 219, para. (6)); see also Panel Report on *China – Auto Parts*, para. 7.702.

[743] Appellate Body Report on *Japan – Alcoholic Beverages II*, para. 106.

[744] Appellate Body Report on *US – Gambling*, para. 192.

[745] Appellate Body Report on *EC – Computer Equipment*, para. 95.

a multilateral treaty, such as the *WTO Agreement*.[746] The Appellate Body further found that if only some WTO Members have actually engaged in a certain practice, that circumstance may reduce the availability of such "acts and pronouncements" for purposes of determining the existence of "subsequent practice" within the meaning of Article 31(3)(b) of the Vienna Convention.

7.560 The Appellate Body moreover noted that it should not be determined that "subsequent practice" under Article 31(3)(b) "has been established by virtue of the fact that the Panel '[h]ad not been provided any evidence to indicate that WTO Members protested against the EC classification practice in question ..."[747] In this respect, the Appellate Body noted as follows:

> "...'lack of reaction' should not lightly, without further inquiry into attendant circumstances of a case, be read to imply agreement with an interpretation by treaty parties that have not themselves engaged in a particular practice followed by other parties in the application of the treaty. This is all the more so because the interpretation of a treaty provision on the basis of subsequent practice is binding on all parties to the treaty, including those that have not actually engaged in such a practice".[748]

7.561 Accordingly, on the basis of guidance provided by the Appellate Body on the assessment of subsequent practice for interpreting a treaty provision, the Panel will now consider whether there is evidence of "consistent, common and concordant" classification practice for flat panel display devices on the part of the ITA participants and with respect to the products at issue during the period since the conclusion of the ITA.

7.562 The parties submitted the following evidence concerning Members' classification practice following the conclusion of the ITA:

(a) the summary table that appears in paragraph 7.528 above, which refers to HS subheadings notified by ITA participants in connection with the FPDs narrative description in 1997[749];

(b) the summary table that appears in paragraph 7.550 above, which updates the HS subheadings notified by ITA participants in connection with the FPDs narrative description in 1999[750];

(c) a publication of the United States' Customs authorities entitled "*What Every Member of the Trade Community Should Know About: Classification of Flat Panel Displays*"[751]; and

(d) a publication of the United States' Customs and Border Protection regarding classification of certain multifunctional LCD monitors[752].

7.563 The Panel is of the view that the evidence submitted by the European Communities in paragraphs 7.528 and 7.550 above is not relevant in assessing "subsequent practice" within the

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[746] Appellate Body Report on *EC – Chicken Cuts*, para. 259.
[747] Appellate Body Report on *EC - Chicken Cuts*, para. 272.
[748] Appellate Body Report on *EC - Chicken Cuts*, para. 273.
[749] WTO document G/IT/2/Add.1 (17 October 1997) (Exhibit EC-14).
[750] WTO document G/IT/2/Add.1/Rev.1 (29 July 1999) (Exhibit EC-20).
[751] Exhibit EC-18.
[752] Exhibit EC-19.

meaning of Article 31(3)(b) of the Vienna Convention. We recall that WTO documents G/IT/2/Add.1 of 17 October 1997 and G/IT/2/Add.1/Rev.1 of 29 July 1999[753], which form the basis for the table in paragraphs 7.528 and 7.550 above, reflect the particular HS subheadings that ITA participants notified in their respective WTO Schedules in 1997 and 1999 and were meant to assist participants in narrowing down the divergences in classification.[754] Although these tables may reflect the HS subheadings that ITA participants considered relevant to classification at the time they modified their schedules to reflect ITA-related concession, it cannot be ascertained that these codes reflect the actual "practice" of these Members without consideration of further evidence, which has not been presented for all the Members. In many cases, Members notified multiple codes next to a particular Attachment B description. Thus, it is not entirely clear what practice has been adopted in these cases. It is also not clear from these tables whether Members are in fact classifying products, such as those at issue in this dispute, in other headings that do not appear in the tables or documents. In our view, information derived from other Members' schedules should more properly be assessed as context under Article 31(1) of the Vienna Convention, as the Panel has done in paragraphs 7.528 and 7.550 above. Thus, we do not find this information useful for our present purposes and, hence, we refrain from elaborating further on these two tables or the documents on which the tables are based.

7.564 We next turn to the two documents presented by the European Communities concerning US classification for the products at issue: (i) the publication of the United States Customs and Border Protection, entitled "*What Every Member of the Trade Community Should Know About: Classification of Flat Panel Displays*"[755], and (ii) a publication of the United States' Customs and Border Protection, Commercial and Trade Facilitation Division (HQ W966995) from 15 December 2006[756]. The document "What Every Member of the Trade Community Should Know About: Classification of Flat Panel Displays" sets out the US Customs Services' position on interpretation of HS heading 8471, and provides "guidelines" to use "when classifying all flat panel display modules".[757] In particular, it discusses the application of principal/sole use with respect to "specific size flat panel display modules" that "are principally used in ADP systems and conform to industry standards".[758] The second document of the United States' Customs and Border Protection, Commercial and Trade Facilitation Division discusses classification of a certain multifunctional LCD monitors "ranging *inter alia* from 15 inch to 24 inch, with or without a TV tuner, DVI and/or S-Video etc connectors, VESA compliant etc", and resorts to GIR 3(c) in certain cases.[759]

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[753] Exhibits EC-14; EC-20.

[754] The introductory paragraphs to each of these documents indicates that "[t]o aid participants in considering divergences in classifying information technology products, the Secretariat has compiled the various classifications of Attachment B items in document [G/IT/2, respectively in document G/IT/2 and in G/IT/2/Add.1]". The introductory paragraphs further similarly provide that "[t]he attached table was prepared from participants' schedules of commitments to provide this information". (See WTO document G/IT/2/Add.1 (17 October 1997) (Exhibit EC-14) and WTO document G/IT/2/Add.1/Rev.1, paras. 1-2; (Exhibit EC-20)). The latter document further provides that "[a]t the meeting of 6 July 1999 it was requested that document G/IT/2/Add.1 be updated in order to provide the latest information on classification divergences" (see Exhibit EC 20, p.1, para. 1).

[755] Exhibit EC-18.

[756] Exhibit EC-19.

[757] Exhibit EC-18, p. 3.

[758] Exhibit EC-18, p. 4.

[759] Exhibit EC-19, pp. 8-20. The Commercial and Trade Facilitation Division document discusses a number of factors that economic operators should consider in determining whether a monitors is of a kind used principally with an automatic data-processing machine, including: physical characteristics, such as brightness; synchronization configuration; VESA-compliant mounting features; scalers; response time; size; the expectation of the ultimate purchaser; the channels of trade; the environment of sale, such as accompanying accessories,

7.565 The panel is of the view that this evidence is insufficient to enable us to draw conclusions about the "consistency" of the United States classification practice in this regard. We do not consider it appropriate to extrapolate on the relatively limited evidence provided in consideration of the potential range of different products that may be classifiable under HS subheading 8471 60 or under other headings discussed in this dispute, such as HS subheading 8528. We observe that it is incumbent on a party asserting the existence of a "common" and "concordant" practice among WTO Members to provide sufficient evidence – which clearly is something beyond a handful of classification exercises in one Member – to establish such a "consistent, common and concordant" classification practice. The European Communities has not met this burden here.

(vii) Other arguments

7.566 We recall that recourse may be had to supplementary means of interpretation may be consulted in order to confirm the meaning resulting from the application of Article 31 of the Vienna Convention, or to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.[760]

7.567 We have found, in interpreting the European Communities' commitment on FPDs in accordance with Article 31 of the Vienna Convention, that the FPDs concession covers a range of non-CRT technologies, including other technologies not actually identified, without limitation on technical characteristics, such as screen size or the presence of certain connectors. We have also found that the concession does not require that such devices are used exclusively with automatic data-processing machines or other ITA products.

7.568 There is a disagreement as to whether resort to Article 32 is appropriate in this case. We will assume it is appropriate for purposes of analyzing the European Communities' position. To the extent, the European Communities' views are relevant, we would consider the appropriateness of Article 32 to our analysis. Therefore, we will examine, first, documents that negotiators allegedly relied on when drafting the ITA agreement; second, documents surrounding ITA II negotiations; and finally, evidence of the existence of certain technologies at the time of the conclusion of the ITA.

Landscape papers submitted during negotiation of the ITA

Arguments of the parties

7.569 The **European Communities** submits that elements of the "landscape papers" submitted while negotiating the ITA, and comments on these papers, are "preparatory work" or "other supplementary means of interpretation" within the meaning of Article 32 of the Vienna Convention. The European Communities thus considers those documents relevant to determine the scope of the FPDs concession under its Schedule.[761] The European Communities argues that these papers contain "a few guiding principles" and reflect "real events and exchanges" that reveal the negotiators' views on the scope of the FPDs narrative descriptions found in Attachment B of the ITA.[762]

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manner of advertisement and display; the usage of the merchandise; the economic practicability of so using the import; and the recognition in trade of this use.

[760] See para. 7.65 above.

[761] European Communities' first written submission, para. 23; European Communities' response to Panel question No. 12.

[762] European Communities' first written submission, para. 26; European Communities second written submission, para. 86.

7.570 In particular, the European Communities argues that some of the landscape papers reveal that the intent of negotiators was to focus on "current" product offerings and that "precise" definitions and coverage of "specific" products were intended.[763] In addition, it argues that those landscape papers demonstrate that negotiators never intended for the "flat panel display devices..." narrative description to cover any kind of monitors other than those specifically for computers.[764] The European Communities submits that an early definition of "displays" in the ITA negotiations was subsequently revised to be more "general", as "displays, designed for use with computers, sometimes referred to as computer monitors".[765] Subsequently, however, the European Communities contends that definitions began to distinguish between "flat panel displays ... for ADP output devices" and "monitors for computers".[766] From then on, the European Communities argues, the flat panel display definition stabilized.[767] Despite changes to the concession for "flat panel displays...", the European Communities argues that the description for "monitors for computers" remained open.[768]

7.571 The **complainants** reject the view that any documents on which the European Communities relies, constitute preparatory work or other supplementary means of interpretation within the meaning of Article 32 of the Vienna Convention. Where the ordinary meaning of the language is clear and makes sense when read in context, they argue, recourse to other means of interpretation are not appropriate.[769] Further, they argue that the ITA does not have a formal "negotiating history" although a number of documents were prepared by various Members in the process of negotiating the ITA.[770]

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[763] European Communities' first written submission, paras. 24-25 (referring to Exhibits EC-2; EC-4). The European Communities refers to the following comment by the United States in a 12 March 1996 paper:

"(…) The following list is an attempt to illustrate the diversity and depth of the landscape of the ITA, with a focus on *current product offerings*. This preliminary list was prepared to stimulate discussion on establishing product coverage for the ITA. Specific products may need to be added within the general categories, and *more precise definition of the products and product categories will be required*. A more specific list should emerge from further discussions. (…)". (emphasis added) (Exhibit EC-2).

[764] European Communities' first written submission, para. 188.

[765] European Communities' first written submission, paras. 182-183 (referring to Facsimile communication of 28 March 1996 from the US authorities, Exhibit EC-3; Facsimile communication of 16 April 1996 from the US authorities. Exhibit EC-23). The European Communities cites an early definition of "displays" was:

"Displays designed for use with computers, sometimes referred to as computer monitors regardless of the size of the display area (however measured, large or small) and whether or not using a CRT or some flat screen technology such as AMLCD, EL, gas plasma, or one of the emerging technologies such as field emission displays. Touch sensitive displays for use as combined input/output units with computers are also covered." (Facsimile communication of 28 March 1996 from the US authorities. Exhibit EC-3).

[766] European Communities' first written submission, paras. 184-185 (referring to Technical Working Document QUAD Countries for consideration with regard to coverage of an Information Technology Agreement, 1 November 1996; Exhibit EC-24; referring to Technical Working Document with comments by QUAD Countries with regard to coverage of an Information Technology Agreement, 19 November 1996, 10:02; Exhibit EC-25).

[767] European Communities' first written submission, para. 186.

[768] European Communities' first written submission, para. 185 (referring to Technical Working Document with comments by QUAD Countries with regard to coverage of an Information Technology Agreement, 25 November 1996 (Exhibit EC-27)).

[769] United States' second written submission, para. 97; Japan's second written submission, para. 32, referring to "Draft Articles on the Law of Treaties with commentaries 1966", at para. 18, pp. 222-23, Yearbook of the International Law Commission, 1966, Vol. II (Exhibit JPN-26); Chinese Taipei's second written submission, para. 26.

[770] Complainants' response to Panel question No. 12; Japan's second written submission, para. 31; Chinese Taipei's second written submission, para. 19. The United States submits that the only records from the ITA negotiations that the participants directed the WTO Secretariat to maintain were those referenced in note 4 of G/L/160. It argues, those records span the brief period between the conclusion of the ITA and the approval of

Japan and **Chinese Taipei** argue that the landscape papers strictly constitute preparations or participants' own submissions in connection with the ITA, and are not the treaty or concessions at issue.[771] The **United States** argues that the "systemic implications" of considering documents that are from a single Member's files as negotiating history or surrounding circumstances would have the effect of reading Article 32 of the Vienna Convention out of the treaty.[772] Moreover, the United States and Chinese Taipei argue that the submitted landscape papers were not accessible to all participants to the ITA or the public, including notably, Chinese Taipei. Thus, they do not represent the common intention of all relevant parties.[773]

7.572 The European Communities argues that the complainants cannot reject the landscape papers on the grounds that they were not made available to all parties. According to the European Communities, such an argument is "manifestly disingenuous", in light of the participation of Japan and the United States in these discussions as Quad members. The European Communities submits that bilateral or plurilateral negotiations prior to multilateralization is a "frequent" and "peculiar feature" of WTO tariff negotiations. In its view, not considering these landscape papers would render the drafting history of many concessions "wholly irrelevant".[774]

Consideration by the Panel

7.573 The Appellate Body in *EC – Chicken Cuts* explained that an interpreter has certain flexibility in considering relevant supplementary means in a given case so as to assist in ascertaining the common intentions of the parties."[775] The supplementary means of interpretation, include, but are not limited to "the preparatory work of the treaty and the circumstances of its conclusion". Thus a treaty interpreter has certain flexibility in considering relevant supplementary means in a given case so as to assist in ascertaining the common intentions of the parties."[776]

7.574 The Appellate Body explained:

> "An 'event, act or instrument' may be relevant as supplementary means of interpretation not only if it has actually influenced a specific aspect of the treaty text in the sense of a relationship of cause and effect; it may also qualify as a 'circumstance of the conclusion' when it helps to discern what the common intentions of the parties were at the time of the conclusion with respect to the treaty or specific provision".[777]

7.575 When determining how relevant a particular instrument or circumstance is for interpreting a specific treaty provision, the Appellate Body explained that a panel should consider a number of objective factors including:

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participants Schedules (Exhibit US-96). It submits that the material submitted by the European Communities is not contained in these documents (United States' response to Panel question No. 12).

[771] Japan's response to Panel question No. 12; Chinese Taipei's response to response to Panel question No. 12; Chinese Taipei's second written submission, paras. 19-25.

[772] United States' second written submission, paras. 45 and 97.

[773] United States' second written submission, para. 45; Chinese Taipei's second written submission, para. 20, referring to Appellate Body Report on *EC – Chicken Cuts*, para. 297, Young Loan Arbitration, 59 I.L.R. 495 (1980) and Sir Ian Sinclair, *The* Vienna Convention *on the Law of Treaties*, 2nd ed (Manchester University Press, 1984 quoted by the Panel in *EC – Chicken Cuts*: Panel Report, footnote 574.

[774] European Communities' response to Panel question No. 12.

[775] Appellate Body Report on *EC – Chicken Cuts*, para. 283.

[776] Appellate Body Report on *EC – Chicken Cuts*, para. 283.

[777] Appellate Body Report on *EC – Chicken Cuts*, para. 289.

> "[T]he type of event, document, or instrument and its legal nature; temporal relation of the circumstance to the conclusion of the treaty; actual knowledge or mere access to a published act or instrument; subject matter of the document, instrument, or event in relation to the treaty provision to be interpreted; and whether or how it was used or influenced the negotiations of the treaty".[778]

7.576 Further in this respect, the Appellate Body stated that instruments originating from individual parties should, at a minimum, be "officially published" and "publicly available" to qualify as a circumstance relevant for consideration under Article 32 of the Vienna Convention.[779] The Appellate Body noted that "proof of actual knowledge will increase the degree of relevance of a circumstance for interpretation".[780]

7.577 The requirement that such material be officially published and publicly available would seem to ensure that all relevant parties, including not only those which participated in the negotiations, but also those which did not, have access to and therefore knowledge of the negotiating history that may be used to interpret their obligations.

7.578 We note that the "landscape papers" submitted by the European Communities derive from discussions between the "Quad" countries. We are not in a position to determine, based on the evidence before us, whether non-Quad participants, including Chinese Taipei, were privy to these discussions or had access to the documents. The European Communities itself appears to recognize the limited audience of these papers.[781] The Panel notes the United States has called attention to Footnote 4 of document G/L/160, which mandated the WTO Secretariat to maintain a set of the "*informal* documents exchanged by participants in consultations that led to the decisions taken *at that meeting*".[782] (emphasis added) However, we observe that the landscape papers submitted by the European Communities do not form part of this record.[783] Finally, we note that the European Communities has not submitted evidence that the "landscape papers" were communicated to all ITA participants or made available for consultation by interested delegations. Even if they had done so, we recall that documents qualifying under Article 32 of the Vienna Convention must have been made available to *all* WTO Members and not simply to participants to the ITA. The European Communities maintains that Japan and the United States as Quad members should have been aware of

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[778] Appellate Body Report on *EC – Chicken Cuts*, para. 291.

[779] This view is supported by reference to a standard understanding of *travaux préparatoires* in public international law. In particular, Ian Sinclair explains

> "... recourse to travaux préparatoires does not depend on the participation in the drafting of the text of the State against whom the travaux are invoked. To hold otherwise would disrupt the unity of a multilateral treaty, since it would imply that two different methods of interpretation should be employed, the one for States who participated in the travaux préparatoires and the other for States who did not so participate. One qualification should, however, be made. The travaux préparatoires should be in the public domain so that States which have not participated in the drafting of the text should have the possibility of consulting them. Travaux préparatoires which are kept secret by negotiating States should not be capable of being invoked against subsequently acceding States."

Ian Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester University Press, 2nd edition (1984) p. 144.

[780] Appellate Body Report on *EC – Chicken Cuts*, para. 297.

[781] European Communities' first written submission, para. 23; European Communities' response to Panel question No. 12.

[782] Exhibit US-96.

[783] The Panel would also note in this respect that the record maintained by the WTO Secretariat in accordance with document G/L/160 is limited and thus, sheds limited light on the status of the documents submitted by the European Communities.

the documents, in particular, because some of the documents were authored by them. However, this is not relevant as criteria for determining their relevance under Article 32.

7.579 We have no evidence before us that the particular landscape papers were published, circulated or made available to the other ITA participants or the WTO membership more broadly at the time of negotiations or prior to this dispute. Thus, it is not clear to what extent if at all the views set forth in these documents reflect the commonly held intentions of the parties.

7.580 The European Communities has taken note of statements made by the Appellate Body in *Canada – Dairy*, concerning the relevance that may be attributed to statements made in the context of bilateral negotiations.[784] We note that the Appellate Body in *Canada – Dairy* took note that the parties had agreed on record that the bilateral negotiations under discussion "failed to produce any agreement between them", in concluding that Canada's commitment was not new or different.[785] Further, the Appellate Body in *EC – Chicken Cuts* emphasized the importance of ensuring that documents being considered under Article 32 of the Vienna Convention reflect the common intentions of the parties.[786]

7.581 We consider that the "landscape papers", which were only reviewed by a subset of the ITA participants (the "Quad" members, in particular) and were not circulated prior to this dispute as far as we can determine based on the evidence before us, should not have any bearing on our interpretation of the concessions arising under the EC schedule pursuant to the ITA. We do not have evidence of any agreement (or lack thereof) among the Quad regarding the particular landscape papers. Nor do we know to what extent if at all these views represent the common intentions of the ITA participants or the WTO Members, because no evidence has been offered that documents were circulated to others prior to the conclusion of negotiations.

Proposals during ITA II negotiations

Arguments of the parties

7.582 The **European Communities** contends that negotiations surrounding the "ITA II" demonstrate the respective positions of the parties on the existing product coverage of the ITA. In this respect, the European Communities argues that Japan submitted a proposal to include "so-called 'multimedia monitor[s]'" as new products, but did not explain that multimedia monitors were already covered by the existing commitments.[787] The European Communities argues that if "multifunctional LCD monitors" existed and were about to replace the CRT technology at the time when the ITA concessions were made, it then is not clear why Japan was trying to negotiate the inclusion of a product that was on its way to becoming redundant.[788] Furthermore, the European Communities argues that in the proposals for the enlargement of the product coverage, participants have explicitly

[784] Appellate Body Report on *Canada – Dairy*, paras. 138-139. Footnotes omitted.
The European Communities additionally referred to findings made by the panel in *Korea – Beef* regarding the relevance of an understanding reached bilaterally. (See Panel Report on *Korea – Beef*, para. 562).
[785] Appellate Body Report on *Canada–Dairy*, paras. 139.
[786] Appellate Body Report on *EC – Chicken Cuts*, para. 239; Appellate Body Report on *EC - Computer Equipment*, para. 84.
[787] European Communities' first written submission, para. 178 (referring to Exhibit EC-21).
[788] European Communities' first written submission, para. 179.

listed *television receivers* and *video monitors* as a product to be covered in the future list of product coverage.[789]

7.583 The **complainants** argue that the proposals and negotiations pertaining to ITA II are not relevant to the interpretative issues.[790] The **United States** submits that just because a proposal was made in ITA II for "multimedia monitors" and "video monitors" does not support the conclusion that the products were not covered under the original concessions.[791] **Japan** argues that the Panel should not rely on the ITA II as an interpretative tool, in particular because no agreement arose out of the ITA II discussions.[792]

Consideration by the Panel

7.584 We note that neither participants to the ITA nor the WTO membership at large has formally agreed to the content of an "ITA II" to succeed or enlarge the product coverage of the ITA.

7.585 We recall that the Appellate Body has indicated that documents published, events occurring, or practice followed *subsequent to* the conclusion of the treaty may be relevant for consideration under Article 32 of the Vienna Convention to the extent that the instrument or document reflects the "common intentions of the parties' *at the time* of the conclusion" of the treaty.[793] The Appellate Body emphasized, however, that such an assessment must be determined on a case-by-case basis.

7.586 In this respect, the European Communities argues that negotiations and proposals made in connection with the ITA II may inform the interpretation of the intended scope of product coverage of the original ITA at the time of *its* conclusion.

7.587 We are hesitant to attribute much weight to statements made in the context of negotiations for a separate, successor agreement that has not yet been concluded, and where the extent of progress towards reaching such an agreement remains unclear. In addition, the European Communities has referred to limited evidence in support of its view on the scope of coverage to be attributed to the FPDs narrative description. We understand the European Communities to be arguing that Japan's proposal to include a product it termed a "multimedia monitor" within ITA II coverage, without explaining that such a product is already covered under the original ITA, somehow demonstrates that those products did not exist at the time ITA concessions were made. However, we note that Japan's proposal appears to be limited to monitors employing CRT-based display technology.[794] Furthermore, the European Communities suggests that a proposal (by Singapore) to include television receivers and video monitors in a list for future coverage indicates these products were not part of ITA coverage.[795]

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[789] European Communities' first written submission, para. 180 (referring to Singapore's proposed additions to product coverage in WTO document G/IT/SPEC/9 of 12 January 1998, Exhibit EC-22).

[790] United States' second written submission, para. 97; Japan's second written submission, para. 183.

[791] United States' second written submission, para. 97 and its fn. 203. Through the notation "already covered by the ITA", the United States argues that the ITA II negotiators recognized that several products proposed for inclusion in ITA II may in fact have been part of ITA I (United States' second written submission, para. 97 and its fn. 203; WTO document Proposed Additions to Product Coverage: Compilation of Participants' Submissions: Note by the Secretariat, G/IT/SPEC/15, pp. 23-24 (24 February 1998) (Exhibit US-130)).

[792] Japan's second written submission, para. 183.

[793] Appellate Body Report on *EC – Chicken Cuts*, para. 305.

[794] Exhibit EC-21, p. 5.

[795] European Communities' first written submission, para. 180, referring to Singapore's proposed additions to product coverage in WTO document G/IT/SPEC/9 of 12 January 1998. Exhibit EC-22.

7.588 We do not consider that we have sufficient grounds to conclude that Japan's individual proposal to include a product it termed a "multimedia monitor" under ITA II coverage establishes whether or not a particular product was covered within the ITA, or whether such a product existed at the time of ITA negotiations. The determination of whether a product is covered by the ITA involves considering first the scope of the concessions already found in the ITA. The products covered by the concession proposed by Japan, may or may not (in whole or in part) fall within the existing ITA coverage, and this is so regardless of Japan's individual views on the matter.[796] Moreover, we note that Japan's views on whether or not multimedia monitors were within the scope of ITA coverage do not represent the common views of all ITA participants, let alone all of the WTO Membership. The terms of the FPDs concession in the EC Schedule, on the other hand, represents agreed-upon text, reflecting the common intentions of ITA participants and the WTO Membership.

7.589 We concluded in our Article 31 analysis that the FPDs concession in the EC Schedule extends to certain apparatus or devices that have a flat display and are generally thinner than conventional CRT displays or monitors, and are designed for visual presentation of data or signals from products falling with in the ITA, including notably, automatic data-processing machines. We determined that there is no express limitation on technical characteristics, such as screen size, dimension, refresh rate, dot-pixel ratio, or other technical characteristics, including no express limitation on the type of connection or sockets it may possess, such as DVI. Finally, we concluded that, while the flat panel display devices at issue must be designed for use with an automatic data-processing machine there is no requirement for exclusivity, such that the concession would be limited to apparatus that only display or reproduce signals from products falling within the ITA, including automatic data-processing machines.

7.590 Finally, we find unpersuasive the European Communities' argument that Singapore's proposal to include HS headings 8528 12, 8528 13, 8528 21 and 8528 22 within the ITA II as duty-free concessions, indicates that all flat panel display devices capable of receiving or reproducing signals from sources other than an ADP machine were not within the scope of the original ITA, in particular, under the narrative description for FPDs. We have established above that the narrative descriptions of the concessions in Members' WTO Schedules must be understood in terms of their ordinary meaning in context and in light of the object and purpose of the treaty, in determining the coverage of a particular concession. We found that the scope of the concession arising from the narrative descriptions is dispositive regardless of the HS headings or tariff codes that Members chose to notify in connection with the descriptions, or those that they chose to bind at zero duties elsewhere in their Schedules. Moreover, Singapore has not proposed modifying the narrative description for FPDs or otherwise amending the list of products appearing in Attachment B. In any event, Singapore's view does not represent the common intentions of all participants nor the WTO membership.

7.591 Accordingly, we consider that proposals made pursuant to the ITA II negotiations do not affect our conclusions established pursuant to Article 31 of the Vienna Convention.

The state of technology at the time of ITA negotiations

Arguments of the parties

7.592 The **United States** and **Japan** contend that LCDs for computer displays began to be commercialized in the 1980s, and "were very much a growing part of the market" beginning in the

[796] We further note that Japan may have sought to *clarify* that a product was covered within the scope of the ITA concessions (under the ITA II) despite its view that the product was already covered under the existing ITA coverage.

"early 1990s", and were "well known during the mid 1990s", when they began to replace CRT-based devices.[797] Japan asserts that the commercial presence of LCD devices explains why the concessions themselves mentioned flat panel devices 'including LCDs'".[798]

7.593 The **European Communities** argues that the technology referred to by the complainants has been subject to "major developments" since the early 2000s, which it argues, is five or more years after the conclusion of the ITA.[799] The European Communities qualifies evidence from the complainants regarding LCD technology as concerning "only the development of LCD televisions", and thus argues that it is not clear that LCD computer displays existed at the time of negotiations as a "viable commercial and technological reality".[800] The European Communities argues that a monitor that can be used today as the output unit of an automatic data-processing machine is fundamentally different from ADP monitors that were used and defined in 1996 when the ITA was negotiated. The European Communities argues that these new products must be subject to negotiations.[801] The European Communities further argues that LCD displays with DVI did not exist at the time of negotiations.[802]

7.594 Several third parties to this dispute argue that the particular technological development of a product should not exclude the possibility that a particular product would fall within the scope of an ITA concession, including those based on Attachment B of the ITA.[803]

Consideration by the Panel

7.595 The **Panel** notes that many of the arguments of the parties set out above concern the existence or otherwise of certain technologies at the time of the ITA negotiations.[804]

7.596 One of the issues to consider is, to what extent is the state of technology that existed at the time of the negotiations relevant to determining the scope of the commitments. A related issue is, how should technological development, product evolution and "new products", be dealt with in interpreting concessions. In the Panel's view it is neither desirable nor possible to answer such questions in the abstract and without reference to the terms of the concessions that are being interpreted.

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[797] Japan's first written submission, paras. 273 and 277. Japan refers to an antidumping petition filed in the United States in 1990 in support of the view that LCDs were commercially available.

[798] Japan's first written submission, paras. 277.

[799] The European Communities argues that LCD technology was nascent during the time of negotiations and afterward for certain applications, due to technical issues (European Communities' first written submission, paras. 88-89, citing Taiichiro Kurita, Moving Picture Quality Improvement for Hold-type AM-LCDs, p. 986 (Exhibit EC-12) and T. Yamammoto, Y. Aono and M. Tsumura, guiding Principles for High Quality Motion Picture in AMLCDs Applicable to TV Monitors, p. 456 (Exhibit EC-13)).

[800] European Communities' first written submission, para. 90.

[801] European Communities' first written submission, para. 76.

[802] European Communities' first written submission, para. 87.

[803] See, for instance, Australia's third party oral statement, para. 14; Australia's response to Panel question No. 4; Costa Rica's third party oral statement, para. 6; Costa Rica's response to Panel question No. 4; Hong Kong (China)'s third party oral statement, para. 6; Korea and Singapore's responses to Panel question No. 9.

[804] See for instance, Japan's second written submission, para. 156, United States' first written submission, paras. 51-52 (citing to Hirohisa Kawamoto, The History of Liquid-Crystal Displays, Proceedings of the IEEE (Vol. 90, No. 4 (April 2002), p. 466 (discussing the reflection process)).

7.597 We recall that, in determining the scope of the European Communities' commitment on FPDs, we applied the customary rules of interpretation of public international law, as codified in Article 31 of the Vienna Convention. In doing so, we examined the ordinary meaning of the terms of the European Communities' FPDs commitment, in the context provided by the ITA, other relevant parts of the EC Schedule, and the schedules of other WTO Members. We established that the FPDs concession pertains to certain apparatus or devices that have a flat display and are generally thinner than conventional CRT displays or monitors, and are designed for visual presentation of data or signals from products falling with in the ITA, including notably, automatic data-processing machines. We determined that there is no express limitation on technical characteristics, such as screen size, dimension, refresh rate, dot-pixel ratio, or other technical characteristics, including no express limitation on the type of connection or sockets it may possess, such as DVI. Finally, we concluded that while the flat panel display devices at issue must be designed for use with an automatic data-processing machine there is no requirement for exclusivity, such that the concession would be limited to apparatus that only display or reproduce signals from products falling within the ITA, including automatic data-processing machines.

7.598 We observe once again that a Member, when making a commitment pursuant to Article II of the GATT 1994, may choose precise, even exclusive, terms and conditions to qualify or limit the scope of coverage. These include terms and conditions that would limit coverage to a particular product based on its physical attributes, dimensions, technical characteristics or features. A Member may also refer to a particular classification or tariff heading to define or limit the scope of a concession. The determination of the scope of coverage comes from the meaning of the terms of that commitment. For this reason, a panel should not read qualifications into a commitment that are not there. At the same time, the other Members have an opportunity to agree or disagree with the proposed concession when it is put forward for incorporation into a Member's schedule.

7.599 The Panel has interpreted the concession based on the FPDs narrative description in this manner. In the case of this concession, the Panel notes that generic terms were used to cover a wide range of products and technologies. In addition, it appears to be undisputed that flat panel display devices designed for use with automatic data-processing machines existed at the time the ITA was concluded (for example, the European Communities has referred to an earlier version of the "displays designed for use with computers" concession that expressly mentions both CRT and flat panel display technology)[805], and that the notion of multifunctional monitors was not unknown to negotiators, as evidenced in the monitors concession in the ITA, which appears to contemplate the existence of monitors that accept signals from multiple sources.[806]

7.600 We are of the view, therefore, that there is no need to consider further the particular status of technology at the time of negotiating the concession in assessing the scope of the concession before us. Thus, for instance, the Panel does not consider the fact that DVI was developed after the conclusion of the ITA operates to exclude FPDs with DVIs from the scope of the concession. As

[805] See fn. 729 above. The Panel notes that, in interpreting the FPDs narrative description, it has declined to consider the landscape papers under Article 32 of the Vienna Convention on account of the fact that they do not reflect common intentions and therefore do not assist our interpretative task. The panel here refers to the landscape document merely as evidence of the fact that both CRT and LCD technologies were known to be used in displays designed for use with computers at the time the concessions were made.

[806] See also *China – Publications and Audiovisuals Products*, para. 397.

explained, we have established on the terms of the concession that "flat panel display devices" incorporating a wide range of characteristics and technologies are covered.[807]

7.601 We note the European Communities' argument that multifunctional monitors are "new products" that did not exist at the time of the negotiations. As noted above, the notion of multifunctionality was not unknown at the time of the negotiations. Even if it were accepted that the European Communities' claim is factually accurate, however, it is of limited relevance to the question of whether the product is covered by the FPDs concession. This must be determined by interpreting the terms of the concession in accordance with the Vienna Convention.

7.602 We recall that, in determining the scope of the European Communities' commitment on FPDs we examined the ordinary meaning of the terms of the European Communities' FPDs narrative description, in the context provided by the ITA, other relevant parts of the EC Schedule, and the schedules of other WTO Members. We established that the FPDs decryption pertains to certain apparatus or devices that have a flat display and are generally thinner than conventional CRT displays or monitors, and are designed for visual presentation of data or signals from products falling with in the ITA, including notably, automatic data-processing machines. We determined that there is no express limitation on technical characteristics, such as screen size, dimension, refresh rate, dot-pixel ratio, or other technical characteristics, including no express limitation on the type of connection or sockets it may possess, such as DVI. We also noted that there is no requirement for exclusivity, such that the concession would be limited to apparatus that only display or reproduce signals from products falling within the ITA, including automatic data-processing machines.

Other arguments - Conclusion

7.603 Given the Panel's view that the materials relied upon the European Communities for its Article 32 arguments are not appropriate to consider under the circumstances of this case, we decline to consider further the applicability of Article 32 in this case.

[807] We also do not consider it necessary to resort to any form of evolutionary interpretation of the terms, in light of our conclusion on the ordinary meaning of the terms. Had there been doubt as to whether LCD or other displays that were capable of connecting to other sources than an automatic data-processing machine, or displays that were fitted with DVI or other multi-use connectors, were within the scope of the concession, only then might we have considered such an interpretative approach. We note in addition, the evidence cited by the United States and Japan suggests that LCD displays were unveiled commercially in 1988, and would likely have been contemplated at the time of the negotiations (See H. Kawamoto, "The History of Liquid-Crystal Displays" Proceedings of the IEEE, Vol. 90, No. 4 (April 2002), available at http://www.ieee.org/portal/cms_docs_iportals/iportals/aboutus/history_center/LCD-History.pdf, p. 495. Exhibit US-32) While the European Communities argues that the LCD industry was nascent then, we note that the European Communities has cited text of it in landscape papers it alleges were submitted by the United States during negotiations of the ITA. In particular, one of these papers referred to an early version of a proposed concession that provides in part "Displays designed for use with computers, sometimes referred to as computer monitors regardless of the size of the display area (however measured, large or small) and whether or not using a CRT or some flat screen technology such as AMLCD, EL, gas plasma, or one of the emerging technologies such as field emission displays" (European Communities' first written submission, para. 182, referring to Facsimile communication of 28 March 1996 from the US authorities, Exhibit EC-3). Regardless of the status of this document, in view of the European Communities' identification of this text, we find further confirmation that negotiators were at least aware of a wide array of technology at the time of considering the FPDs concession.

(viii) Overall conclusions on interpretation of the FPDs narrative product description in the Annex to the EC Schedule

7.604 Based on our assessment of the text of the FPDs narrative description in accordance with the principles codified in Article 31 of the Vienna Convention, we concluded above that the concession refers to certain apparatus or devices that have a flat display and are generally thinner than conventional CRT displays or monitors, and are designed for visual presentation of data or signals from products falling with in the ITA, including notably, automatic data-processing machines. We determined that there is no express limitation on technical characteristics, such as screen size, dimension, refresh rate, dot-pixel ratio, or other technical characteristics, including no express limitation on the type of connection or sockets it may possess, such as DVI. We further concluded there is no requirement for exclusivity, such that the FPDs concession would be limited to apparatus that may only display or reproduce signals from products falling within the ITA, including automatic data-processing machines. In light of our interpretation of the key terms and phrases in the EC headnote, considered in the context of the ITA, we concluded that duty-free treatment must be extended to *all* products that fall within the scope of the FPDs concession in the Annex to the EC Schedule irrespective of where they are classified in the EC Schedule. We found no reason to conclude otherwise based on our assessment of the various contextual arguments presented by the parties, or arguments raised by the European Communities in the context of Article 32 of the Vienna Convention.

(b) The ordinary meaning of the relevant concession: tariff item number 8471 60 90 in the EC Schedule

7.605 The Panel recalls that the complainants have alleged that flat panel display devices are covered not only by the duty-free FPDs narrative description in the Annex to the EC Schedule, *but also* by the duty-free concession for "[i]nput or output units" of an automatic data-processing machine in tariff item number 8471 60 90 in the EC Schedule.[808] In particular, tariff item number 8471 60 90 covers "Automatic data-processing machines and units thereof"; - Input or output units, whether or not containing storage units in the same housing; -- Other; - - - Other". Within the terms of this concession, the complainants consider the term "output units" as key to the ordinary meaning analysis under the Vienna Convention.[809] The complainants do not address the term "input" units in connection with their assessment of tariff item number 8471 60 90.

7.606 The **European Communities** argues that LCD monitors of a kind used principally in an automatic data-processing system are *not* precluded from duty-free treatment on the sole ground that they are capable of displaying signals from sources other than an automatic data-processing machine, or due to the presence of a DVI or other connector. Taking into consideration the relevant HS1996 Section and Chapter Notes, as well as its Explanatory Notes to Chapters 84 and 85 and the GIRs of the HS, the European Communities argues that the determination of whether a given monitor is used "principally" in an automatic data-processing system requires *a case-by-case analysis* on the basis of the product's objective technical characteristics, which could lead to prima facie classification under the heading pertaining to video monitors (HS1996 subheadings 8528 21 and 8528 22).[810] This is because certain displays existing today are "multifunctional", i.e., they can display both from an

[808] Joint Panel request, WT/DS375/8, 376/8, DS377/6, p. 2. The following third parties also take this view in their third party submissions: China, para. 3; Costa Rica, para. 5; Korea, para. 28; Philippines, para. 21; Singapore, paras. 29, 33 and 48; and Thailand in its third party statement, para. 3.

[809] United States' second written submission, para. 99; Japan's first written submission, para. 302; Chinese Taipei's first written submission, para. 320.

[810] European Communities' first written submission, paras. 166 and 169.

automatic data-processing machine and from other sources. The European Communities submits that in this case one would need to resort to GIR 3(c), and classification would result under HS1996 heading 8528.

7.607 The **Panel** will now interpret the relevant EC concession for tariff item number 8471 60 90 which reads as follows:

HS1996	Description	Base rate	Bound rate	Year of full implement ation	Other duties and charges	Legal instrument where the concession is reflected
8471	Automatic data-processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included:					
(…)						
8471 60	- Input or output units, whether or not containing storage units in the same housing					
8471 60 10	- - For use in civil aircraft	0.0	0.0	1997	0.0	WT/Let/156
	- - Other					
8471 60 40	- - - Printers	2.0	0.0	1999	0.0	WT/Let/156
8471 60 50	- - - Keyboards	2.0	0.0	1999	0.0	WT/Let/156
8471 60 90	- - - Other	2.0	0.0	1999	0.0	WT/Let/156

7.608 In order to determine the ordinary meaning of tariff item number 8471 60 90 in the EC Schedule pursuant to Article 31 of the Vienna Convention, we will examine the text in its context and in light of its object and purpose.

(i) The meaning of the terms of tariff item number 8471 60 90 in the EC Schedule

Arguments of the parties

7.609 The **United States** examines the term "input or output units" of tariff item number 8471 60 90 in the EC Schedule.[811] **Japan** argues that the key language in the concession under tariff item number 8471 60 90 is the phrases "units thereof" and "output units".[812] **Chinese Taipei** examines the ordinary meaning of the term "output unit" from both general and specialized dictionaries.[813]

[811] United States' first written submission, para. 136.

[812] Japan's first written submission, para. 298 and 300 (Japan argues there is no dispute over the term "automatic data-processing machines" which includes "computers").

[813] Chinese Taipei's first written submission, para. 311, 323 and 325 (arguing that the terms "whether or not containing storage units in the same housing" in HS1996 subheading 8471 60 do not suggest that a display device capable of receiving signals both from an automatic data-processing machine and other sources would be excluded from the definition of HS1996 subheading 8471 60).

Input or output units

7.610 The **complainants** refer to definitions of the words "output" and "units" from both standard and technical dictionaries. They also consider the terms in combination. They do not address the term "input".

7.611 **Japan** notes that in a technical sense, "output" is defined as "data produced by a data-processing operation, or the information that is the objective or goal in data-processing".[814] In its ordinary sense, Japan notes that "output" is defined as "an electrical signal delivered by or available from an electronic device".[815]

7.612 **Chinese Taipei** refers to one definition of "output" as "energy produced by a machine; spec. an electrical signal delivered by or available from an electronic device. c. Data or results produced by a computer, the physical medium on which these are presented."[816] It also notes the definition, "power or energy produced or delivered by a machine or a system, e: the information produced by a computer (2) the act, process or an instance of producing (3) the terminal for the output of an electrical device."[817]

7.613 Chinese Taipei additionally refers to the definition of "unit" as "3. An individual thing, person or group regarded as single and complete, esp. for the purposes of calculation"[818], and "a piece or complex of apparatus serving to perform one particular function."[819]

7.614 The complainants also look at the use of the terms "output" and "unit", or output device, in combination. In particular, the **United States** notes that one technical definition of "input/output device" is "a unit that accepts new data, sends it into the computer for processing, receives the results, and translates them into a useable medium".[820] The complainants submit that "output unit" means "a unit which delivers information from the computer to an external device or from internal storage to external storage".[821]

7.615 Based on these definitions, the United States argues that an "output unit" under HS1996 code 8471 60 is a device that accepts new data, sends it into the computer for processing, receives the results, and translates them into a useable medium. It argues that an LCD computer monitor is an output unit of an ADP machine since it provides the results of processing to the user by providing a visual display of information received from the CPU. In its view, the mere fact that a monitor uses a

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[814] Japan's first written submission, para. 298 (referring to *McGraw-Hill Dictionary*, p. 1418 (Exhibit JPN-11)).
[815] Japan's first written submission, para. 87 (referring to the *Shorter Oxford Dictionary* (1993), pp. 3275, 2040 (Exhibit JPN-11)).
[816] Chinese Taipei's first written submission, paras. 313 and 316 (referring to the *Shorter Oxford Dictionary* (1993), p. 2040.
[817] Chinese Taipei's first written submission, paras. 313 and 316 (referring to http://www.merriam-webster.com/dictionary).
[818] Chinese Taipei's first written submission, para. 314 (referring to the *Shorter Oxford Dictionary* (1993), p. 3491).
[819] Chinese Taipei's first written submission, para. 317 (referring to http://www.merriam-webster.com/dictionary).
[820] United States' first written submission, para. 136 fn. 193; United States' second written submission, para. 99 (referring to *McGraw-Hill Dictionary* (5th ed. 1994), p. 1021(Exhibit US-82)).
[821] United States' first written submission, para. 136, fn. 193, United States' second written submission, para. 99 and Japan's first written submission, para. 298 and Chinese Taipei's first written submission, para. 319 (all referring to *McGraw-Hill Dictionary* (5th ed. 1994), p. 1419 (Exhibits US-83; JPN-11)).

DVI connector, for instance, to transmit the information displayed does not render it something other than an output unit of an ADP.[822]

7.616 **Japan** submits that the phrase "output unit" or "output device" refers to devices that display or in some other way use computer output. Thus, it argues, display monitors that can display data from a computer are "output devices". Japan considers that "output units" refers to the wide range of "units" covered by HS1996 heading 8471, where in its context "output" means the electric signal delivered by the computer to which the "output unit" has been connected. This language speaks to the interconnectivity between the computer and any units used in connection with that computer. Accordingly, it argues, any device that is connectable to a computer falls within the scope of that heading.[823]

7.617 Japan additionally considers the use of the term "unit thereof" in heading 8471. Japan cites the definition of "thereof" as "of that, concerning that".[824] In its view the terms "units thereof" in heading 8471 refers to devices designed and engineered to be connected to and used in an integrated fashion with computers. Japan further submits that the language "units thereof" imposes no limitation and thus all "units thereof" are covered under subheading 8471 60, not just units that are exclusively dedicated to automatic data-processing machines.[825]

7.618 Taking into consideration what it considers the technology and ordinary meanings, Japan argues that an "output unit" of an automatic data-processing machine is some device that can receive and then act upon electrical signals coming from a computer, without limitation regarding what the device may connect to. Japan submits that an LCD monitor qualifies as an "output unit" of an ADP machine. "By virtue of" the DVI, it argues, the LCD monitor can receive signals from the computer and display them on the display screen.[826]

7.619 Chinese Taipei argues that the ordinary meaning of the terms "output units" in HS1996 subheading 8471 60 includes those FPDs capable of receiving signals both from an automatic data-processing machine and other sources. Chinese Taipei argues that the ordinary meaning of an "output unit" is "very broad" and covers a piece or complex of apparatus serving to deliver information or data produced by a computer.[827]

7.620 The **European Communities** does not dispute that "genuine ADP monitors",_would fall within HS1996 subheading 8471 60. However, it argues that it is not entirely clear whether products identified by the complainants, including what it calls "multifunctional LCD monitors" fall within the scope of the concession. To the extent they would qualify under tariff item number 8471 60 90, the European Communities argues that those products receive duty-free treatment, and that there is thus no need to examine the ordinary meaning of the concessions. But, the European Communities argues, certain FPDs may also fall within the ordinary meaning of "video monitors" under HS1996 headings 8528 21 and 8528 22, or, in some cases, as "reception apparatus for television" under HS1996 headings 8528 12 and 8528 13.[828]

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[822] United States' first written submission, para. 136.
[823] Japan's first written submission, paras. 299-301; Japan's second written submission, paras. 187-188.
[824] Japan's first written submission, para. 87 (referring to the *Shorter Oxford Dictionary* (1993), pp. 3275, 2040 (Exhibit JPN-11).
[825] Japan's first written submission, para. 300; Japan's second written submission, para. 185.
[826] Japan's first written submission, paras. 302-303.
[827] Chinese Taipei's first written submission, paras. 318-320.
[828] European Communities' first written submission, paras. 100-101.

Consideration by the Panel

7.621 The **Panel** notes that, in interpreting the meaning and scope of the concession at issue, the complainants have relied on a variety of definitions from both technical dictionaries and more general dictionaries of the English language. Given the terms involved, we think this is appropriate.[829]

7.622 Before we start our analysis of the specific terms used in the concession based on these dictionary definitions, we recall the Appellate Body's statement that, while dictionaries are a "useful starting point" for the analysis of "ordinary meaning" of a treaty term they "are not necessarily dispositive".[830] We are also aware that understanding the plain meaning of the text is the beginning of our inquiry and not the end. While we may organize our analysis of the ordinary meaning into different sections, for the sake of convenience, we remain cognizant that we are conducting an holistic analysis of the ordinary meaning and that the text of the terms cannot be divorced from the context and the object and purpose of the treaty.[831]

7.623 The complainants provided a number of definitions of the term "output", both in isolation as well as in combination with the term "unit". All of these definitions support the understanding that "output" in a general sense refers to an electrical signal delivered by or available from an electronic device, or in particular, data or information. Such data or input could include that produced and delivered by an automatic data-processing machine.

7.624 The concession in subheading 8471 60 (and tariff item number 8471 60 90 by extension) does not cover the outputs themselves, but "output units". As discussed by Chinese Taipei, "unit" refers to, *inter alia* "a device with a specified function forming part of a complex mechanism". This definition indicates that the meaning of "output units" cannot be dissociated from the question of what is the "function performed" by such units and what complex mechanism they are a part of. To that end, we recall that subheading 8471 60 is a subheading of 8471 which covers "automatic data-processing machines" and "units thereof". Therefore, the "other" covered by tariff item number 8471 60 90 in the EC Schedule would be all "input or output units" of automatic data-processing machines that are not "for use in civil aircraft" (8471 60 10), "printers" (8471 60 40) or "keyboards" (8471 60 50).

7.625 We note that all parties agree that computers qualify as "automatic data-processing machines" as used in HS1996 heading 8471. We note further that "units" of "an automatic data-processing machine" are devices forming part of and having at least one specified function in an ADP. Because the "units" in question are "output" units of ADPs, it logically follows that the functions such "units"

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[829] Other panels have also examined technical dictionaries when conducting an ordinary meaning analysis pursuant to Article 31 of the Vienna Convention. See e.g., the Panel Report on *Mexico – Telecoms*, paras. 7.81-7.83 (using the Newton's Telecom Dictionary to interpret certain terms from Mexico's Services Schedule); Panel Report on *China – Auto Parts*, paras. 7.660-7-661 (using the Dictionary of Automobile Engineering, an automobile industry dictionary, to interpret China's Schedule); Panel Report on *EC – Approval and Marketing of Biotech Products*, para. 7.372 (using the Glossary of Biotechnology for Food and Agriculture, a biotech industry dictionary, to define the word "biodiversity"); *See also* the Appellate Body Report on *EC - Poultry*, para. 92 (citing the Dictionary of Trade Policy Terms and the Dictionary of International Trade).

[830] The Appellate Body Report on *EC – Chicken Cuts*, para. 175 (citing the Appellate Body Reports on: *US - Softwood Lumber IV*, para. 59; *US - Offset Act (Byrd Amendment)*, para. 248; and *US - Gambling*, para. 166). See also the Appellate Body Reports on: *China - Publications and Audiovisual Products*, para. 348; and *India - Additional Import Duties*, para. 167, fn. 324.

[831] In this respect, we recall that the Appellate Body in *EC – Chicken Cuts*, noted that "Interpretation pursuant to the customary rules codified in Article 31 of the Vienna Convention is ultimately an holistic exercise that should not be mechanically subdivided into rigid components." (Appellate Body Report on *EC - Chicken Cuts*, para. 176).

are required to perform are the sending/receiving of electrical signals, information, or data from an ADP.[832]

7.626 Therefore, we preliminarily conclude that the plain meaning of the term "output units" in the relevant concession, i.e., subheading 8471 60, refers to devices that form part of an ADP or an ADP system and that perform at least one specified function involving sending/receiving signals, information or data from the ADP or ADP system. This being the case, the concession in 8471 60 90 of the EC Schedule would cover all "input or output units" of automatic data-processing machines that are not "for use in civil aircraft" (8471 60 10), "printers" (8471 60 40) or "keyboards" (8471 60 50).

7.627 We now turn to consider whether reading the terms of the concession in their context confirms or changes our preliminary understanding of the plain meaning of the term "output units" in the concession.

(ii) The terms of tariff item number 8471 60 90 in their context

7.628 The **complainants** argue that various contextual elements, including the structure of heading 8471, the language used in various subheadings and the interpretative materials in the HS1996, such as the notes to Chapter 84, support the conclusion that the scope of tariff item number 8471 60 90 in the EC Schedule is broad enough to include LCD monitors and other display devices, that are fitted with connectors, such as DVI, that can receive and reproduce signals from an automatic data-processing machine, regardless of whether they can also connect to other devices.[833]

7.629 The **European Communities** argues that the key question is whether a given LCD monitor falls within the scope of tariff item number 8471 60 90 or under one of the headings of Chapter 85.[834] Contrary to the complainants, the European Communities argues that it has followed the HSEN1996 to heading 8471 in classifying FPDs under subheadings 8528 12 and 8528 13 and 8528 21 and 8528 22, where appropriate.[835] Specifically, the European Communities argues that it has simply been applying the criteria contained therein to distinguish between display units of ADP machines and video monitors. At the time relevant to this dispute, the language of the Explanatory Note to heading 8471 with regard to "separately presented units" such as "display units of automatic data-processing machines" stated that display units of ADP machines were "capable of accepting a signal only from the central processing unit of an automatic data-processing machine and [were] therefore not able to reproduce a colour image from a composite video signal whose waveform conforms to a broadcast standard (NTSC, SECAM, PAL, D-MAC etc.)". Such display units, it argues, were equally "fitted with connectors characteristic of data-processing systems (e.g. RS-232C interface, DIN or SUB-D connectors)". According to the European Communities, these are precisely the two criteria that the

[832] The parties have not raised the issue as to whether the displays under discussion in this dispute are those of a type included within the same housing as the microprocessor and other components of an automatic data-processing machine, or those external to the housing of an automatic data-processing machine. We recall that the parties have limited their arguments to finished products, and not semi-finished ones. Accordingly, we will focus our assessment here on finished products, or external displays or monitors, and not semi-finished components that may be incorporated in the housing of an automatic data-processing machine.

[833] United States' first written submission, paras. 137-139; United States' second written submission, paras. 99-100; Japan's first written submission, para. 304; Japan's second written submission, para. 189; Chinese Taipei's first written submission, para. 323-348.

[834] European Communities' first written submission, para. 134. The European Communities argues, in particular, that it is first necessary to exclude the applicability of other headings including 8528 before considering whether the products at issue can fall within residual CN code 8471 60 90.

[835] European Communities' first written submission, para. 158.

complainants claim the European Communities should not have applied.[836] But, it argues, even if the HSEN1996 to heading 8471 were ignored it would still be necessary "in most cases" to resort to the application of GIR 3(c) because it would be impossible to identify the principal function of the multifunctional monitor.[837]

The terms of HS1996 heading 8471, other subheadings under it and its overall structure

Arguments of the parties

7.630 The **complainants** argue that the duty-free concession in heading 8471 covers not only parts of the heading, but the entire heading. **Japan** believes this indicates that the duty-free treatment was intended to be offered to all devices that are computers or are used in conjunction with computers.[838] This is confirmed, argues Japan, by the use of the term "units thereof" in the heading. Because the subheading in subheading 8471 60 clarifies that "units thereof" includes "input or output units", the complainants believe that the concession broadly covers any devices used either to input information into a computer or to output information coming from a computer.[839] Finally, Japan also claims that the meaning "units thereof" indicates that the language of HS1996 heading 8471 is not limited by the technology used in the products falling under it, which confirms that this heading "is broad enough to cover products using changed technology."[840]

7.631 The **complainants** further argue that the overall structure of HS1996 heading 8471, which includes several subheadings, confirms the broad scope of the European Communities' concession.[841] They consider that the terms of the other subheadings under HS1996 heading 8471 taken together provide strong contextual support for understanding that all types of computers and all types of computer units – separately or in various combinations – fall within heading 8471.[842]

7.632 In particular, **Japan** submits that HS1996 subheadings 8471 41, 8471 49 and 8471 50 cover different types of products that combine a computer with some other computer related devices.[843] The text of these three headings is:

> 8471 41: "- Other digital automatic data-processing machines; - - comprising in the same housing at least a central processing unit and an input and output unit, whether or not combined"
>
> 8471 49: "- Other digital automatic data-processing machines; - - Other, presented in the form of systems"
>
> 8471 50: "- Digital processing units other than those of subheadings No 8471 41 and 8471 49, whether or not containing in the same housing one or two of the following types of unit: storage units, input units, output units"[844]

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[836] European Communities' first written submission, para. 158.
[837] European Communities' first written submission, para. 159.
[838] Japan's first written submission, para. 304.
[839] Japan's first written submission, para. 305.
[840] Japan's response to Panel question No. 13.
[841] United States' second written submission, para. 99 (referring to United States' first written submission, para. para. 137); Japan's first written submission, para. 305; Chinese Taipei's first written submission, para. 328.
[842] United States' first written submission, para. 137; Japan's first written submission, para. 316; Chinese Taipei's first written submission, para. 329.
[843] Japan's first written submission, para. 310.

7.633 It argues, however, that the rest of the subheadings deal with "units" of computers that do not include computers, such as HS1996 subheadings 8471 60 (input and output units); 8471 70 (storage units) and 8471 80 (other types of units).[845] Finally, Japan notes that subheading 8471 90 captures "other" devices that would otherwise be included in heading 8471 but that do not fall within any of the earlier subheadings.[846]

7.634 **Chinese Taipei** argues that heading 8471 makes clear that all types of automatic data-processing machines are covered, including, under HS1996 subheading 8471 10, 8471 30, 8471 41 and 8471 49.[847] Chinese Taipei notes that subheading 8471 60 contains a residual heading under eight-digit tariff item number 8471 60 90 ("- - Other; "- - - Other"). Chinese Taipei submits that the existence of the "other"[848] subcategory indicates therefore that, under the EC Schedule, *all* "input or output units" of computers that are not specifically covered by one of the tariff item numbers under the HS1996 subheading 8471 60 (i.e., as "printers" or "keyboards") fall under the "residual" tariff item number 8471 60 90. Chinese Taipei reasons that the existence of a "residual subheading" in the EC Schedule is important as it tends to underline the "broad scope" of the EC concession in HS1996 subheading 8471 60, under which it is included.[849]

7.635 The **European Communities** has argued in this dispute that the mere presence of an "others" subheading within 8471 cannot have the effect of expanding the coverage of that heading beyond its own terms.[850] In the European Communities' view, because the present dispute concerns issues with respect to concessions based on subheadings belonging to different HS1996 Chapters (Chapters 84 and 85), "in resolving those issues no relevant contextual guidance can be drawn from the mere fact that HS1996 heading 8471 includes an 'Other' subheading."[851]

Consideration by the Panel

7.636 The **Panel** recalls that the Appellate Body has confirmed that the HS may provide additional relevant context to the interpretation of a given tariff concession.[852] The parties all agree that the HS1996, on which the concession in CN 8471 60 in the EC Schedule is based, is the relevant HS document to provide context for the ordinary meaning of that concession.[853] The Panel finds, therefore, that the other parts of heading 8471 are relevant context for determining the scope of the meaning of the terms used in the concession.

7.637 In this regard, we observe that heading 8471 is structured in broad terms as follows:

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[844] Japan's first written submission, paras. 307-309.
[845] Japan's first written submission, para. 314.
[846] Japan's first written submission, para. 315.
[847] Chinese Taipei's first written submission, para. 328.
[848] Chinese Taipei's first written submission, para. 554 (citing the *Shorter Oxford Dictionary* (1993) defining "other" as "existing besides or distinct from that or those already specified or implied; further, additional").
[849] Chinese Taipei's first written submission, paras. 328, 555-557; Chinese Taipei's second written submission, para. 333. Japan, more generally, refers to the European Communities' concession in CN code 8471 60 90 ("Other"), together with the text of other subheadings, as part of its contextual arguments on the "structure" of HS1996 heading 84.71 (see Japan's first written submission, para. 142).
[850] European Communities' first written submission, para. 424.
[851] The European Communities' response to Panel question No. 13.
[852] Appellate Body Report on *EC – Chicken Cuts*, para. 199; Appellate Body Report on *China - Auto Parts*, para. 151.
[853] Parties' response to Panel question No. 104.

HS1996	Description
8471	Automatic data-processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included:
8471 10	- Analogue or hybrid automatic data-processing machines
8471 30	- Portable digital automatic data-processing machines, weighing not more than 10 kg, consisting of at least a central processing unit, a keyboard and a display
	- Other digital automatic data-processing machines:
8471 41	- - Comprising in the same housing at least a central processing unit and an input and output unit, whether or not combined
8471 49	- - Other, presented in the form of systems
8471 50	- Digital processing units other than those of subheading 8471 41 or 8471 49, whether or not containing in the same housing one or two of the following types of unit: storage units, input units, output units
8471 60	- Input or output units, whether or not containing storage units in the same housing
8471 70	- Storage units
8471 80	- Other units of automatic data-processing machines
8471 90	- Other

7.638 In particular, we observe that the structure and wording of heading 8471 seem to encompass *all* types of computer units within its parameters. The structure has the logic of first looking at ADPs themselves (8471 10, 8471 30, 8471 41 and 8471 49)[854] and then moving on to "units" of those computers in the various ways they are presented – i.e., as part of a computer, as systems, with digital processing units, input or output units, storage units on a stand-alone basis, and other ADP units. In particular, we note the residual category of "other". We agree with the European Communities that the inclusion of an "other" category in a heading or subheading cannot lead to an interpretation beyond its terms. However, the inclusion of an "other" subheading can indicate that the terms of the remaining subheadings do not by themselves delineate the limits of the scope of the main heading. This structure, along with the generic nature of the language in the main heading, lends credence to an interpretation of heading 8471 that it is meant to include *any* type of ADP unit.

7.639 At the same time, our understanding of the broad nature of the scope of 8471 is *not* informed by the fact that the entire heading was included in the duty-free concession in the ITA. Contrary to the complainants' arguments, we do not believe this provides any guidance to the effect that terms within that heading are to be interpreted broadly. It could be equally plausible that the entire heading was included in the duty-free category because it was narrowly construed and therefore, duty-free treatment would be limited to a small set of products. That being said, however, our broad understanding of the coverage of heading 8471 is based on the words in the heading itself in conjunction with its structure. On the other hand, our analysis cannot end with an understanding that heading 8471 has a broad coverage; indeed the relevant concession under consideration is not 8471 generally, but rather the specific subheading 8471 60 for input or output units.

7.640 We note that subheading 8471 60 in the EC Schedule follows the same type of structural logic as the main heading. It begins generally with input or output units and then specifies the coverage of printers, keyboards, and a residual category "other". As with the main heading, subheading 8471 60

[854] We do note that even within 8471 30 the term "unit" is used to describe the Central Processing Unit ("CPU") which is the main component of an automatic data-processing machine, therefore it seems that the term "unit" can also refer to parts of an automatic data-processing machine.

contains generic language "input or output units" and then has eight-digit tariff item number which further subdivide the broader category. One of these eight-digit codes is "other", which as noted above could indicate that the subheading under which it falls is not intended to be narrowly construed.

7.641 Thus the context provided by the terms of heading 8471 and subheading 8471 60 further informs our earlier understanding that the plain meaning of the text of the terms in the concession covers devices that form part of an ADP or ADP system and that perform at least one specified function involving sending/receiving signals, information or data from the ADP or ADP system. Under this scenario, the concession in 8471 60 90 of the EC Schedules would cover all "input or output units" that are not "for use in civil aircraft" (8471 60 10), "printers" (8471 60 40) or "keyboards" (8471 60 50).

The HS1996: Note 5 to Chapter 84 and the HSEN1996 to heading 8471 and heading 8528

7.642 The **complainants** have discussed the contextual relevance of the text of HS1996 Note 5 to chapter 84 to understanding the scope of the European Communities' concession of duty-free treatment for "input or output units" in subheading 8471 60. They consider that the chapter notes, in particular Notes 5(B) and 5(C) to chapter 84 provide further contextual support for the broad interpretation of the terms "input or output units" in the text of subheading 8471 60 in the EC Schedule.[855] By contrast, the **European Communities** argues that the language of those chapter notes with regard to "display units of automatic data-processing machines" confirms that products capable of receiving or reproducing signals from sources other than an automatic data-processing machine are properly classifiable under HS1996 Chapter 85[856], "in most cases" through the application of GIR 3(c) because it would be impossible to identify the principal function of a monitor.[857]

7.643 We recall that the Appellate Body has confirmed that the HS may provide additional relevant context to the interpretation of a given tariff concession, including not only the text of the Chapter, heading and subheadings, but also the Section, Chapter heading and subheadings notes, the HSEN and the GIRs.[858] The parties all agree that the 1996 version of the Harmonized System, on which the concession in subheading 8471 60 in the EC Schedule is based, is the relevant document of the HS to provide context for the ordinary meaning of that concession.[859] The **Panel** finds, therefore, that the Section, Chapter, heading and subheadings notes, the HSEN and the GIRs that have been to referred to by the parties *qualify* as context for interpreting the concessions in subheading 8471 60 of the EC Schedule. In doing this, we are mindful of the Appellate Body's general proposition that the binding elements of the HS may have greater probative value than those which are non- binding.[860]

[855] United States' first written submission, para. 138; Japan's first written submission, para. 318; Chinese Taipei's first written submission, para. 331. (Exhibits US-84, JPN-23; EC-15).

[856] European Communities' first written submission, para. 158.

[857] European Communities' first written submission, para. 159.

[858] Appellate Body Reports on *EC - Computer Equipment*, para. 89; *EC – Chicken Cuts*, para. 199 and *China – Auto Parts*, para. 151.

[859] The parties' responses to Panel question No. 132 (arguing that the HS1996 applied at the time of the concession and that the HS2007 (and the Explanatory Notes thereto) are neither 'context' under Article 31(2) of the Vienna Convention, nor an element 'to be taken into account together with the context', under Article 31(3) of the Vienna Convention).

[860] Appellate Body Report on *EC – Chicken Cuts*, para. 224.

Notes 5(B) and 5(C) to HS1996 Chapter 84

7.644 The **complainants** submit that Note 5(B)(a) to HS1996 Chapter 84 permits that a "unit" is considered part of an automatic data-processing system when "it is either 'of a kind solely or principally used' in an automatic data-processing system".[861] They argue that solely or principally have different meanings. Therefore, they argue that the mere possibility that a display device could receive and reproduce signals from a source other than an automatic data-processing machine is not sufficient to exclude it from HS1996 heading 8471.[862]

7.645 In particular, **Japan** notes that the first sentence of Note 5(B) indicates that "solely" and "principally" are alternatives.[863] It argues that a product should qualify under Note 5(B) as a "unit" of an automatic data-processing machine if it is either "solely" or "principally" of a kind used with an automatic data-processing machine.[864] Japan notes that the word "solely" means "as a single person or thing; without any other as an associate, etc.; alone" and that "principally" means "for the most part; in most case".[865] Based on these definitions, Japan contends that "solely" in Note 5(B) means a unit is only used in an automatic-data-processing system, whereas "principally" means that the unit may be used in connection with machines other than automatic data-processing systems. Thus, it considers that displays that are capable of receiving and reproducing signals from sources other than solely an automatic data-processing system should qualify under heading 8471 as "principally" used with an automatic data-processing machine. By requiring exclusive use with an automatic data-processing machine under the measures at issue, Japan argues that the EC measures at issue render the term "principally" in Note 5(B)(a) "inutile".[866]

7.646 **Chinese Taipei** argues that the ordinary meaning of the term "principally" is "1. in the chief case, above all, pre-eminently" or "3 For the most part; in most cases", which it considers makes clear that "principally" does not exclude other uses.[867] Accordingly, the **United States** and Chinese Taipei argue that an output unit of an automatic data-processing machine that is capable of receiving signals from sources other than an automatic data-processing machine can still fall within the scope of HS1996 heading 8471 as an output unit "principally" for use with an automatic data-processing machine.[868]

7.647 Japan and Chinese Taipei additionally argue that Note 5(C) to Chapter 84 applies because it discusses "separately presented units of an automatic data-processing machine".[869] They consider this paragraph provides the broadest possible reading of heading 8471 because it includes any unit "of" an

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[861] United States' first written submission, paras. 138-139 (Exhibit US-84); United States' second written submission, para. 100; Chinese Taipei's first written submission, paras. 332-333.

[862] United States' first written submission, para. 138, United States' second written submission, para. 100; Japan's first written submission, para. 337; Chinese Taipei's first written submission, paras. 334; 337-338.

[863] In its first submission, Japan indicates that Note 5(B) to Chapter 84 does not appear to apply directly to "separately presented units of "an automatic data-processing machine", but "separate units" of "systems" of automatic data-processing machines. Japan submits that the displays at issue are not necessarily parts of "systems", leaving the applicability of Note 5(B) unclear. Nevertheless it considers the meaning, in light of the European Communities' identification of Note 5 (Japan's first written submission, paras. 332-334).

[864] Japan's first written submission, paras. 332-334.

[865] Japan's first written submission, paras. 333-334 (referring to the *Shorter Oxford Dictionary* (1993), pp. 2939 and 2356 (Exhibit JPN-11)).

[866] Japan's first written submission, para. 337.

[867] Chinese Taipei's first written submission, para. 335 (referring to the *Shorter Oxford Dictionary* (1993), p. 2356).

[868] Chinese Taipei's first written submission, paras. 334; 337-338.

[869] Japan's first written submission, para. 234; Japan's second written submission, para. 192.

automatic data-processing machine, and states that such units are to be classified in heading 8471.[870] Japan submits that the definition "of" – including, "related to (a thing) in a way defined, specified, or implied by the preceding words" – indicates a broad application and does not require exclusivity.[871] Thus, it argues that monitors that are capable of receiving or reproducing signals of an automatic data-processing machine through a DVI are a "units" of an automatic data-processing machine, regardless of whether they can reproduce or receive signals from other sources.[872] Chinese Taipei takes Japan's view that Note 5(C) does not require exclusive use with an automatic data-processing machine in order to be classified under heading 8471.[873]

HSEN1996 to heading 8471 and heading 8528

7.648 The **European Communities** argues that the language of HSEN1996 to heading 8471 with regard to separately presented units" such as display units of automatic data-processing machines confirms that products capable of receiving or reproducing signals from sources other than an automatic data-processing machine are properly classifiable under HS1996 Chapter 85.[874] In particular, the European Communities cites the language in HSEN1996, Note I(D)(1) to heading 8471 that states: "Display units of automatic data-processing machines are capable of accepting a signal only from the central processing unit of an automatic data-processing machine ... They are fitted with connectors characteristic of data-processing systems (e.g. RS-232C interface, DIN or SUB-D connectors) and do not have an audio circuit...".[875] The European Communities additionally cites the HSEN1996 to heading 8528 that provides: "video monitors of this heading should not be confused with the display units of [ADP] machines described in the Explanatory Note to heading 8471".[876]

7.649 The **complainants** submit that HSEN to headings 8471 and 8528 should not be relied on to inform interpretation of tariff item number 8471 60 90.[877] In particular, Japan and Chinese Taipei argue that, by referring to ADP monitors as "accepting a signal *only* from an ADP machine," the HSEN to 8471 Point I(D)(1) contradicts the wording of Note 5(B)(a) to Chapter 84 that refers to input or output units "of a kind *principally or solely* for use in an ADP system" (emphasis added) and

[870] Japan's first written submission, para. 324.
[871] Japan's first written submission, para. 325.
[872] Japan's first written submission, paras. 327-328.
[873] Chinese Taipei's first written submission, para. 340.
[874] European Communities' first written submission, para. 158.
[875] European Communities' first written submission, paras. 156 and 158.
[876] European Communities' first written submission, paras. 156-157. The European Communities recognizes that the European Court of Justice in its preliminary ruling in *Kamino* identified a textual conflict between the language in HSEN to heading 8471 and that in Note 5(B)(a) to Chapter 84, ruling that the conflicting part in HSEN to heading 8471 is inapplicable on the basis of the hierarchy of Notes in the CN and the HS (European Communities' first written submission, para. 165). Based on this, the European Communities acknowledges that its classification justification in most cases is "too rigid" and needs to be reviewed (European Communities' first written submission, paras. 166-167).
[877] United States' second written submission, para. 100; Japan's second written submission, para. 191; Chinese Taipei's second written submission, para. 185. The United States argues that HSEN cannot supersede Chapter Notes. Chinese Taipei argues that the HSEN are not legally binding and thus should not be given interpretative value where they conflict with binding HS section or chapter notes or with the wording of HS headings.

therefore must be ignored.[878] Thus, they reject that the HSEN(1996) to heading 8471, including its Point I(D), justifies reading the term "principally" out of Note 5(B)(a) to Chapter 84.[879]

The application of GIR 3(c)

7.650 To the extent the HSEN1996 to heading 8471 were considered irrelevant, the European Communities argues that it would still be necessary "in most cases" to resort to the application of GIR 3(c) because it would be impossible to identify the principal function of a monitor. It argues that the assessment of whether a monitor is "principally" for use with an automatic data-processing machine – and thus, whether or not it is classifiable under HS1996 heading 8471 – requires a case-by-case analysis on the basis of objective technical characteristics. In such an assessment, it argues, recourse to GIR 3(c) may be necessary where the principal function cannot be identified. If GIR 3(c) is applied, the European Communities argues, relevant monitors would then be classified in one of the subheadings in heading 8528 because that occurs last in numerical order among those which equally merit consideration, i.e., as a video monitor or reception apparatus for television.[880]

7.651 The complainants reject this view.[881] Japan argues that resort to GIR 3(c) is incorrect if the interpretative question can be resolved by reference to the language of the relevant heading.[882] In general, Chinese Taipei cautions against application of rule GIR 3(c), arguing that classification under the heading that occurs last in numerical order among those which equally merit consideration is arbitrary and "without economic or real basis".[883] It argues that the application of GIR 3(c) to devices able to reproduce signals from sources other than automatic data-processing machines would nevertheless violate EC obligations under tariff item number 8471 60 90 in its Schedule, because application of this rule should lead to classification in either headings 8531 or 9013, not heading 8528 as the European Communities has argued.[884] The United States argues that GIR 3 should not be applied in these circumstances since the products at issue are in no way classifiable outside of chapter 84 or chapter 85.[885]

Consideration by the Panel

7.652 The **Panel** notes at the outset that the discussion of the HS1996 Notes in this section of the Reports is related to the contextual value that Note 5 to Chapter 84 provides for interpreting the ordinary meaning of the terms in subheading 8471 60 in the EC Schedule– i.e., in this instance,

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[878] Japan's second written submission, para. 193; Chinese Taipei's second written submission, para. 185; Chinese Taipei's second oral statement, para. 18.

[879] United States' second written submission, para. 100; Japan's second written submission, para. 191; Chinese Taipei's second oral statement, para. 17. Chinese Taipei submits that the European Court of Justice in *Kamino* confirmed that any CNEN and HSEN that would require exclusive use with an automatic data-processing machine for a classification under heading 8471 is inapplicable, since it would modify the scope of Note 5(B)(a) to Chapter 84 (Chinese Taipei's first written submission, para. 208).

[880] European Communities' first written submission, paras. 159 and 166.

[881] United States' response to Panel question No. 20; Japan's second written submission, para. 194; Chinese Taipei's second written submission, para. 182.

[882] Japan's second written submission, para. 194; Japan's response to Panel question No. 20.

[883] Chinese Taipei's response to Panel question No. 20.

[884] Chinese Taipei submits that the European Communities' application of GIR3(c) would regardless be inconsistent with its obligations, because it considers that it would not lead to classification of display devices under heading 8528 but instead to duty-free headings 8531 or 9013 that equally merit consideration and occur later in numerical order than 8528 (Chinese Taipei's first written submission, para. 340; Chinese Taipei's second written submission, para. 186).

[885] United States' response to Panel question No. 20.

"output units". We recognize that HS1996 Note 5 to Chapter 84 is relevant in determining whether the flat panel display devices identified by the complainants – those flat panel display devices that are fitted with a DVI interface, or similar connector, and/or are capable of reproducing and receiving video signals from automatic data-processing machines as well as other sources – could fall within the scope of 8461 60. We thus begin our analysis of what context Note 5 provides to an understanding of the concession in 8471 60.

7.653 HS1996 Note 5 to Chapter 84 provides[886]:

"Chapter 84

Nuclear reactors, boilers, machinery and mechanical appliances; parts thereof

Notes.

[...]

5.(A) For the purposes of heading No. 84.71, the expression "automatic data-processing machines" means :

(a) Digital machines, capable of (1) storing the processing program or programs and at least the data immediately necessary for the execution of the program; (2) being freely programmed in accordance with the requirements of the user; (3) performing arithmetical computations specified by the user; and, (4) executing, without human intervention, a processing program which requires them to modify then-execution, by logical decision during the processing run;

(b) Analogue machines capable of simulating mathematical models and comprising at least: (1) analogue elements, control elements and programming elements;

(c) Hybrid machines consisting of either a digital machine with analogue elements or an analogue machine with digital elements.

(B) Automatic data-processing machines may be in the form of systems consisting of a variable number of separate units. Subject to paragraph (E) below, a unit is to be regarded as being a part of a complete system if it meets all of the following conditions:

(a) It is of a kind solely or principally used in an automatic data-processing system;

(b) It is connectable to the central processing unit either directly or through one or more other units; and

(c) It is able to accept or deliver data in a form (codes or signals) which can be used by the system.

(C) Separately presented units of an automatic data-processing machine are to be classified in heading No. 8471.

[886] Exhibits US-84; JPN-23; EC-15.

(D) Printers, keyboards, X-Y co-ordinate input devices and disk storage units which satisfy the conditions of paragraphs (B) (b) and (B) (c) above, are in all cases to be classified as units of heading No. 8471.

(E) Machines performing a specific function other than data-processing and incorporating or working in conjunction with an automatic data-processing machine are to be classified in the headings appropriate to their respective functions or, failing that, in residual headings.

[...]

Subheading Notes.

1.- For the purposes of subheading No. 8471.49, the term "systems" means automatic data-processing machines whose units satisfy the conditions laid down in Note 5(B) to Chapter 84 and which comprise at least a central processing unit, one input unit (for example a keyboard or scanner), and one output unit (for example, a visual display unit or a printer)."

7.654 The parties have additionally discussed the relevance of HSEN1996 to headings 8471 and 8528.

7.655 HSEN1996 to Heading 8471 provides:

"I.– Automatic data-processing machines and units thereof

(…)

D.– Separately presented units

This heading also cover separately presented units of data-processing systems. These may be in the form of units having a separate housing and designed to be connected, for example, by cables to other machines on a system, or in the form of units not having a separate housing and designed to be inserted into a machine (e.g., insertion onto the main board of a central processing unit). Constituent units are those defined in Parts (A) and (B) above as being parts of a complete system.

Among the constituent units included are display units of automatic data-processing machines which provide a graphical representation of the data processed. They differ from the video monitors and television receivers of heading 8528 in several ways, including the following:

(1) Display units of automatic data-processing machines are capable of accepting a signal only from the central processing unit of an automatic data-processing machine and are therefore not able to reproduce a colour image from a composite video signal whose waveform conforms to a broadcast standard (NTSC, SECAM, PAL, D-MAC etc.). They are fitted with connectors characteristic of data-processing systems (e.g. RS-232C interface, DIN or SUB-D connectors) and do not have an audio circuit. They are controlled by special adaptors (e.g. monochrome or graphics adaptors) which are integrated in the central processing unit of the data-processing machine.

(2) These display units are characterised by low magnetic field emissions. Their display pitch starts at 0.41 mm for medium resolution and gets smaller as the resolution increases.

(3) In order to accommodate the presentation of small yet well-defined images, display units of this heading utilise smaller dot (pixel) sizes and greater convergence standards than those applicable to video monitors and television receivers of heading 8528. (Convergence is the ability of the electron gun(s) to excite a single spot on the face of the cathode-ray tube without disturbing any of the adjoining spots.)

(4) In these display units, the video frequency (bandwidth), which is the measurement determining how many dots can be transmitted per second to form the image, is generally 15 MHz or greater. Whereas, in the case of video monitors of heading 8528, the bandwidth is generally no greater than 6 MHz. The horizontal scanning frequency of these display units varies according to the standards for various display modes, generally from 15 kHz to over 155 kHz. Many are capable of multiple horizontal scanning frequencies. The horizontal scanning frequency of the video monitors of heading 8528 is fixed, usually 15.6 or 15.7 kHz depending on the applicable television standard. Moreover, the display units of automatic data-processing machines do not operate in conformity with national or international broadcast frequency standards for public broadcasting or with frequency standards for closed-circuit television.

(5) Display units covered by this heading frequently incorporate tilt and swivel adjusting mechanisms, glare-free surfaces, flicker-free display, and other ergonomic design characteristics to facilitate prolonged periods of viewing at close proximity to the unit...".[887]

7.656 HSEN1996 to Heading 8528 provides:

"This heading covers television receivers (including video monitors and video projectors), whether or not incorporating radio-broadcasting receivers or sound or video recording or reproducing apparatus.

This heading includes:

(1) Television receivers of the kind used in the home (table models, consoles, etc.) including coin-operated televisions sets.

(…)

(5) Video monitors which are receivers connected directly to the video camera or recorder by means of co-axial cables, so that all the radio-frequency circuits are eliminated. They are used by television companies or for closed-circuit television (airports, railway stations, steel plants, hospitals, etc.). These apparatus consist essentially of devices which can generate a point of light and display it on a screen synchronously with the source signals. They incorporate one or more video amplifiers with which the intensity of the point can be varied. They can, moreover, have separate inputs for red (R), green (G) and blue (B), or be coded in accordance with a

[887] Exhibit EC-11.

particular standard (NTSC, SECAM, PAL, D-MAC, etc.). For reception of coded signals, the monitor must be equipped with a decoding device covering (the separation of) the R, G and B signals. The most common means of image reconstitution is the cathode-ray tube, for direct vision, or a projector with up to three projection cathode-ray tubes; however, other monitors achieve the same objective by different means (e.g., liquid crystal screens**,** diffraction of light rays on to a film of oil).

Video monitors of this heading should not be confused with the display units of automatic data-processing machines described in the Explanatory Note to heading 8471.

(...)

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* *

The heading excludes, *inter alia*:

(a) Display units of automatic data-processing machines, whether or not presented separately (heading 8471) ...".[888]

7.657 The parties have also addressed the relevance of GIR 3(c) which provides:

"When goods cannot be classified by reference to Rule 3 (a) or 3 (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration".

7.658 Finally, in respect of this rule, HSEN1996 Explanatory Note VI to Section Note 3 as follows:

"In general, multi-function machines are classified according to the principal function of the machine.

(…)

Where it is not possible to determine the principal function, and where, as provided in Note 3 to the Section, the context does not otherwise require, it is necessary to apply General Interpretative Rule 3 (c); such is the case, for example, in respect of multi-function machines potentially classifiable in several of the headings 84.25 to 84.30, in several of the headings 84.58 to 84.63 or in several of the headings 84.69 to 84.72."[889]

7.659 We recall from paragraph 7.34 above that Article 1(a) of the HS Convention provides that the HS comprises headings and subheadings and their related numerical codes, as well as the section, chapter and subheading notes and GIRs. Under Article 3.1(a) of the HS Convention, each contracting party seeks to ensure that its domestic nomenclature is in conformity with the HS, and to use the headings and subheadings of the HS without addition or modification, and apply the GIRs and all the

[888] HSEN1996 to heading 8528 (Exhibit EC-17).
[889] Exhibit EC-16.

Section, Chapter and Subheading Notes, and in doing so, it shall not modify the scope of the Sections, Chapters, headings or subheadings of the Harmonized System.[890]

7.660 The GIRs provide the interpretative principles which govern the classification of goods. GIR 1 provides that:

> "The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification *shall* be determined according to the terms of the headings *and* any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions:" (emphasis added)

7.661 We observe that HS1996 Note 5 to Chapter 84 is organized in a way similar to the heading itself. Note 5(A) defines an automatic data-processing machine; Note 5(B) describes how a "unit" can qualify as part of a "complete system"; Note 5(C) addresses units presented separately; Note 5(D) to printers, keyboards and X-Y devices and disk storage units; and Note 5(E) to machines incorporating or working in conjunction with an automatic data-processing machine and performing a specific function other than data-processing.

7.662 With respect to the three criteria in Note 5(B), we note that the main disagreement among the parties is the relevance of the requirement in Note 5(B)(a) of a determination as to the scope of the coverage of the term "output units" in subheading 8471 60. Namely, that to be regarded as part of a complete system, the "unit" must be "of a kind solely or principally used in an automatic data-processing system". The European Communities does not dispute that chapter note 5(B) is applicable to the question of what types of products fit within the subheading 8471 60 and that a product must be solely or principally used in an automatic data-processing system in order to fall within the scope of the concession.[891] However, it argues that HSEN1996 to heading 8471 is relevant to understanding Note 5(B)(a).[892]

7.663 In response to a question posed by the Panel on the meaning of the phrase "of a kind" in Note 5(B)(a), the WCO Secretariat explains that the HS Nomenclature Committee considered the issue, but declined to issue an Interpretative Rule defining the expression. Therefore, in the WCO Secretariat's view, it would "seem reasonable to conclude that the Nomenclature Committee was, in effect, leaving the interpretation of the expressions to each administration to apply, on a case-by-case basis, in the context of classifying specific articles." [893]

7.664 We note that the chapeau to Note 5(B) tells us that the note provides guidance in determining whether a unit can be regarded as being part of a complete system. We are not convinced that a unit needs to be regarded as *part of a complete system* to fall within the meaning of the term "input or output units" in subheading 8471 60 as a unit could also be presented separately as explained in Note 5(C) or fall within the meaning of Note 5(D).[894] Note 5(C) provides that separately presented units of

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[890] Exhibits EC-15; US-8; TPKM-6.
[891] European Communities' second written submission, para. 130.
[892] European Communities' first written submission, para. 158.
[893] WCO responses to Panel questions, pp. 5-6.
[894] The Panel notes that HS96 subheading 8471 60 does not refer to "systems" or "complete systems", rather HS96 subheading 8471 49 is the only subheading of HS96 heading 8471 which refers to systems. Although not raised by the parties in this dispute, this may raise a question whether Note 5(B) is applicable to all "units" or only those units that are to be regarded as forming part of a complete system. We note that in para. 7.626 above, based on the plain meaning of the terms, we considered that a unit of an ADP is a device that forms "part of an ADP or an ADP system" and that performs "at least one specified function involving

an ADP machine "are to be classified in heading 8471." Additionally, Note 5(D) provides that printers, keyboards, X-Y co-ordinate input devices and disk storage units which satisfy the terms of Notes 5(B)(b) and (B)(c) are in all cases to be classified as units of heading 8471.

7.665 We are of the view that these provisions of the Chapter Note must be read holistically and cannot be read in such a way that whether a particular device falls within heading 8471 would differ depending on how it is presented at the border, i.e., separately or as part of a complete system. We also note that the requirement in Note 5(B)(a) that units be "of a kind solely or principally used in an automatic data processing system" resonates within an expression of what we have already found to be the plain meaning of an "unit "of" an ADP machine".[895] We also recall that an ADP system is defined in the subheading note as consisting of at least a CPU, one input unit, and one output unit.[896] Therefore, regardless of whether a unit is presented as part of a complete ADP system or separately it must be "of a kind solely or principally used in an automatic data processing system".

7.666 The term "principally" means "for the most part; in most case", "in the chief case, above all, pre-eminently" or "for the most part; in most cases".[897] The formulation of "solely" or "principally" as alternatives thus means that it is not necessary for a unit to be used exclusively in an automatic data-processing system for it to be to be classified within heading 8471. While Note 5(C) is formulated differently as, "separately presented units *of* an automatic data-processing machine", in our view, Note 5 has to be read holistically and in its entirety such that heading 8471 should not apply differently to units whether presented separately or as part of a complete system. Accordingly, we understand the term "of" in 5(C) embodies the conditions set forth in 5(B).

7.667 We note that HSEN1996 to heading 8471 appears to contradict HS1996 Chapter Note 5(B)(a). In particular, Chapter I(D) to HSEN1996 to heading 8471 indicates that separately presented units of data-processing systems may form part of a complete system, as discussed above. However, its point 1 states that "[d]isplay units of automatic data-processing machines are capable of accepting a signal *only* from the central processing unit of an automatic data-processing machine" (emphasis added) while Chapter Note 5 provides that 8471also covers units that are principally for use with an automatic data-processing machine. Since an explanatory note cannot alter the scope of the HS, we consider that Chapter I(D) to HSEN1996 to headings 8471 does not justify excluding flat panel display devices from heading 8471, merely because they can also connect to sources other than an automatic data-processing machine.[898] In this respect, we note that the Appellate Body in

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sending/receiving signals, information or data from the ADP or ADP system." While the Panel does not exclude an interpretation whereby "units" might nevertheless fall under Note 5(C) or 5(D), for example, the Panel does not consider that it makes a substantive difference in the circumstances of this dispute, and it therefore does not consider it necessary to rule on this matter.

[895] See paragraph 7.626 above where we stated that, based on the plain meaning of the terms, units of an ADP are devices that form part of an ADP or an ADP system and that perform at least one specified function involving sending/receiving signals, information or data from the ADP or ADP system.

[896] Subheading Note 1 (for 8471 49) cited in Japan's first written submission, fn. 69. Subheading Note 1 clarifies that for the purposes of subheading 8471 49 the term "systems" means computers "whose units satisfy the conditions laid down in Note 5(B) to chapter 84 and which comprise at least a central processing unit, one input unit (for example a keyboard or a scanner) and one output unit (for example a visual display unit or a printer).

[897] Chinese Taipei's first written submission, para. 335 (referring to the *Shorter Oxford Dictionary* (1993), p 2356).

[898] In this respect, we note that the European Court of Justice ruled that point 1 to Chapter I(D) to HSEN1996 was to be considered inapplicable, since the requirement that display units of automatic data-processing machines are capable of accepting a signal *only* from the central processing unit of an automatic

EC - Chicken Cuts explained that Chapter Notes to the Harmonized System, which are binding, can have greater probative value than HSEN.[899] We are of the view that the Chapter Notes provide relevant guidance here.

7.668 Note 5(D) provides additional context to understanding what the crucial features are of an "input or output unit" of an automatic data-processing machine. Note 5(D) provides that a printer, keyboard, or X-Y device which satisfies the terms of Notes 5(B)(b) and (B)(c) falls within the heading 8471. This may indicate that the criteria in Note 5(B)(b) and (B)(C) are important to units of heading 8471. The implications on the relevance of Note 5(B)(a) are unclear, however, as it may only be that the types of units enumerated in Note 5(D) are so obviously part of a system of an automatic data-processing machine that it would not be necessary to assess whether these units were of a kind solely or principally for use with an automatic data-processing machine.

7.669 Finally, Chapter Note 5(E) to HS1996 Chapter 84 provides for a classification of machines incorporating or working in conjunction with an automatic data-processing machine and performing a specific function other than data-processing. According to this note, these "are to be classified in the headings appropriate to their respective functions or, failing that, in residual headings". There has been no argument before us, however, that the products at issue in this dispute are "machines incorporating or working in conjunction with an automatic data-processing machine and performing a specific function other than data-processing". Nothing in Note 5(E) instructs on how to determine whether a product which performs data processing *and* a specific function other than data processing may fall within the scope of heading 8471. The Panel notes that monitors that can operate as display units of an automatic data-processing machine therefore do not appear to fall within the scope of the note.

7.670 Our analysis of Note 5 to HS1996 Chapter 84 and the HSEN1996 to heading 8471 has led us to understand that automatic data-processing machine "units" that are of a kind used solely or principally with an automatic data-processing machine are to be covered under heading 8471, regardless of whether they are presented separately or as part of a complete system. This is also true of units that are printers/keyboards/X-Y units or that are disk storage units. This provides important contextual guidance as to the parameters of the scope of this concession. The comprehensive scope of the Chapter Note reinforces our conclusion that heading 8471 is broad.

7.671 This analysis further informs our understanding that input or output units of an ADP machine under subheading 8471 60 of the EC Schedule includes devices that are "of a kind solely or principally used by an automatic data-processing system", and that perform at least one specified function that involves accepting or delivering data in a form (codes or signals) that can be used by the automatic data-processing machine or "automatic data-processing machine system". More specifically, tariff item number 8471 60 90 of the EC Schedule would cover all "input or output units" that are not "for use in civil aircraft" (8471 60 10), "printers" (8471 60 40) or "keyboards" (8471 60 50). These Notes also inform our understanding that not all devices capable of connecting to an automatic data-processing machine by accepting or delivering data from or to an automatic-data-processing machine *necessarily* qualify as an input or output unit of heading 8471.

7.672 Finally, we observed that GIR 1 directs contracting parties to the HS to consider the terms of the headings and any relevant Section or Chapter Notes in classifying goods at their border, and otherwise, according to the principles in the remaining GIRs 2-6. We note that GIR 2 pertains to

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data-processing machine would have the effect of amending and, in particular, of restricting the scope of Note 5(B)(a) to Chapter 84 of the CN (See European Court of Justice (Kamino), paras. 49-50 (Exhibit TPKM-52)).

[899] Appellate Body Report on *EC – Chicken Cuts*, para. 224.

incomplete or unfinished articles, or mixtures or combinations, none of which are applicable in this case. GIR 3 sets forth applicable rules when goods are prima facie classifiable under two or more headings.[900] We note that we do not need to consider this issue further as it is not relevant in the circumstances of the present case. The issue before us is whether at least some of the products at issue (that is, with particular characteristics such as possessing a DVI connector and/or the ability to receive and display signals from both ADP and non-ADP sources) will fall within the scope of the 8471 60. We are not called upon to determine whether all such products fall within this concession, or whether in some instances, some products with those characteristics may be properly considered to fall within the scope of other concessions. We find that GIRs Rules 4-6 are also inapplicable here.

Other parts of the EC Schedule

7.673 In addressing the complainants' separate Article II claims concerning the FPDs narrative description and tariff item number 8471 60 90 in the EC Schedule, the European Communities has identified heading 8528 under the HS1996 as another potential relevant headings under which the products discussed by the complainants should be classified.

7.674 We observe that the general structure of heading 8528 in the EC Schedule, which is identical to HS1996 heading 8528, is as follows:

HS1996	Description
8528	Reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus; video monitors and video projectors:
	- Reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus
8528 12	- - Colour
8528 13	- - Black and white or other monochrome
	- Video monitors
8528 21	- - Colour
8528 22	- - Black and white or other monochrome
8528 30	- Video projectors

7.675 The **European Communities** considers that a key issue before the Panel is whether the products discussed by the complainants fall within the scope of the concession: (i) under tariff item number 8471 60 90, (ii) under any of subheadings 8528 21 and 8528 22, and 8528 12 and 8528 13, as either "video monitors" or "reception apparatus for television", or (iii) prima facie, under both tariff item number 8471 60 90 and any one of the subheadings of 8528.[901] We note that the European Communities has not provided a detailed analysis of the meaning that should be attributed to the terms of the identified HS1996 subheadings under 8528 or its scope of coverage.

[900] We note that the Appellate Body in *EC – Chicken Cuts* explained that an assessment of the scope of a tariff commitment is a first step that should not be confused with the determination of where a product is properly classified. It explained that GIR 3 is only relevant in a classification exercise. (Appellate Body Report, *EC – Chicken Cuts*, para. 234). We note that GIR 3(c) provides general guidance in cases where classification cannot be determined based either on the specific description of a heading or the essential character of a good. We thus do not consider this provision sheds light on our understanding of "output unit" in heading 8471 in the circumstances of this case.

[901] European Communities' first written submission, paras. 100-101.

7.676 The **complainants** submit that the ordinary meaning of the terms of tariff item number 8471 60 90, considered in the context of HS1996 subheading 8471 60 and the HS1996 Note 5 to Chapter 84 support their view that a device that is principally used for computers, but is also capable of receiving a signal from sources other than an automatic data-processing machine, or equipped with a DVI or similar interface, is a "unit" of an automatic data-processing machine within the ordinary meaning of the language in HS1996 heading 8471.[902]

7.677 The Panel will address below the relevance of whether the products at issue properly fall within the scope of the dutiable concession under HS1996 heading 8528, to the extent relevant. Here, we address only whether the terms of HS1996 heading 8528 have any relevance for the interpretation of the scope of coverage of tariff item number 8471 60 90 in the EC Schedule.

7.678 We do not consider that the terms in heading 8528 lend interpretative assistance to determining, in a general sense, the meaning to be given to the terms "input or output units" of automatic data-processing machines in the concession at issue. The word "unit" or any explanation of that term does not appear in the heading. Rather the terms "Reception apparatus for television" and "Video monitors" are prominent.

7.679 As noted above, in the circumstances of this case we do not consider it necessary to rule on whether some of the products at issue, namely FPDs with DVI and/or the capability to receive and display signals from automatic data processing machines and other sources, may fall within the scope of heading 8528 by virtue of the effect of the HS interpretative rules considered as context. The issue before us whether *some* such products fall within the scope of heading 8471 60. Accordingly, we do not consider it necessary to consider heading 8528 any further.

7.680 Therefore, we find that an analysis of the other portions of the EC Schedule, outside the terms of subheading 8471 60, do not provide significant additional guidance in interpreting the scope of the concession in 8471 60 of the EC Schedule.

(iii) Object and purpose (Article 31 of the Vienna Convention*)*

Arguments of the parties

7.681 We recall from our assessment of the parties' arguments concerning object and purpose[903], that the **complainants** argued that a recognized object and purpose of the *WTO Agreement* and GATT 1994 is providing security and predictability in the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and barriers to trade.[904] The complainants argue that the objectives of security and predictability also require that concessions cover products even if they did not exist in that form at the time the concessions were granted as long as they comply with the wording of the concessions concerned.[905] The complainants also note that both the *WTO Agreement* and the GATT 1994 recognize "expanding the production and trade in goods" as another

[902] Japan's second written submission, para. 188; Chinese Taipei's second written submission, para. 142.

[903] See paras. 7.537-7.549 above.

[904] Complainants' response to Panel question No. 1; Japan's first written submission, paras. 172 (referring to paragraph 3 of the Preamble to the Marrakesh Agreement; Panel Report on *China – Auto Parts*, para. 7.460 and Appellate Body Report on *EC – Chicken Cuts*, paras. 243 and 288; Japan's second written submission, paras. 409-410; Chinese Taipei's first written submission, paras. 144-145; Chinese Taipei's second written submission, para. 282.

[905] Japan's first written submission, para. 177; Chinese Taipei's first written submission, paras. 289-290, 627-630; Chinese Taipei's second written submission, para. 444.

core object and purpose that is furthered by mutually reciprocal reductions in tariffs. In addition, the complainants argue that the ITA may be relevant to analyse the object and purpose of the GATT 1994 because the ITA is an instrument related to the GATT 1994.[906]

7.682 The **European Communities** considers the complainants' interpretative approach is overbroad and compromises the legal certainty and predictability of tariff concessions, creating the risk that Members will become reluctant to pursue the ITA liberalization process. [907]

Consideration by the Panel

7.683 The **Panel** concluded that the relevant object and purpose with respect to this dispute is the general object and purpose of the *WTO Agreement* and the GATT 1994 as a whole, which is to provide security and predictability in the reciprocal and mutually advantageous concessions negotiated by parties for the reduction of tariffs and other barriers to trade. We concluded that the ITA should not be considered a basis for determining the object and purpose of the *WTO Agreement* and the GATT 1994.

7.684 The Panel does not consider that the object and purpose of the WTO Agreement and the GATT 1994 provide significant guidance in the circumstances of the interpretative exercise before us. Nevertheless the Panel considers that the interpretation of the concession at issue discussed above is consistent with the object and purpose of the WTO Agreements. More specifically, tariff item number 8471 60 90 of the EC Schedule would cover all "input or output units" that are not "for use in civil aircraft" (8471 60 10), "printers" (8471 60 40) or "keyboards" (8471 60 50).

(iv) *Subsequent practice (Article 31(3)(b) of the* Vienna Convention*)*

7.685 We recall from above[908], that the **European Communities** argued that the specific classification practice of the United States and the practice of ITA participants between 1997 and 1999 provides other relevant means to interpret the FPDs narrative description.[909] In this latter respect, the European Communities compares particular HS subheadings notified by ITA participants in 1997, with updates to those HS subheadings notified by ITA participants in connection with the FPDs narrative description in 1999.

7.686 The **Panel** determined that evidence submitted by the European Communities regarding HS subheadings notified by ITA participants is not relevant in assessing "subsequent practice" within the meaning of Article 31(3)(b) of the Vienna Convention.[910] We additionally concluded that evidence is too limited to draw conclusions about the "consistency" of the United States classification practice broadly.[911]

7.687 We, therefore, do not consider further the evidence presented by the European Communities regarding the existence of a consistent practice regarding the potential range of different products that may be classifiable under this HS subheading 8471 60 or under other headings discussed in this dispute, such as HS subheading 8528.

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[906] United States' and Chinese Taipei's responses to Panel question No. 1; Chinese Taipei's second written submission, para. 15.
[907] European Communities' first written submission, paras. 170-172.
[908] See paras 7.550, 7.553 and 7.555 above.
[909] European Communities' first written submission, paras. 174-177.
[910] See para. 7.563 above.
[911] See para. 7.564 above.

(v) Other arguments

Arguments of the parties

7.688 **Chinese Taipei** argues that subheading 8528 51, as it appears in the HS2007, further supports the conclusion that flat panel display devices of a kind used at least *principally* with an ADP machine are to be classified under a heading that treats them as output units of an ADP machine. Under the HS2007, Chinese Taipei argues that HS2007 Note 5 to Chapter 84 indicates that output units of an ADP machine classifiable under HS1996 subheading 8471 60 are now classifiable under subheading 8528 51 as monitors "[o]f a kind *solely or principally* used in an automatic data-processing system of heading 8471". Chinese Taipei notes further under the HS2007, the requirement of "sole or principal" use, that previously appeared in the text of HS1996 Note 5(B)(a) to Chapter 84 pertaining to heading 8471 is now included in the wording itself of HS2007 subheading 8528 51. In its view, this change demonstrates that the notion of an "exclusive use" requirement for consideration as an output unit of an automatic data-processing machine has been rejected.[912]

7.689 The **European Communities** has argued that subsequent versions of the HS are not relevant to the interpretation of the concessions at issue in this dispute which were made on the basis of the HS1996.[913]

Consideration by the Panel

7.690 The **Panel** notes that Chinese Taipei has not specified that the Panel should consider the relevance of the HS2007 as supplementary means of interpretation under Article 32 of the Vienna Convention.

7.691 We have found, in interpreting the European Communities' commitment under tariff item number 8471 60 90 in accordance with Article 31 of the Vienna Convention, that the concession covers devices that form part of an "automatic data-processing machine" are "of a kind solely or principally used by an automatic data-processing system" and that perform at least one specified function that involves accepting or delivering data in a form (codes or signals) that can be used by the automatic data-processing machine or "automatic data-processing machine system". More specifically, tariff item number 8471 60 90 of the EC Schedule would cover all "input or output units" that are not "for use in civil aircraft" (8471 60 10), "printers" (8471 60 40) or "keyboards" (8471 60 50).

7.692 We recall that under Article 32 of the Vienna Convention, recourse may be had to "supplementary means of interpretation" in two distinct circumstances, namely, either to confirm the meaning of the treaty terms resulting from the application of Article 31 or to determine such meaning, but only if the Article 31 interpretation left the meaning ambiguous or obscure, or led to a result manifestly absurd or unreasonable.[914] The Appellate Body in *EC – Chicken Cuts* has indicated that documents published, events occurring, or practice followed subsequent to the conclusion of the treaty may be relevant for consideration under Article 32 of the Vienna Convention to the extent that the instrument or document reflects the "common intentions of the parties' at the time of the conclusion"

[912] Chinese Taipei's first written submission, paras. 343-346.
[913] European Communities' first written submission, para. 407.
[914] See para. 7.65.

of the treaty.[915] The Appellate Body emphasized however, that such an assessment must be determined on a case-by-case basis.

7.693 Furthermore, as to what material can qualify as "supplementary means of interpretation", we recall the Appellate Body's clarification in *EC – Chicken Cuts* that the reference made in Article 32 to "preparatory work of the treaty" and "circumstances of its conclusion" is not exhaustive, indicating that "an interpreter has a certain flexibility in considering relevant supplementary means in a given case so as to assist in ascertaining the common intentions of the parties."[916]

7.694 It follows therefore that the fact that the HS2007 is not preparatory work of the treaty or circumstances of the conclusion of the treaty, does not *per se* disqualify it from being considered supplementary means of interpretation under Article 32. Nor can the fact that the HS2007 occurred subsequently to the conclusion of the treaty be *per se* a reason to disqualify it under Article 32, so long as it serves to indicate what were the "common intentions of the parties" at the time of the conclusion of the treaty, i.e. at the time they bound their Schedules. [917]

7.695 We note that the HS is constantly evolving and that, in fact, the HS2007 is the second update to the HS since 1996.[918] If the current version of the HS or its Chapter or Explanatory Notes contained information that indicated the common intentions of the parties at the time of the conclusion of the treaty it could serve as a supplementary means of interpretation.

7.696 We note that under HS2007, CN code 8471 60 90 that appears in the EC Schedule no longer applies, and that the relevant subheading is now 8528 51 under the HS2007. We observe that the terms of HS2007 heading 8528 are as follows:

	Description
8528	Monitors and projectors, not incorporating television reception apparatus; reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus.
	- Cathode-ray tube monitors:
8528 41	- - Of a kind solely or principally used in an automatic data-processing system of heading 84.71
8528 49	- - Other
	- Other monitors:
8528 51	- - Of a kind solely or principally used in an automatic data-processing system of heading 84.71
8528 59	- - Other
	- Projectors
8528 61	- - Of a kind solely or principally used in an automatic data-processing system of heading 84.71
8528 69	- - Other

[915] Appellate Body Report on *EC – Chicken Cuts*, para. 305.

[916] Appellate Body Report on *EC – Chicken Cuts*, para. 283 and para. 305, fn. 574 (relying on the use of the word "including" in the text of Article 32 as an indication of its non-exhaustive nature).

[917] Appellate Body Report on *EC – Chicken Cuts*, para. 305 (footnote omitted).

[918] We note that the HS Committee undertakes a periodic review of the HS, approximately every 4 to 6 years. Since the version of the HS that came into force on 1 January 1996 (the version under which the concessions of this case were based on), new versions of the HS have come into force on 1 January 2002 (HS 2002) and 1 January 2007 (HS2007). It is envisaged that a fifth set of amendments will enter into force on 1 January 2012.

	Description
	- Reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus:
8528 71	- - Not designed to incorporate a video display or screen
8528 72	- - Other, colour
8528 73	- - Other, black and white or other monochrome

7.697 In addition we observe that the HS2007 Notes 5(C) and (D) to Chapter 84 differ from those of HS1996 as follows:

> "(C) Subject to paragraphs (D) and (E) below, a unit is to be regarded as being part of an automatic data-processing system if it meets all of the following conditions:
>
> (i) It is of a kind solely or principally used in an automatic data-processing system;
>
> (ii) It is connectable to the central processing unit either directly or through one or more other units; and
>
> (iii) It is able to accept or deliver data in a form (codes or signals) which can be used by the system".
>
> (D) Heading 84.71 does not cover the following when presented separately, even if they meet all of the conditions set forth in Note 5 (C) above :
>
> (...)
>
> (v) Monitors and projectors, not incorporating television reception apparatus."[919]

[919] We recall that HS1996 Note 5 to Chapter 84 provides as follows:

"5.(A) For the purposes of heading No. 84.71, the expression "automatic data-processing machines" means :
(a) Digital machines, capable of (1) storing the processing program or programs and at least the data immediately necessary for the execution of the program; (2) being freely programmed in accordance with the requirements of the user; (3) performing arithmetical computations specified by the user; and, (4) executing, without human intervention, a processing program which requires them to modify then-execution, by logical decision during the processing run;
(b) Analogue machines capable of simulating mathematical models and comprising at least: (1) analogue elements, control elements and programming elements;
(c) Hybrid machines consisting of either a digital machine with analogue elements or an analogue machine with digital elements.
(B) Automatic data-processing machines may be in the form of systems consisting of a variable number of separate units. Subject to paragraph (E) below, a unit is to be regarded as being a part of a complete system if it meets all of the following conditions:
(a) It is of a kind solely or principally used in an automatic data-processing system;
(b) It is connectable to the central processing unit either directly or through one or more other units; and
(c) It is able to accept or deliver data in a form (codes or signals) which can be used by the system.
(C) Separately presented units of an automatic data-processing machine are to be classified in heading No. 8471.

7.698 We note that the HS2007 was concluded nearly 10 years after the European Communities bound its schedule containing the concession at issue and is actually the second change in the HS since that time. The Panel believes that it would be difficult to sustain the view that any material so remote in time from the conclusion of the treaty could serve as supplementary means of interpreting the intent of the Members at the time they concluded the treaty. However, we do not bar this as a possibility. Indeed, it is possible that the HS2007 could serve as a means of supplementary interpretation if it could be substantiated that it reflected the common intentions of the parties at the time of the conclusion of the relevant treaty being examined. For example, if the Notes 5(C) and 5(D) to Chapter 84 of the HS2007 specifically stated that the products not to be classified in 8471 had been classified therein in previous versions, then it might be possible to demonstrate the common intentions of the Members. However, there is nothing to indicate as much. Therefore, we conclude that this particular HS2007 subheading, explanatory note, and Chapter Note cannot serve as a supplementary means of interpreting the concessions the European Communities made in its schedule in 1997.

7.699 Therefore, we find that an analysis of subheading 8528 51 as it appears in the HS2007 does not provide guidance in interpreting the scope of the concession in 8471 60, which was based on the HS1996 nomenclature.

(vi) Overall conclusions on the ordinary meaning of the terms tariff item number 8471 60 90 in the EC Schedule

7.700 In our analysis of the text of the tariff concession under tariff item number 8471 60 90 in its context and in light of the treaty's object and purpose we considered the ordinary meaning of subheading 8471 60 in the EC Schedule. This analysis led us to conclude that the meaning applies to devices that form part of an "automatic data-processing machine" are "of a kind solely or principally used by an automatic data-processing system" and that perform at least one specified function that involves accepting or delivering data in a form (codes or signals) that can be used by the automatic data-processing machine or "automatic data-processing machine system". More specifically, tariff item number 8471 60 90 of the EC Schedule would cover all "input or output units" that are not "for use in civil aircraft" (8471 60 10), "printers" (8471 60 40) or "keyboards" (8471 60 50). We are also of the view that not all devices capable of connecting to an ADP or ADP system by accepting or delivering data from or to an ADP *necessarily* qualify as an input or output unit of heading 8471. We did not find any relevant subsequent practice on the matter. Furthermore, we do not consider an assessment of the changes made under the HS2007 relevant to our interpretation.

(c) Do the flat panel displays at issue which are the subject of this dispute fall within the scope of the narrative description in the Annex to the EC Schedule or HS 8471 60?

7.701 The Panel has established the scope of the concession, i.e., the type of products that are covered by the European Communities' obligation under Article II of the GATT 1994 to provide duty-free treatment to products under the FPDs narrative description *and* within CN 8471 60 90 in its Schedule. It will now turn to an analysis of whether the complainants have established that the measures at issue are inconsistent with its obligations arising under the concessions at issue.

(D) Printers, keyboards, X-Y co-ordinate input devices and disk storage units which satisfy the conditions of paragraphs (B) (b) and (B) (c) above, are in all cases to be classified as units of heading No. 8471.

(E) Machines performing a specific function other than data-processing and incorporating or working in conjunction with an automatic data-processing machine are to be classified in the headings appropriate to their respective functions or, failing that, in residual headings." (Exhibits US-84, JPN-23 and EC-15)

7.702 We recall that in paragraphs 7.309-7.320 above we determined the products at issue in this dispute to be: (i) flat panel display devices capable of connecting to an automatic data-processing machine *and* that are also capable of reproducing video images from a source other than an automatic data-processing machine, and (ii) flat panel display devices capable of connecting to an automatic data-processing machine *and* that have a DVI or other type of connector, whether or not they are capable of receiving signals from another source. We noted that the "flat panel display devices" at issue are generally thin, and are not based on CRT technology. The complainants focused their submissions to a great extent on displays with LCD technology, however, the technology used by a flat panel display device is not dispositive to our definition. Indeed, certain measures at issue focus on LCD technology, such as Commission Regulation Nos. 634/2005 and 2171/2005, while CNEN 2008/C 133/01 addresses a larger array of technologies, including LCD, organic light emitting diode (OLED) or plasma, among others.

7.703 The **complainants** assert that the flat panel display devices that are capable of connecting to an automatic data-processing machine that have a DVI connector and/or are capable of receiving and reproducing signals from sources other than automatic data-processing machines are flat panel display devices "for" products within the ITA within the meaning of the FPDs narrative description, or are "output units" within the meaning of tariff item number 8471 60 90 in the EC Schedule.[920] The complainants argue that a flat panel display device which has the capability of receiving output from an automatic data-processing machine by virtue of its DVI connector should not be excluded as being "for" an automatic data-processing machine.[921] The complainants argue that these products are *additionally* input or output units within the meaning of tariff item number 8471 60 90 in the EC Schedule, because they provide the results of processing to the user by means of a visual display of information received from the CPU.[922]

7.704 The **European Communities** asserts that it is not in dispute that certain monitors are "genuine ADP monitors" that fall within the duty-free scope of the concession for tariff item number 8471 60 90 of its schedule.[923] Pursuant to the ruling by the European Court of Justice in *Kamino*, the European Communities acknowledges that there is a difference between the relative weight given to criteria in the CNEN to headings 8528 41 00 and 8528 51 00 and in Commission Regulation Nos. 634/2005 and 2171/2005 as compared with the relative weight given by the European Court of Justice to these criteria.[924] However, it argues that not necessarily all products identified by the complainants fall within the scope of either of the two concessions identified by the complainants.[925] The European Communities argues that a new product, which it terms "multifunctional LCD monitors" emerged following the conclusion of the ITA, that incorporated elements such as LCD technology and DVI and merged products in a way that "cuts right in between the commitments taken and those explicitly not taken pursuant to the ITA".[926] It argues these "new" products are not to be confused with those

[920] Japan and Chinese Taipei observe that, while the concessions may overlap to a certain extent, if a product is explicitly covered by one of the concessions, but it is unclear whether it is covered by the other, it is still to be extended duty-free treatment (Japan's first written submission, para. 263; Chinese Taipei's second written submission, para. 147).

[921] United States' first written submission, para. 129; Japan's first written submission, paras. 267-270; Chinese Taipei's first written submission, paras. 185-186.

[922] United States' first written submission, para. 136; Chinese Taipei's first written submission, para. 186.

[923] European Communities' first written submission, paras. 100-101.

[924] European Communities' first written submission, paras. 167-169.

[925] European Communities' first written submission, paras. 65-66.

[926] European Communities' first written submission, para. 74. The European Communities claims that LCD technology was not commercialized at the time of negotiations. It further asserts that the DVI connector did not exist at the time the concessions were negotiated, but only two to three years later (European

that were present in 1996, and that they are excluded from duty-free coverage.[927] At a minimum, to the extent the products were considered to fall within the scope of tariff item number 8471 60 90, the European Communities contends that these products "may fulfil also" the ordinary meaning of "video monitors" under subheadings 8528 21 and 8528 22 in its Schedule, or, in some cases, "reception apparatus for television..." under subheadings 8528 12 and 8528 13.[928]

7.705 As a general proposition, the Panel is of the view that if the flat panel display devices at issue are determined to be within the scope of the concession based on the FPDs narrative description concession, or within the scope of the concession in tariff item number 8471 60 90, then the European Communities is obliged to provide them with duty-free treatment pursuant to Article II:1(a) and (b) of the GATT 1994.

7.706 We will begin our analysis with the question of whether the flat panel display devices at issue are covered either by the tariff concession based on the FPDs narrative description concession, and then turn to the concession in tariff item number 8471 60 90.

(i) Arguments of the parties

7.707 The **complainants** submit that the flat panel display devices at issue use a DVI connector to transmit the information from the computer to the display, thereby qualifying these products as both flat panel display devices "for" computers or other ITA products, and "output units" within the meaning of tariff item number 8471 60 90 in the EC Schedule.[929] The complainants argue that a DVI is a standard computer connector that is display technology independent and was developed for the computer industry to allow computers to transmit digital signals to a display device.[930]

7.708 The **United States** argues that approximately half of all LCD monitors have a DVI connector.[931] It claims that some devices with a DVI connector, such as the Apple Cinema Display, discussed in the context of this dispute, *must* be connected to a computer in order to receive video signals because such displays are configured to accept a single signal and a single bandwidth.[932]

Communities' first written submission, paras. 87-88). For these reasons, the European Communities concludes that, *a fortiori*, multifunctional monitors could not have existed at the time of negotiations to be considered within the concessions (European Communities' first written submission, para. 90).

[927] European Communities' first written submission, paras. 71-76.

[928] European Communities' first written submission, paras. 100-101.

[929] United States' first written submission, paras. 129 and 136; Japan's first written submission, para. 303.

[930] United States' first written submission, para. 129. The United States refers to a Paper of Digital Display Working Group, Digital Visual Interface (DVI) Revision 1.0p, p.5 (March 30, 1999) ("DDWG Paper") (Exhibit US-35), which discusses the DVI specification as "provid[ing] a high-speed digital connection for visual data types that is display technology independent" and "primarily focused at providing a connection between a computer and its display device" and "meet[ing] the needs of all segments of the PC industry (workstation, desktop, laptop, etc)" and "enabl[ing] these different segments to unite around one monitor interface standard". The United States additional refers to Carmack and Tyson, How Computer Monitors Work, p. 5, indicating that "DVI keeps data in digital form from the computer to the monitor". Japan's first written submission, para. 275; Chinese Taipei's first written submission, para. 13.

[931] United States' first written submission, para. 129; United States' second written submission, para. 90; referring to Apple product manual (Exhibit US-78).

[932] United States' first written submission, para. 130, referring to Apple Cinema Displays: Technology Overview (May 2005) (referring to http://images.apple.com/pro/pdf/L309968A_Display_TO.pdf, p. 22 (listing a PC, Power Mac, or Powerbook computer as requirements for operability) (Exhibit US-78); see also Exhibit US-

7.709 In particular, it submits that certain displays – the Apple Cinema Display – cannot operate without a computer.[933]

7.710 With the advent of LCD technology in computer displays, Japan argues that the DVI standard was necessary to allow a digital-to-digital connection to support connectability with computers.[934] **Japan** argues that the DVI standard became the "de facto standard" for an interface permitting the display of digital information received from a computer, based on support by leading computer companies.[935] Japan argues it is not in dispute that LCD monitors with DVI can connect to the CPU of an automatic data-processing machine.[936]

7.711 The complainants consider that merely because a DVI connector enables a flat panel display device to reproduce and receive signals does not mean the device is no longer "for" a computer. Neither is a display with DVI no longer a "unit" of an automatic data-processing machine or system, just because it transmits information displayed from sources other than an automatic data-processing machine.[937] In accordance with Notes 5(B) and (C) of HS1996 Chapter 84, the complainants argue that the mere possibility that a monitor could be connected to something other than an automatic data-processing machine is not sufficient to exclude it from heading 8471 because coverage under that heading is extended to devices that are either solely or principally used in an automatic data-processing system.[938]

7.712 The United States and Japan argue that reliance on a "sole or principal use" standard cannot be reconciled with the notion that monitors "capable of connecting to a device other than a computer" are not entitled to duty-free treatment. It considers this to be contradicted by the European Communities own duty suspension, which states that LCDs are "mainly used as output units of automatic data-processing machines" but are treated as not "principally" used in an automatic data-processing system". The United States argues that "mainly" and "principally" are synonyms.[939]

7.713 Japan argues that under Note 5(C) to Chapter 84, a flat panel display device that is a separately presented unit must be "of" a computer, where the term "of" is interpreted broadly. Otherwise, Japan argues that "principally" within Note 5(B) means "for the most part, in most cases" which necessarily means that a unit may be used in connection with machines other than automatic data-processing machines, and still qualify as "units".[940] On the contrary however, it argues that the EC measures only allow minimally duty-free treatment for products that solely connect to a computer,

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50, including GB5002860943 (UK, April 13, 2007), classifying a display with DVI in a dutiable tariff line, while describing it as "solely for use with an automatic data-processing system".

[933] United States' second written submission, para. 90; referring to Apple product manual (Exhibit US-78).

[934] Japan's first written submission, paras. 278-279. In contrast to computers, Japan argues that virtually no DVD players can connect to an LCD monitor through a DVI (Japan's first written submission, fn. 123).

[935] Japan's first written submission, para. 275.

[936] Japan's first written submission, para. 331.

[937] United States' first written submission, para. 132; United States first written submission, para. 135.

[938] United States' first written submission, para. 138.

[939] United States' first written submission, para. 132 (referring to Commission Regulation No. 493/2005, p. 1).

[940] Japan's first written submission, para. 334 (referring to the Shorter Oxford (1993), p.2356).

reading the word principally out of the concession.[941] Chinese Taipei submits that "principally" means "in the chief case" or "for the most part, in most cases".[942]

7.714 The **European Communities** states that it understands the complainants' claim under tariff item number 8471 60 90 to concern monitors that are "solely or principally" for use with an automatic data-processing machine, whereas it understands the complainant's claim pursuant to the FPDs narrative description to cover devices that are "merely capable of operating with a computer".[943] It considers that these two claims are different in scope.[944] Moreover, it contends that the complainants have argued that televisions and video monitors fall within this concession, a proposition with which it strongly disagrees.[945]

7.715 The European Communities argues that the complainants have not established that the identified criteria are dispositive with regard to classification under a dutiable heading.[946] The European Communities argues that the decision on whether or not a given monitor is used solely or principally in an automatic data-processing system to qualify for duty-free treatment requires a case-by-case analysis based on objective technical characteristics as laid down in HSEN1996 to heading 8471, with the exception of point 1 of Chapter I(D), that the European Court of Justice determined to be inapplicable in the European Court of Justice *Kamino* ruling.[947] In determining the classification of displays, the European Communities argues that it currently takes into consideration a number of technical characteristics, including screen resolution, aspect ratio, bandwidth, size, and the presence of a DVI connector. For instance, the European Communities submits that it has classified the LCD monitor in item 1 in Commission Regulation No. 2171/2005 in duty-free subheading heading 8471 60 based on its ability to reproduce video signals from a source other than an automatic data-processing machine. Thus, it argues, it does not necessarily limit the scope of the concession to products that can only be used with an automatic data-processing machine.[948] In addition, the European Communities argues that the presence of a DVI connector is "not necessarily dispositive" as to whether a monitor is not an output unit of a computer It refers to item 4 in Commission Regulation No. 634/2005 and

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[941] Japan's first written submission, para. 337.

[942] Chinese Taipei's first written submission, para. 335 (defining "principally" as "1. in the chief case; above all; pre-eminently. 3 For the most part; in most cases".

[943] European Communities' first written submission, para. 97; European Communities' second written submission, para. 33. The European Communities takes issue in particular with Japan's statement that its claim related to the FPDs narrative description covers those products "for" automatic data-processing machines or other ITA products ("i.e., only those capable of operating with a computer or other ITA product"), whereas it considers its claim in connection with CN code 8471 60 90 covers products that have digital connectivity (European Communities' second written submission, para. 205).

[944] European Communities second written submission, paras. 33-36. In response to a question from the Panel, the European Communities argues that the United States clarified that a television would not be covered under subheading 8471 60 even it if could connect to a computer. However, the European Communities argues that the United States has not clarified whether a television would be covered under the FPDs narrative concession, and it argues that neither Chinese Taipei nor Japan clarified whether televisions were covered under either of the concessions (European Communities' second written submission, para. 37).

[945] European Communities' second written submission, para. 29. The European Communities argues that the "monitors" concession in the Annex to its Schedule categorically excludes televisions, including high definition televisions, as well as video monitors and high definition video monitors capable of receiving and processing television signals other analogue or digitally processed audio or video signals without the assistance of a central processing unit of a computer (European Communities' second written submission, para. 30).

[946] European Communities' first written submission, paras. 69-70.

[947] European Communities' first written submission, para. 166, citing European Court of Justice (Kamino) (Exhibit TPKM-52).

[948] European Communities' first written submission, para. 68.

items 3 and 4 in Commission Regulation No. 2171/2005, in which it argues that the presence of a DVI connector is listed among other technical characteristics.[949]

7.716 Moreover, the European Communities argues that, to the extent any displays were improperly excluded from duty-free coverage as displays solely or principally for use with automatic data-processing machines, the duty suspension in place has reduced the likelihood that duties have been "unduly levied".[950] Furthermore, the European Communities argues that, in cases where duties might have been levied, many products are of the kind that would *prima facie* be classifiable as "video monitors" under subheadings 8528 21 and 8528 22, or, in some cases, "reception apparatus for television..." under heading 8528 12 and 8528 13. As explained above, the European Communities argues that a new product, which it terms "multifunctional LCD monitors" emerged following the conclusion of the ITA, that incorporated elements such as LCD technology and DVI and merged products in way that "cuts between the commitments taken and those explicitly not taken pursuant to the ITA".[951] It thus disputes that either LCD or DVI were contemplated as falling within the coverage of ITA products, as LCD televisions and monitors did not exists as a viable commercial reality and DVI was not available at that time. It argues these "new" products are not to be confused with those that were present in 1996, and are excluded from duty-free coverage.[952] In cases where products may be classifiable in more than one heading, it considers that GIR 3(c) would apply and those display monitors would be justifiably subject to duties as televisions or as video monitors.[953]

7.717 The European Communities argues that the fact that the DVI originated on the computer side of the industry proves nothing in light of the convergence of the IT and multimedia consumer electronics industries. It considers that the very purpose of DVI is to display video signals as evidenced by the fact that DVI is Video Electronics Standards Association (VESA) certified.[954] Moreover, because many modern televisions have a DVI connector, the European Communities argues that its mere existence in a monitor cannot establish that the display is an "ADP monitor".[955] In this sense, it argues that the presence of a DVI connector indicates the presence of certain electronic components inside the monitor that allows the LCD monitor to function with many different devices that are not covered by the ITA.[956] Even if the DVI standard was developed first by the computer industry for computer purposes, because of its ability to be used with both analogue and

[949] European Communities' response to Panel question 23.

[950] European Communities' first written submission, paras. 167-169. The European Communities acknowledges that it has previously "paid specific attention to whether or not a monitor is 'capable of accepting a signal only from the central processing unit of an automatic data-processing machine" in accordance with its interpretation of the HSEN1996 to heading 8471.

[951] European Communities' first written submission, para. 74. The European Communities claims that LCD technology was not commercialized at the time of negotiations. It further asserts that the DVI connector did not exist at the time the concessions were negotiated, but only two to three years later (European Communities' first written submission, paras. 87-88). For these reasons, the European Communities concludes that, *a fortiori*, multifunctional monitors could not have existed at the time of negotiations to be considered within the concessions (European Communities' first written submission, para. 90).

[952] European Communities' first written submission, paras. 71-76, 87, 90.

[953] European Communities' first written submission, para. 169. The European Communities refers in particular to the "Apple Cinema" monitors in arguing that the application of GIR 3(c) is justified.

[954] European Communities' first written submission, para. 65.

[955] European Communities' first written submission, para. 65.

[956] European Communities' response to Panel question No. 50.

digital signals, the European Communities explains that it was adopted by the consumer electronics sector for products such as set-top boxes, DVD players and game consoles.[957]

7.718 The European Communities also challenges the argument by the United States that certain display products with DVI connectors – the Apple Cinema Display – are solely capable of connecting with a computer, and that European Communities would thus classify products solely used with computers in a dutiable heading.[958] The European Communities claims that this particular product can operate without the assistance of a computer.[959]

7.719 Finally, the European Communities argues that because DVI is "display technology independent" means that it was foreseen to function with displays using CRT or LCD or other technologies", and thus is not considered as a standard computer connector.[960]

7.720 The complainants respond that the European Communities' reliance on the HSEN is misplaced, as the HSEN are not relevant to extent they contradict the meaning of the HS itself, including its Chapter Notes.[961] In addition, the complainants argue that GIR 3(c) is inapplicable.[962]

7.721 The United States additionally rejects that the presence of a DVI connector or the ability to connect to sources other than automatic data-processing machines has not been dispositive. The United States submits that the statement by the European Communities that the presence of a DVI connector has not been "necessarily dispositive" fails to clarify whether the presence of DVI was in fact dispositive. Contrary to the European Communities' reference to items in Commission Regulation Nos. 634/2005 and 2171/2005, the United States notes that all the items were classified in a dutiable heading.[963] It argues that the mere fact that devices are described as having characteristics in addition

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[957] European Communities' second oral statement, para. 22 (referring to Exhibit EC-110). The EC argues that many consumer products, notably DVD players include DVI.

[958] According to the European Communities, the Apple Cinema Display can also connect to an ADP machine (see European Communities' comments to the United States' response to Panel question No. 143). In this respect, the European Communities argues that "page 22 of Exhibit US-78 addresses the question what kind of a computer is required if the monitor is to be used as a unit of an ADP system. Of course, in such a situation an ADP machine will be necessary"); See also: European Communities' first written submission, para. 169, fn. 90; European Communities' second oral statement, para. 23. In addition to asserting that the product manual for this device makes clear that it can connect to sources other than computers (see Exhibit US-78, citing p. 6, second paragraph, last sentence or p. 7, fourth paragraph, last sentence, p. 23), the European Communities argues that the device can at a minimum be connected to other sources with the use of as SDI-DVI converters specifically designed to drive Apple Cinema Displays or similar monitors without the assistance of an ADP machine (Exhibit EC-116).

[959] European Communities' response to Panel question No. 143 (stating, with reference to the manual in Exhibit US-78, that the Apple Cinema Display can indeed operate without the assistance of a computer/ADP machine).

[960] European Communities' response to Panel question No.50, para. 164.

[961] United States' comment on the European Communities' response to Panel questions Nos. 138 and 139; Chinese Taipei's second oral statement, para. 18.

[962] United States' and Japan's response to Panel question No. 20, para. 52; Japan's second written submission, para. 194; Chinese Taipei's first written submission, para. 340; Chinese Taipei's second written submission, paras. 182 and 186.

[963] United States' second written submission, para. 70. The United States argues in addition that item 2 in Commission Regulation No. 2171/2005 was classified strictly on the basis of the presence of DVI, and item 1 in Commission Regulation No. 2171/2005 is not relevant because the device is indicated as not having a DVI connector (but instead a "mini D-sub 15 pin interface only") The United States argues that item 1 of Commission Regulation No. 634/2005 only has a VGA connector, and not a DVI connector, which does not demonstrate how a device capable of connecting to sources other than a computer might be entered duty-free

to DVI in certain items of the Regulations does not support the conclusion that DVI was merely a "strong indicator" that the product was dutiable.

7.722 Japan also considers that the mere presence of a DVI connector is dispositive for tariff treatment. It understands, however, that the mere presence of a DVI connector in a flat panel display monitor does not by itself necessarily mean the flat panel display device will be capable of operating with a computer. Whether an flat panel display device can be used with an automatic data-processing machine, depends on all relevant technological specifications, including interfaces on the flat panel display device, to determine whether the flat panel display device is in fact capable of operating with a computer and/or some other ITA products.[964]

7.723 In addition, the United States and Chinese Taipei argue that the European Communities has not provided evidence to demonstrate that a device with DVI connector or capable of receiving and reproducing signals from a source other than a computer could be classified in a duty-free subheading. On the contrary, the United States submits that the evidence shows that customs officials in certain cases have not referred to any characteristic except the presence of DVI connector as the basis for classification in a dutiable subheading.[965] Moreover, it argues that CNEN 2008/C 133/01 demonstrates clearly that the presence of DVI is not merely a strong indicator but is in fact decisive of classification in a dutiable heading.[966]

7.724 The complainants submit that, in determining whether devices equipped with DVI technology are covered, it is not relevant whether the DVI connector was developed after the ITA concluded.[967] In addition, the United States argues that it is factually not relevant whether different DVI standards exist, including DVI-I and DVI-D, or whether DVI was adopted and used in the consumer media industry. It notes that DVI-I and DVI-D differ only in that the former accepts both digital and analogue signals while the later accepts only digital signals.[968] In addition, it argues that an adoption by consumer media industry does not support the use of a *per se* exclusion of products with DVI. Moreover, the United States claims that virtually no consumer electronics devices are today equipped with DVI while computers are.[969]

7.725 The United States argues that the fact that the DVI was not designed for a particular display technology supports the view that this connector was in fact designed for computers, in particular considering that the ITA expressly refers to a number of technologies used with flat panel displays, including LCD.[970]

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simply does not demonstrate how devices capable of connecting to sources other than an automatic data-processing machine are sometimes granted duty-free treatment (United States' second written submission, paras. 70-71).

[964] Japan's response to Panel question No. 48.

[965] United States' second written submission, para. 71 (referring to Exhibit US-50).

[966] United States' second written submission, para. 72; Chinese Taipei's second oral statement, para. 40.

[967] United States' second written submission, para. 87; Japan's second written submission, para. 155; Chinese Taipei's second written submission, para. 125. Japan submits evidence in addition that the flat panel displays were used as display computer terminals at the time of ITA negotiations (Japan's first oral statement, para. 47, referring to Exhibit JPN-25).

[968] United States' second written submission, para. 92 (referring to "How Computer Monitors Work", pp. 8-10 (Exhibit US-34)).

[969] United States' second written submission, para. 92. The United States argues that only 11 of 1500 DVD players it assessed have DVI, while no camcorders incorporate this standard (Exhibit US-129).

[970] United States' first written submission, para. 53.

7.726 Finally, the United States disputes the European Communities' view that the Apple Cinema Display, as it is imported without the use of external converters, is capable of operating with devices other than computers, such that it would justify subjecting the device to duties.[971]

(ii) Consideration by the Panel

7.727 The **Panel** will consider below whether the products identified by the complainants fall within the scope of the FPDs narrative description, or are "input or output units; - other" within the meaning of tariff item number 8471 60 90 in the EC Schedule.

The concession pursuant to the FPDs narrative description in the Annex to the EC Schedule

7.728 We recall our conclusion above that the concession refers to certain apparatus or devices that have a flat display and are generally thinner than conventional CRT displays or monitors, and are designed for visual presentation of data or signals from products falling with in the ITA, including notably, automatic data-processing machines. We determined that there is no express limitation on technical characteristics, such as screen size, dimension, refresh rate, dot-pixel ratio, or other technical characteristics, including no express limitation on the type of connection or sockets it may possess, such as DVI. We further concluded there that there is no requirement for exclusivity, such that the FPDs concession would be limited to apparatus that may only display or reproduce signals from products falling within the ITA, including automatic data-processing machines. We also concluded that the concession applies to products that fall within its scope, wherever those products are classified.

7.729 We also recall that the products at issue in this dispute are: (i) flat panel display devices that are capable of connecting to an automatic data-processing machine *and* are also capable of reproducing video images from a source other than an automatic data-processing machine, and (ii) flat panel display devices that are capable of connecting to an automatic data-processing machine *and* have a DVI connector, whether or not they are capable of receiving signals from another source.

7.730 Based on our conclusions on the scope of the FPDs narrative description above, we conclude that the products at issue, including flat panel display devices with DVI, and flat panel display devices able to accept and receive signals from automatic data-processing machines and sources other than automatic data-processing machines, may fall within the scope of the concession, provided that they are designed for use with an automatic data-processing machine. We determined that an array of non-CRT technologies, including LCD, fall within the concession. In addition, the FPDs narrative description does not establish particular limitations on the type of connector or socket that a display might incorporate, nor does the concession establish any exclusivity requirement such that a product may only connect with a computer in order to be eligible for duty-free treatment. The fact that a device may be able to receive and display signals from other sources would not therefore exclude it from coverage under the concession. In addition, the Panel can see no reason why a product that otherwise falls within the scope of the concession, would be excluded simply because it is fitted with certain connectors, such as DVI or HDMI.

7.731 Having said this, we reiterate, it is conceivable that certain products that have a DVI or similar connector or that are able to display and receive signals from ADP and non-ADP sources would not qualify under the concession to the extent they did not provide an acceptable level of

[971] United States' comment on European Communities' response to Panel question No. 143; para 61 (referring to Exhibit EC-116). See also Japan's and Chinese Taipei's responses to the European Communities' second question after the second Panel meeting.

functionality or operability, or otherwise not meet the requirements set out in the concession. The mere capability to receive signals from computers is not enough to qualify under the concession.[972] For example, the resolution of certain products may not be high enough to properly display signals from a computer.

7.732 Thus, we conclude that at least some flat panel display devices at issue in this dispute could fall within the scope of the concession for "flat panel display devices (including LCD, Electro Luminescence, Plasma, Vacuum-Fluorescence and other technologies) for products falling within this agreement" that appears in the Annex to the EC Schedule.

The concession pursuant to tariff item number 8471 60 90 in the EC Schedule

7.733 We next consider whether the products at issue in this dispute fall within the separate concession pursuant to tariff item number 8471 60 90 in the EC Schedule. We recall our conclusion that an "input or output unit" within the meaning of tariff item number 8471 60 90 is a device that forms part of an "automatic data-processing machine", is "of a kind solely or principally used by an automatic data-processing system", and that performs at least one specified function that involves accepting or delivering data in a form (codes or signals) that can be used by the automatic data-processing machine or "automatic data-processing machine system". More specifically, tariff item number 8471 60 90 of the EC Schedule covers all "input or output units" of an automatic data-processing machine that are not "for use in civil aircraft" (8471 60 10), "printers" (8471 60 40) or "keyboards" (8471 60 50). We also explained that not all devices capable of connecting to an ADP machine or ADP system by accepting or delivering data from or to an ADP *necessarily* qualify as an input or output unit of heading 8471.

7.734 We are not persuaded that flat panel displays which incorporate a DVI or similar connector, or which can receive and display signals from automatic data processing machines and other sources, necessarily fall outside the scope of 8471 60 90 as defined above. There is no reason to automatically preclude the flat panel display devices at issue from being "input or output units". In particular, it is clear that the scope of 8471 60 and 8471 60 90, is not limited to those output units that are used exclusively with an ADP. We are, however, not saying that all of the flat panel display devices at issue will necessarily fall within the scope of this concession. That would have to be determined on a case-by-case basis, taking into account all the objective characteristics of a particular product.

7.735 We note that the European Communities has argued that the products at issue are prima facie classifiable under other, dutiable, headings and that by virtue of the application of the HS interpretative rules, and GIR3(c) in particular, the products at issue could fall within these dutiable headings. As we have noted,[973] in the circumstances of this case we are only required to determine whether *some* of the products at issue fall within the scope of the duty free heading 8471 60. We do not preclude the possibility that some of the products at issue, depending on their particular objective characteristics, may fall within the scope of other headings or subheadings, by virtue of the effect of the HS interpretative rules considered as context. The key finding, in terms of the effect of the measures at issue in this case, is that it is not possible to assume that *all* such products would fall within the scope of these dutiable headings.[974]

[972] Japan's second oral statement, para. 70.
[973] See para. 7.668 above.
[974] The Panel notes that the European Communities has relied on the judgment of the European Court of Justice in *Kamino* to support its contention that its measures are WTO consistent. We recall that the facts of the case in *Kamino* are not the same as those before us and that while the case dealt with the same relevant HS

(d) Do the measures at issue provide for duties on products identified by the complainants which are in excess of those set forth in the EC Schedule?

7.736 We recall our reasoning in paragraphs 7.97-7.102 above that Article II:1(b) requires that Members not apply ordinary customs duties in excess of those provided for in the Schedule. Therefore, in this section we will compare the tariff treatment provided to the products identified by the complainants under the challenged measures with that provided for in either the FPDs narrative description or tariff item number 8471 60 90 in the EC Schedule. Having done this, we can determine whether the challenged measures impose duties in excess of those set forth in the EC Schedule, such that the European Communities is in breach of its obligations under Article II:1(b) of the GATT 1994.[975]

7.737 The complainants argue that, through the measures at issue, including Council Regulation No. 2658/87, as amended, CNEN 2008/C 133/01 and Commission Regulation Nos. 634/2005 and 2171/2005, the European Communities does not provide duty-free treatment to flat panel displays that are entitled to such treatment. They additionally identified the application of a suspension of duties on products that are classified under CN codes 8528 59 10 and 8528 59 90 covering certain black and white or other monochrome monitors, and certain colour monitors, respectively, each subject to a 14 per cent duty rate.

7.738 We recall from paragraph 7.232 above that the current CN extends duty-free treatment under CN code 8528 51 00 to certain "monitors...of a kind solely or principally used in an automatic data-processing system of heading 8471" and for dutiable CN codes 8528 59 10 and 8528 59 90 covering certain black and white or other monochrome monitors, and certain colour monitors, respectively, each subject to a 14 per cent duty rate. In paragraph 7.258 above, we concluded that CNEN 2008/C 133/01 requires that LCD and other flat panel display devices that are fitted with a DVI connector, or that are capable of receiving and reproducing video images both from an automatic data-processing machine and from a source other than an automatic data-processing machine, are required to be classified under dutiable CN codes 8528 59 10 or 8528 59 90, each of which sets a duty rate of 14 per cent. Thus, CNEN 2008/C 133/01 requires that flat panel display devices that are capable of connecting with sources other than automatic data-processing machine, or those that are fitted with connectors such as DVI-I, DVI-D or HDMI, be excluded from classification under duty-free CN code 8528 51 00.

7.739 In addition, in paragraph 7.284 above, we concluded that Commission Regulation No. 634/2005 requires that LCD monitors as described in item 4 of its Annex be classified under CN

Chapter Note it did not deal with the same HS subheading, the same measures, or the same products. We also note that the European Court of Justice is the domestic court of 27 out of 153 Members of the WTO and that in the *Kamino* decision the European Court of Justice was applying the rules of European Community law to gauge the consistency of the EC regulation at issue in that case with that legal regime rather than applying the general rules of interpretation of public international law to determine the consistency of a measure with WTO obligations. Moreover, the Panel notes that our findings here are similar to the view taken by the European Court of Justice in *Kamino*. See European Court of Justice (Kamino), para. 71.

[975] As noted in paragraph 7.102, prior panels have reasoned that a measure which is inconsistent with the obligation in Article II:1(b) to provide duty treatment not in excess of that set forth in a Member's schedule necessarily implies an inconsistency with the obligation in Article II:1(a) not to provide less favourable treatment to imported products than that set forth in a Member's schedule. Therefore, we will begin our analysis of whether the tariff treatment provided for in the European Communities' measures is consistent with Article II of the GATT 1994 with an analysis of the obligation in Article II:1(b). Subsequently, we will move on to address the complainants' claim that the European Communities is also acting inconsistently with the obligation in Article II:1(a).

code 8528 21 90. Similarly, Commission Regulation No. 2171/2005 requires that LCD monitors as described in items 2, 3 and 4 of its Annex be classified under CN code 8528 21 90, which sets a duty rate of 14 per cent. CN code 8528 21 90 has been replaced by CN code 8528 59 90 under the current CN.

7.740 Finally, we concluded in paragraph 7.294 above that Council Regulation No. 179/2009 suspends the application of duties on the following displays that would otherwise be classifiable under dutiable headings 8528 59 10 and 8528 59 90, respectively, each of which sets a duty rate of 14 per cent:

> "black and white or other monochrome monitors, using liquid crystal display technology, equipped with either digital visual interface (DVI) or a video graphics array (VGA) connector or both with a diagonal measurement of the screen not exceeding 77,50 cm (i.e. 30,5 inches), with an aspect ratio of 1:1, 4:3, 5:4 or 16:10, with a pixel resolution exceeding 1,92 mega pixels, and with a dot pitch not exceeding 0,3 mm".
>
> "colour monitors, using liquid crystal display technology, with a diagonal measurement of the screen not exceeding 55,9 cm (i.e. 22 inches), with an aspect ratio of 1:1, 4:3, 5:4 or 16:10".

7.741 In the Annex to its Schedule, the European Communities agreed to bind and eliminate duties on flat panel display devices that fall within the scope of the FPDs narrative description. In addition, we also recall our conclusion that at least some of the flat panel display devices at issue fall within the scope of tariff item number 8471 60 of the EC schedule (under 8471 60 90, in particular), which is a duty-free concession.

7.742 Therefore, CNEN 2008/C 133/01, by directing national customs authorities to classify those flat panel display devices in CN codes 8528 59 10 or 8528 59 90, under which the CN imposes duties of 14 per cent, requires the imposition of duties on at least some products which fall within the scope of the FPDs narrative description and/or within the scope of the CN code 8471 60 90 in the EC Schedule. The CNEN and CN operating together therefore result in the levying of duties in excess of those provided for in the European Communities' Schedule, and are therefore inconsistent with Article II:1(b) of the GATT 1994.

7.743 Similarly, Commission Regulation Nos. 634/2005 and 2171/2005 direct national customs authorities to classify all products matching the terms of the description in their annexes under a CN code which imposes a 14 per cent duty, because those products are capable of receiving and reproducing video signals from sources other than an automatic data-processing machine. They therefore result in the imposition of duties on at least some products which fall within the scope of the FPDs narrative description and/or within the scope of the tariff item number 8471 60 90 in the EC Schedule. Commission Regulation Nos. 634/2005 and 2171/2005 therefore result in the levying of duties in excess of those provided for in the European Communities' Schedule, and are therefore inconsistent with Article II:1(b) of the GATT 1994.

7.744 It must be borne in mind that Council Regulation No. 179/2009 that is currently in effect, suspends the application of duties on certain displays as described in paragraph 7.740 above, that would otherwise be classifiable under dutiable headings 8528 59 10 and 8528 59 90, and subject to a 14 per cent duty. To the extent that Council Regulation No. 179/2009 suspends duties levied on products that the European Communities is obliged to provide duty-free treatment for under either of the concessions, (including LCD monitors with a DVI, or those that are capable of receiving and

reproducing video signals from sources other than an automatic data-processing machine), neither CNEN 2008/C 133/01 working in conjunction with the CN, nor Commission Regulation Nos. 634/2005 and 2171/2005 actually imposes duties in excess of those set forth in the EC Schedule. Accordingly, the duty suspension eliminates the inconsistency with the European Communities' obligations under Article II:1(b). In other words, but for the duty suspension, the measures at issue are inconsistent with Article II:1(b) of the GATT 1994.

7.745 However, to the extent the duty suspension were not applicable to a particular product that fell within the scope of either concession, i.e., a product covered by either concession fell outside the scope of the express terms of the duty suspension, or if the suspension measure were to be repealed or annulled, then, as discussed above, CNEN 2008/C 133/01 working in conjunction with the CN, or Commission Regulation Nos. 634/2005 and 2171/2005, would result in the levying of duties in excess of those provided for in the European Communities' Schedule in a manner inconsistent with Article II:1(b) of the GATT 1994.

7.746 Notwithstanding, our conclusions in this section, we next consider whether the measures at issue otherwise lead the European Communities, by directing national customs authorities, to accord to the commerce of the other contracting parties treatment less favourable than that provided for in its Schedule.

(e) Do the measures at issue provide less favourable treatment than that set forth in the EC Schedule?

7.747 With respect to whether the European Communities' measures provide for less favourable treatment than that set forth in the EC Schedule, we recall the explanation of the Appellate Body in *Argentina – Textiles and Apparel*, that Article II:1(b) prohibits a specific kind of practice that will always be inconsistent with Article II:1(a). In particular, the Appellate Body found that "the application of customs duties in excess of those provided for in a Member's Schedule inconsistent with the first sentence of Article II:1(b), constitutes 'less favourable' treatment under the provisions of Article II:1(a)."[976] Therefore, as prior panels have before us, we find that a violation of Article II:1(b) necessarily results in less favourable treatment which is inconsistent with the obligations in Article II:1(a).[977]

7.748 In addition, we indicated above that Council Regulation No. 179/2009 currently suspends the application of duties on products that fall within its scope, in particular those described in paragraph 7.740.

7.749 In light of our analysis of the scope of concessions arising under the FPDs narrative description, we concluded that the products at issue could fall within the scope of that duty-free concession. In addition, we indicated that certain of the flat panel display devices at issue qualify for duty-free treatment under CN 8471 60 90 in the EC Schedule.[978]

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[976] Appellate Body Report on *Argentina – Textiles and Apparel*, paras. 45-47.

[977] Panel Report on *EC – Chicken Cuts*, para. 7.65.

[978] In particular, we recall, the concession under the FPDs narrative description refers to certain apparatus that have a flat display and generally thinner than conventional CRT displays or monitors, and is designed for visual presentation of data or signals from products that fall within the ITA, including automatic data-processing machines. We determined that there is no limitation on technical characteristics, such screen assize, dimension, refresh rate, dot-pixel ratio, or other technical characteristics, including no express limitation on the type of connection or sockets it may possess, such as DVI. We further concluded there is no requirement for exclusivity, such that the FPDs concession would be limited to apparatus that may only display or reproduce

7.750 We also found that Council Regulation No. 2658/87, as amended, operating in conjunction with CNEN 2008/C 133/01; and Commission Regulation Nos. 634/2005 and 2171/2005 are inconsistent with Article II:1(b) of the GATT 1994, to the extent they levy duties in excess of those set forth in the EC Schedule. However, Council Regulation No. 179/2009 suspends those duties for some products, and hence there is no inconsistency with Article II:1(b) to the extent the duty suspension is applied to a product covered by either concession. It follows, therefore, that there is no inconsistency with Article II:1(a) by virtue of an inconsistency with Article II:1(b).

7.751 In cases where the suspension of duties were not applied, then, in accordance with the approach of the Appellate Body in *Argentina – Textiles and Apparel*, the levying of duties would be inconsistent with Article II:1(a) of the GATT 1994.

7.752 However, we now consider whether the measures at issue would also provide for less favourable treatment in a manner inconsistent with Article II:1(a) of the GATT 1994, even in cases where the duty suspension under Council Regulation No. 179/2009 is applied.

(i) Arguments of the parties

7.753 The **complainants** argue that the application of the suspension results in less favourable treatment because it is both temporary, applying for defined and limited time periods, and conditional, because it may be terminated unilaterally if conditions for its continuation are no longer fulfilled.[979] In particular, the **United States** argues that the failure to provide permanent duty-free treatment adversely affects imports because importers do not have certainty regarding duty treatment.[980] The United States notes that the panel in *EC – Selected Customs Matters* stated that "the fact that traders may be subject to the same duty (or, for that matter, no duty) whether the LCD monitors they are importing in the European Communities are classified under heading 8471 or 8528 does not detract from our conclusion that the trading environment has been affected as a result of the divergent tariff classification".[981] Further, according to the United States, "lasting" duty-free treatment can only be provided through amendments to the autonomous duty rate in the CCT.[982] In this respect, the United States refers to the words of the Commission, that duty suspensions "constitute an exception to the normal state of affairs" and are "reviewed regularly with the possibility of deletion on request of a party concerned".[983] In addition, **Chinese Taipei** argues that various types of flat panel displays fall outside the scope of the duty suspension and are therefore subject to duties inappropriately.[984]

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signals from products falling within the ITA, including automatic data-processing machines. The concession under CN code 8471 60 90 in the EC Schedule refers to a device that forms part of an "automatic data-processing machine" or are "of a kind solely or principally used by an automatic data-processing system", and that perform at least one specified function that involves accepting or delivering data in a form (codes or signals) that can be used by the automatic data-processing machine or "automatic data-processing machine system".

[979] United States' first written submission, para. 142; Japan's second written submission, para. 141; Chinese Taipei's first written submission, para. 124; Chinese Taipei's first written submission, para. 354-355.

[980] United States' first written submission, para. 143.

[981] United States' first written submission, para. 143, referring to Panel Report on *EC - Selected Customs Matters*, para. 7.304, fn. 579.

[982] United States' second written submission, para. 77, citing Exhibit US-85.

[983] United States' first written submission, para. 142, referring to Commission communication concerning autonomous tariff suspensions and quotas, OJ C 128 (April 25, 1998), p. 2 (Exhibit US-85).

[984] Chinese Taipei's first written submission, para. 184; Chinese Taipei's first written submission, para. 354-355.

7.754 The **European Communities** argues that the duty suspension, which has recently been prolonged and extended to cover additional monitors, results in monitors receiving duty-free treatment, for those that might have been erroneously classified in a dutiable heading. The European Communities claims therefore that no breach of Article II would occur.[985]

(ii) Consideration by the Panel

7.755 The notion of less favourable treatment has been examined in the context of other provisions of the GATT, notably in Article III:4 of the GATT 1994.

7.756 The Appellate Body in *Korea – Various Measures on Beef* stated that whether or not imported products are treated "less favourably" should be assessed by examining whether a measure modifies the *conditions of competition* in the relevant market to the detriment of imported products.[986]

7.757 While Article III:4 focuses on less favourable treatment between domestic and imported like products and Article II focuses on less favourable treatment, vis-à-vis what is in a Schedule, we find the emphasis on competitive opportunities relevant for our analysis, particularly as negotiated tariff concessions and the certainty thereof are important market access guarantees. Therefore, if a measure adversely affects the conditions of competition for a product from that which it is entitled to enjoy under a Schedule, this would be less favourable treatment under Article II:1(a).

7.758 We have found in paragraph 7.744 that, but for the duty suspension, the European Communities' measures are inconsistent with its obligations under Article II:1(b). It follows, in light of the Appellate Body decision in *Argentina – Textiles and Apparel* referred to in paragraph 7.99 above, that the European Communities' measures are also inconsistent with Article II:1(a). The question arises whether the duty suspension eliminates the inconsistency with respect to Article II:1(a) in the same way as it did with respect to Article II:1(b). The current suspension regime of Council Regulation No. 179/2009 has been in place since 1 January 2009, but was applicable retroactively for the period January-March 2009. It will automatically expire on 31 December 2010. The duty suspension is limited to the particular products specified therein.[987] Council Regulation No. 179/2009 is the third in a succession of measures that have applied a suspension of duties on imports of particular LCD displays. The first of these measures, Council Regulation No. 493/2005, was published 31 March 2005 with effect from 1 January 2005 through 31 December 2006. Second, Council Regulation No. 301/2007 was published in 19 March 2007 with effect from the 1 January of that year. This latter regulation extended the identical terms of the prior suspension under Council Regulation No. 493/2005 to 31 December 2008. Most recently, Council Regulation No. 179/2009 was published in March 2009 with retroactive effect to 1 January of 2009. This measure is currently in force and forms part of the Panel's terms of reference.[988] This measure enlarged the scope of application of the duty suspensions that were previously applied to certain LCD imports.

7.759 These earlier applications of the duty suspension reveal that the duty suspension regime currently in place has been renewed biannually, is set to expire automatically and is not extended automatically. The duty suspension has only been extended or amended, subject to formal actions taken by the EC Council, i.e., following the passage of a new Council Regulation. It appears that these measures do not take effect prior to their publication in the EU Official Journal. The suspension under

[985] European Communities' first written submission, paras. 62-63.
[986] Appellate Body Report on *Korea –Various Measures on Beef*, para. 137.
[987] See para. 7.740 above.
[988] See paras. 7.170-7.190 above.

all three measures was applied retroactively for periods between January and March in 2005, 2007 and 2009, respectively.

7.760 Thus, while a suspension on imports of certain LCD displays has formally been in effect for five years or more, the suspension is not permanent in nature, and is subject to a formal extension or amendment. In addition, we note that the measure at issue (as well as prior measures) implementing the autonomous duty suspension does not set out specific conditions for its withdrawal or non-renewal. Thus the duty suspension in force at a particular time may expire, be repealed, or be amended to increase or decrease coverage.

7.761 We recognize that no amount of autonomous duty-free coverage can be assured in an absolute sense. The European Communities, for instance, sets forth its tariff bindings in the EC Schedule pursuant to annual amendments to the autonomous duty rate in the CCT, published in October of each year prior to its entry into force the following January. Notwithstanding this fact, tariff bindings set forth in the CCT autonomous duty regime remain in place until formal repeal by the Commission. Thus, tariff treatment under the CCT is not contingent on renewal or extension, unlike under the current duty suspension regime. In our view, this distinction is significant, in particular, in the sense that continuous tariff treatment provides forseeability for traders operating in the marketplace. Moreover, the tariff treatment established under the CCT is prospective, unlike under the duty suspension regime, where the application of the suspension has been applied retroactively on a number of occasions.[989] For the foregoing reasons, we are of the view that the duty suspension measure does not eliminate the inconsistency with Article II:1(a) because there remains the potential of deleterious effects on competition.

7.762 We note finally that the Appellate Body has explained that the examination of whether a measure involves "less favourable treatment" within the meaning of Article III:4 of the GATT 1994 does not require an examination of the actual effects of the contested measure in the marketplace, in order to demonstrate inconsistency.[990] In our view, the same holds true for purposes of our analysis in this case with respect to Article II:1(a).

7.763 Accordingly, the measures at issue, including Council Regulation No. 179/2009 operating in conjunction with the CN and CNEN 2008/C 133/01, and with Commission Regulation Nos. 634/2005 and 2171/2005, are inconsistent with the European Communities' obligations under Article II:1(a) of the GATT 1994. This is true even in cases where Council Regulation No. 179/2009 suspends duties on products that the European Communities is obligated to provide duty-free treatment for, including LCD monitors with a DVI interface, or that are capable of receiving and reproducing video signals from sources other than an automatic data-processing machine.

F. SET-TOP BOXES WHICH HAVE A COMMUNICATION FUNCTION (STBCS)

7.764 In this section of the Reports, the Panel will consider the **complainants'** claims that certain EC measures are inconsistent with Articles II:1(a) and II:1(b) of the GATT 1994 because they result in less favourable tariff treatment to imports of certain set top boxes which have a communication

[989] We find further support for this view in the statement of the Commission, provided by the United States, that duty suspensions "constitute an exception to the normal state of affairs" and are "reviewed regularly with the possibility of deletion on request of a party concerned" (United States first written submission, para. 142, referring to Commission communication concerning autonomous tariff suspensions and quotas, OJ C 128 (April 25, 1998), p. 2 (Exhibit US-85)). While this statement was not made in the circumstances of this case, it is at least, illustrative of the conditional nature of the measure. The European Communities has not rebutted this statement.

[990] Appellate Body Report on *US – FSC (Article 21.5 – EC)*, paras. 215 and 221 (footnote omitted).

function (STBCs) than that provided for these products under the EC Schedule, and because the tariff treatment afforded is in excess of that afforded for them in the EC Schedule. In the joint Panel request, the complainants indicate that the identified measures at issue affect set top boxes with "modems of certain types (e.g., Ethernet modems)" or STBCs "which incorporate a device performing a recording or reproducing function (e.g., a hard disk or DVD drive)".[991]

7.765 The complainants argue, pursuant to commitments made in the ITA, the European Communities is obliged to provide duty-free treatment to STBCs. In particular, the complainants allege that certain STBCs are covered by the duty-free concession set forth in the narrative description "set-top boxes which have a communication function: a microprocessor-based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange", located in the Annex to the EC Schedule, regardless of which tariff line the products are classified under in the CN.[992] The United States submits that the bound duty rate for these products is set forth in tariff item numbers 8517 50 90, 8517 80 90, 8525 20 99, and 8528 12 91, and as specified in the headnote, is zero.

7.766 According to the complainants, despite this duty-free concession, one of the challenged measures, an amendment to CNEN 2008/C 112/03, requires that particular STBCs with "modems of certain types (e.g., Ethernet modems)" or STBCs "which incorporate a device performing a recording or reproducing function (e.g., a hard disk or DVD drive)", be excluded from duty-free heading CN code 8528 71 13. In the same amendment, according to complainants, STBCs "which incorporate a device performing a recording or reproducing function (e.g., a hard disk or DVD drive)" must be classified under CN code 8521 90 00, which carries a 13.9 per cent *ad valorem* duty.[993] The exclusion of STBCs with "modems of certain types (e.g., Ethernet modems)" from duty-free CN code 8528 71 13, and the application of this 13.9 per cent duty on STBCs "which incorporate a device performing a recording or reproducing function (e.g., a hard disk or DVD drive)" is the essence of the complainants' claim.

7.767 In addition, the United States and Chinese Taipei argue that actions of the European Communities concerning the delivery of opinions with respect to the proposed amendments to the Explanatory Notes contained in 2008/C 112/03 in October 2006 and May 2007 are inconsistent with EC obligations under Articles X:1 and X:2 of the GATT 1994. The United States and Chinese Taipei argue that these opinions were not published in the EC Official Journal until 7 May 2008. Further, they argue that EC member States were applying duties to set top boxes using the approach specified in 2008/C 112/03 prior to 7 May 2008.[994]

7.768 The **European Communities** argues, however, that the complainants have misinterpreted the commitment for STBCs in the EC Schedule. Consequently, the European Communities rejects the complainants' Article II claims. In addition, the European Communities rejects that the actions cited by the United States and Chinese Taipei are inconsistent with Articles X:1 and X:2 of the GATT 1994.

7.769 In respect of the complainants' Article II claims, as with preceding claims, the Panel considers its task is therefore to determine: (a) the scope of duty-free treatment in the EC Schedule; (b) whether

[991] Joint Panel request, WT/DS375/8, 376/8, DS377/6, p. 4.
[992] Joint Panel request, WT/DS375/8, 376/8, DS377/6, p. 4.
[993] Joint Panel request, WT/DS375/8, 376/8, DS377/6, pp. 4-5.
[994] Although the three complainants made a *joint* request for the establishment of this Panel, which includes *inter alia* joint claims under Article X of the GATT 1994, Japan did not pursue these particular claims in its submissions.

the products identified by the complainants fall within the scope of the duty-free tariff concession; (c) whether the challenged measures result in the imposition of duties on the products at issue in excess of those provided for in the EC Schedule; and (d) whether the measures at issue result in less favourable treatment of the products at issue than that provided for in the EC Schedule.

7.770 In light of the approach we have outlined above, we will first identify the measures and products at issue. This is particularly important in this case as the European Communities has called into question whether the particular measures are within the Panel's terms of reference. Therefore, before proceeding to the substance of the complainants' claims, we first turn to address whether the complainants may bring their claim before the Panel.

1. Preliminary issues

7.771 During these proceedings, the European Communities has raised various issues with respect to STBCs claims.[995] As with their claim concerning flat panel display devices, the European Communities considers that one of the challenged measures is not legally binding under EC law. In addition, the European Communities has contended that the complainants have failed to explain what constitutes the relevant EC concession and what are the precise terms of the concession. The Panel will briefly address each of these issues in this section.

7.772 We recall that the Appellate Body has explained that together, the identification of the specific measures at issue and the legal basis of the claims comprise the "matter referred to the DSB" which forms the basis for a panel's terms of reference under Article 7.1 of the DSU.[996]

7.773 One of the essential purposes of the terms of reference is to establish the jurisdiction of the panel by defining the precise claims at issue in the dispute.[997] The Appellate Body has also observed that the vesting of jurisdiction in a panel is a fundamental prerequisite for lawful panel proceedings.[998] Therefore, we must address these issues before we can proceed to address the substance of the complainants' claims.

7.774 As the joint Panel request serves as the basis for the terms of reference of this Panel[999], we will start our analysis by first setting forth the relevant text of the joint Panel request.

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[995] We note that the European Communities has not alleged particular violations of Article 6.2 of the DSU or the Panel's terms of reference, but instead alleges that the complainants have failed to make a "prima facie" case. See European Communities' first written submission, para. 32. Nevertheless, the Panel considers it appropriate to address issues raised by the European Communities, as well as additional issues that go to the Panel's terms of reference at the outset. These issues are enumerated in paragraph 7.123 of these Reports.

[996] Appellate Body Report on *Guatemala – Cement I*, paras. 69-76.

[997] Appellate Body Report on *Brazil – Desiccated Coconut*, DSR 1997:I, p. 186.

[998] Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36.

[999] We recall, as set forth in para. 1.6 above, the Dispute Settlement Body (DSB) established a panel in the present dispute in accordance with Article 6 of the DSU with the following terms of reference:

> "To examine, in the light of the relevant provisions in the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the United States, Japan and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu in document WT/DS375/8, WT/DS376/8 and WT/DS377/6, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

See also Constitution of the Panel Established at the Request of the United States, Japan, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, WT/DS375/8, 376/8, DS377/6, p. 1.

(a) STBCs: The measures at issue

7.775 In their joint Panel request, the complainants identified the relevant EC measures at issue as follows:

> "Customs authorities of EC member States impose duties on STBs with a communication function. The measures at issue through which they do so include:
>
> 1. Council Regulation (EEC) No. 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, including all annexes thereto, as amended[10]; and
>
> 2. Explanatory Notes to the Combined Nomenclature of the European Communities, 2008/C 112/03, (7 May 2008), alone or in combination with Council Regulation (EEC) No. 2658/87 of 23 July 1987,[11]
>
> as well as any amendments or extensions and any related or implementing measures.[12]

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[10] Including amendments adopted pursuant to Commission Regulation (EC) No. 1214/2007 of 20 September 2007.

[11] See also the decisions of the Customs Code Committee discussed on page 5, infra.

[12] Including the actual application by customs authorities of EC member States of customs duties on imports of STBs with a communication function."[1000]

7.776 The European Communities has not contested the complainants' specific identification of the measures in its joint Panel request. The relevant aspects of these measures are discussed in detail below.

(b) Is CNEN 2008/C 112/03 a measure that can be subject to WTO dispute settlement?

7.777 We recall from the section of the Reports concerning flat panel display devices[1001], the European Communities' position that CNEN in general are not legally binding in the European Communities' legal order, and are in their essence "important tools for the interpretation of the CN".[1002] Most importantly, the European Communities maintains the view that CNEN are not binding on customs officials in their interpretation and application of the CN to customs determinations, to the extent a conflict arises between the terms of the CNEN and CN, including its Section and Chapters notes.[1003]

[1000] Joint Panel request, WT/DS375/8, 376/8, DS377/6, p. 4.

[1001] See paras. 7.130 *et seq*.

[1002] European Communities' first written submission, paras. 312-314; European Communities' response to Panel question No. 23; European Communities' second written submission, paras. 47-49 and 55 (Exhibit TPKM-52)); European Communities' second oral statement, paras. 27-34.

[1003] European Communities' first written submission, para. 98; European Communities' second oral statement, paras. 38-43; European Communities' response to Panel question No. 122.

7.778 As it is relevant to the complainants' claim concerning STBCs, the Panel recalls its finding that the CNEN amendments at issue in this dispute are measures of general and prospective application that can be challenged "as such". In particular, we concluded that CNENs are of "general application" because the application of a CNEN is not limited to a single import or a single importer, and they set forth rules or norms that are intended to have general and prospective application that create legitimate expectations among the public and among private actors.

7.779 For the same reasons as those stated in paragraphs 7.158-7.160 the Panel therefore concludes that CNEN 2008/C 112/03 can be challenged "as such".

(c) Have the complainants' identified the EC concession at issue?

7.780 In its first written submission, the European Communities argues that the complainants have failed to explain what constitutes the EC concession for "set top boxes which have communication..." and where it is provided for, by referring both to the narrative description appearing in Attachment B, and also the description in the Annex to the EC Schedule.[1004] The European Communities further argues that the complainants have failed to properly identify the precise language of the concession "set top boxes *which have* a communication function" through their reference to "Set top boxes *with* a communication function", thus failing to analyse the terms consistent with the approach set forth in Article 31 of the Vienna Convention.[1005]

7.781 The complainants identified the relevant "concessions" in their joint Panel request, as follows:

> "The Schedule provides in a headnote that '[w]ith respect to any product described in or for Attachment B to the Annex to the Ministerial Declaration on Trade in Information Technology Products, to the extent not specifically provided for in this Schedule, the customs duties on such product, as well as any other duties and charges of any kind…shall be bound and eliminated, as set forth in paragraph 2(a) of the Annex to the Declaration, wherever the product is classified.' Attachment B includes 'set-top boxes which have a communication function: a microprocessor-based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange.' The bound duty rate for this product, as set forth in HS items 8517 50 90, 8517 80 90, 8525 20 99, and 8528 12 91, and as specified in the headnote, is zero."[1006]

7.782 The complainants argued that they have properly referred to the language that constitutes the concession in the Annex to the EC Schedule, namely identifying "Set top boxes *which have* a communication function".[1007]

7.783 We consider the complainants have established what they consider to be the relevant concession(s) at issue. However, we consider that two issues arise in light of the European Communities' concerns with the complainants' discussion of the relevant EC concession: first, what is the location of the concession arising under the relevant narrative product description for purposes of the Panel's analysis, and second, what are the implications of the reference to "set top boxes with a communication function" to this dispute.

[1004] European Communities' first written submission, paras. 190-196.
[1005] European Communities' first written submission, paras. 197-201.
[1006] Joint Panel request, WT/DS375/8, 376/8, DS377/6, p. 4.
[1007] United States' first written submission, para. 43; Japan's first written submission, para. 350; Chinese Taipei's first written submission, para. 360.

7.784 We note that the European Communities has not argued that the complainants' alleged failure to identify the precise concession means that the complainants have breached the provisions of Article 6.2 or other provisions of the DSU, in either respect. We also recall our statement in paragraph 7.773 above that Panels may choose to deal with issues on their own motion that it considers to go to the heart of its jurisdiction, to satisfy themselves that they may proceed.[1008] We will first address where precisely the relevant concession is located. Second, we will consider what are the relevant terms of the concession.

Is the relevant commitment located in the Annex to the EC Schedule, Attachment B, or both?

7.785 The issue that arises over the European Communities' complainant is whether the narrative description for "Set top boxes which have a communication function ..." is the narrative description reproduced separately in the Annex to the EC Schedule, or that contained in Attachment B, or whether both texts are relevant.

7.786 In addressing the location of the narrative description for "flat panel display devices..." above[1009], we recall our view that the ITA participants did not intend for there to be discrepancies between the descriptions that appear in Attachment B of the ITA and those appearing in the EC Schedule. Accordingly, as above, we will not address further the question of whether the focus should be on the narrative descriptions in Attachment B of the ITA, or those reproduced separately in the Annex to the EC Schedule. To the extent that the product descriptions themselves define the scope of the obligations (a point that we will return to below), we explained that the identical language used in these narrative product descriptions in the ITA on the one hand, and as reproduced in the EC Schedule on the other, would give rise to obligations of identical scope.

7.787 We thus turn to the second issue identified above.

What are the implications of the reference to "set top boxes with a communication function" to this dispute?

7.788 We recall the European Communities' complaint over the identification of the language "Set top boxes *with* a communication function" in its submissions.[1010] The European Communities considers the complainants' reliance on the descriptive language "set top boxes *with* a communication function", rather than the language of the concession which uses the terms "which have", leads to a different conclusion on the scope of coverage, in light of the definition of the term "with", which is defined as "denoting association of accompaniment", or accompanied by; having (a person or thing) as an addition accompaniment".[1011]

7.789 We note that the United States and Japan have asserted that the phrase "set top boxes with a communication function" is "at times used simply to paraphrase the language associated with the Attachment B headnote" and other times is "used to refer to the concession the EC made in 2000 for 'set top boxes with a communication function.'"[1012]

[1008] Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 36 and 53.
[1009] See para. 7.226 above.
[1010] European Communities' first written submission, paras. 197-201.
[1011] European Communities' first written submission, para. 217 (referring to the *Shorter Oxford Dictionary* (1993), p. 3703 (Exhibit EC-31)).
[1012] United States' and Japan's response to Panel question 80.

7.790 In its first oral statement, the United States further specified that it considers the European Communities has made separate commitments both for "set top boxes which have a communication function" and "set top boxes with a communication function". The United States explains that the first arises from the inclusion of the headnote and narrative description in the Annex to the EC Schedule, while the latter arises from a fourth tariff line (tariff item number 8528 71 13) that the United States claims was added in 2000 to the Annex to the EC Schedule.[1013] The United States asserts that it has properly identified both of these concessions in its initial submissions.[1014] The United States has argued additionally that it did not consider there was any substantive distinction between the terms "with" and "which have".[1015]

7.791 The Panel has discussed above the circumstances surrounding the addition of tariff item number 8528 71 13 to the Annex to the EC Schedule via document G/MA/TAR/RS/74.[1016]

7.792 In response, the European Communities argued that it considers that the decision to notify an additional code in 2000 did not introduce a separate narrative description into its Schedule nor modify the existing one. At most, the European Communities argues that the addition of the tariff item number could be understood to mean that the narrative description could be understood to cover a specific category of set top boxes capable of receiving television signals provided that these products otherwise satisfy the terms of the narrative description.[1017]

7.793 In view of the parties' further comments, we consider the implications of the parties' separate references to the term "with" in their submissions. We note that Japan and Chinese Taipei have limited their claims concerning set top boxes to an assessment of the STBCs narrative description. Accordingly, as we have determined these two parties to have sufficiently identified the concession as the narrative description, we do not understand either of these complainants to have considered that the word "with" forms a literal part of the concession. In addition, we understand the United States has affirmed it has raised two separate claims concerning set top boxes. First, like the other two complainants, we consider the United States has sufficiently set forth its claim pursuant to the STBCs narrative description. Separately, however, apart from occasional paraphrasing of the narrative description, we understand the United States reference to the term "with" pertains to its second claim raised with respect to tariff commitments arising from four tariff lines that appear in the Annex to the EC Schedule in connection with the STBCs narrative description.

7.794 In light of complainants reference in their joint Panel request to the precise language of the concession as it appears in the EC Schedule, and their subsequent discussion of this language, we therefore consider that the complainants have explained what constitutes the concession.[1018] Further, we will address the significance of the term "with" as it may pertain to the United States' other claim in connection with tariff item number 8528 71 13, to the extent relevant.

[1013] United States' first oral statement, paras. 13 and 16.
[1014] United States' second written submission, para. 23.
[1015] United States' first oral statement, para. 16.
[1016] See paras. 7.413-7.423 above.
[1017] European Communities' second written submission, para. 80. The European Communities offers several reasons why the term "with" should not be given relevance. First, it contends that the terms or phrase used by a domestic legislator to describe or name a product in the context of a classification measure should not be relevant for interpreting the scope of a tariff concession. In addition, it argues that the terms "Set top boxes with a communication" were not intended to be included in the modified Schedule, only the code identified with it (European Communities second written submission, paras. 77-78).
[1018] See, for instance, United States' first written submission, para. 43; Japan's first written submission, para. 350; Chinese Taipei's first written submission, para. 360.

7.795 Accordingly, the Panel will consider the effect of the EC measures identified by the complainants, and subsequently, the scope of the relevant concessions in its assessment of the complainants' claims concerning Article II of the GATT 1994.

2. The measures at issue and their effects

7.796 The Panel will now consider the measures at issue specifically identified by the complainants, as set forth in paragraph 7.775 above, and their effects.

(a) Council Regulation No. 2658/87, as amended

7.797 As discussed in paragraphs 7.39-7.45 above, Council Regulation No. 2658/87 establishes the CN and CCT.[1019]

7.798 We recall that we concluded in paragraph 7.146 above that the Council Regulation No. 2658/87, including its Annex I, as it has been most recently amended, is the specific measure at issue in this dispute and was properly identified as such in the joint Panel request.

7.799 The CN2010 version includes the duty-free CN code 8521 90 00 as follows:[1020]

CN code	Description	Conventional rate of duty (%)	Supplementary unit
1	2	3	4
8521	Video recording or reproducing apparatus, whether or not incorporating a video tuner:		
8521 10	- Magnetic tape-type:		
8521 10 20	- - Using tape of a width not exceeding 1,3 cm and allowing recording or reproduction at a tape speed not exceeding 50 mm per second	14	p/st
8521 10 95	- - Other	8	p/st
8521 90 00	- Other	13.9	p/st

7.800 The CN2010 version includes the duty-free CN code 8528 71 13, as well as the dutiable CN codes 8528 71 19 and 8528 71 90, as follows:

CN code	Description	Conventional rate of duty (%)	Supplementary unit
1	2	3	4
8528	Monitors and projectors, not incorporating television reception apparatus; reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus		
	- Reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video		

[1019] Council Regulation No. 2658/87, Article 1 (Exhibits EC-49; US-13; TPKM-5).

[1020] The Panel notes that CN code 8521 10 20 in both the CNEN2007 and CNEN2008 contains a reference next to the conventional rate of duty of 14 per cent, which states, "Lower applied duty rate of 13 per cent until 24 December 2008 (Council Regulation (EC) No 2114/2005 (OJ L 340, 23.12.2005, p. 1))" (Exhibit JPN-3).

CN code	Description	Conventional rate of duty (%)	Supplementary unit
	recording or reproducing apparatus		
8528 71	- - Not designed to incorporate a video display or screen		
	- - - Video tuners:		
8528 71 11	- - - - Electronic assemblies for incorporation in automatic data-processing machines	Free	p/st
8528 71 13	- - - - Apparatus with a microprocessor-based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange, capable of receiving television signals ('set-top boxes with communication function')	Free	p/st
8528 71 19	- - - - Other	14	p/st
8528 71 90	- - - Other	14	p/st
8528 72	- - Other, colour		
8528 72 10	- - - Television projection equipment	14	p/st
8528 72 20	- - - Apparatus incorporating a video recorder or reproducer	14	p/st
	- - - Other:		

7.801 The terms and applicable duty rates of CN codes 8521 90 00, 8528 71 13, 8528 71 19 and 8528 71 90 are identical in the CN2007 version (contained in Commission Regulation No. 1549/2006, as amended), the CN2008 version (contained in Commission Regulation No. 1214/2007, as amended), the CN2009 version (contained in Commission Regulation No. 1031/2008, as amended), and the CN 2010 version (contained in Commission Regulation No. 948/2009, as amended).[1021]

(i) Arguments of the parties

7.802 The **complainants** have identified Council Regulation No. 2658/87, as amended, as providing the basic EC measure on tariffs, wherein set top boxes are classified either under CN code 8521, covering "recording or reproducing apparatus" or under CN code 8528 (under either CN code 8528 17 13, 8528 71 19 or 8528 71 90) concerning "Reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus; video monitors and video projectors".

7.803 The **European Communities** does not dispute that certain STBCs may be classified under dutiable CN codes 8521 90 00, 8528 71 19, or 8528 71 90.[1022]

(ii) Consideration by the Panel

7.804 The parties do not appear to dispute the content of the CN. As noted in paragraphs 7.799-7.801, the CN2007 version and subsequent versions (through the CN2010 version) include the CN codes 8521 90 00, 8528 71 13, 8528 71 19 and 8528 71 90. The terms and applicable duty rates for the relevant headings have remained identical in the subsequent versions of the CN, i.e. in CN2008, CN2009 and its current version, CN2010.

[1021] CN2007 (Exhibits US-47; JPN-2; TPKM-34); CN2008 (Exhibit JPN-3); CN2009 (Exhibits US-11; JPN-20; TPKM-21).
[1022] European Communities' first written submission, para 278.

7.805 CN code 8528 71 13, which is duty free - and which, before CN2007 was 8528 12 91 - concerns:

> "- Reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus:; - - Not designed to incorporate a video display or screen:; - - - Video tuners:; - - - - Electronic assemblies for incorporation in automatic data-processing machines; - - - - Apparatus with a microprocessor-based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange, capable of receiving television signals ('set-top boxes with communication function')".

7.806 CN code 8528 71 19 applies a 14 per cent duty rate. CN code 8528 71 90 applies a 14 per cent duty rate.

7.807 CN code 8521 90 00, which has a duty rate of 13.9 per cent duty rate, concerns:

> "Video recording or reproducing apparatus, whether or not incorporating a video tuner:; - Magnetic tape-type:; - - Using tape of a width not exceeding 1,3 cm and allowing recording or reproduction at a tape speed not exceeding 50 mm per second; - - Other; - - - Other".

7.808 In conclusion, Council Regulation No. 2658/1987, as amended, sets forth in CN 8528 71 13, the duty-free CN code that applies to the following products: "Apparatus with a microprocessor-based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange, capable of receiving televisions signals ('set-top boxes with communication function')". In addition, the CN establishes dutiable CN codes 8521 90 00, applicable to "[v]ideo recording or reproducing apparatus, whether or not incorporate a video tuner", which sets a 13.9 per cent duty. The CN also sets forth CN codes 8528 71 19 and 8528 71 90, as "other" headings, each of which sets a duty rate of 14 per cent.

(b) CNEN 2008/C 112/03

7.809 On 7 May 2008, the European Communities published CNEN 2008/C 112/03 which includes the following excerpts pertaining to CN codes 8521 90 00, 8528 71 13, 8528 71 19 and 8528 71 90:

> "'**8521 90 00 Other**
>
> This subheading includes apparatus without a screen capable of receiving television signals, so-called "set-top boxes", which incorporate a device performing a recording or reproducing function (for example, a hard disk or DVD drive).
>
> *On page 339, the following text is inserted:*
>
> '**8528 71 13 Apparatus with a microprocessor-based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange, capable of receiving television signals ("set-top boxes with communication function")**
>
> This subheading covers apparatus without a screen, so-called "set-top boxes with communication function", consisting of the following main components:

— a microprocessor,

— a video tuner.

The presence of an RF connector is an indicator that a video tuner may be present.

— a modem.

Modems modulate and demodulate outgoing as well as incoming data signals. This enables bidirectional communication for the purposes of gaining access to the Internet. Examples of such modems are: V.34-, V.90-, V.92-, DSL- or cable modems. An indication of the presence of such a modem is an RJ 11 connector.

Devices performing a similar function to that of a modem but which do not modulate and demodulate signals are not considered to be modems. Examples of such apparatus are ISDN-, WLAN- or Ethernet devices. An indication of the presence of such a device is an RJ 45 connector.

The modem must be built into the set-top box. Set-top boxes which do not have a built-in modem but use an external modem are excluded from this subheading (e.g. a set consisting of a set-top box and an external modem).

The Transmission Control Protocol/Internet Protocol (TCP/IP) must be present as firmware in the set-top box.

Set-top boxes of this subheading must enable the user of the apparatus to access the Internet. The apparatus must also be able to run Internet applications in an "interactive information exchange" mode such as an e-mail client or a messaging application using UDP or TCP/IP sockets.

Set-top boxes which incorporate a device performing a recording or reproducing function (for example, a hard disk or DVD drive) are excluded from this subheading (subheading 8521 90 00).

8528 71 19 Other

See the last paragraph of the Explanatory Notes to subheading 8528 71 13.

8528 71 90 Other

This subheading includes products without a screen which are reception apparatus for television but which do not incorporate a video tuner (for example, so-called 'IP-streaming boxes').

See also the last paragraph of the Explanatory Notes to subheading 8528 71 13.'"

7.810 In addition to this CNEN amendment as published in the EU Official Journal, the complainants referred in their joint Panel request to certain decisions of the Customs Code Committee (Tariff and Statistical Nomenclature Section), including opinions delivered with respect to this CNEN amendment in draft form in October 2006 and May 2007. Both these CNEN amendment proposals

formed the basis for the CNEN amendment that was published in the EU Official Journal on 7 May 2008.

7.811 In October 2006, the Customs Code Committee (Tariff and Statistical Nomenclature Section) considered a Commission proposal for a CNEN amendment concerning CN code 8528 12 20 for "reception apparatus for colour television, incorporating a video recorder or reproducer"; CN codes 8528 12 90 to 8528 12 95 for "video tuners"; CN code 8528 12 91 for "set top boxes with communication function"; and CN code 8528 12 98 for "other".[1023]

7.812 In May 2007, the Customs Code Committee (Tariff and Statistical Nomenclature Section) considered a Commission proposal for a CNEN amendment, excluding "STBs with HDD" from CN code 8528 12 91 but no opinion was delivered, while the text of the draft was added to the minutes of the Customs Code Committee meeting.[1024]

(i) Arguments of the parties

7.813 In accordance with the 2008/C 133/01, the **complainants** argue that the European Communities improperly applies either 13.9 or 14 per cent duties on certain set top boxes that should be extended duty-free treatment. In particular, under this CNEN, the complainants argue that the following products are excluded from duty-free treatment under CN code 8528 71 13: (i) set top boxes with a hard disk or DVD drive are excluded from CN code 8528 71 13 and must be classified in CN code 8521 90 00 and subject to a 13.9 per cent duty; (ii) set top boxes with ISDN, WLAN or Ethernet technology are excluded from CN code 8528 71 13 and are classified under 8528 71 19 and subject to a 14 per cent duty; (iii) set top boxes that use an external (not "built in") modem are excluded.[1025]

7.814 The **European Communities** does not dispute that these CN codes are subject to either 13.9 or 14 per cent duties.[1026] Nevertheless, the European Communities submits that consideration of whether a particular product is a set top box which has a communication function that qualifies for duty-free treatment requires objective consideration of "the totality of technological elements present in the set top box" subject to the GIRs.[1027] It argues that, if a set top box fulfils the objective characteristics of a reception apparatus for television, it is to be classified in heading 8528. Otherwise, if a product has the characteristics of a video recording or reproducing apparatus, it is classified in heading 8521. In this latter respect, the European Communities asserts that the presence of a hard disk is not assessed in isolation of other characteristics of the product. In addition, it argues that products may be classified under CN code 8528 71 19 if they do not incorporate a modem, or under CN code 8528 71 90 if they are reception apparatus for televisions, but do not incorporate a tuner. In cases where classification cannot be determined the European Communities argues that products are classified in accordance with GIR 3. The European Communities considers that CNEN generally do not have binding legal authority and therefore should not form the basis of an "as such" challenge.[1028]

[1023] Customs Code Committee (407th meeting) (Exhibit TPKM-30).

[1024] Customs Code Committee (420th meeting) (Exhibit TPKM-31).

[1025] United States' first written submission, paras. 48, 89 and 98-99, 104; Japan's first written submission, para. 359, 388; Chinese Taipei's first written submission, paras. 103-104.

[1026] European Communities' first written submission, para. 278.

[1027] European Communities' response to Panel question No. 83; European Communities' first written submission, paras. 279 and 286.

[1028] See paragraphs 7.147-7.148 above.

(ii) Consideration by the Panel

7.815 In paragraphs 7.160 above, we determined that CNENs in general are "authoritative", setting forth rules or norms that have or are intended to have general and prospective application, having normative value and providing administrative guidance, and creating expectations among the public and among private actors. On this basis, we determined that CNENs can be challenged "as such", in particular since they are issued by the European Communities, provide administrative direction to customs authorities, and create legitimate expectations. Accordingly, the Panel will consider the effect of the CNEN 2008/C 112/03 on classification of STBCs. The Panel will focus on the particular CNEN to CN codes 8521 90 00, 8528 71 13, 8528 71 19 and 8528 71 90.

7.816 CNEN 2008/C 112/03 refers, *inter alia*, to CN code 8528 71 13, which applies to "[a]pparatus with a microprocessor-based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange, capable of receiving television signals", identified specifically as "set-top boxes with communication function".

7.817 Under the CNEN to CN code 8528 71 13, set top boxes which incorporate a device performing a recording or reproducing function, including specifically a hard disk or DVD drive are excluded from this subheading, and are directed to be classified in subheading 8521 90 00. CN code 8521 90 00 covers "set-top boxes" ("apparatus without a screen capable of receiving television signals") which incorporate a device performing a recording or reproducing function, including specifically a hard disk or DVD drive. This code carries a 13.9 per cent duty, as discussed in the preceding section.

7.818 In addition, the CNEN to CN code 8528 71 13 indicates that the described "set top box" contains three main components: a microprocessor, a video tuner and a modem. Under the CNEN to this heading, modems are indicated to modulate and demodulate outgoing as well as incoming data signals to enable bidirectional communication for the purposes of gaining access to the Internet. While several examples of modems are provided (V.34-, V.90-, V.92-, DSL- or cable modems), ISDN-, WLAN- or Ethernet devices are expressly excluded as modems that modulate and demodulate signals.

7.819 Accordingly, we understand that apparatus containing in particular ISDN, WLAN or Ethernet technology as apparatus that do not contain a "modem" within the meaning of the CNEN amendment, which indicates that that apparatus will not comply with the requirement in the heading to possess each of a microprocessor, a video tuner *and a modem*. Thus, a "set-top box with communication function" that incorporates ISDN, WLAN or Ethernet technology is expressly excluded from CN code 8528 71 13. A "set top box" incorporating ISDN, WLAN or Ethernet technology is classifiable under either dutiable CN codes 8521 90 00 or another CN code (CN code 8528 71 19 or CN code 8528 71 90) depending on the presence or not of a recording or reproducing function.

7.820 Set-top boxes which do not have a built-in modem, but use an external modem are similarly excluded from CN code 8528 71 13. It is not expressly indicated which CN code would be applicable for such a product. However, the European Communities has confirmed that these products are classifiable under CN code 8528 71 19 that is described in CNEN 2008/C 112/03 as "other". CN code 8528 71 19 assigns a 14 per cent duty under the current CN2010 (and as well as 2007-2009 CN versions). The CNEN to CN code 8528 71 19 refers to language in the concluding paragraph of CN code 8528 71 13, indicating that such products that incorporate a device performing a recording or reproducing function are not to be classified in CN code 8528 71 19 either.

7.821 Finally, the CNEN to CN code 8528 71 90 described as "Other" indicates that it covers products without a screen which are reception apparatus for television but which do not incorporate a video tuner, including "so-called 'IP-streaming boxes'". The CNEN similarly refers to CN code 8528 71 13. Thus, we understand that products classifiable in 8528 71 90 must also be excluded from coverage there if they perform a recording or reproducing function. These products would be classifiable in 8521 90 00 and similarly subject to a 14 per cent duty.

7.822 In summary, we conclude that products may only qualify under duty-free CN code 8528 71 13 to the extent they meet the terms of the concession generally. However, set top boxes that do not have a built-in modem, as described in the provisions, or otherwise incorporate ISDN, WLAN or Ethernet technology, are excluded. A set top box that qualifies as a product without a screen which is a reception apparatus for television but which does not incorporate a video tuner is also excluded. Finally, any set top box that contains a device performing a recording or reproducing function, such as a hard drive or DVD drive, will also be excluded. Based on the text of CNEN 2008/C 112/03, we have no evidence before us to conclude that devices that fulfil these conditions are not excluded, or that resort might be had to GIR 3 if prima facie classifiable under other headings. As noted, products that are in part described by CN code 8528 71 13 but that do not meet the requirements enumerated in this paragraph are required to be classified under other codes under heading 8528, subject to 14 per cent duties, or otherwise under CN code 8521 90 00 and subject to 13.9 per cent duties.

(c) The application of duties on imports of certain set top boxes

7.823 In addition to the above measures at issue, in their joint Panel request, the complainants specified that the measure at issue includes "the actual application by customs authorities of EC member States of customs duties on imports of STBs with a communication function".[1029] In response to a question from the Panel, however, the complainants indicated that they were not challenging the application of any EC measures.[1030] Accordingly, the Panel will not consider particular applications by EC member State customs officials, or reach findings with respect to particular applications.

(d) Conclusions

7.824 In our analysis of the measures above, we concluded that CN code 8528 71 13 is duty-free, while CN codes 8521 90 00, 8528 71 19 and 8528 71 90 are all dutiable. Further, we concluded that CNEN 2008/C 112/03 identifies certain product characteristics as dispositive for classification in CN codes other than duty-free treatment under CN code 8528 71 13. In particular, we found that set top boxes that do not have a built-in modem, as described in the provisions, or otherwise incorporate ISDN, WLAN or Ethernet technology, are excluded. A set top box that qualifies as a product without a screen which is a reception apparatus for television but which does not incorporate a video tuner is also excluded. Finally, any set top box that contains a device performing a recording or reproducing function, such as a hard drive or DVD drive, will also be excluded.

3. The complainants' further identification of the products at issue

(a) Arguments of the parties

7.825 The **United States** and **Japan** argue that STBCs are "an electronic apparatus that connects to a communication channel, such as a phone, integrated services digital network (ISDN) or cable

[1029] Joint Panel request, WT/DS375/8, 376/8, DS377/6, p. 4.
[1030] See complainants' responses to Panel question No. 119.

television line, and produces output on a conventional television screen".[1031] The United States and Japan argue that these set top boxes "enable a television set to receive and decode digital television (DTV) broadcasts and are often referred to as 'cable boxes' or 'receivers'" and "vary greatly in their complexity".[1032] The United States and Japan submit further that these set top boxes additionally enable connection to the Internet, and to send and receive information via "interactive information exchange".[1033] Japan submits that such "interactive information exchange" occurs in real time over the Internet using a modem.[1034] **Chinese Taipei** argues that set top boxes which have a communication function are "devices that enable a television set to receive and decode digital television ('DTV') signals ... that are used for satellite, cable and terrestrial digital televisions ... [and] ... include the capability to connect to the Internet through a modem".[1035] Chinese Taipei and Japan submit that STBCs "*sometimes include* a hard disk to record television programmes, download software from the DTV provider and to perform other ancillary applications enabled by the DTV provider".[1036] Japan and Chinese Taipei submit that its claim with respect to set top boxes does not concern tariff treatment applicable to a specific models, but rather, it concerns a "number of criteria" used by the European Communities to determine the tariff treatment of a category of products.[1037]

7.826 The **European Communities** argues that the complainants have not met their burden to sustain their "as such" claims due to their failure to identify the products or product categories at issue.[1038] For this reason, it considers that the complainants have failed to establish that *all* set top boxes are subject to duties to necessarily violate its commitments.[1039] The European Communities argues that the United States' and Japan's description of the products selects and de-emphasizes different technical elements, while Chinese Taipei provides "an entirely unsupported description" of the product.[1040] In the view of the European Communities, by joining and combining descriptive elements from various sources and time periods, the complainants fail to address differences between the products existing at the time of the conclusion of the ITA and the product as it existed/exists at later times.[1041] The European Communities argues that consideration of certain models, such as set top boxes with a recording function, demonstrates that the main features of certain set top boxes make them "digital video recorders", which are "completely different" than what is covered by the concession.[1042] Generally, the European Communities argues that particular set top boxes when considered objectively, are not eligible for duty-free treatment, such as a set top box that performs a 1

[1031] United States' first written submission, para. 42; Japan's first written submission, para. 344 (referring to informitv glossary, http://informitiv.com/glossary/settopbox/ (Exhibit US-22); ITV dictionary.com http://www.itvdictionary.com (Exhibit US-23, JPN-11)).

[1032] United States' first written submission, para. 42; Japan's first written submission, para. 344 (referring to Newton's Telecom Dictionary (10th ed. 1996), p. 1041 (Exhibit US-24, Exhibit JPN-11)).

[1033] United States' first written submission, para. 42; Japan's first written submission, para. 344 (referring to Annabel Z. Dodd, the Essential Guide to Telecommunications (3rd ed. 2001), p. 308 (Exhibit US-25, Exhibit JPN-11)).

[1034] Japan's first written submission, para. 345.

[1035] Chinese Taipei's first written submission, para. 15.

[1036] Japan's first written submission, para. 345 (emphasis added); Chinese Taipei's first written submission, para. 15.

[1037] Japan's second written submission, para. 197; Chinese Taipei's second written submission, para. 225.

[1038] European Communities' second written submission, para. 67; European Communities' second oral statement, paras. 51 and 58.

[1039] European Communities' second written submission, para. 68.

[1040] European Communities' first written submission, para. 202 (referring to Exhibits US-22 to 25).

[1041] European Communities' first written submission, para. 205.

[1042] European Communities' first written submission, para. 260 (referring to Exhibit EC-43 to 45, US-28).

per cent "communication" function and 99 per cent "other" functions.[1043] In its view, if the complainants' broad approach were followed, no matter how prevailing the recording function, that product, and any other possible product in the future would be considered an ITA product as long as the "technological elements" fit inside a "box" that enables a communication function.[1044]

(b) Consideration by the Panel

7.827 We recall from above our finding that the task before us in respect of the complainants' claims based on Article II of the GATT 1994, is to determine whether the measures at issue result in duties being levied on certain products, in excess of the tariff treatment provided for those products under the EC Schedule. In doing so, we explained our understanding of the complainants' claim to be that *aspects* of the measures operate automatically to exclude from particular duty-free tariff headings *all* products with a certain characteristic *irrespective* of the other objective characteristics they may possess. Thus, we concluded that, if we were to determine that some products fall within the scope of duty-free concessions in the EC Schedule, and if the challenged measures provided for the application of duties to those products covered by the concession, this treatment would breach Article II.[1045]

7.828 Accordingly, we disagree with the European Communities that the complainants were obliged in this case to identify the particular models or precise products at issue in order to succeed with their claim. We consider that the measures within our terms of reference determine the products that are within our terms of reference. The Panel will consider below these and other aspects of the measures in its assessment in determining whether the complainants have met their burden to demonstrate inconsistency of the measures at issue under Article II of the GATT 1994.

7.829 In making our assessment, we note that the complainants have referred to various characteristics of the products in framing their arguments to the Panel. In particular, the complainants submit that a set top box with a communication function is an electronic apparatus that connects to a communication channel, including through technologies based on phone, ISDN or cable television line. They argue these devices enable connection to the Internet and handle information interactively, and produce output on a conventional television screen. In addition, the complainants submit that these devices connect to a television set to receive and decode digital television broadcasts, including over satellite and cable. The complainants also argue that the addition of a hard drive to a set top box with a communication function does not change its nature as a set top box with a communication function.[1046]

7.830 Bearing in mind the foregoing, we consider that the products at issue in this dispute are (i) electronic apparatus that enable a video monitor or television to receive and decode digital television broadcasts from a communication channel, which are capable of connecting to the Internet through an in-built WLAN, ISDN or Ethernet device in order to have an interactive information exchange; and (ii) electronic apparatus that meet the terms of the description in the CNEN and otherwise incorporate a device performing a recording or reproducing function, such as a hard disk or DVD drive.

7.831 In the Panel's view, therefore, the two main issues before it concern whether the concession for "Set top boxes which have a communication function" covers electronic devices that achieve an interactive communication function via WLAN, ISDN or Ethernet, and whether the concession covers

[1043] European Communities' first written submission, paras. 258-260 (Exhibit EC-46).
[1044] European Communities' response to Panel question No. 69.
[1045] See paras. 7.103-7.117 above.
[1046] Complainants' response to Panel questions Nos. 85, 88 and 146.

those devices containing recording functionality (for example, a hard drive or DVD drive), in addition to an interactive communication function. As noted in paragraphs 7.809-7.812 above, these aspects are reflected in the text of the measure CNEN 2008/C 112/03, and were the focus of the complainants' arguments. The Panel will thus proceed on the basis of the products affected by these aspects of the measures, and in light of the description of the product presented by the parties.

4. Whether the European Communities' tariff treatment of particular set top boxes is consistent with its obligations under Article II of the GATT 1994

7.832 The European Communities made duty-free concessions on certain information technology products as part of its implementation of the ITA, which are reflected in the EC Schedule. The complainants' claim relates to the concession embodied in the narrative description "Set top boxes which have a communication function: a microprocessor based device incorporating a modem for gaining access to the Internet and having a function of interactive information exchange" in the Annex to the EC Schedule. In addition, the United States argues that the European Communities has committed to provide duty-free treatment to set top boxes in accordance with concessions embodied in the EC Schedule under CN codes 8517 50 90, 8517 80 90, 8525 20 99 or 8528 12 91 listed therein. The complainants argue that by not affording duty-free treatment to products which are within the scope of these tariff concessions, the European Communities is acting inconsistently with its obligations under Article II of the GATT 1994, which requires that Members not treat products coming from another Member less favourably than in their schedules or to charge duties in excess of the bound rates set forth in said Schedule.

7.833 As noted above, we will start by determining the scope of the STBCs concession in the Annex to the EC Schedule. We will then turn to consider the United States' claim with respect to CN codes 8517 50 90, 8517 80 90, 8525 20 99 or 8528 12 91. Having determined the scope of the relevant obligation in the EC Schedule, we will then consider whether the effect of the measures at issue noted above is such that products that fall within the scope of the EC's obligations do not receive duty-free treatment.

(a) The Ordinary Meaning of the Relevant Concession: The EC headnote and narrative product description for STBCs in the Annex to the EC Schedule

7.834 The **complainants** submit that certain set top boxes are covered by the duty-free concession in the narrative description for STBCs in the Annex to the EC Schedule ("Set top boxes which have a communication function: a microprocessor based device incorporating a modem for gaining access to the Internet and having a function of interactive information exchange").[1047] They argue that the ordinary meaning of the terms of the STBCs narrative description, when read in the context of the EC headnote, requires the European Communities to extend duty-free coverage to all products described by the narrative description, wherever those products are classified.[1048] In their view, the tariff item

[1047] The following third parties also take this view: see, for instance, Australia's oral statement, paras. 8, 13; China's executive summary of its third party submission, para. 3; Costa Rica's third party submission, para. 5, 22-23; Hong Kong (China)'s third party statement, paras. 4-5; Korea's third party submissions, paras. 10-11, 22; Philippines' third party submission, para. 3; Philippines' third party statement, pp. 5-6; Singapore's oral statement, paras. 9 and 48.

[1048] Complainants' response to panel question No. 100. The United States and Chinese Taipei submit that the ITA itself does not provide for the inclusion of a headnote; however, they argue that participants agreed, during the implementation phase, to incorporate a headnote into their Schedules as part of the process of implementing their Attachment B concessions. They argue that such a headnote was to include the language "wherever they are classified in the HS" (United States' and Chinese Taipei's responses to panel question No. 100). Japan argues that the ITA does not require the incorporation of a headnote when inscribing duty-free

numbers listed beside the narrative descriptions cannot limit the concession's scope to only those products classifiable in the listed codes. The United States describes the EC headnote as a "separate" commitment, *additional* to the commitments associated with individual tariff lines in the EC Schedule.[1049]

7.835 The **European Communities** accepts that the EC headnote is part of its Schedule[1050], but rejects the complainants' allegations on the ordinary meaning of the terms in the EC headnote[1051] as well as the STBCs narrative description.[1052] The European Communities argues that the three tariff item numbers listed next to the STBCs narrative description determine the scope of the STBCs commitment made pursuant to Attachment B and therefore shed light on what products were understood to be covered.[1053]

7.836 As explained above,[1054] the Annex to the EC Schedule contains (i) the EC headnote, and (ii) a table listing 55 narrative descriptions (including the STBCs narrative description) in a left-hand column with one or more specific tariff item numbers listed next to each narrative description in the table's right-hand column (including four codes associated with the STBCs narrative description).

7.837 We recall that the EC headnote provides as follows:

> "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 as 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".[1055]

7.838 The text of the STBCs narrative description, that appears below the EC headnote, provides as follows:

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concessions on products described in Attachment B into ITA participants' Schedules. It argues that participants had discretion concerning how to reflect this commitment into their own Schedules subject to review and approval by the Members. While arguing that no requirement exists to incorporate a particular headnote, Japan submits it included a note that is "almost the same" as the EC headnote (Japan's response to panel question No. 100).

[1049] United States' comments to the European Communities' response to Panel questions Nos. 100 and 103 and to questions 1-3 of the United States.

[1050] European Communities' first written submission, para. 18.

[1051] European Communities' first oral statement, para. 20.

[1052] European Communities' first written submission, paras. 104-118.

[1053] European Communities' first written submission paras. 50-61. The European Communities has argued that the CN codes that appear next to the product descriptions (such as for instances, the FPDs narrative description) "appear twice" in its Schedule, as those codes listed next to the narrative descriptions in the Annex to the EC Schedule are also listed elsewhere in the EC Schedule and carry a zero duty. Thus, the European Communities considers that the CN codes in the Annex to the EC Schedule "exhaust" the headnote, in particular the language "wherever the product is classified" that appears therein. Accordingly, the European Communities does not consider the headnote adds to its commitments (see, for instance, European Communities' first oral statement, para. 19; European Communities' response to questions from the United States during second meeting, para. 1).

[1054] See paragraphs 7.24 - 7.25 above.

[1055] Exhibit US-7.

> "Set top boxes which have a communication function: a microprocessor based device incorporating a modem for gaining access to the Internet and having a function of interactive information exchange".[1056]

7.839 The following four tariff item numbers are associated with the STBCs narrative description:

> 85175090, 85178090, 85252099, 85281291.[1057]

7.840 The complainants have identified both the STBCs narrative description and the EC headnote in discussing the concession that they consider to arise under the Annex to the EC Schedule. Because the EC headnote appears at the outset of the Annex to the EC Schedule and thus precedes the narrative descriptions, we consider it appropriate to begin our analysis with the EC headnote before turning to the narrative description. Pursuant to Article 31 of the Vienna Convention, we will consider the ordinary meaning of the EC headnote.

(i) The meaning of the terms of the EC headnote

7.841 The Panel recalls its conclusions from paragraph 7.330 *et seq*. above regarding the interpretation of the EC headnote in the Annex to the EC Schedule. In accordance with Article 31 of the Vienna Convention, the Panel determined that the EC headnote operates so that the EC concession is defined by the narrative product descriptions in the Annex to the EC Schedule and not by the terms of the tariff item numbers beside them, which are "illustrative" of the headings that the European Communities considered relevant at the time of implementation of the ITA. The tariff item numbers do not delimit the particular products that should be extended duty-free treatment.[1058]

7.842 The Panel found support for this in the context provided by the ITA, other aspects of the EC Schedule, and other WTO Members' schedules of concessions, and in light of the object and purpose of the *WTO Agreement* and GATT 1994. As a separate matter, because the language of the dispositive product descriptions at issue, are not based on HS language and do not refer to the HS, the Panel further considered that HS interpretative materials, including section and chapter notes and GIRs, are not relevant to an assessment of the scope of product coverage. Neither did we consider relevant the CNEN, which are not part of the HS.

7.843 Likewise, the EC concession for set top boxes in the Annex to the EC Schedule is defined only by the relevant narrative description, which we now analyse. On the basis of our findings above, we will consider the ordinary meaning of the specific terms of the STBCs narrative description to determine the treatment under the EC concession. Again, the Panel will assess the narrative description in accordance with the principles of treaty interpretation as codified in Article 31 of the Vienna Convention.

[1056] Exhibit US-7.

[1057] Exhibit US-7. CN codes 85175090, 85178090 and 85252099 also appear in the EC Schedule's consolidated section that lists the HS1996 duty-free codes from *Sections 1* and *2* of Attachment A. The fourth code, CN code 8528 12 91, was added to the Annex to the EC Schedule, in 15 December 2000. See EC ITA Modifications; Committee on Market Access, Rectifications and Modifications of Schedules, Schedule CXL – European Communities, G/MA/TAR/RS/74 (15 December 2000) (Exhibit US-26).

[1058] See in particular paras. 7.445-7.447 for a summary of overall conclusions on interpretation of the EC headnote and on the relevance of the narrative product descriptions and CN codes in the Annex to the EC Schedule.

(ii) The terms of the STBCs narrative description in the Annex to the EC Schedule

7.844 We recall that the STBCs narrative description provides:

> "Set top boxes which have a communication function: a microprocessor based device incorporating a modem for gaining access to the Internet and having a function of interactive information exchange".[1059]

7.845 The **complainants** distinguish between the terms appearing *before* the colon ("Set top boxes which have a communication function:"), and those *after* the colon ("a microprocessor-based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange"). The **United States** and **Japan** argues that a device having the three characteristics appearing after the colon is a set top box with a communication function.[1060] **Chinese Taipei** notes that only the words before the colon were marked in bold, as the description originally appeared in Attachment B of the ITA, which it argues, suggests that "negotiators of the ITA intended to stress the words 'set top boxes which have a communication function" over the rest of the text.[1061] According to Chinese Taipei, the colon "breaks the sentence" into two parts, wherein the product is identified before the colon, while the terms after the colon describe "a type of device ... that is able to perform a communication function". Chinese Taipei argues that the terms after the colon provide context to interpret the terms before the colon, though it argues the conclusion would be the same whether treated as context or otherwise, namely, that the addition of functions or features would not preclude a set top box from falling within the concession.[1062] If the concession contains no limitation, they argue, the concession does not limit the type of functionality.

7.846 The **European Communities** argues that the narrative description must be considered in its entirety, and not divided into pieces.[1063] In its view, the text which follows after the colon is used to identify or explain the text before the colon, and accordingly, the two parts cannot be read in separation.[1064] Thus, it considers "set top boxes which have a communication function" are identified after the colon as a specific type of "device" that is i) microprocessor-based, ii) incorporating a modem for gaining access to the Internet and iii) having a function of interactive information exchange.[1065] In its view, these three aspects do not constitute "minimal requirements" and endless additional features or technical elements should not be assumed when considering the definition of a set top box which has a communication function.[1066] The European Communities argues that it is not feasible to ignore the main versus an ancillary function, in determining whether a product qualifies as a set top box within the meaning of the narrative description.[1067]

7.847 The **Panel** notes that the narrative description at issue contains 29 terms, many of which have been discussed by the parties. The main questions before the Panel are whether the concession for

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[1059] Exhibit US-7.
[1060] United States' first written submission, para. 92; Japan's first written submission, para. 373.
[1061] Chinese Taipei's first written submission, para. 384, fn. 196.
[1062] Chinese Taipei's first written submission, para. 403.
[1063] European Communities' first written submission, para. 211.
[1064] European Communities' first written submission, para. 212.
[1065] European Communities' first written submission, para. 213.
[1066] European Communities' first written submission, paras. 214, 218. The European Communities qualifies the complainants as "saying that a set top box which has a communication function is the communication function": "STB + communication function = (1) + (2) + (3) where (1) + (2) + (3) would be the defining elements … of the communication function" (European Communities' first written submission, para. 218).
[1067] European Communities' comments on complainants' responses to Panel question No. 146.

"set top boxes which have a communication function" covers electronic devices that achieve an interactive communication function via WLAN, ISDN or Ethernet, and/or whether the concession covers those devices containing recording functionality, such as a hard drive or DVD drive, in addition to an interactive communication function. Considering the complainants' arguments, and the focus of their complaints in these two respects, we focus our analysis on those terms of the concession that are central to addressing the matters before us, in their relevant context and in light of the object and purpose. The Panel will also consider the European Communities' argument that the concession must be considered in its entirety. At the outset, the Panel considers it helpful to begin with an assessment of the opening terms appearing in the concession, which indicate that the concession concerns "Set top boxes", in particular, those "which have a communication function".

The meaning of the terms "set top boxes which have a communication function"

The meaning of the terms "set top box"

Arguments of the parties

7.848 The **complainants** submit technical definitions of the term "set top boxes". **Japan** and **Chinese Taipei** argue that the term "set top box" is a high-tech neologism – i.e., a new word or expression – with no precise definition in ordinary dictionaries.[1068] The **United States** and Japan describe a set top box as a microprocessor-based electronic apparatus that incorporates a modem to connect to a communication channel, such as a phone, ISDN or cable television line, and produces output on a conventional television screen, adding that set top boxes "vary greatly in their complexity". They argue that set top boxes often enable a television set to receive and decode digital television broadcasts and that set top boxes are often referred to as "cable boxes" or "receivers".[1069] Also, set top boxes enable a user to connect to the Internet and send and receive information – thus engaging in "interactive information exchange".[1070] According to Chinese Taipei, a "set top box" is "a device that interfaces a television set or computer" with "a network, enabling users to exchange information"[1071] or to "a cable TV network, cable modem network, or satellite TV dish and, perhaps, telephone network".[1072] Chinese Taipei submits that a set top box may have a communication function for which its "purpose or intended role is the transmission or exchange of information, news, etc".[1073]

7.849 The complainants define a "set top box" as follows:

Source Referred to:	**Definition of "set top box"**
Informitv glossary, http://informitv.com/glossary/settopbox/ [1074]	"[r]eceiver device that processes an incoming signal from a satellite dish, aerial, cable, network or telephone line"

[1068] Japan's first written submission, para. 377; Chinese Taipei's first written submission, paras. 389-390.
[1069] United States' first written submission, para. 42; United States' second written submission, para. 37.
[1070] United States' first written submission, para. 42; Japan's first written submission, para. 345.
[1071] Chinese Taipei's first written submission, para. 400.
[1072] Chinese Taipei's first written submission, para. 401.
[1073] Chinese Taipei's first written submission, para. 401.
[1074] United States' first written submission, para. 42, fn. 45, (Exhibit US-22); Japan's first written submission, para. 344, fn. 145, (Exhibit JPN-11).

Source Referred to:	**Definition of "set top box"**
ITV Dictionary, http://www.itvdictionary.com (Exhibit US-23)[1075]	"A set-top box (STB) is a device that connects to an external signal source and decodes that signal into content that can be presented on a display unit such as a TV."
Newton's Telecom Dictionary (10th ed. 1996), p. 1041 (Exhibit US-24)[1076]	"The electronics box which sits on top of your TV, connecting it to your incoming CATV signal and your TV's incoming coaxial cable. Set-tops vary greatly in their complexity with older models merely translating the frequency received off the cable into a frequency suitable for the television receiver while newer models can be addressable with a unique identify much like a telephone. That identify can be addressed from the cable head end. This allows the CATV operator to turn individual channels on and off, such as pay channels"
Annabel Z. Dodd, The Essential Guide to Telecommunications (3rd ed. 2001), p. 308[1077]	"Digital set top boxes are available to take advantage of the two-way capability of digital cable TV and satellite TV."
Yourdictionary.com, http://www.yourdictionary.com/set-top-box, visited on 30 October 2008[1078]	"a small computing device that interfaces a television (TV) set or computer to a cable TV (CATV) network, cable modem network, or satellite TV dish and, perhaps, telephone network. A set-top box is responsible for functions such as decoding digital TV signals for display on an analogue TV set, compression and decompression, buffering, security management, and various signalling and control communications."
Foldoc, Free Online Dictionary of Computing, http://foldoc.org/index.cgi?query=set+top+box, visited on 30 October 2008[1079]	"Any electronic device designed to produce output on a conventional television set (on top of which it nominally sits) and connected to some other communication channels such as telephone, ISDN, optical fibre, or cable. The STB usually runs software to allow the user to interact with the programmes shown on the television in some way."

[1075] United States' first written submission, para. 42, fn. 45, (Exhibit US-23); Japan's first written submission, para. 344, fn. 145, (Exhibit JPN-11).

[1076] United States' first written submission, para. 42, fns. 46-47, (Exhibit US-24); Japan's first written submission, para. 344, fns. 146-147.

[1077] United States' first written submission, para. 42, fn. 48, (Exhibit US-25); Japan's first written submission, para. 344, fn. 148, (Exhibit JPN-11).

[1078] Chinese Taipei's first written submission, paras. 397, fn. 200.

[1079] Chinese Taipei's first written submission, paras. 398, fn. 201.

Source Referred to:	Definition of "set top box"
SearchNetworking.com, http://searchnetworking.techtarget.com/sDefinition/0,,sid7_gci212971,00.html, visited on 30 October 2008[1080]	"A set-top box is a device that enables a television set to become a user interface to the Internet and also enables a television set to receive and decode digital television (DTV) broadcasts. DTV set-top boxes are sometimes called receivers. A set-top box is necessary to television viewers who wish to use their current analogue television sets to receive digital broadcasts."

7.850 The **European Communities** argues that there is no universally applicable definition of a "set top box". Rather, "set top box" covers "a very broad category of products, the only common feature of which is that they have the form of a box and are placed close to a TV or a video monitor (for the use with that product for the purposes of ultimately reproducing television)". The European Communities argues that a "great variety" of set top boxes exist today, not all of which have the same features[1081], including set top boxes that serve as satellite receivers to decode television programming.[1082] However, the European Communities argues that the terms "which have a communication function" denote a particular type of set top box, i.e., those set top boxes that access the Internet directly through an incorporated modem.[1083] The advent of set top boxes incorporating both communication and video recording or reproducing functions resulted in what the European Communities calls a "new" product where the communication function is supplementary to the recording or reproducing function.

Consideration by the Panel

7.851 The parties agree on certain common elements, which are supported by the various definitions and descriptions they provided. In particular, the parties recognize that a "set top box" describes an apparatus or device that processes an incoming signal from an external signal source in a manner that can be presented on a display unit, such as a video monitor or television set. The parties seem to agree that the apparatus may not necessarily be designed to be "on top" of a television or video monitor.[1084] Otherwise, many of the definitions acknowledge that a set top box may handle one or several functionalities, including receiving and decoding television broadcasts, whether from a satellite, cable or Internet source; converting digital TV broadcasts to function on older analogue TV sets; enabling two-way interactive connectivity with digital cable television broadcasts or via the Internet. The complainants submit that set top boxes might also provide recording of digital video content. While disagreeing with several other elements, the European Communities accepts that the definition of a set top box encompasses "a very broad category of products, the only common feature of which is that they have the form of a box and are placed close to a TV or a video monitor (for the use with that product for the purposes of ultimately reproducing television)".[1085] Furthermore, the European Communities seems to accept that an apparatus having a recording function may still be considered a set top box in case such recording function is "ancillary".[1086]

[1080] Chinese Taipei's first written submission, paras. 399, fn. 202.
[1081] European Communities' response to Panel question No.69 (referring to Exhibit US-23).
[1082] Exhibit EC-35.
[1083] European Communities' response to Panel question Nos. 69 and 78.
[1084] European Communities' response to Panel question No.69.
[1085] European Communities' response to Panel question No.69.
[1086] European Communities' response to Panel question No. 23. In this respect, the European Communities considers that products which are currently in the market could, with some simplification, be

7.852 In light of the broad array of functionalities contemplated by set top boxes, we agree with the European Communities that the use of the terms "which have a communication function" may limit the particular type of set top box that is covered under the concession. We will accordingly consider these terms, as well as the relevance of the remaining terms in the entire text of the concession. In light of the complainants' focus on recording features and certain technologies that enable connectivity, we consider that it is not necessary to assess all of the various possible functions a set top box could perform.

The terms "which have a communication function"

7.853 Japan argues that the ordinary sense of the phrase "which have a communication function" confirms that the scope of the EC concession is broad.[1087] We recall our conclusion above that the complainants' reference to the term "with" was either intended to paraphrase the concession, or otherwise, the United States used the term in reference to its separate claim in connection with the European Communities' 2000 notification of tariff item number 8528 71 13 in the Annex to the EC Schedule.[1088] Accordingly, we see no need to consider the term here.

Arguments of the parties

7.854 The **complainants** argue that the description contains the terms "which have" and does not include the terms "which have *only*" or "which have *solely*". Therefore, in their view the phrase "which have" does not limit the concession to set top boxes that are solely comprised of the three characteristics enumerated after the colon in the concession.[1089] The complainants argue that such a reading would impute into the EC Schedule words that are not there. Had the drafters intended to limit the concession, the complainants argue that the term "only" or its equivalent would have been included.[1090] In the absence of additional words, **Japan** argues that set top boxes with other functions are covered as well.[1091]

7.855 Japan and **Chinese Taipei** additionally argue that the indefinite article "a", defined as "[o]ne, some, any"[1092] indicates that ITA participants intended to cover a broad array of set top boxes. Japan argues that the term "a" indicates that parties intended to cover set top boxes which may perform not only a communication function but also other set top boxes which perform a function *in addition to* a communication function.[1093] Chinese Taipei argues that the use of the term "a" indicates coverage of set top boxes which perform *any type of* communication function, not a specific type.[1094]

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divided into the following three categories: 1) set top boxes of the type of digital video recorders with an ancillary communication function (such as those in Exhibit EC-44), 2) the "Internet on TV" set top boxes whose main function is to communicate (such as those in Exhibit EC-46), or set top boxes of the type that would be classifiable in heading 8528, i.e. set top boxes which perform the function of reception apparatus for television and whose communication function is somehow more limited (and which have no or even a small hard disk drive).

[1087] Japan's first written submission, para. 380.

[1088] See paras 7.788-7.795 above.

[1089] United States' second written submission, para. 39; Japan's first written submission, para. 386; Chinese Taipei's first written submission, para. 394.

[1090] United States' response to Panel question No. 80; Chinese Taipei's first written submission, para. 394.

[1091] Japan's first written submission, para. 383.

[1092] The *Shorter Oxford Dictionary* (1993), p. 1.

[1093] Japan's first written submission, para. 382.

[1094] Chinese Taipei's first written submission, paras. 393.

7.856 Finally, Japan and Chinese Taipei additionally define the term "communication" as "[t]he action of communicating heat, feeling, motion, etc.; esp. the transmission or exchange of information, news, etc."[1095]; and the term "function" as "[t]he activity proper or natural to a person or thing; the purpose or intended role of a person or thing; an office, duty, employment, or calling. Also, a particular activity or operation (among several) …"[1096] Based on these definitions, Japan argues that set top boxes with a "communication function" are those whose purpose or intended role is the transmission or exchange of information, without constraining the type of information that can be exchanged. Japan argues further that the term "function" conveys "the notion of a single function among several functions, in no way excluding other functions".[1097] Chinese Taipei argues that the terms "communication" and "function" indicate that set top boxes with a communication function are those that have an activity or operation of transmission or exchange of information, news, etc.[1098]

7.857 The **European Communities** argues that the term "which" as a relative noun serves the purpose of "introducing a clause defining or restricting the antecedent, esp. a clause essential to the identification of the antecedent".[1099] Accordingly, the European Communities argues that "which have a communication function" defines or restricts the meaning of the antecedent term "set top boxes". When considered in combination with the use of a colon, the European Communities argues that it should be understood that not *all* set top boxes are defined but merely certain *kinds of* set top boxes, in particular those with a communication function.[1100] The European Communities is of the view that, when appraising the objective characteristics of an apparatus for purposes of classification, it is possible that the prevalence of a recording function over other functions will lead to the conclusion that an apparatus is a "video recorder" rather than a "set top box".[1101] The European Communities has not assessed the meaning of the term "a" in isolation.

Consideration by the Panel

7.858 The European Communities provides a definition of "which" as to "introduc[e] a clause defining or restricting the antecedent". The term "which" followed by "communication function" may thus be used to *restrict* the antecedent term "set top boxes", as the European Communities suggests. However, the term "which" is also defined as "used as a function word to introduce a non-restrictive relative clause and to modify a noun in that clause and to refer together with that noun to a word or word group in a preceding clause or to an entire preceding clause or sentence or longer unit of discourse".[1102] Therefore, rather than restricting the term "set top boxes" the term "which have a communication function" can also be used to *define* "set top boxes". Thus, this definition confirms to us that "which", considered as it appears in the narrative description, cannot necessarily be assumed to limit the breadth of coverage of the concession to set top boxes which *only* have a communication function. Accordingly, we will consider the remaining terms in the concession and any relevant context thereafter to inform our interpretation of the scope of coverage.

[1095] The *Shorter Oxford Dictionary* (1993), p. 466.
[1096] The *Shorter Oxford Dictionary* (1993), p. 1056.
[1097] Japan's first written submission, para. 381.
[1098] Chinese Taipei's first written submission, para. 391.
[1099] European Communities' first written submission, para. 215 (referring to The *Shorter Oxford Dictionary* (1993), p. 3667 (Exhibit EC-31)).
[1100] European Communities' first written submission, para. 216.
[1101] European Communities' response to Panel questions Nos. 23 and 89. Regarding the European Communities' argument that the prevalence of a recording function may lead to the conclusion that a device is not a "set top box", see United States' second written submission, para. 37.
[1102] *Merriam-Webster* Online Dictionary (http://www.merriam-webster.com/dictionary/which).

7.859 The definition of the terms "communication" and "function" provided by Japan and Chinese Taipei support the view that a communication function refers to the transmission or exchange of information as a capability or operation of a set top box. Generally, the meaning of these terms are not in dispute to the extent that the parties agree that communication is through access to the Internet and is interactive as opposed to unidirectional (these aspects are discussed in further detail in below).

7.860 Although the Panel agrees that the narrative description covers set top boxes which have a communication function in addition to other functions, we would note that the concession does not cover all multifunction products which may incorporate in them a set top box with a communication function. For a product to be covered by the concession it must be a "set top box", an apparatus or device that processes an incoming signal from an external signal source in a manner that can be presented on a display unit, such as a video monitor or television set. This apparatus need not be designed to be placed on top of the display unit, and may handle one or several functionalities, including: receiving and decoding television broadcasts, whether from a satellite, cable or Internet source; converting digital TV broadcasts to function on older analogue TV sets; enabling two-way interactive connectivity with digital cable television broadcasts or via the Internet; or even recording of digital video content. Therefore, if through the inclusion of additional features or incorporating it into another product, an apparatus may no longer be described as, in essence, a "set top box which ha[s] a communication function" it would not be covered by the concession.

7.861 Accordingly, based on our preliminary assessment of the terms "set top boxes which have a communication function", we conclude that the terms "which have" in isolation do not necessarily limit the breadth of coverage of the concession to set top boxes which *only* have a communication function. However, we also find that the coverage of the concession was not intended to extend to devices which have set top boxes incorporated into them along with other functions in a way that they may no longer be described as, in essence, a "set top box which ha[s] a communication function". In other words, we determined that the concession covers set top boxes which have a communication function, but not necessarily *only* a communication function. In addition, the Panel notes that while "which have" does not necessarily imply an exclusive functionality, it is clear that the drafters chose to emphasize functionality, and a communication function in particular, in defining this narrative product description. We will return to this below.[1103] Before addressing the words that appear after the colon, we address briefly the relevance of the use of a colon in the concession.

The relevance of the colon to an understanding of the terms in the concession

Arguments of the parties

7.862 **Japan** and **Chinese Taipei** consider the relevance of the use of the colon in their assessment of the ordinary meaning of the concession. In particular, Japan argues that a device having the three characteristics appearing after the colon is a set top box with a communication function.[1104] Chinese Taipei argues that the colon "breaks the sentence" into two parts, wherein the product is identified before the colon, and "a type of device (STB) that is able to perform a communication function is described" after the colon. In other words, according to Chinese Taipei, the terms after the colon merely provide for an example of a set top box which has a communication function.

7.863 The **European Communities** argues that the use of a colon divides the text into two parts: "Set top boxes which have a communication function", and "a microprocessor-based device incorporating a modem for gaining access to the Internet, and having a function of interactive

[1103] See paragraph 7.883 *et seq*. below.
[1104] Japan's first written submission, para. 373.

information exchange". In its view, the text which follows after the colon is used to identify or explain the text before the colon, which requires not reading the two parts in absolute separation.[1105]

Consideration by the Panel

7.864 The *Oxford Guide to English Usage* explains that one function of a colon is to "[l]ink[] two grammatically complete clauses, but mark[] a step forward, from introduction to main theme, from cause to effect, or from premise to conclusion".[1106]

7.865 It is unquestionable that the colon provides a division between the antecedent text "Set top boxes which have a communication function", and that which follows it. A "link" or relationship between these clauses is implicit since the full text constitutes the concession at issue. Thus, the terms before the colon cannot be understood in isolation from the rest. Rather, all the terms together determine the concession. The text following the colon appears to inform and expand upon the description provided by the antecedent text "Set top boxes which have a communication function". Such a set top box is "microprocessor-based", and further "incorporat[es] a modem for gaining access to the Internet, and [has] a function of interactive information exchange". What remains is to determine the ordinary meaning of "a microprocessor-based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange", which informs the meaning of "Set top boxes which have a communication function".

Textual analysis of the phrase "a microprocessor-based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange"

7.866 The parties' arguments centre on the significance of "incorporating a modem", the description "for gaining access to the Internet" and the relevance of "interactive information exchange". The **United States** and **Japan** define the term "microprocessor" as "[a]n electronic circuit, usually on a single chip, which performs arithmetic, logic and control operations, with the assistance of internal memory".[1107] However, they do not consider the language "a microprocessor-based device" to restrict the broad scope of the meaning of the concession.[1108] The **European Communities** has not commented on the significance of these terms for interpretation of the overall concession. The parties do not dispute that the apparatus at issue are "microprocessor-based" and neither does the Panel. Set top boxes falling under the concession must thus be "microprocessor-based". The Panel will now consider the remaining terms, in particular those highlighted by the parties.

The terms "incorporating a modem"

Arguments of the parties

7.867 The **complainants** define "incorporate" as "1. combine or unite into one body or uniform substance; mix together. 2. Put (one thing) in or into another to form one whole; include, absorb."[1109] They argue that, in the context of the definition of set top box, "incorporating" signifies that the

[1105] See para. 7.846 above; European Communities' first written submission, para. 212.

[1106] *The Oxford Guide to English Usage*, Oxford University Press, 2d edition, 1994, p. 237. In addition, *The Oxford Guide to English Usage* explains that a colon may also be used to introduce a list of items or otherwise to introduce speech or a quotation in an "especially formal and emphatic way". (p. 237).

[1107] United States' first written submission, para. 94 (Exhibit US-63); Japan's first written submission, paras. 379-380 (referring to *Newton's Telecom Dictionary* (10th ed. 1996), p. 731 (Exhibit JPN-11)).

[1108] Japan's first written submission, paras. 379-380.

[1109] The *Shorter Oxford Dictionary* (1993), p. 1342.

device must itself contain a modem.[1110] **Japan** notes the use of the term "incorporating" in other provisions of the HS[1111], and argues that these examples confirm that the term "incorporating" is used to mean that "something is included or mounted in internal space of a frame or a base in a housing of a machine, to be fitted together to form a whole".[1112]

7.868 The **European Communities** agrees that "incorporating" means that a modem must be included in the same housing.[1113] Based on this definition, the European Communities argues that set top boxes that cannot connect to the Internet without assistance from an external modem, do not meet the requirement of incorporating a modem for gaining access to the Internet and providing interactive information exchange.[1114]

7.869 With respect to the term "modem" the **complainants** argue that it should be interpreted broadly to include a wide array of technologies that enable a set top box to gain access to the internet. The complainants refer to the following definitions of the term "modem":

Source Referred to:	**Definition of "modem"**
IEEE Standard Dictionary of Electrical and Electronics Terms (6th ed. 1996), p. 660[1115]	"[a] contraction of MOdulator-DEModulator, an equipment that connects data terminal equipment to a communication line"
Newton's Telecom Dictionary (2004, 20th ed.), p. 532[1116]	"The term 'modem' also is applied (and correctly so, in the purely technical sense) to ISDN TAs (Terminal Adapters), ADSL TUs (Terminating Units), line drivers and short-haul modems"
The Shorter Oxford Dictionary (1993), p. 1342[1117]	"A combined modulator and demodulator, used *esp.* to connect a computer to a telephone line, for converting digital electrical signals to analogue or audio one and vice versa."

7.870 Based on these definitions, the complainants argue that the term "modem" does not require that a device perform digital-to-analogue signal conversion via the sending and receiving of audible tones transferred over telephone lines.[1118] Neither must a device enable any form of "direct" access to an Internet Service Provider ("ISP"), Internet Exchange ("IX") or Network Access Point ("NAP" or

[1110] Complainants' responses to Panel question No. 76; Chinese Taipei's first written submission, paras. 410-415.

[1111] For example, Japan refers to the concessions "Indicator panels incorporating liquid crystal devices (LCD) or light emitting diodes (LED)" in HS code 8531 20, "Wrist-watches, electrically operated, whether or not incorporating a stop-watch facility" in HS heading 9102 10 and the reference "This Chapter does not cover: (g) Pumps incorporating measuring devices, of heading 84.13…" in Note 1 to Chapter 90 of the HS. (Japan's response to Panel question No. 76).

[1112] Japan's response to Panel question No. 76.

[1113] European Communities' response to Panel question No. 76.

[1114] European Communities' response to Panel question No. 73.

[1115] United States' first written submission, para. 100, fn. 145 (Exhibit US-67); Japan's first written submission, para. 390, fn. 180 (Exhibit JPN-11); Chinese Taipei's first written submission, para. 418.

[1116] Japan's first written submission, para. 390, fn. 181; Chinese Taipei's first written submission, para. 419, fn. 212.

[1117] Chinese Taipei's first written submission, para. 410.

[1118] United States' comments on European Communities' response to Panel question Nos. 151, 152, and 153.

"peering point"), in order to qualify as a "modem" within the concession.[1119] Chinese Taipei argues that the term "modem" is a generic term used to describe an apparatus that accesses and interfaces with the Internet.[1120] Japan and Chinese Taipei argue that the use of the words "used esp." in the *Shorter Oxford Dictionary* definition of modem above, demonstrates that the definition is not "self-restrictive", and that the reference "connect a computer to a telephone line" is an example only.[1121]

7.871 The United States and Japan define "modulate" as "to convert voice or data signal for transmission over a communications network"[1122] and "demodulate" as "to receive signals transmitted over a communications computer; and to convert them into electrical pulses that can serve as inputs to a computer system".[1123] The United States and Japan further define "pulse modulation" as "[t]he deployment of high-speed networks such as the Integrated Service Digital Network (ISDN) in many parts of the world has also relied heavily on PCM technology".[1124] The complainants argue that dictionaries recognize that an array of technologies, including specifically those based on ISDN, and LAN, as well as digital-to-analogue telephone-line based modems and cable modems were available for gaining access to the Internet at the time the ITA was negotiated.[1125] The United States argues that the fact that ISDN technology existed at the time of the concession, for instance, supports the view that the concession's coverage was intended to be broad. Otherwise, the United States argues, the text of the concession would have been drafted to reflect a limitation to a certain type of modem.[1126]

7.872 The **European Communities** defines a "modem" as "a combined modulator and demodulator, used esp. to connect a computer to a telephone line, for converting digital electrical signals to analogue or audio ones and vice versa".[1127] The European Communities acknowledges that technologies other than digital-to-analogue telephone-based modems existed at the time of the negotiations, including ISDN, which it submits was developed in the mid-1970s through the 1990s, and Asymmetrical Digital Subscriber Line ("ADSL") technology, which it submits, was developed in

[1119] United States' second written submission, paras. 51 and 54; United States' comments on European Communities' response to Panel question Nos. 149 and 150. The United States refers to the following sources: Jonathan E. Nuechterlein & Philip J. Weiser, Digital Crossroads: American Telecommunications Policy in the Internet Age 131-32 (2005) (Exhibit US-126); Newton's Telecom Dictionary 525, 629, 708 (24th Ed. 2008) (Exhibit US-127).

[1120] Chinese Taipei's first written submission, para. 420.

[1121] Japan's second written submission, para. 218; Chinese Taipei's second written submission, para. 239.

[1122] United States' first written submission, para. 101, fn. 147; Japan's first written submission, para. 391, fn. 182 (both citing the IEEE Standard Dictionary of Electrical and Electronics Terms (6th ed. 1996), p. 703 and IEEE 100: The Authoritative Dictionary of IEEE Standard Terms (2000), p. 703). (Exhibit US-70) (Exhibit JPN-11).

[1123] United States' first written submission para. 101, fn. 147 (referring to IEEE Standard Dictionary of Electrical and Electronics Terms (6th ed. 1996), p. 270 (Exhibit US-70)); Japan's first written submission, para. 391, fn. 182 (referring to IEEE 100: The Authoritative Dictionary of IEEE Standard Terms (2000), p. 287. (Exhibit JPN-11)).

[1124] United States' first written submission, para. 101, fn. 147 (referring to Hermann J. Helgert, AccessScience@McGraw-Hill, http://www.accessscience.com (Exhibit US-71)); Japan's first written submission, para. 391, fn. 182 (referring to McGraw Hill Encyclopaedia of Science and Technology, 5th ed. (Exhibit JPN-11)).

[1125] Complainants' response to Panel question No. 70; see, e.g., Exhibits US-67-68, US-72.

[1126] United States' second written submission, para. 55.

[1127] European Communities' first oral statement, para. 44 (referring to the *Shorter Oxford Dictionary* (1993), p. 1803 (Exhibit EC-31)).

1989 and allows for transfer of data over telephone lines at frequencies different from those used by telephone voice calls, allowing for simultaneous voice and data transfer.[1128]

7.873 The European Communities argues that modems must fulfil two conditions to be properly considered as a "modem": first, the apparatus has to perform digital-to-analogue modulation and demodulation, and second, modulation must occur for the purposes of "direct" transmission and communication with the Internet. The European Communities submits that a "direct" connection to the Internet is effectuated through the server of the relevant Internet Service Provider ("ISP") to the Internet.[1129] The European Communities argues that digital-to-analogue telephone-based modems and cable modems fulfil both conditions. The European Communities submits that cable modems provide a direct connection[1130] and perform digital-to-analogue modulation and reverse demodulation similar to traditional modems, albeit on different non-telephone networks and a higher frequency without audible tone conversion.[1131] But, in its view, devices based on ISDN, WLAN or Ethernet technology do not meet these conditions and thus do not qualify as "modems" under the concession at issue.

7.874 The European Communities submits that there is no basis in the terms of the concession to conclude that negotiators relied on highly technical terms, such as "pulse code modulation" or "pulse amplitude modulation" to either include or exclude products from the concession. Rather it considers the common understanding of the term "modem" was relied on.[1132] The European Communities argues that in other aspects, Attachment B relied on highly technical and specific descriptions if they wanted to ensure that a particular product was covered.[1133]

7.875 Additionally, the European Communities recalls statements by the United States as a complainant in the dispute *EC – Computer Equipment*, which, it argues, coincided "exactly" with the time of the negotiation and conclusion of the ITA.[1134] The European Communities submits that the United States argued factually that LANs, principally including Ethernet, Token Ring and fibre distributed data interface technologies, were expressly not "modems".[1135]

[1128] European Communities' response to Panel question No. 70 (referring to http://www.iptegrity.com/index/php?option=com_content&task=view&id=30&Itemid=42 (Exhibit EC-81)).

[1129] European Communities' response to Panel question No. 153; European Communities comments on complainants' response to Panel question No. 153.

[1130] European Communities' response to Panel question Nos. 149 and 150.

[1131] European Communities' comments on complainants' responses to Panel question No. 150.

[1132] European Communities' second written submission, paras. 231-232.

[1133] European Communities' second written submission, paras. 233-234.

[1134] European Communities' second oral statement, para. 73 (referring to United States' first written submission in that dispute, paras. 28-29 and to the United States second written submission in that case, para. 31).

[1135] European Communities' second oral statement, para. 75 (referring to United States' first written submission in that dispute, paras. 28-29 and to the United States' second written submission in that case, para. 31. In particular, the European Communities cites the following statement by the United States in that dispute :

> "The EC mistakenly includes 'multiplexers' and 'modems' in its description of LAN equipment, suggesting that these, too, are LAN products, which they are not. 'Modems' are combined modulators-demodulators, which operate to convert a signal in order to achieve compatibility in a telecommunications environment. Modems are not LAN equipment, and, indeed, have historically been classified and been accorded tariff treatment as telecommunications apparatus by the EC and other U.S. trading partners".
>
> United States second written submission in that case, para. 31.

Consideration by the Panel

7.876 The parties agree that the term "incorporating" in the concession means that a set top box must physically contain a "modem" in order to fall within the scope of the concession. The definition of incorporate – "combine or unite into one body"[1136] – supports this view. The heart of the parties' disagreement, however, arises from the meaning of "modem" in the concession. The complainants argue that ISDN, WLAN or Ethernet devices are such modems allowing access to the Internet and that set top boxes incorporating such in-built devices thus fall within the concession. The European Communities, however, disagrees arguing that the term "modem" only covers products that fit within the common understanding of the term at the time of the ITA and that modems must directly connect to the Internet and perform digital-to-analogue modulation and reverse demodulation to satisfy the terms of the concession. Thus, the issue between the parties concerns, not the meaning of incorporating – which the parties agree on - but the meaning of "modem" as it appears in the concession.

7.877 The range of definitions discussed by the parties provide that the term "modem" is "a contraction of "Modulator-Demodulator", and is used to connect "data terminal equipment" to a "communication line".[1137] The *Shorter Oxford* states that a "modem" is used *especially* to connect a computer to a telephone line, and converts digital signals to analogue ones.[1138] (emphasis added). The European Communities considers this latter definition provides support for its contention that the term "modem" is limited to those devices that provide digital-to-analogue signal conversion, in particular via a telephone line. The complainants consider that the notion of "used *esp.*" indicates that a device achieving a connection over a telephone line is only an example of a modem, allowing for other types of devices. The complainants have cited at least one other definition indicating that the term "modem" may refer to devices in addition to those handling digital-to-analogue conversion, for instance an ISDN terminal adapter device (i.e., an ISDN modem) or an Asymmetric Digital Subscriber Line ("ADSL") terminating unit.[1139]

7.878 These definitions have evolved over time and reflect that the term "modem" is not limited in its usage to refer to a particular device or equipment that converts digital to analogue signals over a standard telephone line. The ordinary usage of the term "modem" expanded with the advent of newer technologies developed to transfer data over a communication line. In this respect, a telephone line-based modulator and demodulator that converted digital to analogue signals represented an early type of "modem". However, evidence provided by the complainants, including the aforementioned dictionary definitions, indicates that the term "modem" has been used in referring to other devices that provided modulation and demodulation over different mediums and also potentially without digital-to-analogue signal conversion. For instance, *Newton's Telecom Dictionary* notes that the term "modem" is applicable to refer to ISDN terminal adapters (ISDN modems), which are equipment responsible for providing digital signal transfer over a special type of digital telephone line.[1140] Evidence provided by the European Communities shows that terminal adapters used with ISDN

[1136] The *Shorter Oxford* (1993), p. 1342.
[1137] IEEE Standard Dictionary of Electrical and Electronics Terms (6th ed. 1996), p. 660 (Exhibit US-67).
[1138] The *Shorter Oxford* (1993), p. 1342.
[1139] *Newton's Telecom Dictionary* (2004, 20th ed.), pp. 532; see also *Dictionary of Business Terms* (3rd ed.).
[1140] *Newton' Telecom Dictionary* (2004, 20th ed.), pp. 532; see also *Dictionary of Business Terms* (3rd ed.).

service are sometimes called modems.[1141] In addition, the European Communities concedes (and the text of the amendment to the CNEN 2008/C 112/03 reflects) that the term "modem" is used to refer to "cable modems" as well, which are in several ways technologically distinct from telephone line-based modems, in terms of the medium used, frequency range and other parameters.[1142]

7.879 It bears noting that the European Communities acknowledges that alternate technologies, including ISDN and ADSL either existed or were in development in advance of the conclusion of ITA negotiations, though it does not concede that the term "modem" is applicable to devices that operate based on these technologies.[1143]

7.880 Given the foregoing, the plain meaning of the term "modem" can include devices other than those that convert a digital signal to analogue for purposes of information transfer over a telephone line. We note the European Communities' argument that for a device to be a "modem" it must provide for a direct connection to an ISP (Internet Service Provider). However, we see no basis for this conclusion in the plain meaning of the term modem. We will however, consider whether the remaining terms of the concession further inform our understanding of the terms "incorporating a modem". In particular we will analyse whether the modifying phrase "for gaining access to the Internet" indicates that the direct connection to an ISP advocated by the European Communities is indeed required. We will also examine whether the terms "and having a function of interactive information exchange" also inform our understanding of the particular type of modem covered by the concession.

> The terms "for gaining access to the Internet, and having a function of interactive information exchange"
>
> *Arguments of the parties*

7.881 The **United States** and **Chinese Taipei** argue that the language surrounding the term "modem" as it appears in the Annex to the EC Schedule, in particular the terms "for gaining access to the Internet", provides support that a "modem" is not limited to a device that is telephone line-based and provides digital to analogue signal conversion. The United States and Chinese Taipei argue that the term "communication function" is "broad", which supports the view that devices of any type that enable a set top box to gain access to the Internet may qualify, including devices based on ISDN, WLAN or Ethernet technology.[1144] Chinese Taipei submits that what is fundamental or "essential" is "that the device enables one to gain access to the Internet".[1145] Chinese Taipei notes that the definition of the term "gain" is "[o]btain, secure, or acquire (esp. something desired or advantageous)". The complainants additionally argue that devices of any type that enable a set top box to perform interactive information exchange, in addition to being microprocessor-based, fall under the concession. Chinese Taipei submits that the term "interactive" means "1. Reciprocally active; acting upon or influencing each other. 2. Designating or pertaining to a computer terminal or system that allows a two-way flow of information between it and a user, responding to input from a user."; "information" means "2. Communication of the knowledge of some fact or occurrence. 3. Knowledge or facts communicated about a particular subject, event, etc; intelligence, news."; and "exchange"

[1141] See Exhibit EC-107, p. 5. The evidence provided by the European Communities indicates that a "modem" is not needed for operation on an ISDN service, which requires use of a terminal adaptor, which it is stated, "works much like a modem" (p. 15).

[1142] *Newton's Telecom Dictionary*, (2004, 20th ed.), p. 191 (Exhibit US-72).

[1143] See fn. 1127 above.

[1144] United States' first written submission, para. 102; Chinese Taipei's first written submission, para. 421.

[1145] Chinese Taipei's first written submission, para. 421.

means, as a noun, "[t]he action, or an act, of reciprocal giving and receiving", and as a verb, "Dispose of by exchange or barter; relinquish (something)".[1146]

7.882 The **European Communities** submits that interactivity within the concession refers to a two-way communication process, in the case of set-top boxes between the service provider and the client in which a message is related to the previous messages exchanged. This includes the ability to control video on demand or pay-TV, and Internet connectivity.[1147] The European Communities submits that an incorporated modem component enables interactive exchange.

Consideration by the Panel

7.883 The term "modem" is followed by the phrase "for gaining access to the Internet, and having a function of interactive information exchange". The meaning of the term "gain" provided by the complainants is not disputed by the European Communities, though the European Communities rejects the view that the phrase supports a broad interpretation of the meaning of the term "modem". In addition, the parties agree that the meaning of the term "interactive information exchange" refers to a requirement of a two-way communication process or "two-way flow of information".[1148]

7.884 In our view, the phrase "for gaining access to the Internet, and having a function of interactive information exchange" informs the nature of the "communication function" referred to in the language of the concession preceding the colon. As we explained above, the plain words of the concession define a particular class or category of set top box by reference to function, i.e., those which *have* a communication function. Emphasis is placed on functionality, and in particular, a communication function. The language following the colon further informs the nature of this communication function. Specifically, it is a communication function enabled through the ability to access the Internet in an interactive manner. In our view, the incorporation of a modem fulfils the purpose of gaining Internet access, which in turn may enable interactive information exchange. In the Panel's view it is this functionality that is central to the product definition at issue. There is no express specification as to the nature or quality of Internet access, in terms of speed, transfer rate, or whether limited or full access may be provided, in determining whether a device has a communication function.

7.885 In light of the broad meaning that is imparted by the concession, with its emphasis on a "communication function", "gaining access to the Internet" and enabling "interactive information exchange", we are of the view that function should guide an assessment of the scope of the concession, including the terms "incorporating a modem", as opposed to a narrow or detailed assessment of the technical properties of the internal components of a set top box. As the European Communities argues[1149], the concession does not contain detailed or highly technical terms, and we do not consider it appropriate to assume that drafters intended to include or exclude products based on their technical design or makeup. The drafters have not, for example, elaborated extensively on the specific technical nature of a "modem". Rather, as we state here, the concession in terms of its plain meaning emphasizes function.

7.886 Accordingly, based on the plain meaning of the terms of the concession, we consider that, in order to constitute a set top box covered by the concession, the device must be microprocessor-based;

[1146] Chinese Taipei's first written submission, paras. 410-415, (referring to the *Shorter Oxford Dictionary* (1993), p. 1811 (gain), p. 1406 (interactive), p. 1379 (information) and p. 886 (exchange).

[1147] European Communities' response to Panel question No. 74.

[1148] Chinese Taipei's first written submission, paras. 410-415 (referring to the *Shorter Oxford* (1993), p. 1406); European Communities' response to Panel question No. 74.

[1149] European Communities' second written submission, paras. 231-232.

incorporate a "modem", and be capable of gaining access to the Internet and handling two-way interactivity or information exchange. We concluded that, in the context of this concession, the term "modem" should not be interpreted in an overly narrow or technical sense, but should be informed by the clear emphasis on functionality. Accordingly, we found that devices that incorporate, or have built in, technologies that enable them to access the Internet and provide interactive information exchange may fall within the scope of the concession. While set top boxes available at the time of the ITA negotiations may have primarily incorporated modems that operate directly over a telephone line and provide digital-to-analogue signal conversion, both contemporary and newer technologies are commonplace today and enable similar or identical functionality. In our view, to interpret otherwise, would exclude from coverage many set top boxes which, in fact, have a communication function of the type contemplated in the concession.

7.887 In reaching our preliminary findings on the meaning of the terms of the concession, we have briefly addressed the issue of products available at the time of the negotiation of the concession for "Set top boxes which have a communication function (...)".[1150] We will address further below the European Communities' arguments concerning the state of technology at the time the concessions were made, and its reference to what it asserts were descriptions of "set top boxes" used during the negotiations.

Preliminary conclusions on the textual analysis of the STBCs narrative description

7.888 The Panel concludes that the term "set top box" generally describes an apparatus or device that processes an incoming signal from an external signal source in a manner that can be presented on a display unit, such as a video monitor or television set. This apparatus need not be designed to be placed on top of the display unit and may handle one or several functionalities. We recognized that, through the inclusion of additional features or incorporation into another product, an apparatus may no longer be described as, in essence, a "set top box which ha[s] a communication function" and would not be covered by the concession. We concluded further that the terms of the STBCs concession in the Annex to the EC Schedule extends to any "set top box" that fulfils all of the following requirements: is microprocessor-based; incorporates a "modem", and is capable of gaining access to the Internet and handling two-way interactivity or information exchange. We concluded that, in the context of this concession, the term "modem" should not be interpreted in an overly narrow or technical sense, but should be informed by the clear emphasis on functionality. Accordingly, we found that devices that incorporate, or have built in, technologies that enable them to access the Internet and provide interactive information exchange may fall within the scope of the concession. We will now consider the terms of the STBCs narrative product description in their broader context.

(iii) The terms of the STBCs narrative description in their context

7.889 The **complainants** have argued that other narrative descriptions that appear in the Annex to the EC Schedule provide relevant context that further supports their interpretation of the STBCs narrative descriptions.

7.890 The **European Communities** has referred to other parts of its Schedule, including descriptions in the tariff item numbers notified in connection with the FPDs narrative description, and the concessions in other ITA participants' WTO Schedules in support of their interpretation of the FPDs narrative description as it appears in the Annex to the EC Schedule.

[1150] See paras. 7.871, 7.872 above.

Other parts of the EC Schedule as context

7.891 The Panel recalls as the Appellate Body explained in *EC – Chicken Cuts*, that context in a Member's Schedule may include "other terms" in the same heading or chapter.[1151] We will consider the parties' arguments surrounding whether various elements found in the EC Schedule, including other descriptions in the Annex to the EC Schedule, inform interpretation of the STBCs narrative description.

The descriptions in the tariff item numbers 8517 50 90, 8517 80 90, 8525 20 99 and 8528 12 91 in connection with the STBCs narrative description as context

Arguments of the parties

7.892 **Japan** and **Chinese Taipei** argue that the tariff lines appearing in the Annex to the EC Schedule next to the description for STBCs – i.e., tariff item numbers 8517 50 90, 8517 80 90, 8525 20 99 and 8528 12 91 – support their interpretation of the concession based on the ordinary meaning of the terms. While considering that these codes do not determine the scope of the concession at issue, Japan and Chinese Taipei submit that these codes provide relevant context to the extent that they indicate where the European Communities viewed STBCs were classified at the time of implementation.[1152]

7.893 Japan and Chinese Taipei note that HS1996 heading 8517 covers "[e]lectrical apparatus for line telephony or line telegraphy, including line telephone sets with cordless handsets and telecommunication apparatus for carrier-current line systems or for digital line systems; videophones". Further, they note that tariff item number 8517 50 90 covers "Other apparatus, for carrier-current line systems or for digital line systems - Other" and that tariff item number 8517 80 90 covers "Other apparatus – Other". Japan and Chinese Taipei argue that none of the terms of these headings refer to the functions that may be performed by apparatuses classified under this heading and subheadings, or expressly or implicitly limit the functions of products classified under them to one or more functions. Japan and Chinese Taipei also argue that HS1996 heading 8517 and tariff item numbers 8517 50 90 and 8517 80 90 do not refer to a specific type of modem that would restrict the scope of the concession.[1153]

7.894 Japan and Chinese Taipei next note that HS1996 heading 8525 covers "[t]ransmission apparatus for radio-telephony, radio-telegraphy, radio-broadcasting or television, whether or not incorporating reception apparatus or sound recording or reproducing apparatus; television cameras; still image video cameras and other video camera recorders". Further, they note that HS1996 subheading 8525 20 covers "transmission apparatus incorporating reception apparatus". Japan and Chinese Taipei argue that the terms of this heading, read together with the terms of heading 8525, make clear that apparatuses covered by this heading fall under it regardless of whether they incorporate reception apparatus or sound recording or reproducing apparatus. Japan and Chinese Taipei note that HS1996 heading 8525 is divided into four main subheadings. Since the terms "recording" and "reproducing" are placed before the first semi-colon in the title of heading 8525, Japan and Chinese Taipei argue that recording and reproducing applies to apparatus for all four main subheadings, including transmission apparatus for radio-telephony, radio-telegraphy, radio-broadcasting or television. Thus, they argue that devices falling under subheading 8525 20, including

[1151] See Appellate Body Report on *EC – Chicken Cuts*, para. 193.
[1152] Japan's first written submission, para. 394; Chinese Taipei's second written submission, para. 245.
[1153] Japan's first written submission, paras. 398-400; Chinese Taipei's first written submission, paras. 426-431; Chinese Taipei's second oral statement, para. 52.

set top boxes which have a communication function, may perform more than one function and still be classifiable therein. Moreover, they argue that the terms of HS1996 heading 8525 and subheading 8525 20 do not require that transmission apparatus incorporating reception apparatus also incorporate a modem in order to be classifiable under that heading and subheading.[1154]

7.895 Japan notes that HS1996 heading 8528 covers "[r]eception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus; video monitors and video projectors". Thus, it argues, whether or not a device incorporates video recording or reproduction is irrelevant for classification under heading 8528. Furthermore, Japan notes that HS1996 heading 8527 differentiates between "[o]ther radio-broadcast receivers, including apparatus capable of receiving also radio-telephony or radio-telegraphy: − − 8527 31 "[c]ombined with sound recording or reproducing apparatus" and − − 8527 32 "[n]ot combined with sound recording or reproducing apparatus but combined with a clock". Similarly, Japan notes HS1996 subheading 8528 12 relates to "− Reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus: − − Colour" differentiates between "− − − Television projection equipment" and "− − − Apparatus incorporating a video recorder or reproducer". In Japan's view, the separate treatment provided for in headings for products able to perform different functions would seem to indicate that where no such differentiated treatment exists, for instance in HS headings 8517 and 8525, apparatus able to perform more than one function should not be treated differently.[1155]

7.896 Finally, Chinese Taipei submits that the fact that the European Communities did not implement the full concession for "set top boxes which have a communication function" by including the same wording as appears in the Attachment B description – i.e., "a microprocessor-based device incorporating a modem for gaining access to the internet, and having a function of interactive information exchange" – supports the view that this description is "but only one type of [STBC]" that is covered by the concession.[1156] However, despite the fact that the European Communities chose to implement the language appearing in the Attachment B description at the end of 2000, via the amendment of tariff item number 8528 21 91 to its Schedule, the overall contextual analysis is not affected, because, it argues, tariff item number 8528 21 91 must necessarily include what had been identified by the European Communities in the initial CN subheadings.[1157]

7.897 The **United States** argues that the 2000 amendment to the EC Schedule – i.e., when the European Communities added tariff item number 8528 12 91 against the STBCs narrative description in the Annex to the EC Schedule - supports the view that the European Communities agreed to a commitment which comprises not only "Set top boxes *which have* a communication function", but also "Set top boxes *with* a communication function" (emphasis added). Thus, it argues, this modification contradicts the view that the phrase "which have" must be read to limit the concession to products that are solely comprised of the three characteristics enumerated after the colon in Attachment B.[1158] The United States argues that the *2000 amendment* establishes that STBCs with tuners were covered by the original description in the Annex to the EC Schedule, because the

[1154] Japan's first written submission, paras. 401-404; Japan's response to Panel question No. 82; Chinese Taipei's first written submission , paras. 433-435; Chinese Taipei's response to Panel question No. 82; Chinese Taipei's second oral statement, para. 52.
[1155] Japan's first written submission, paras. 405-406.
[1156] Chinese Taipei's first written submission, para. 436.
[1157] Chinese Taipei's first written submission, para. 436.
[1158] United States' second written submission, para. 39.

description of the tariff item number that was added (i.e., 8528 12 91) acknowledges that products with tuners are covered within the concession.[1159]

7.898 The **European Communities** argues that the three codes notified in the Annex to the EC Schedule in 1997 shed light on what sort of products were "understood to be covered by the narrative description".[1160] In its view, tariff item numbers 8517 50 90, 8517 80 90, 8525 20 99 indicate a common feature of these codes is that they all pertain to modem devices, i.e. CN heading 8517 concerns set top boxes incorporating wired modems, and heading 8525 concerns those incorporating "wireless modems".[1161] The European Communities notes that it did not include HS1996 subheadings under 8521 which covers devices with recording functionality or initially include HS1996 heading 8528 concerning devices with tuners. In addition, the European Communities submits that its inclusion of tariff item number 8528 12 91 in the year 2000 "extended on its own motion the treatment available so far only for products meeting exactly the ITA definition to another and well defined category of products, even though these products were significantly different from those set forth in the ITA definition and, legally speaking, not covered by it."[1162] In the European Communities' view, set top boxes equipped with a tuner "were *not* initially supposed to be covered by the ITA" because "the presence of a tuner changes the nature of the apparatus and requires a classification in heading 8528, even if the product additionally incorporates a modem or other elements mentioned in narrative description."[1163] The European Communities submits it modified its schedule to provide for the duty-free treatment for tariff item number 8528 12 91 in the year 2000 because the United States insisted that set top boxes with a tuner should receive ITA treatment.[1164] The European Communities submits further that since only Japan and Turkey joined them "in such a move", this means that "there was no broader consensus among the ITA parties on this new classification"[1165] and such notification "cannot be interpreted to mean that the ITA definition has been relaxed or abandoned".[1166]

7.899 In response to the argument by the United States, the European Communities argues that its concession only concerns "Set top boxes *which have* a communication function", and that the 2000 modification adding tariff item number 8528 12 91 does not change the language of the concession. The European Communities argues that no particular name or phrase used for describing and naming a product in the context of adopting a classification measure can be considered relevant for interpretation of the scope of a tariff concession formulated at the WTO level. At most, the European Communities considers that the STBCs narrative description covered a specific category of products that, in addition to meeting the other requirements of the definition, are capable of receiving television signals.[1167]

Consideration by the Panel

7.900 The STBCs narrative description appears in the Annex to the EC Schedule in connection with four tariff item numbers 8517 50 90, 8517 80 90, 8525 20 99 and 8528 12 91. We recall from

[1159] United States' second written submission, para. 41.
[1160] European Communities' first written submission, para. 239.
[1161] European Communities' first written submission, para. 241.
[1162] European Communities' first written submission, para. 251.
[1163] European Communities' first written submission, para. 248.
[1164] European Communities' first written submission, para. 249.
[1165] European Communities' first written submission, para. 250.
[1166] European Communities' first written submission, para. 251.
[1167] European Communities' second written submission, para. 80.

paragraph 7.420 that the European Communities notified the addition of tariff item number 8528 12 91 on 1 October 2000.[1168]

7.901 the European Communities also notified the addition of this last code 8528 12 91 on 15 December 2000, to its Schedule under HS1996 heading 8528 12 as follows:

		Base rate	Final rate	Implementation
8528 12 91	------- Apparatus with a microprocessor-based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange, capable of receiving television signals ("Set-top boxes with a communication function")	New line	0.0	2000

7.902 These changes took effect from 1 October 2000, and were certified on 19 March 2010.[1169]

7.903 Whether this action represents an autonomous liberalization effort, as the European Communities contends[1170], or an indication of changes to classification of a product already understood to be covered under the narrative description, we see no reason for excluding the tariff item number that was added in 2000 for purposes of our contextual assessment of the meaning of the concession.

7.904 The **Panel** recalls its preliminary finding that the STBCs narrative description determines the scope of the concession, no matter where classified in the EC Schedule, and that the tariff item numbers appearing alongside the product descriptions do not have the effect of controlling the scope of coverage arising from the ordinary meaning of the product descriptions.[1171] Aside from their reference in the Annex to the EC Schedule, these tariff item numbers also appear elsewhere in the EC Schedule together with their associated six-digit HS subheading descriptions.

7.905 As we noted above, the tariff item numbers address a different issue: they assist in the implementation of the Attachment B-related commitments and to register the classification intended by the European Communities with a view to assisting ITA participants in the discussions on the classification divergences that were envisaged in paragraph 5 of the ITA Annex. This was necessary because the approach taken with respect to HS headings that appear in Attachment A was not feasible for other products. Due to the fact that ITA participants notified different codes next to the descriptions in many cases, we explained that reliance on interpretation of those codes would not reflect the common intentions of participants and could run contrary to an assessment of the objective meaning of the terms. We accordingly decline to consider them further.

[1168] Specifically, the notification of that amendment reads in relevant part as follows:
"Consequently, the tariff references shown against product descriptions in Attachment B of the ITA Schedule of the European Communities should be modified as follows:

Set-top boxes: Replace by following reference: 8517.50.90 (unchanged), 8517.80.90 (unchanged), 8525.20.99 (unchanged), **8528.12.91 (new)**."

See G/MA/TAR/RS/74 (15 December 2000) (Exhibit US-26).

[1169] See para. 7.29 above.

[1170] European Communities' first written submission, para. 251.

[1171] See para. 7.343 above. We confirmed our findings based *inter alia* on our contextual assessment of the ITA, and consideration of the WTO schedules of other WTO participants.

7.906 While the Panel considers that the descriptions associated with the tariff item numbers do not define the scope of the obligation, we nevertheless note that the codes do not inform us whether coverage extends to products that incorporate additional features, such as a hard drive, or products that employ particular technologies to achieve Internet connectivity. Were we to treat the codes as dispositive, then one might conclude that the European Communities only undertook obligations for products containing telephone-based modems due to the particular codes.

Other descriptions in the Annex to the EC Schedule in context

Arguments of the parties

7.907 **Japan** argues that other descriptions in the Annex to the EC Schedule reflect that the concession for STBCs was not intended to be limited. Japan argues, where the drafters intended to limit the function of the apparatus they included clear statements to this effect, such as in the description for "computers" or "Network equipment". In the case of "computers", Japan emphasizes the language "Machines performing a *specific function other than data-processing*, or incorporating or working in conjunction with an automatic data-processing machine, and not otherwise specified under Attachment A *or B*, are not covered by this agreement." (emphasis added).[1172] In the description for "Network equipments", Japan refers to the language "Local Area Network (LAN) and Wide Area Network (WAN) apparatus, including those products dedicated for use *solely or principally* to permit the interconnection of automatic data-processing machines and units thereof for a network…" (emphasis added).[1173] Japan argues that the concession for STBCs does not include comparable words of limitation and that there is thus no such limitation for the STBCs concession.[1174]

7.908 The **European Communities** argues that, overall, Attachment B was written "in rather straightforward terms, not using any highly technical language", a good example of which is the description of "proprietary format storage devices", which specifies that that product category also includes "Bernoulli box, Syquest and Zipdrive cartridge storage units".[1175] According to the European Communities, while this language appears highly technical "at first sight", it confirms that the language that the negotiators used "was not a highly technical one and that when they wanted to ensure that a particular product is covered, they did not hesitate to use even its commercial name". For instance, the European Communities argues that drafters could have made express reference to technologies such as ISDN, WLAN or Ethernet had they intended from products that connect to the Internet through these technologies to be covered.[1176] Or, drafters could have referred to a particular standard (such as an IEEE standard) had it considered the technical standard of a professional organization were relevant.[1177]

Consideration by the Panel

7.909 Japan and the European Communities refer to the following narrative descriptions in the Annex to the EC Schedule as providing relevant context to inform interpretation of the STBCs narrative description.

[1172] Japan's first written submission, para. 395.
[1173] Japan's first written submission, para. 396.
[1174] Japan's first written submission, para. 397.
[1175] European Communities' second written submission, para. 234.
[1176] European Communities' second written submission, para. 229.
[1177] European Communities' second written submission, para. 233.

"Computers: automatic data-processing machines capable of 1) storing the processing program or programs and at least the data immediately necessary for the execution of the program; 2) being freely programmed in accordance with the requirements of the user; 3) performing arithmetical computations specified by the user; and 4) executing, without human intervention, a processing program which requires them to modify their execution, by logical decision during the processing run.

The agreement covers such automatic data-processing machines whether or not they are able to receive and process with the assistance of central processing unit telephony signals, television signals, or other analogue or digitally processed audio or video signals. Machines performing a specific function other than data-processing, or incorporating or working in conjunction with an automatic data-processing machine, and not otherwise specified under Attachment A or B, are not covered by this agreement."

"Network equipment: Local Area Network (LAN) and Wide Area Network (WAN) apparatus, including those products dedicated for use solely or principally to permit the interconnection of automatic data-processing machines and units thereof for a network that is used primarily for the sharing of resources such as central processor units, data storage devices and input or output units including adapters, hubs, in line repeaters, converters, concentrators, bridges and routers, and printed circuit assemblies for physical incorporation into automatic data-processing machines and units thereof."

"Proprietary format storage devices including media therefor for automatic data-processing machines, with or without removable media and whether magnetic, optical or other technology, including Bernoulli Box, Syquest, or Zipdrive cartridge storage units."

7.910 As is reflected in the descriptions above, the product coverage in the Annex to the EC Schedule is varied, including computers, but also network equipment, storage devices, and set top boxes which have a communication function, among other products. In our view, divergences in the language used in the various product descriptions, and the varying levels of specificity they contain, diminishes the significance that can be drawn from comparisons and contrasts between the language in various products descriptions.

7.911 We explained above that the inclusion of the list of narrative descriptions in Attachment B reflects an approach different from the traditional approach of using the language of the HS. Participants to the ITA agreed to eliminate duties on all products specified in Attachment B, whether or not they are included in Attachment A. Inherent in this dual approach, ITA participants consequently agreed to include language in descriptions in Attachment B that is not necessarily language derived from the HS. Certain descriptions in Attachment B provide limited explanation of the type of products covered (e.g. "Paging alert devices, and parts thereof"), while other descriptions provide detailed technical characteristics of the products covered (e.g. "monitors"[1178]). In addition, while some of them define the coverage in terms of the "use" of the product (e.g. "electric

[1178] "Monitors: display units of automatic data-processing machines with a cathode ray tube with a dot screen pitch smaller than 0,4 mm not capable of receiving and processing television signals or other analogue or digitally processed audio or video signals without assistance of a central processing unit of a computer as defined in this agreement. The agreement does not, therefore, cover televisions, including high definition televisions."

amplifiers"[1179]), others descriptions identify types of products covered (e.g. "Proprietary format storage devices"[1180]). While some relate to terms which are not found in the HS ("Flat panel display devices"), some appear to borrow language from the HS (e.g. "computers"[1181]), and at least one description makes express reference to specific HS headings where the products appear in the HS (i.e., "Plotters"[1182]) Moreover, certain descriptions including the STBCs narrative description make use of a colon or semicolon in the first part of the description.[1183] Finally, certain descriptions expressly limit coverage, whereas other descriptions contain no such express limitation.

7.912 This lack of uniformity in the Attachment B product descriptions potentially arose from the desire of participants to provide duty-free coverage for products matching descriptions, but without clear agreement as to the relevant headings for classification of those products. In our view, this makes it difficult to extrapolate the terms from one Attachment B description to interpret another Attachment B description.

7.913 As discussed in paragraph 7.888 above, we note the description for STBCs emphasizes the function of the product, rather than, for example, an extensive technical description or focus on specific technology. Such emphasis is clear from the language "which have a communication function", that is informed by the phrase "for gaining access to the Internet, and having a function of interactive information exchange". The functionality includes "access to the Internet" and "interactive" or "two-way" information exchange. We determined the emphasis on functionality to be primary to our interpretation, rather than, for example, a focus on technical properties, which were not elaborated in the concession.

7.914 Similar to the STBCs narrative description, the description for "Computers" is also function-oriented, enumerating the capabilities or functions of the device. Distinctly however, this description indicates with certain precision devices that would qualify ("machines whether or not they are able to receive and process with the assistance of central processing unit telephony signals, television signals, or other analogue or digitally processed audio or video signals"), but also those that would not qualify ("Machines performing a specific function other than data-processing, or incorporating or working in conjunction with an automatic data-processing machine, and not otherwise specified under Attachment A or B, are not covered by this agreement"). We are hesitant to imply restrictions into the concession for STBCs that are not expressly provided for, as is the case with the "Computers" concession.

7.915 We note that the descriptions for "Network Equipment" and "Proprietary format storage devices (...)" provide detailed explanation of their coverage, specifying products that are to be included and enumerating devices and components that are to be included in the concession. The description for "Proprietary format storage devices (...)" enumerates an exemplary, though not exclusive list of products that are to be covered. The concession pursuant to the STBCs narrative description in the EC Schedule appears to be restricted to a more limited category of products, as opposed to a range of equipment.

[1179] "Electric amplifiers *when used* as repeaters in line telephony products falling within this agreement, and parts thereof." (emphasis added)

[1180] "Proprietary format storage devices including media therefor for automatic data-processing machines, with or without removable media and whether magnetic, optical or other technology, cartridge storage units." (emphasis added)

[1181] See Exhibit US-1.

[1182] "Plotters *whether* input or output units of *HS heading No 8471* or drawing or drafting machines of *HS heading No 9017*." (emphasis added). See Exhibit US-1.

[1183] The other three narrative descriptions in Attachment B making use of a semicolon are "computers", "network equipment", and "monitors".

7.916 As a matter of treaty interpretation, we have focused on the ordinary meaning of the words used in the concession for STBCs. As we have noted, the words used place a clear emphasis on functionality. We note that while the negotiators used the term "modem", they did not go further and enumerate precise modem or device technologies that are considered to fall within the concession, or that are considered to fall outside the concession. This supports the Panel's view that the intention of the drafters was to emphasize function (for example, gaining access to the internet) and not form (for example, a particular kind of modem or device technology enabling access to the internet). Beyond this, however, in the Panel's view the particular terms of surrounding concessions, which were negotiated in different circumstances and in a different factual context, and concern altogether dissimilar products, do not greatly assist in interpreting the scope of the STBCs concession.

The WTO Schedules of other WTO Members as context

7.917 The European Communities argues that the Schedules of other ITA participants provide relevant context to interpret the FPDs narrative description.[1184] The Panel recalls as the Appellate Body explained in *EC – Chicken Cuts*, that other WTO Members' Schedules may provide relevant context to interpret the terms in a particular Member's Schedule.[1185] We will thus consider the European Communities' arguments concerning the HS subheadings that other ITA participants notified in the Schedules when implementing their ITA commitments. The European Communities refers to a table summarizing the classification up to HS subheading level (six digits) notified by ITA participants based on modifications made via WTO document G/IT/2/Add.1 of 17 October 1997:[1186]

Classification of "set top boxes which have a communication function" by ITA participants in 1997		
Sub-heading	Number of participants classifying in that subheading	Main parties to the dispute
8471.41	2	-
8471.90	1	-
8517.50	25	EC, TPKM, US
8517.80	12	EC, JA
8525.10	3	US
8525.20	14	EC, JA, TPKM
8528.12	3	US
8543.89	1	-

7.918 The European Communities submitted a second table, based on an updated document by the WTO Secretariat of 29 July 1999:[1187]

Classification of "set top boxes which have a communication function" by ITA participants from 1997 to 1999		
Sub-heading	Number of participants classifying in that subheading	Main parties to the dispute
8471.41	2	-
8471.90	1	-
8517.50	31	EC, TPKM, US
8517.80	14	EC, JA

[1184] European Communities' first written submission, paras. 142-145.
[1185] See Appellate Body Report on *EC – Chicken Cuts*, para. 193.
[1186] WTO document G/IT/2/Add.1 (17 October 1997) (Exhibit EC-14).
[1187] European Communities' first written submission, para. 246, which makes reference to WTO document G/IT/2/Add.1/Rev.1 of 29 July 1999 (Exhibit EC-20).

Classification of "set top boxes which have a communication function" by ITA participants from 1997 to 1999		
Sub-heading	Number of participants classifying in that subheading	Main parties to the dispute
8525.10	3	US
8525.20	17	EC, JA, TPKM
8528.12	3	US
8543.89	1	-

Arguments of the parties

7.919 The **European Communities** argues that the information presented in the table indicates the parties' understanding of what was covered by the product description for STBCs in 1997. While recognizing divergences in the codes that were notified by ITA participants, the European Communities submits that the "overwhelming majority" notified HS1996 subheadings 8517 50, 8517 80 and 8525 20, confirming agreement on the intended coverage of the STBCS narrative description.[1188] The European Communities also refers to a second table containing 1999 updated information by the WTO Secretariat, which incorporates HS headings notified by participants that joined the ITA following the issuance of the original document. This later document further incorporates change that had been implemented by the participants as a result of rectifications or modifications.[1189]

7.920 The **complainants** argue that the table summarizing the codes where the ITA participants classified STBCs is irrelevant. In their view, the table merely supports the view that at the time of the ITA there was no uniform agreement on the relevant classification headings for STBCs which have a communication function.[1190] In any case, as illustrated by the table, some WTO Members listed "set-top boxes which have a communication function" under HS1996 heading 8528 12.[1191]

Consideration by the Panel

7.921 The **Panel** recalls from paragraph 7.445 above that the four tariff item numbers next to the narrative descriptions in the EC Schedule do not limit the concession. They only illustrate where the European Communities considered relevant FPDs were classifiable at the time of implementation of the ITA. Accordingly, we will only make a few points regarding the table presented by the European Communities.

7.922 The European Communities submitted as exhibits two separate WTO Secretariat reports which summarize the HS subheadings that were listed by ITA participants: the table above, describing the situation in 1997, as well as a document assessing the practice of ITA parties between 1997 and 1999.[1192] Both the WTO Secretariat reports and the tables submitted by the European Communities,

[1188] European Communities' first written submission, paras. 244-245.
[1189] See fn. 1187 above.
[1190] United States' second written submission, para. 47; Japan's second written submission, para. 222; Chinese Taipei's second written submission, paras. 249-250.
[1191] Japan's response to Panel question No. 82; Chinese Taipei's response to Panel question No. 82.
[1192] European Communities' first written submission, para. 243, 246 and fn. 156. These are document G/IT/2/Add.1 (17 October 1997) (Exhibit EC-14) and document G/IT/2/Add.1/Rev.1 (29 July 1999) (Exhibit EC-20).

however, wrongly mention that Japan notified HS headings next to narrative product descriptions. Japan's schedule, however, did not.[1193]

7.923 In light of this error, the Panel conducted its own assessment of the information as presented below:[1194]

HS Subheading (6 digit)	Number of participants notifying that subheading	There is at least one tariff line listed in the Schedule of the following ITA participants:
8471 41	6	Costa Rica; Dominican Republic; Guatemala; Honduras; Nicaragua; El Salvador
8471 50	1	China
8471 90	1	Indonesia
8517 50	40	Albania; Australia; Bahrain; Canada; China; Costa Rica; Croatia; Dominican Republic; Egypt; El Salvador; European Communities; Georgia; Guatemala; Honduras; Hong Kong, China; Iceland; India; Israel; Jordan; Korea; Kyrgyz Rep.; Macao, China; Malaysia; Mauritius; Moldova; Nicaragua; New Zealand; Norway; Oman; Peru; Philippines; Saudi Arabia; Chinese Taipei; Singapore; Switzerland/Liechtenstein; Thailand; Turkey; UAE; United States; Viet Nam
8517 80	13	Albania; Croatia; European Communities; Egypt; Georgia; Iceland; Jordan; Kyrgyz Rep.; Macao, China; Moldova; New Zealand; Norway; Turkey
8525 10	11	Bahrain; Costa Rica; El Salvador; Honduras; Nicaragua; Oman; Peru; Saudi Arabia; UAE; United States; Viet Nam
8525 20	15	Albania; Australia; Croatia; European Communities; Georgia; Iceland; Kyrgyz Rep.; Macao, China; Moldova; New Zealand; Peru; Philippines; Chinese Taipei; Turkey; Viet Nam
8528 12	9	European Communities; Iceland; Macao, China; Oman; Saudi Arabia; Ukraine; UAE; United States; Viet Nam
8530 00	1	Bahrain
8543 89	1	Israel

7.924 This table demonstrates considerable divergence in the HS subheadings listed by ITA participants next to the STBCs narrative description. HS1996 subheading 8517 50, for instance, appears in twice as many schedules as other subheadings.[1195] This subheading pertains to Electrical apparatus for line telephony or line telegraphy, including line telephone sets with cordless handsets and telecommunication apparatus for carrier-current line systems or for digital line systems; videophones. - Other apparatus, for carrier-current line systems or for digital line systems." However, a number of Members declined to notify subheadings 8517 50, 8517 80 and 8525 20 next to the STBCs narrative description in the corresponding section of their Schedule.

[1193] See paragraph 7.432 above.

[1194] The Panel followed the same methodology used by the WTO Secretariat in preparing this table. A particular Member is listed next to those HS subheadings if that Member has listed at least one national tariff line in its schedule that falls under that HS subheading. The following table summarizes the HS subheadings listed by the relevant 43 Members in their schedules of concessions, but does not include information of the schedules of those EC member States that are jointly represented by the EC-27. These are: Bulgaria, Cyprus, Czech Republic, Estonia, Latvia, Lithuania, Poland, Romania, Slovak Republic and Slovenia.

[1195] Besides Japan, which did not assign any code to products in or for Attachment B, the Panel notes that Indonesia and Ukraine did not list HS1996 subheading 8517 50 as relevant for STBCs in their schedules of concessions.

7.925 In addition, other HS1996 subheadings that appeared more or less frequently in the schedules of ITA participants include the following:

> 8517 80: "Electrical apparatus for line telephony or line telegraphy, including line telephone sets with cordless handsets and telecommunication apparatus for carrier-current line systems or for digital line systems; videophones. - Other apparatus"
>
> 8525 10: "Transmission apparatus for radio-telephony, radio-telegraphy, radio-broadcasting or television, whether or not incorporating reception apparatus or sound recording or reproducing apparatus; television cameras; still image video cameras and other video camera recorders. - Transmission apparatus"
>
> 8525 20: "Transmission apparatus for radio-telephony, radio-telegraphy, radio-broadcasting or television, whether or not incorporating reception apparatus or sound recording or reproducing apparatus; television cameras; still image video cameras and other video camera recorders. - Transmission apparatus incorporating reception apparatus."
>
> 8528 12: "Reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus; video monitors and video projectors; - Reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus; - - Colour"

7.926 While a number of participants considered subheading 8517 50 relevant to their classification of products in connection with the STBCs narrative description, a noteworthy number of participants considered HS subheading 8528 12 to be relevant to their classification of set top boxes.

(iv) Object and purpose

Arguments of the parties

7.927 We recall from our assessment of the parties' arguments concerning object and purpose[1196], that the **complainants** argued that a recognized object and purpose of the *WTO Agreement* and GATT 1994 is providing security and predictability in the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and barriers to trade.[1197] In their view, the objectives of security and predictability also require that concessions cover products even if those products did not exist in that form at the time the concessions were granted as long as they comply with the wording of the concessions concerned.[1198] The complainants also note that both the *WTO Agreement* and the GATT 1994 recognize "expanding the production and trade in goods" as another core object and purpose that is furthered by reciprocal reductions in tariffs.

[1196] See paras. 7.537-7.549 above.

[1197] Complainants' response to Panel question No. 1; Japan's first written submission, para. 172 (referring to paragraph 3 of the Preamble to the Marrakesh Agreement; Panel Report on *China – Auto Parts*, para. 7.460 and Appellate Body Report on *EC – Chicken Cuts*, paras. 243 and 288); Japan's second written submission, paras. 409-410; Chinese Taipei's first written submission, paras. 144-145; Chinese Taipei's second written submission, para. 282.

[1198] Japan's first written submission, para. 177; Chinese Taipei's first written submission, paras. 289-290 and 627-630; Chinese Taipei's second written submission, para. 444.

7.928 The **European Communities** considers the complainants' interpretative approach overbroad and that it compromises the legal certainty and predictability of tariff concessions, creating the risk that Members will become reluctant to pursue the ITA liberalization process. [1199]

Consideration by the Panel

7.929 The **Panel** concluded that the relevant object and purpose with respect to this dispute is the general object and purpose of the *WTO Agreement* and the GATT 1994 as a whole. We concluded that the ITA should not be considered the basis for determining the object and purpose of the *WTO Agreement* and the GATT 1994.

7.930 The relevant object and purpose for the purposes of this dispute is to provide security and predictability in the reciprocal and mutually advantageous concessions negotiated by parties for the reduction of tariffs and other barriers to trade. In the Panel's view, the interpretation of the STBCs narrative description described above is fully consistent with this object and purpose.

(v) Subsequent practice (Article 31(3)(b) of the Vienna Convention*)*

Arguments of the parties

7.931 The **European Communities** argues that the codes notified by ITA participants between 1997 and 1999, as referred to in WTO Document G/IT/2/Add.1/Rev.1 of 29 July 1999[1200], provides information on classification divergences, including those of new participants that joined the ITA since 1997. The European Communities argues that the codes notified by ITA participants at the time of implementation reveal that the "overwhelming majority of ITA participants" shared its understanding of the product coverage of the concession for STBCs at the time of implementation of the concession.[1201] The European Communities provides the following table to summarize the information:[1202]

Classification of "Set top boxes which have a communication function" by ITA participants from 1997 to 1999		
Sub-heading	Number of participants classifying in that subheading	Main parties to the dispute
8471.41	2	-
8471.90	1	-
8517.50	31	EC, TPKM, US
8517.80	14	EC, JA
8525.10	3	US
8525.20	17	EC, JA, TPKM
8528.12	3	US
8543.89	1	-

7.932 Specifically, the European Communities submits that the "overwhelming majority of ITA participants" identified codes 8517 50; 8517 80 and 8525 20 as the relevant codes for STBCs. These are also the codes that the European Communities notified in the Annex to its Schedule, i.e.,

[1199] European Communities' first written submission, paras. 170-172.
[1200] Exhibit EC-20.
[1201] European Communities' first written submission, para. 245.
[1202] European Communities' first written submission, para. 246 (referring to G/IT/2/Add.1/Rev. 1 (Exhibit EC-20)).

8517 50 90; 8517 80 90 and 8525 20 99. The European Communities argues that the data provides a "very valuable indication" of what the ITA parties to the ITA understood in 1997 (i.e., when they notified their amended schedules of commitments to the WTO) under the product description "set top boxes which have a communication function".[1203] Specifically, the European Communities indicates that codes 8517 50; 8517 80 and 8525 20 all pertain to modem devices. Thus, it argues that the notification of these tariff lines reflects an understanding that the narrative description in the concession was only intended to cover certain types of set top boxes. that access the Internet via a modem connected through a telephone line but, not set top boxes which function as recorders or those that incorporate a tuner. The European Communities argues that, had Members intended to incorporate those with recording or tuner capabilities, then they would have notified codes of heading 8521 or 8528.[1204]

7.933 The **complainants** consider that the notified codes merely illustrate where the products were classified at that time. Thus, they argue that the absence of particular codes should not be interpreted to mean that only certain categories of set top boxes are covered under the concession.[1205] Japan and Chinese Taipei submit that certain Members notified heading 8525, which contradicts the assertion that Members held a consistent view on the coverage of the STBCs concession.[1206]

Consideration by the Panel

7.934 We recall from paragraphs 7.557-7.561, that "subsequent practice" is the "...'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties [to a treaty] regarding its interpretation"[1207]. It is an "important element" in treaty interpretation that provides "objective evidence of the understanding of the parties as to the meaning of the treaty".[1208] Inconsistent classification practice must be disregarded.[1209] In determining what constitutes "common" and "concordant" practice, we noted that it would be *difficult* to establish a "concordant, common and discernible pattern" on the basis of acts or pronouncements of one, or very few parties to a multilateral treaty, such as the *WTO Agreement*.[1210]

7.935 Accordingly, the Panel will consider whether there is evidence of "consistent, common and concordant" classification practice on the part of the ITA participants and with respect to the set top box products at issue since the conclusion of the ITA until present.

7.936 As mentioned in paragraph 7.563 above, we do not consider it appropriate to assess information in WTO document G/IT/2/Add.1/Rev.1 (29 July 1999), either alone or in combination with information from WTO document G/IT/2/Add.1 of 17 October 1997[1211] as "subsequent practice" because it is unclear whether the tables broadly reflect the practice of ITA participants classifying STBCs. That document indicates that the "table was prepared from participants' schedules of commitments" and that it incorporates "any changes that were implemented by participants as

[1203] European Communities' first written submission, paras. 244-245.
[1204] European Communities' first written submission, para. 241.
[1205] Complainants' response to Panel question No. 82.
[1206] Japan's and Chinese Taipei's responses to Panel question No. 82.
[1207] Appellate Body Report on *Japan – Alcoholic Beverages II*, para. 106.
[1208] Appellate Body Report on *EC – Chicken Cuts*, para. 255 (citing *Yearbook of the International Law Commission* (1966), Vol. II, page 219, para. (6)); see also Panel Report on *China – Auto Parts*, para. 7.702.
[1209] Appellate Body Report on *EC – Computer Equipment*, para. 95.
[1210] Appellate Body Report on *EC – Chicken Cuts,* para. 259.
[1211] WTO document G/IT/2/Add.1 of 17 October 1997 (Exhibit EC-14) see para. 7.917 above.

rectifications or modifications".[1212] Since we cannot confirm the nature of participants' practice solely on the basis of the codes appearing in the table, and since we have considered the identical data in our assessment of other Members' Schedules as relevant "context", we abstain from elaborating further in this Section on the European Communities' table or the document that forms the basis of the table.

7.937 Apart from information appearing in the table, the European Communities has not identified evidence of the practice of other Members. The complainants allege that the practice of the European Communities has been inconsistent, in particular beginning in the years 2005-2006. Without further evidence to assess the practice among at least those Members that participate in the export and import of set top boxes, we lack sufficient evidence of the existence of subsequent practice to inform its interpretation.

(vi) Other arguments – Surrounding circumstances

7.938 Apart from an analysis of the text of the concession in the EC Schedule, the European Communities argues that the Panel should consider the "surrounding circumstances" to inform its interpretation of the treaty terms. In particular, the European Communities argues that the type of set top boxes that were available in 1996 at the time of negotiations, and the descriptions used during negotiations of the concession establish what was the intended product coverage.[1213]

7.939 The complainants argue that the European Communities' allegations concerning the type of set top boxes available and descriptions allegedly used in the context of ITA negotiations can at most qualify as "supplementary means" of interpretation pursuant to Article 32 of the Vienna Convention. The United States argues that the European Communities has not demonstrated that the meaning resulting from Article 31 is obscure or manifestly absurd or unreasonable or that the documents confirm the meaning resulting from the application of an Article 31 analysis under the Vienna Convention in this case.[1214]

7.940 In raising its arguments concerning the surrounding circumstances, the European Communities refers to the following citation by the Appellate Body in *EC – Chicken Cuts*:[1215]

> "The ordinary meaning of a treaty term must be ascertained according to the particular circumstances of each case. Importantly, the ordinary meaning of a treaty term must be seen in the light of the intention of the parties 'as expressed in the words used by them against the light of the surrounding circumstances'".[1216]

7.941 In that case, the Appellate Body evaluated the Panel's decision to consider other elements in addition to dictionary definitions, to complete its ordinary meaning analysis of the terms under review.[1217] The Appellate Body found no flaws in the Panel's decision to consider other elements to complement its analysis of the dictionary definitions, noting that interpretation pursuant to Article 31

[1212] WTO document G/IT/2/Add.1/Rev.1, paras. 1 and 2 (Exhibit EC-20).

[1213] European Communities' first written submission, paras. 219-236 and, in particular, para. 235.

[1214] United States' second written submission, para. 45.

[1215] European Communities' first written submission, para. 219 (noting that this excerpt derives from a book by Lord McNair, *The Law of Treaties* (Oxford Clarendon Press, 1961), p. 365 (Exhibit EC-33)).

[1216] Appellate Body Report on *EC – Chicken Cuts*, para. 175.

[1217] Appellate Body Report on *EC – Chicken Cuts*, para. 176. These elements, described as "factual context" included "products covered by the concession contained in heading 02.10", "flavour, texture, [and] other physical properties" of the products falling under heading 02.10, and "preservation" when interpreting the term "salted" as it appears in heading 02.10.

of the Vienna Convention is a "holistic exercise", and that such elements could otherwise be considered as "context" if not considered under "ordinary meaning".

7.942 One issue that arises is what relevance and weight should be given to the materials that the European Communities submitted. As a second matter, we recall that the party that asserts a particular fact must be able to prove it. In this latter respect, in asserting that a certain factual situation existed at the time of the negotiations, and that this should inform our interpretation, the burden is on the European Communities to provide clear and objective evidence not just that such a factual situation did indeed exist, but also the linkage between this factual situation and the actual text of the concession. In other words, the European Communities must be able to demonstrate, on an objective basis, that the factual situation at the time of the concession informed the intention of the drafters, and influenced the terms used in the concession at issue.

7.943 We have found in paragraph 7.888, in interpreting the European Communities' commitment on STBCs in accordance with Article 31 of the Vienna Convention, that the term "set top box" generally describes an apparatus or device that processes an incoming signal from an external signal source in a manner that can be presented on a display unit, such as a video monitor or television set. This apparatus need not be designed to be placed on top of the display unit and may handle one or several functionalities. We recognized that, through the inclusion of additional features or incorporation into another product, an apparatus may no longer be described as, in essence, a "set top box which ha[s] a communication function" and would not be covered by the concession. We concluded further that the terms of the STBCs concession in the Annex to the EC Schedule extends to any "set top box" that fulfils all of the following requirements: it is microprocessor-based; incorporates a "modem", and is capable of gaining access to the Internet and handling two-way interactivity or information exchange. We concluded that, in the context of this concession, the term "modem" should not be interpreted in an overly narrow or technical sense, but should be informed by the clear emphasis on functionality. Accordingly, we found that devices that incorporate, or have built in, technologies that enable them to access the Internet and provide interactive information exchange may fall within the scope of the concession.

7.944 We will examine, first, materials presented by the European Communities in connection with the ITA negotiations, and second, the European Communities' arguments regarding the existence of certain technologies at the time of the conclusion of the ITA.

7.945 Before proceeding, we recall the European Communities' statement that it is not arguing that only those products and models that use the precise technology present in 1996 would be covered by the concessions made pursuant to the ITA. Contrary to this view, the European Communities recognizes certain concessions are open ended in respect of the precise technology used by a given device or apparatus."[1218]

Landscape papers submitted during negotiation of the ITA

Arguments of the parties

7.946 The **European Communities** argues that "non-papers" circulated among negotiators illustrate the type of set top boxes that were intended to be covered by the STBCs narrative description. In papers issued on 4 October 1996 and 18 October 1996, the European Communities argues that a

[1218] European Communities' response to Panel question No. 53 (stating "[t]here is no general rule according to which the ITA concessions would either be entirely open to technological developments or that they would only be limited to the products and technology existing at the time).

negative list of "items predominantly designed for consumer use" demonstrates that only certain set tops were intended for duty-free coverage, in particular "Set top boxes for connecting to the Internet", but not "Set top boxes (decoder and TV receiver or decoder only)".[1219] In a 23 October 1996 paper, the European Communities argues that Japan proposed inclusion of set top boxes that "bring high-quality, economical Internet access to the television consumer audience" or are "television-based Internet solution[s] … to accessing and browsing the Internet".[1220] In a 31 October 1996 paper, the European Communities refers to a description for "Set-top boxes which have communication function" as "a device, equipped with CPU and modem function, which has a function of interactive information exchange".[1221] In a 1 November 1996 document, the European Communities notes that the descriptions for "Game machines (…)", "Internet television" and "Set top boxes (decoder and TV receiver or decoder only)" were included on the same lists.[1222] In a 25 November 1996 document, described as a "Quad Technical Working Document", the European Communities argues that a more-developed definition of "Set top boxes which have communication function" was finally provided, reflecting in handwritten notes a proposal to change the phrase "which have communication function" to "with communication function".[1223] In the European Communities' view, these materials are evidence that the words of the particular concession at issue "really matter", as demonstrated through the back and forth comments by parties.[1224]

7.947 The **United States** and **Chinese Taipei** submit that the materials were prepared by individual Members and do not represent the common intentions of the parties, or even the views of all ITA participants, and thus should not be considered. Moreover, the United States argues that the European Communities uses these materials to advocate a different meaning than what may be concluded from an analysis of the ordinary meaning of the terms of the concession, and thus its position should not be accepted.[1225]

Consideration by the Panel

7.948 In the context of discussing landscape papers submitted as part of the negotiations of the ITA, we recall our determination in paragraph 7.581, that consideration of "landscape papers", which were only reviewed by a subset of the negotiating ITA participants (the "Quad" members, in particular) and were not circulated at any point in time prior to this dispute, should not have any bearing on our interpretation of the concessions arising under the ITA, that were subsequently incorporated into ITA participants' Schedules. Accordingly, we do not consider that they should inform our interpretation here.

7.949 Notwithstanding this conclusion, we find it difficult to draw any particular conclusion from the content of the materials that have been submitted. In particular, the lists of "products to be

[1219] European Communities' first written submission, paras. 227-228, referring to Exhibits EC-39-40.
[1220] European Communities' first written submission, para. 230, referring to Exhibit EC-41, p. 25.
[1221] European Communities' first written submission, para. 230, referring to Exhibit EC-42. The European Communities notes that this same document also included a description for "Game Machines which have a communication function", described as "Game machines equipped with CPU and modem function, which adds a function of interactive information exchange to television set when connected to it"; and "Internet television", which was described as "A television set, equipped with CPU and modem function inside, which has a function of interactive information exchange" (European Communities' first written submission, para. 231).
[1222] European Communities' first written submission, para. 232, referring to Exhibit EC-24.
[1223] European Communities' first written submission, para. 233, referring to Exhibit EC-27.
[1224] European Communities' first written submission, para. 235.
[1225] United States second written submission, para. 46; Chinese Taipei's second written submission, para. 243.

included wherever they are classified" in the 18 October 1996 "non-paper" refers broadly to "Set top boxes for connecting to the Internet". To the extent relevant to our analysis, this would appear to support a broad interpretation. Moreover, this same document refers to products to be excluded from ITA coverage, including "Set top boxes (decoder and TV receiver or decoder only)". No mention is made to these aspects in the final text of the concession, nor is mention made to hard drive or recording features. Finally, the progression of working documents ultimately demonstrate a definition of set top boxes that is not much, if at all, different from that appearing in Attachment B and the EC concession. As noted above, the burden is on the European Communities to demonstrate how and why the documents it has referred to assist the Panel in interpreting the text of the concession and the intention of the drafters. We do not find such assistance in these materials.

The state of technology at the time of ITA negotiations

Arguments of the parties

7.950 The **European Communities** argues that set top boxes available in 1996 can generally be divided into two categories: a first category it describes as "traditional" set top boxes that mainly allowed for digital TV viewing on analogue TV devices by paying customers; and a second it describes as "Internet on TV" devices, which allowed interactive communication and could access the Internet when used in conjunction with a television.[1226] The European Communities argues that this latter category of product was generally not successful in the market, and disappeared with the introduction of the 1996 Microsoft "WebTV" project.[1227] In subsequent years, the European Communities claims new set top boxes with a modem and microprocessor were developed that were oriented toward ordering of video-on-demand content, or accessing certain websites (e.g., home shopping or tele-voting), as opposed to sending and/or receiving emails. Later set top box models were developed that allowed limited access to the Internet, such as to websites offering on-line shopping (e.g., walled garden type set top boxes). Only later did set top boxes begin to incorporate video tuners to decode TV signals, and hard disks and functionality to record material from the television signal, according to the European Communities. While these latter models retained a communication function for purposes such as ordering movies or downloading electronic programme guides/schedules facilitating the recording of TV programmes, the European Communities argues that these products represent a new or "merged category" of products focused on video recording .[1228] In its view, evidence demonstrates that two categories of set top box were available in the marketplace in 1996, which should inform the understanding of the scope of the concession.

7.951 The **United States** and **Chinese Taipei** argue that the European Communities has not provided evidentiary support for its assertions that only two types of set top boxes existed in 1996, or that "Internet on TV" devices were the only really successful set top boxes at that time.[1229] The United States and Chinese Taipei submit that set-top boxes existed in 1996 that permitted both television programming and Internet access via TV, and are clearly distinguishable from "Internet on TV" devices such as "WebTV".[1230] The United States refers to literature describing a set top box in 1996 that contained a decoder and television receiver as well as a cable modem and provided access

[1226] European Communities' first written submission, para. 222, referring to Exhibits EC-34-35; European Communities' response to Panel question No. 78.

[1227] European Communities' first written submission, para. 222, referring to Exhibit EC-36-38.

[1228] European Communities' response to Panel question No. 78.

[1229] United States second written submission, para. 43; Chinese Taipei's response to Panel question No. 81; Chinese Taipei's second written submission, para. 244; Gerard O'Driscoll, The Essential Guide to Digital Set-Top Boxes and Interactive TV, (2000), p. 91 (Exhibit US-116).

[1230] United States second written submission, fn. 68 to para. 37, United States' response to Panel Question 81, referring to Exhibits US-114 to 116.

to services including home shopping, interactive games and distance learning.[1231] Chinese Taipei argues that literature at the time recognized a wide range of set top boxes with more traditional uses, such as television viewing or ordering pay-per-view movies and more advanced uses, such as interactive services including home shopping and Internet.[1232] If there had been one product, the United States argues that the concession would have been drafted differently to refer to, for instance "WebTV devices without tuners" rather than set top boxes.[1233]

Consideration by the Panel

7.952 The **Panel** notes that the arguments of the parties set out above concern the existence or otherwise of certain technologies at the time of the ITA negotiations.[1234] We recall that, as explained in paragraph 7.596 above, we do not consider it desirable nor possible to consider the relevance of the state of technology that existed at the time of the negotiations, or technological development in the abstract and without reference to the terms of the concessions that are being interpreted.

7.953 We recall that, in determining the scope of the European Communities' commitment on STBCs, we have applied the customary rules of interpretation of public international law, as set out in Articles 31 of the Vienna convention. In doing so, we have examined the ordinary meaning of the terms of the European Communities' commitment, in the context provided by the ITA, other relevant parts of the EC Schedule, and the schedules of other WTO Members. We have interpreted the concession based on the STBCs narrative description in this manner.

7.954 We established that the STBCs concession pertains to apparatus or devices that processes an incoming signal from an external signal source in a manner that can be presented on a display unit, such as a video monitor or television set. These apparatus need not be designed to be placed on top of the display unit and may handle one or several functionalities. We recognized that, through the inclusion of additional features or incorporation into another product, an apparatus may no longer be described as, in essence, a "set top box which ha[s] a communication function" and would not be covered by the concession. We concluded further that the terms of the STBCs concession in the Annex to the EC Schedule extends to any "set top box" that fulfils all of the following requirements: it is microprocessor-based; incorporates a "modem", and is capable of gaining access to the Internet and handling two-way interactivity or information exchange. We concluded that, in the context of this concession, the term "modem" should not be interpreted in an overly narrow or technical sense, but should be informed by the clear emphasis on functionality. Accordingly, we found that devices that incorporate, or have built in, technologies that enable them to access the Internet and provide interactive information exchange may fall within the scope of the concession.

7.955 We also observed that, when making a commitment, Members may propose precise, even exclusive terms to define that concession, to qualify or limit the scope of coverage through terms and conditions, including by limiting terms to physical attributes, dimensions, technical characteristics or features. A Member may also refer to a particular classification or tariff heading to define or limit the scope of a concession. With regard to the STBCs concession we have found that that the central focus

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[1231] Complainants' response to Panel question No. 81, referring to Scientific-Atlanta 1996 Annual Report, p. 16 (Exhibit US-114); Explorer 2000 Installation and Operation Guide, pp. 1-2 and 1-4 (Exhibit US-115).

[1232] Japan's response to Panel question No. 81; Chinese Taipei's response to Panel question No. 81.

[1233] United States second written submission, para. 37, fn. 71, referring to Exhibit US-115.

[1234] See for instance, Japan's second written submission, para. 156; United States' first written submission, paras. 51-52 (citing to Hirohisa Kawamoto, The History of Liquid-Crystal Displays, Proceedings of the IEEE (Vol. 90, No. 4 (April 2002), p. 466 (discussing the reflection process)).

is on function, as opposed to a precise or detailed assessment of the technical properties of the internal components of a set top box.

7.956 Even setting this aside, we recall that the European Communities would need to demonstrate, on an objective basis, that the factual situation at the time of the concession informed the intention of the drafters, and influenced the terms used in the concession at issue. The Panel is not persuaded by evidence submitted by the European Communities that the market for set top boxes consisted of those used for viewing digital TV on analogue TVs, and devices that enabled Internet access on TV, such that the concession was only to cover these products. While the evidence in the form of media press releases[1235] research studies[1236], a product manual[1237] and a fax from Japan's Ministry of International Trade, dated 23 October 1996, which itself attaches a "Web TV Networks" press release[1238], reflects that so-called "Internet on TV" devices with limited functionalities and access via telephone line-based modems were marketed and available in 1996, the complainants have referred to more sophisticated products with TV tuner capabilities.[1239] While this does not directly address the question of whether devices with recording capabilities or modem technologies existed or not at that time, it at least does call into question whether the ITA participants were narrowly focused in their views on products.

(vii) Overall conclusions on the interpretation of the narrative description for STBCs in the Annex to the EC Schedule

7.957 Based on our assessment of the text of the STBCs narrative description in the Annex to the EC Schedule in accordance with the principles codified in Article 31 of the Vienna Convention, we concluded above that the term "set top box" generally describes an apparatus or device that processes an incoming signal from an external signal source in a manner that can be presented on a display unit, such as a video monitor or television set. This apparatus need not be designed to be placed on top of the display unit and may handle one or several functionalities. We recognized that, through the inclusion of additional features or incorporation into another product, an apparatus may not meet the description of a "set top box which ha[s] a communication function" and would not be covered by the concession. We concluded further that the terms of the STBCs concession in the Annex to the EC Schedule extends to a "set top box" that fulfil all the following requirements: it is microprocessor-based; incorporates a "modem", and is capable of gaining access to the Internet and handling two-way interactivity or information exchange. We concluded that, in the context of this concession, the term "modem" should not be interpreted in an overly narrow or technical sense, but should be informed by the clear emphasis on functionality. Accordingly, we found that devices that incorporate, or have built in, technologies that enable them to access the Internet and provide interactive information exchange may fall within the scope of the concession.

[1235] "Internet on TV satisfies consumers", Exhibit EC-34; "Out with decoder boxes, in with on-tv licenses at ViewCall", Exhibit EC-35; "Microsoft and WebTV Networks to Collaborate On Internet Television Browsing for the Masses", Exhibit EC-36.

[1236] "Media Policy: convergence, Concentration and Commerce", Euromedia Research Group, p. 91 (Exhibit EC-37).

[1237] Sony Internet Terminal, Operating Instructions, Exhibit EC-38.

[1238] Fax from Japan's Ministry of International Trade, dated 23 October 1996, to Mr Jaochim Graminsky and Mr. Matthew Rohde, (Exhibit EC-41). Of note, the Panel cannot verify that this fax was received by additional recipients.

[1239] Scientific-Atlanta 1996 Annual Report, p. 16 (Exhibit US-114); Explorer 2000 Installation and Operation Guide, pp. 1-2 and 1-4 (Exhibit US-115).

(b) The ordinary meaning of the relevant concession: the United States' claim in connection with tariff item numbers 8517 50 90, 8517 80 90, 8525 20 99 and 8528 12 91 in the EC Schedule

7.958 In addition to its claim in connection with the narrative product description for STBCs in the Annex to the EC Schedule, the United States has additionally claimed that the European Communities is required to provide duty-free treatment to STBCS under individual tariff lines that appear in the EC Schedule. The United States submits that the European Communities bound certain subheadings at zero duty in order to implement its ITA obligations, including tariff item numbers 8517 50 90 ("Electrical apparatus for line telephony or line telegraphy... -- Other apparatus, for carrier-current line systems or for digital line systems... – Other"), 8517 80 90 ("Electrical apparatus for line telephony or line telegraphy... -- Other apparatus ... – Other"), 8525 20 99 ("Transmission apparatus for radio-telephony, radio-telegraphy, radio-broadcasting or television... -- Transmission apparatus incorporating reception apparatus... --- Other") and 8528 12 91 ("Reception apparatus for television, whether or not incorporating radio broadcast receivers or sound or video recording or reproducing apparatus ... -- Colour ... --- Other ... ---- Other ... ------ Apparatus with a microprocessor-based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange, capable of receiving television signals ('Set-top boxes with a communication function')."[1240]

7.959 The United States notes that the latter tariff item number 8528 12 91, in particular, describes "[a]pparatus with a microprocessor-based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange, capable of receiving television signals" similar to the narrative description in the Annex to the EC Schedule. The United States argues that the "devices in question" are "microprocessor-based devices, incorporating a modem for gaining access to the internet, and having a function of interactive information exchange" that are "also capable of receiving television signals" due to their ability to "enable a television set to receive and decode digital television (DTV) broadcasts".[1241]

7.960 The United States argues that the language "whether or not incorporating radio broadcast receivers or sound or video recording or reproducing apparatus" in HS1996 heading 8528 does not mean that set top boxes incorporating a device performing a recording or reproducing function are excluded from duty-free coverage.[1242]

7.961 The European Communities submits that a claim in connection with the subheadings and their descriptions has not been clearly established, as the customs classification rules are relevant and have not been referred to.[1243]

7.962 It appears that the United States has turned to its analysis in respect of the concession in the STBCs narrative description, including its assessment of the ordinary meaning of the terms of that concession, in concluding that the products fall within the scope of the concessions under tariff item

[1240] United States' first written submission, para. 109, referring to EC ITA Schedule Modifications; Committee on Market Access, Rectifications and Modifications of Schedules, Schedule CXL – European Communities, G/MA/TAR/RS74 (15 December 2000) (Exhibit US-26); United States' second written submission, para. 63.

[1241] United States' first written submission, para. 110; United States' second written submission, para. 63.

[1242] United States' second written submission, para. 64.

[1243] European Communities' second oral statement, para. 47. The European Communities notes in addition, that the United States alone has raised a claim concerning the descriptions, while the other complainants consider the codes may only provide context for interpreting the narrative description (European Communities' second oral statement, para. 49).

numbers 8517 50 90, 8517 80 90, 8525 20 99, and 8528 12 91. The United States has not offered any analysis of the ordinary meaning to be attributed to the terms of the tariff item numbers 8517 50 90, 8517 80 90, 8525 20 99, and has summarily limited its assessment of the terms of 8528 12 91. Moreover, the United States has not considered in limited fashion the location of the concession in its context, including its surrounding provisions.[1244] Finally, in the Panel's view, the United States has asserted with only limited argumentation that the devices in question fall within the scope of the four identified tariff lines.

7.963 For all the foregoing reasons, the Panel considers that the United States has failed to meet its burden to establish a prima facie case of violation, with respect to its claims concerning tariff item numbers 8517 50 90, 8517 80 90, 8525 20 99 and 8528 12 91 in the EC Schedule.

(c) Do the set top boxes which are the subject of this dispute fall within the scope of the narrative description in the Annex to the EC Schedule?

7.964 Now that we have determined the scope of the concession, i.e., the type of products covered by the European Communities' obligations under Article II of the GATT 1994 to provide duty-free treatment, we must determine whether the products raised by the complainants in the joint Panel request fall within that description such that they would be entitled to the duty-free treatment required by the concession.

7.965 We recall our conclusion in paragraph 7.830 above that the products at issue in this dispute are (i) electronic apparatuses that enable a video monitor or television to receive and decode digital television broadcasts from a communication channel, which are capable of connecting to the Internet through an in-built WLAN, ISDN or Ethernet device in order to have an interactive information exchange; and (ii) electronic apparatuses that meet the terms of the description in CNEN 2008/C 112/03 and otherwise incorporate a device performing a recording or reproducing function, such as a hard disk or DVD drive.

7.966 The complainants argue that all such products fall within the scope of the STBCs narrative description in the Annex to the EC Schedule. The European Communities, on the other hand, argues that the products do not communicate using a "modem" and are thus not within the scope of the STBCs narrative description. Additionally, the European Communities argues that some of the products raised by the complainants have additional features and functionality that make them entirely new products that do not fall within the scope of the STBCs narrative description. Therefore, according to the European Communities, these products are not covered by the obligation to provide duty-free treatment to certain set top boxes in the Annex to its Schedule.

7.967 As a general proposition, if the set top boxes at issue are determined to be within the scope of the STBCs narrative description concession in the Annex to the EC Schedule, then the European Communities is obliged to provide them with duty-free treatment. Once the Panel has reached a conclusion on whether the products are within the scope of the concession, the next step would be to compare the obligation in the EC Schedule with the treatment provided for in the European Communities' measures in order to determine whether that treatment is less favourable than and levies duties in excess of that set forth in its schedule, such that it would be in contravention of its

[1244] We recall, in our assessment of the complainants' claim in connection with CN8471 60 90, we determined that the HS1996, including relevant Chapter and Section Notes and interpretative materials, may provide relevant context for interpreting a Member's concessions that are based on the HS. See para. 7.636 above, referring to Appellate Body Report on *EC – Chicken Cuts*, para. 199; Appellate Body Report on *China - Auto Parts*, para. 151.

obligations under Articles II:1(a) and II:1(b) of the GATT 1994. We begin our analysis, therefore with the question of whether the products at issue are "set top boxes which have a communication function: a microprocessor based device incorporating a modem for gaining access to the Internet and having a function of interactive information exchange." We will conduct our analysis pursuant to our understanding of the scope of the concession as set out above.

(i) Arguments of the parties

7.968 The **European Communities** contends that the products at issue fall outside of the scope of the STBCs narrative description in the Annex of the EC Schedule for two main reasons. First, because they do not incorporate "modems" as that term is used in the concession. Second, because by virtue of additional features they have become a product other than a set top box.

7.969 The **complainants** are of the view that nothing in the STBCs concession allows the European Communities to exclude from duty-free treatment set top boxes with a communication function merely because they gain access to the Internet using "particular types of modems" that use RJ-45 connectors[1245] or because they incorporate a hard disk or other recording or reproducing apparatus.[1246]

> Do products which incorporate ISDN, WLAN, and Ethernet technology incorporate modems for gaining access to the Internet?

7.970 The **complainants** argue that devices which incorporate communication devices with ISDN, WLAN, and Ethernet technology are devices which "incorporate a modem for gaining access to the internet and having a function of interactive information exchange."[1247]

7.971 The complainants explain that ISDN-based devices uses pulse code modulation to convert analogue to digital signals at the transmitter ("modulate"), and to convert back ("demodulate") digital signals to analogue at the receiver end via pulse code modulation that samples the amplitude of an analogue signal in uniform intervals. The complainants submit that an ISDN modem, also known as a "terminal adapter", essentially serves as a protocol converter to interface non-ISDN devices through variation of the electrical signal as the information to be transmitted on the communication medium varies.[1248] Through this process, in which the electric signal is varied, the complainants argue that both voice (via analogue) and digital signals are transferred over an ISDN medium.[1249]

7.972 As concerns WLAN technology, the complainants submit that WLAN achieves transmission and receipt of data by varying the characteristics of the electrical signal in the form of a radio frequency signal. Under the most common standards, which they refer to as IEEE 802.11 (including

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[1245] United States' first written submission, para. 104 Japan's first written submission, paras. 368; Chinese Taipei's first written submission, paras. 365 and 437.

[1246] United States' first written submission, para. 97; Japan's first written submission, paras. 368 and 384; Chinese Taipei's first written submission, paras. 365 and 437.

[1247] United States' first written submission, para. 100; Japan's second written submission, para. 218; Chinese Taipei's first written submission, para. 419; complainants' response to Panel question No. 70.

[1248] Japan's first written submission, paras 390-391, footnote 181; United States' first written submission, para. 100, footnote 146; and Chinese Taipei's first written submission, para. 419, footnote 212 (all referring to *Newton's Telecom Dictionary* (24th ed. 2008), p. 922) (Exhibits US-68; JPN-11).

[1249] Complainants' response to Panel question No. 72 (referring to ITU-T Recommendation G.711: General Aspects of Digital Transmission Systems. Terminal Equipments: Pulse Code Modulation of Voice Frequencies (Exhibit US-109)).

802.11b and 802.11a), the complainants argue that the transferred information is modulated at the transmitter side and demodulated at the receiving end.[1250]

7.973 The complainants submit that Ethernet achieves transmission and receipt of data via different standards that vary the electrical characteristics of the signal via pulse amplitude modulation, in particular a five-level PAM constellation at the transmission and receiver side.[1251] The United States also emphasizes that set top boxes with an Ethernet "modem" may connect via an RJ-45 connector directly to a network port in a user's wall, in the same manner as a cable modem with RF connector linking to a cable port in the wall.[1252]

7.974 In addition, the complainants note the European Communities' view that cable modems fall within the terms of the scope of the STBCs narrative description. Given the functionality of ISDN, WLAN and Ethernet devices discussed above, and the European Communities' acceptance that set top boxes incorporating "cable modems" fit within the scope of the STBCs narrative description, the United States argues that there is no rationale for considering cable modems as "modems", but excluding ISDN, WLAN or Ethernet devices, which also modulate and demodulate signals.[1253]

7.975 The **European Communities** argues that only digital-to-analogue telephone-based modems and cable modems fulfil the conditions of performing digital-to-analogue modulation and demodulation and modulating for the purposes of "direct" transmission and communication with the Internet, and are thus "modems" within the meaning of the STBCs narrative description.[1254]

7.976 The European Communities argues that ISDN-based devices do not constitute "modems" because these device do not perform digital-to-analogue modulation and demodulation to connect to the Internet, but instead perform digital-to-digital transmission only. In addition, the European Communities submits that ISDN functions through a terminal adapter.[1255] In contrast, the European

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[1250] Complainants' response to Panel question No. 72. The complainants specify that 802.11b supports DBPSK, DQPSK modulation schemes, which allow for transmissions via binary constellation (they refer to: IEEE Std 802.11b – 1999. Part 11: Wireless LAN Medium Access Control (MAC) and Physical Layer (PHY) specifications: Higher-Speed Physical Layer Extension in the 2.4 Ghz Band, p. 42 (Exhibit US-111)). The complainants specify that 802.11a supports BPSK, QPSK, 16-QAM and 64-QAM modulation schemes, which rely on a 64-point constellation (they refer to: IEEE Std 802.11a-1999 - Supplement to IEEE Standard for Information Technology, p. 24 (Exhibit US-112)). See also United States' first written submission, para. 100 (referring to Wireless Broadband Modems, International Engineering Consortium, www.iec.org (Exhibit US-69)).

[1251] Complainants' response to Panel question No. 72. The complainants specify that Ethernet relies on different standards (802.3 IEEE), including Ethernet, Fast Ethernet, Gigabit Ethernet, and 10 Gigabit Ethernet. The complainants submit that Fast and Gigabit Ethernet use Pulse Amplitude Modulation (PAM) to handle information transmission. The complainants refer to the following sources: IEEE Std 802.3-2005, Section 2, Part 3: Carrier Sense Multiple Access with Collision Detection (SCMA/CD) access method and physical layer specifications (Exhibit US-110), p. 426, Section 3, Part 3, pp. 149-150, Section 2, Part 3, Figure 32-4, p. 42.

[1252] See Exhibits US-124 and US-125 (manuals for set top boxes providing instructions on connecting an RJ-45 interface to a network port in the wall).

[1253] United States' first written submission, paras. 100-101; United States' second written submission, para. 53; United States' second oral statement, para. 22 (Exhibits US-65; US-140).

[1254] European Communities' response to Panel question Nos. 149, 150; European Communities' comments on complainants' responses to Panel question No. 150.

[1255] European Communities' response to Panel question No. 73; European Communities' second written submission, para. 225 (referring to Overview of ISDN lines, available at http://www.wifinotes.com/computer-networks/how-ISDN-works.html (Exhibit EC-107, p. 1-2); *How ISDN works* (available at http://www.smartcomputing.com/articles/archive/R0501/25R-1/25R01.pdf?guid= and http://www.teach-ict.com/as_a2/topics/telephone_systems/telephone_systems/how_isdn_works.htm (Exhibit EC-107, pp. 3-5)).

Communities argues that telephone-based modems use analogue technology via sending and receiving data in the form of audible tones transferred by telephone lines, which is converted back into digital data. As a reflection of distinctions in these technologies, the European Communities submits that traditional modems and ISDN technology were classified until 2006 in different parts of its domestic nomenclature: CN: 8517 50 10 for modems (apparatus for carrier-current line systems) and 8517 50 90 for digital line systems. In light of this treatment, the European Communities argues that, it is hard to accept that ITA participants decided not to distinguish between these two technologies in the concession.[1256]

7.977 Furthermore, the European Communities argues that Ethernet and WLAN also do not constitute "modems" under the concession, because they do not perform digital-to-analogue modulation and demodulation[1257], and do not connect directly to the Internet, but connect only after connecting first to an external modem.[1258] It argues that WLAN and Ethernet are thus not modems but "devices for connection to an internal network" via an "external modem".

Are the products at issue which incorporate additional features still set top boxes of a type covered by the STBCs Concession?

7.978 The **complainants** argue that the addition of features such as video recording does not change the fact that the product is a set top box with a communication function.[1259] The **United States** contends that the European Communities' position that the recording function can somehow be divorced from the communication function, such that a device could be described as 80 per cent recording and 20 per cent communication is utterly flawed.[1260] **Chinese Taipei** and **Japan** submit that set top boxes which have a communication function "*sometimes include* a hard disk to record television programmes, download software from a digital television provider and to perform other ancillary applications enabled by the digital television provider".[1261] Japan is of the view that STBCs concession should include not only set top boxes capable of *solely* performing a communication function, but also STBCs which perform *additional* functions, such as recording or reproducing, in addition to the communication function.[1262]

The document explains the basic features of ISDN, including the terminal adapter; *Cisco's How ISDN works*, available at http://www.cisco.com/en/US/docs/internetworking/technology/handbook/ISDN.html (Exhibit EC-107, pp. 6-12); *Beginner's Guide to ISDN*, available at http://www.seg.co.uk/products/isdnover.htm (Exhibit EC-107, pp. 13-18); *How it works: science and technology*, by Wendy Horobin, Marshall Cavendish Corporation, 3rd ed., published by Marshall Cavendish, 2003, pp. 1473 et seq.

[1256] European Communities second written submission, para. 227.

[1257] European Communities' response to Panel question No. 151; European Communities' comments on complainants' responses to Panel question No. 149; see also European Communities' second written submission, para 228; European Communities' response to Panel question No. 73.

[1258] European Communities' first written submission, para. 265; European Communities' response to Panel question No. 73; European Communities' second written submission, para. 228.

[1259] United States' second written submission, para. 38.

[1260] United States' second written submission, para. 40. With respect to the products at issue, the United States refers to the European Communities' own modification of its schedule in 2000 and several BTIs from national customs authorities which it argues demonstrate that the European Communities itself acknowledges that set top boxes which also have recording devices incorporated into them fall within the scope of the STBCs narrative description (United States' first oral statement, para. 15; United States' second written submission, para. 41; Exhibits US-26 and US-28).

[1261] Chinese Taipei's first written submission, para. 15, Japan's first written submission, para. 345 (emphasis added).

[1262] Japan's first written submission, para. 382.

7.979 The **European Communities** argues that the products at issue fall outside the scope of the STBCs narrative description because, the main features of certain set top boxes make them "digital video recorders" or "personal video recorders", which are "completely different" than what is covered by the concession.[1263] Generally, the European Communities argues that certain set top boxes when considered objectively, are not eligible for duty-free treatment, such as a set top box that performs a 1 per cent "communication" function and 99 per cent "other" functions.[1264] In response to the evidence presented by the United States, the European Communities submits that even a cursory review of the products discussed in the BTIs presented by the complainants would reveal that they are no longer considered to be "set top boxes", as their main features and functionality make them completely new products that do not fall within the scope of the STBCs concession.[1265]

7.980 The European Communities argues that a determination of whether a "set top box" is excluded from duty-free treatment because of its additional functionality is not done merely based on the presence of a hard disk, but rather based on a consideration of all the characteristics of those products.[1266] The European Communities submits that it may determine on the basis of an objective assessment of all the objective characteristics of a set top box with recording or reproducing capabilities, that such product is *prima facie* classifiable under the terms of both CN heading 8528, as "[r]eception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus", and CN heading 8521, as "[v]ideo recording or reproducing apparatus, whether or not incorporating a video tuner".[1267] In accordance with GIR 1 and Note 3 to Section XVI of the HS1996, the European Communities argues it would be necessary to determine the "principal function" of the device.[1268] By way of example, the European Communities argues that a set top box with video recording or reproducing capabilities, which is also equipped with a video tuner for the reception of TV signals, and software that automatically downloads TV programming, may be considered principally a recording or reproducing apparatus, however, only when considering the presence of electronics for recording, playback and recording buttons, remote control, absence of a screen, and after assessing whether recording or reproducing capabilities will be an additional/secondary feature.[1269] On the other hand, if it were determined that the hard drive was used for saving emails or attachments, or if the product were equipped with a keyboard for an easy sending of emails, as opposed to use of the numeric keypad on a remote control primarily oriented toward recording functionality, the European Communities argues this would be a factor suggesting that the communication function prevails over recording capability.[1270]

(ii) Consideration by the Panel

7.981 We recall our conclusion in paragraphs 7.851-7.852, that a "set top box" is an apparatus or device that processes an incoming signal from an external signal source in a manner that can be presented on a display unit, such as a video monitor or television set. This apparatus need not be

[1263] European Communities' first written submission, para. 260, referring to Exhibits EC-43, EC-44, EC-45, Exhibit US-28.

[1264] European Communities' first written submission, paras. 258-260; Exhibit EC-46.

[1265] European Communities' first written submission, para. 260 making reference to Exhibit US-28 and the confidential version of the BTI in Exhibit EC-43.

[1266] European Communities' first written submission, para. 286.

[1267] European Communities' second written submission, para. 239.

[1268] European Communities' response to Panel question No. 85.

[1269] European Communities' second written submission, para. 243. As an example, the European Communities refers to a product which describes itself as a Digital Video Recorder, and has a product instruction manual which describes how to record or watch movies, without reference to Internet functionality (Exhibit EC-44).

[1270] European Communities' response to Panel question No. 85.

designed to be placed on top of the display unit, and may handle one or several functionalities, including: receiving and decoding television broadcasts, whether from a satellite, cable or Internet source; converting digital TV broadcasts to function on older analogue TV sets; enabling two-way interactive connectivity with digital cable television broadcasts or via the Internet; or even recording of digital video content.

7.982 We also recall our conclusion in paragraphs 7.861 that the use of the terms "which have a communication function" places an important emphasis on the communication functionality in defining the particular type of set top box that is covered under the concession. Although all such set top boxes must have a communication function, we also found that the terms of the concession did not convey the meaning such that coverage is limited to set top boxes with *only* a communication function. However, we did note that there may come a point when, due to additional functionality, a particular product would not, in essence, meet the description of a "set top box which ha[s] a communication function" and, therefore, would not be included within the scope of the STBCs narrative description.

7.983 We further concluded in paragraphs 7.880 and 7.886 that the text following the colon, in the narrative description, expands upon the description provided by the antecedent text "Set top boxes which have a communication function". We concluded that the terms of the STBCs concession in the Annex to the EC Schedule extends to a "set top box" that fulfil all the following requirements: it is microprocessor-based; incorporates a "modem", and is capable of gaining access to the Internet and handling two-way interactivity or information exchange. In the context of this concession, the term "modem" should not be interpreted in an overly narrow or technical sense, but should be informed by the clear emphasis on functionality. Thus, the term should not be interpreted to refer only to components that connect to the Internet directly, or perform digital-to-analogue signal conversion over a telephone line. Interpreting the concession in context and in light of the clear focus on functionality, we found that devices that incorporate, or have built in, technologies to access the Internet and provide interactive information exchange may fall within the scope of the concession.

7.984 The complainants have presented evidence that devices based on ISDN, WLAN and Ethernet technology connect set top boxes to a communication line. We consider that it is clear that such devices incorporate, or have built in, technologies to access the Internet and provide interactive information exchange. We therefore conclude that set top boxes that otherwise meet the terms of the concession, and that incorporate ISDN, WLAN, and Ethernet technology fall within the scope of the concession.

7.985 In reaching our conclusions, we do note that we have not relied on technical definitions of terms such as "modems", "pulse code modulation" or "pulse amplitude modulation" to either include or exclude products, as the European Communities has raised.[1271] Rather, we have based our conclusions on the ordinary meaning of the terms used in the concession considered in context and in light of their object and purpose.

7.986 Finally, with respect to set top boxes which have a communication function which also incorporate a recording device or hard disk, we recall our conclusion that the STBCs narrative description is not limited to products that only have a communication function. However, we also recall that additional functionality may, at a certain point, result in a product not meeting the description of a "set top box which ha[s] a communication function". Such a determination about whether a product is or not such a set top box must be made based on a case-by-case analysis of the objective characteristics of a particular product as it is presented at the border.

[1271] European Communities' second written submission, para. 231-232.

(d) Does the CN, in conjunction with CNEN 2008/C 112/03, provide for duties on products identified by the complainants which are in excess of those set forth in the EC Schedule?

7.987 We recall our reasoning in paragraphs 7.97-7.102 above that Article II:1(b) requires that Members shall not apply ordinary customs duties in excess of those provided for in the Schedule. Therefore, in this section we will compare the tariff treatment provided to the products identified by the complainants under the challenged measures with that provided for in the STBCs narrative description in the Annex to the EC Schedule to determine whether the challenged measures provide for duties being applied which are in excess of those set forth in the EC Schedule, such that the European Communities is in breach of its obligations under Article II:1(b) of the GATT 1994.[1272]

7.988 The complainants argue that, through the measures at issue -- Council Regulation No. 2658/87, as amended and CNEN 2008/C 112/03 -- the European Communities does not provide duty-free treatment to set top boxes which have a communication function.

7.989 We recall from paragraph 7.808 above that Council Regulation No. 2658/1987, as amended, sets forth in CN code 8528 71 1 the duty-free CN code in which to classify certain "Apparatus with a microprocessor-based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange, capable of receiving televisions signals ('set-top boxes with communication function')". In addition, the CN establishes dutiable CN codes 8521 90 00, applicable to "[v]ideo recording or reproducing apparatus, whether or not incorporate a video tuner", which sets a 13.9 per cent duty. The CN also establishes CN codes 8528 71 19 and 8528 71 90 without additional description, which each set a duty rate of 14 per cent.

7.990 In paragraph 7.822 above, under CNEN 2008/C 112/03, we concluded that products may only qualify under duty-free CN code 8528 71 13 to the extent they meet the terms of the CNEN generally. However, set top boxes that do not have a built-in modem, as described in the provisions, or otherwise incorporate ISDN, WLAN or Ethernet technology, are excluded. A set top box that qualifies as a product without a screen which are reception apparatus for television, but which does not incorporate a video tuner is also excluded. Finally, any set top box that contains a device performing a recording or reproducing function, such as a hard drive or DVD drive, will also be excluded. Products that are in part described by CN code 8528 71 13, but do not meet the requirements enumerated in this paragraph are instructed to be classified under other codes under heading 8528, subject to 14 per cent duties, or otherwise under CN code 8521 90 00 and subject to 13.9 per cent duties.

7.991 We recall that, in the Annex to its Schedule, the European Communities agreed to bind and eliminate duties on set top boxes that fall within the scope of the STBCs narrative description. We also note that the CNEN requires that set top boxes which incorporate a device performing a recording or reproducing function, as well as those which utilise ISDN, WLAN or Ethernet technology be classified outside the scope of the duty-free CN code 8528 71 13. The CNEN by directing national customs authorities to classify those set top boxes in dutiable CN code 8521 90 00 or in dutiable CN codes 8528 71 19 and 8528 71 90 under which the CN imposes duties of 13.9 per cent and 14 per cent, respectively, requires the imposition of duties on at least some products which

[1272] As noted in paragraph 7.102, prior panels have reasoned that a measure which is inconsistent with the obligation in Article II:1(b) to provide duty treatment not in excess of that set forth in a Member's schedule necessarily implies an inconsistency with the obligation in Article II:1(a) not to provide less favourable treatment to imported products than that set forth in a Member's schedule. Therefore, we will begin our analysis of whether the tariff treatment provided for in the European Communities' measures is consistent with Article II of the GATT 1994 with an analysis of the obligation in Article II:1(b). Subsequently, we will move on to address the complainants' claim that the European Communities is also acting inconsistently with the obligation in Article II:1(a).

fall within the scope of the STBCs narrative description. Therefore, the CNEN and CN operating together result in the imposition of duties in excess of those provided for in the European Communities' Schedule and are inconsistent with Article II:1(b) of the GATT 1994.

(e) Does the CN, in conjunction with the CNEN 2008/C 112/03 provide less favourable treatment than that set forth in the EC Schedule?

7.992 We recall from paragraph 7.102 above that, if we were to determine that the applied rate exceeds the bound duty rate, then, in accordance with the aforementioned approach, the application of customs duties would be "in excess" of those provided for in the EC Schedule, and would consequently also violate Article II:1(a) of the GATT 1994 by according to imports of the products at issue treatment less favourable than that provided for those products in accordance to the applicable concession in the EC Schedule.

7.993 Accordingly, for those products discussed above that are classified under a dutiable heading, that should otherwise be accorded duty-free treatment in respect of the concession for "Set top boxes which have a communication function: a microprocessor based device incorporating a modem for gaining access to the Internet and having a function of interactive information exchange" as provided for in the EC Schedule, we conclude that the application of duties on these products would consequently result in treatment less favourable in violation of Article II:1(a) of the GATT 1994.

5. Whether the European Communities' actions concerning the delivery of opinions with respect to the proposed amendments to the Explanatory Notes contained in 2008/C 112/03 are inconsistent with Articles X:1 and X:2 of the GATT 1994

(a) Summary of main issues for the Panel's determination

7.994 The Harmonized Commodity Description and Coding System (the "HS")[1273] is supplemented by Explanatory Notes, known as the "HSEN".[1274] Similarly, the European Communities' Combined Nomenclature (the "CN") is supplemented by its own Explanatory Notes, known as the Explanatory Notes to the Combined Nomenclature ("CNENs").[1275] CNENs are published by the Commission in the Official Journal of the European Union ("EU Official Journal"). In addition, the Commission regularly publishes a consolidated version of all CNENs incorporating amendments published in the EU Official Journal up to a certain date. All CNENs published after that date remain in force and are incorporated in a subsequent consolidated version.[1276]

[1273] The HS, as amended, is set out as an Annex to the International Convention on the Harmonized Commodity Description and Coding System (the "HS Convention"), done at Brussels on 14 June 1983 (Exhibit EC-119). See, in particular, Articles 1(a) and 2 of the HS Convention.

[1274] However, according to Article 1(a) of the HS Convention, as noted by the Panel in *EC - Chicken Cuts*, HSEN are not binding and do not form part of the HS *per se*. On the other hand, as also noted by the Panel in *EC – Chicken Cuts*, the WCO has indicated that HSEN "are taken into consideration in conjunction with the legal texts when interpreting the HS." (Panel Report on *EC – Chicken Cuts*, para. 7.220). See also Appellate Body Report on *EC – Chicken Cuts*, para. 224.

[1275] Throughout these Reports we will use the abbreviation "CNENs" to indicate Explanatory Notes to the Combined Nomenclature in general, as a group. The abbreviation "CNEN" will be used with reference to a particular Explanatory Note to the Combined Nomenclature.

[1276] The consolidated version of the CNENs as published in the EU Official Journal on 30 May 2008 (OJ 2008/C 133/01) specifies in its foreword that: "[t]his version of the CNENs includes and, where appropriate, replaces those published in the Official Journal of the European Union, C series, up to 11 April 2008. CNENs

7.995 On 7 May 2008, the Commission published in the EU Official Journal an amendment to a CNEN regarding the classification of "set-top boxes with communication function" of duty-free CN2007 code 8528 71 13 ("STBCs").[1277] This amendment explains *inter alia* the scope of coverage of that code and provides that among the conditions required for classification under this code are: (1) the presence of a "video tuner"; (2) the presence of a modem, but not including devices that it states perform a similar function but which do not modulate or demodulate signals, such as ISDN-, WLAN- or Ethernet connectivity; and (3) the absence of a device performing a recording or reproducing function such as a hard disk or a DVD drive. As with other CNENs, this amendment started as a Commission proposal that was discussed in the Customs Code Committee.[1278] As explained below, this proposed amendment is at the heart of the GATT 1994 Article X claims.

7.996 Although the three complainants made a *joint* request for the establishment of this Panel, which includes *inter alia* joint claims under Article X of the GATT 1994, Japan did not pursue these particular claims in its submissions. With regard to the Article X claims, the joint panel request states as follows:

> "[W]ith respect to STBs with a communication function, the Tariff and Statistical Nomenclature Section of the Customs Code Committee delivered favourable opinions with respect to the proposed amendments to the Explanatory notes contained in 2008/C 112/03 in October 2006 and May 2007, respectively. It did not publish the amended explanatory notes in the EC Official Journal until 7 May 2008. Furthermore, EC member States were applying duties to STBs using the approach specified in 2008/C 112/03 prior to 7 May 2008. We consider that these actions are inconsistent with the EC's obligations under Articles X:1 and X:2 of the GATT 1994."[1279]

7.997 The **United States** argues that the European Communities violated Article X:1 of the GATT 1994 in that it "made effective" certain CNEN amendments in October 2006 and May 2007, that is, well before their publication in the EU Official Journal on 7 May 2008. In addition, the United States argues that the European Communities violated Article X:2 of the GATT 1994 since it used CNEN amendments to apply duties on certain products before officially publishing those CNEN amendments.[1280] The United States explains that the relevant CNEN amendments are those voted by the Customs Code Committee in October 2006 and May 2007. More particularly, in October 2006 the Customs Code Committee delivered a favourable opinion on a proposed amendment to a CNEN providing that STBCs with ISDN-, WLAN-, or Ethernet connectivity were to be excluded from duty-free CN code 8528 12 91 (which later became 8528 71 13 under the CN2007) and that STBCs falling in that duty-free CN code must incorporate a video tuner. STBCs with such connectivity or lacking a video tuner would be subject to 14 per cent duties. In May 2007, it argues, the Customs Code

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published in the Official Journal, C series, subsequent to that date remain in force and will be incorporated in the CNENs when revised".

[1277] We note that the terms of CN code 8528 71 13 refer to "set top boxes *with* communication function" while the concession in the EC Schedule is for "set top boxes *which have* a communication function". Here, we will refer to "set top boxes with communication function" since those are the terms of CN code 8528 71 13 as reflected in the CNEN at issue here; CNEN, OJ 2008/C 112/03, 7 May 2008. The text of that CNEN itself clarifies that "the Explanatory Notes to the Combined Nomenclature of the European Communities are amended as follows: On page 335, the following text is inserted: [...]; On page 339, the following text is inserted [...]." (emphasis added); (Exhibits US-30; TPKM-28).

[1278] See paragraphs 7.46-7.47 above.

[1279] Joint panel request, WT/DS375/8, DS376/8, DS377/6, p.5.

[1280] See, for instance, United States' first written submission, paras. 112-119; United States' second written submission, paras. 120 and 124.

Committee approved a second amendment to the CNEN, providing that STBCs with a "recording function" would be "excluded from" duty-free CN code 8528 12 91 and subject to a 13.9 per cent duty. **Chinese Taipei** has advanced similar arguments under its GATT 1994 Article X claims. It identifies the proposed amendments to the CNEN in its submissions as "draft CNEN".[1281]

7.998 The **European Communities**, however, submits that the CNEN amendments cannot be considered "laws, regulations, judicial decisions or administrative rulings of general application" under Article X:1 nor "measures of general application" under Article X:2 "in particular, because of the factual features of the CNEN such as their non-binding nature combined with their essentially and inherently informative character".[1282] Furthermore, the European Communities strongly emphasizes the "draft" character of the CNEN amendments, being merely "preparatory" acts, i.e. draft measures. The European Communities submits that draft CNEN amendments cannot be "made effective" or "enforced" within the meaning of Articles X:1 and X:2 of the GATT 1994. In its view, the CNEN amendments were "made effective" upon adoption by the Commission and their subsequent publication in the EU Official Journal. Since the CNEN amendments were only adopted by the Commission on 29 April 2008 and published in the Official Journal a few days later on 7 May 2008, there is no Article X:1 violation. The European Communities also argues that the CNEN amendments were not enforced before official publication in the EU Official Journal and that the evidence submitted by the complainants in support of this allegation is not satisfactory. Accordingly, the European Communities argues, there is no Article X:2 violation either.[1283]

(b) The measures at issue

7.999 The Panel must first determine which measures are at issue and whether such measures are within the Panel's terms of reference. Once we have made this determination, we will proceed to analyse the Article X claims *per se*.

7.1000 The **United States** and **Chinese Taipei** identify in their joint panel request as the measures at issue two "proposed amendments" to the CNEN for which the Customs Code Committee delivered "favourable opinions" in "October 2006 and May 2007 respectively".[1284]

7.1001 The first measure identified by the two complainants is the "Draft CNEN on Satellite receivers with built-in modem" as voted upon by the Customs Code Committee in October 2006 and which received a "favourable opinion".[1285] The European Communities explains that discussions on issues pertaining to the classification of set-top boxes were held in the Customs Code Committee during 2005 and that, following these discussions, the Commission submitted a document (doc. TAXUD/0667/2006) in May 2006 as a "preliminary draft" for discussion (but not for a "vote").[1286] According to the European Communities, the purpose of these discussions was to seek the input and opinions of the EC member States on the classification of these products. During the course of these discussions, the initial text of document TAXUD/0667/2006 was revised and became document TAXUD/0667/2006 Rev. 2, then document TAXUD/0667/2006 Rev. 3, reflecting the comments of

[1281] Chinese Taipei's first written submission, paras. 371-372; 374; 459-462.
[1282] European Communities' first written submission, para. 310.
[1283] European Communities' first written submission, paras. 306-309; 316.
[1284] See para. 7.996 above.
[1285] "Draft CNEN on Satellite receivers with built-in modem" (doc. TAXUD/0667/2006 Rev 3), see point 3.7 and Annex VI in Customs Code Committee (407th meeting) (Exhibits US-27; TPKM-30). The text of document TAXUD/0667/2006 Rev 2 is also available in Exhibits EC-54 and EC-90.
[1286] "Draft Explanatory Notes: Satellite receivers" (doc. TAXUD/0667/2006), see point 4.13 (pages 7-8) in Customs Code Committee (395th meeting) (Exhibits EC-90; US-74); (also cited in European Communities' first written submission, para. 301, fn. 200).

the EC member States. It was this latest version of the proposed amendment to the CNEN that the Commission submitted to the Customs Code Committee in October 2006 for a vote. This proposal contained explanatory notes for different interrelated CN codes, i.e. for CN codes 8528 12 90 to 8528 12 95 ("video tuners"); 8528 12 91 ("set-top boxes with a communication function")[1287]; and 8528 12 98 ("other").[1288]

7.1002 The **European Communities** explains that the purpose of the October 2006 version was to clarify the scope of certain CN codes related to STBCs for which no Explanatory Notes yet existed. However, its main focus was on duty-free CN code 8528 12 91 for "set-top boxes with a communication function", which became 8528 71 13 in the CN2007. This proposal for amendment specified, *inter alia*, that "set-top boxes with a communication function" from CN code 8528 12 91 did not include set-top boxes with Ethernet-, WLAN- or ISDN- connectivity nor set-top boxes which incorporate a device performing a recording or reproducing function such as, for example, a hard disk or a DVD drive. When submitted for a vote in October 2006, the Customs Code Committee delivered a favourable opinion on the exclusion of set-top boxes with Ethernet, WLAN or ISDN.[1289] The voting on the exclusion for set-top boxes incorporating a device performing a recording or reproducing function was postponed.[1290]

7.1003 The second measure identified by the two complainants is the "Draft CN Explanatory Notes: Set-top box incorporating a hard disk"[1291] which, they contend, received a "favourable opinion" by the Customs Code Committee in "May" 2007.[1292] This proposal for amendment of the CNEN called for exclusion from duty-free CN code 8528 12 91 set-top boxes which incorporate a device performing a recording or reproducing function (for example, a hard disk or DVD drive); this had been proposed at the October 2006 meeting, but had been postponed. The European Communities points out that the reference to "May" 2007 in the Panel request is "not correct".[1293]

7.1004 The European Communities submits, first, that the vote in the Customs Code Committee took place in April 2007 instead of "May" 2007 (which is the date of the document containing the minutes of the meeting). Secondly, the European Communities argues that the Customs Code Committee did not deliver a "favourable" opinion on this proposed amendment as mentioned in the joint panel request, but rather a "no opinion".[1294] The European Communities observes that it "understands which measure is at issue, or, rather, what is the measure the existence of which the complainants allege". However, the European Communities points out "that the factual statements set forth in the Panel request, and underlying the complainants' theory of how this measure came into *existence*, are not correct". In the European Communities' view, the measure that the complainants identify and

[1287] The terms of CN code 8528 12 91 read in full: "apparatus with a microprocessor-based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange, capable of receiving television signals ('set-top boxes with communication function')."

[1288] European Communities' first written submission, paras. 300-302.

[1289] European Communities' first written submission, paras. 300-302.

[1290] European Communities' first written submission, para. 302. The Panel notes that the "Draft CNEN on Satellite receivers with built-in modem", as voted by the Customs Code Committee and as reflected in the Annex to the minutes of the October 2006 Customs Code Committee meeting, reflects this, in that it does not mention the exclusion for set-top boxes incorporating a device performing a recording or reproducing function and refers only to the exclusion of ISDN, WLAN and Ethernet connectivity.

[1291] "Draft CN Explanatory Notes: Set-top box incorporating a hard disk" (doc. TAXUD/0590/2007), see point 3.3 (page 5) to Customs Code Committee (420th meeting) (Exhibits EC-90; TPKM-31).

[1292] Joint panel request, W/DS375/8, 376/8, 377/6.

[1293] European Communities' comments on the complainants' responses to Panel question No. 154.

[1294] This means that there the Customs Code Committee did not reach a qualified majority in favour (favourable opinion) or against (non favourable opinion) the Commission's proposal.

describe in the Panel request "does not exist" and this "is not without consequences for the analysis of the complainants' claims by the Panel".[1295]

7.1005 The **Panel** observes first that, as pointed out by the European Communities, the complainants have incorrectly mentioned "May" 2007 as the date of the "Draft CN Explanatory Notes: Set-top box incorporating a hard disk", described above at paragraph 7.1003, and they have also incorrectly stated that the Customs Code Committee delivered a "favourable" opinion with respect thereto. In fact, the draft CNEN was dated April 2007 and the Customs Code Committee delivered a "no opinion" instead of a favourable opinion. It is clear that the reference to "May" instead of "April" is a mere clerical error, which did not lead to any confusion on the part of the European Communities. Indeed, the European Communities confirmed that it understood "which measure is at issue, or, rather, what is the measure the existence of which the complainants allege".[1296] Hence we see no reason to exclude the correct "draft CNEN" from our consideration. As for referring to a "favourable" opinion as opposed to a "no opinion", we do not consider that this error should put the "draft CNEN" beyond our consideration either. Although they are two distinct actions, we understand that in the circumstances before us, both a "no opinion" and a "favourable opinion" would lead to the same result, namely the adoption of this "draft CNEN" by the Commission.[1297] In addition, both the statement of the European Communities that it "understands which measure is at issue" and its active defence demonstrate that the European Communities' ability to defend itself was not prejudiced by this error in the Panel request. Accordingly, we will take into consideration this draft CNEN in our analysis and will henceforth refer to "April 2007" instead of "May 2007" with respect to this measure.

7.1006 The **European Communities** further submits that proposed amendments to the CNEN have to be "adopted by the Commission to exist"[1298] and that this only happened on 29 April 2008.[1299] Consequently, it argues, from an EC legislative process point of view, both measures at issue are mere "drafts" or "preparatory acts". Given that a measure must be adopted before it can be "made effective" and "enforced", it argues, the "draft" CNEN amendments fall outside the ambit of Articles X:1 and X:2 of the GATT 1994.[1300] The United States and Chinese Taipei respond that they do not contest that the CNEN amendments were not formally adopted by the Commission until 29 April 2008. In their view, however, nothing in Article X:1 or X:2 – that is, nothing in the meaning of "made effective" or "enforced" requires such formal adoption. Rather, Articles X:1 and X:2 only require that the measures at issue were "made effective" and "enforced" in practice, which has occurred in the present case.[1301]

7.1007 Turning first to the concerns raised by the European Communities with regard to the draft character of the CNEN amendments, we observe that the CNEN amendments' draft character does not automatically preclude them from being challengeable measures. The Appellate Body in *US - Corrosion-Resistant Steel Sunset Review* determined that any act of a WTO Member can

[1295] European Communities' comments to the United States' and Chinese Taipei's response to Panel question No. 154.

[1296] See para. 7.1003 above; European Communities' comments to the United States' and Chinese Taipei's response to Panel question No. 154.

[1297] See para. 7.47 above.

[1298] European Communities' second written submission, para. 95.

[1299] European Communities' first written submission, para. 305, (explaining that the CNEN were adopted on 29 April 2008 by Mr. Verheugen (Vice-President of the Commission) signing the act on behalf of the Commission (College)) (Exhibit EC-55).

[1300] European Communities' first written submission, para. 309; European Communities' second written submission, para. 95; European Communities' second oral statement, para. 92; European Communities' response to Panel question No. 154.

[1301] Chinese Taipei's comments to the European Communities' response to Panel question No. 154; United States' and Chinese Taipei's responses to Panel question No. 155.

constitute a measure challengeable before a Panel.[1302] It is an entirely different question, however, whether a given measure, such as the "draft" CNEN at issue here, falls within the scope of Articles X:1 and X:2 of the GATT 1994. Given that the core of the parties' argumentation in relation thereto concerns the meaning of the terms "made effective" in Article X:1 and "enforced" in Article X:2, we will deal with this issue below, when we address those matters.[1303] We will thus assess in those sections below whether the draft character of the CNEN amendments excludes the CNEN amendments from the scope of Articles X:1 and X:2.

7.1008 In their submissions – but not in their joint panel request – the **United States** and **Chinese Taipei** present both measures at issue together with: (1) various statements made by the Chair of the Customs Code Committee at the 413th, 432nd and 433rd meetings and (2) several BTIs. The European Communities questions whether these statements and BTIs form part of the measures at issue. The United States and Chinese Taipei clarify that they do not consider this material to form part of the measures at issue. Rather, they consider them to serve as "ample evidence that the customs authorities of the EC member States must apply the draft CNEN once the EC Customs Code Committee has issued an opinion by means of a vote". According to the two complainants, this material thus establishes that the draft CNENs were "made effective" once they were voted upon by the Customs Code Committee.[1304] The European Communities responds that if the draft measures were sent to the customs authorities with an "administrative instruction" to follow them as if they had been adopted, it would not be the draft CNEN that would constitute the measure at issue for the purposes of Articles X:1 and X:2 of the GATT 1994. Rather, it argues, the measure at issue would instead be the "administrative instruction". The European Communities submits that the complainants have not made such a claim.[1305] The Panel will treat the various statements made by the Chair of the Customs Code Committee and the BTI as evidence and not as "measures at issue".

(c) The United States' and Chinese Taipei's claim under Article X:1 of the GATT 1994

(i) Main claim of the parties

The arguments of the Parties

7.1009 The **United States** and **Chinese Taipei** assert that the measures at issue fall within the scope of Article X:1 of the GATT 1994 as they constitute regulations or administrative rulings of general application pertaining to the classification of products for customs purposes. They claim further that the measures at issue were made effective upon the votes in the Customs Code Committee in October 2006 and April 2007, but that they were published only in May 2008 (i.e., more than one year later). As a consequence, they argue, the European Communities violated its obligation under Article X:1 to publish promptly the measures at issue once they were made effective.

[1302] Appellate Body Report on US – Corrosion-Resistant Steel Sunset Review, para. 81:

> "In principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings. The acts or omissions that are so attributable are, in the usual case, the acts or omissions of the organs of the state, including those of the executive branch."

[1303] See paras. 7.1048 and 7.1128 *et seq.*

[1304] Chinese Taipei's response to Panel question No. 156. See also United States' response to Panel question No. 156 and Chinese Taipei's comments on the European Communities' responses to Panel question Nos. 163 and 165.

[1305] European Communities' response to Panel question No. 155.

7.1010 The **European Communities** responds that the measures at issue do not constitute a "law, regulation, judicial decision or administrative ruling of general application" in the sense of Article X:1 of the GATT 1994. According to the European Communities, "this is, in particular, because of the factual features of the CNEN such as their non-binding nature combined with their essentially and inherently informative character".[1306] Furthermore, the identified measures at issue are merely "preparatory acts" that were not "made effective".[1307] In the alternative, the European Communities argues that the measures at issue were published promptly and in such a manner as to allow governments and traders to become acquainted with them.[1308]

7.1011 Of the third parties, only the Philippines submits arguments in relation to Article X:1. The Philippines argues that the publication of the CNEN on 7 May 2008 i.e. more than one year after having been adopted by the Customs Code Committee in October 2006 and April 2007 – is contrary to Article X:1 of the GATT 1994.[1309]

Consideration by the Panel

7.1012 The Panel begins its analysis by recalling the text of Article X:1 of the GATT 1994:

> "Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefore, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or governmental agency of any other contracting party shall also be published. The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private."

7.1013 In examining the provisions of Article X:1 of the GATT 1994, the Appellate Body in *EC - Poultry* held that:

> "Article X relates to the publication and administration of 'laws, regulations, judicial decisions and administrative rulings of general application', rather than to the substantive content of such measures".[1310]

7.1014 The Panel in *EC – Selected Customs Matters* stated that:

> "[T]he title as well as the content of the various provisions of Article X of the GATT 1994 indicate that that Article, at least in part, is aimed at ensuring that due process is

[1306] European Communities' first written submission, para. 310.
[1307] European Communities' second oral statement, para. 92; European Communities' response to Panel question No. 154.
[1308] European Communities' first written submission, para. 305; European Communities' comments to the United States' and Chinese Taipei's responses to Panel question No. 159.
[1309] Philippines' third party submissions, paras. 40-41.
[1310] Appellate Body Report on *EC – Poultry*, para. 115.

> accorded to traders when they import or export [...] In this regard, we note that Article X:1 of the GATT 1994 requires that customs laws, regulations etc. should be published 'in such a manner as to enable governments and traders to become acquainted with them' [...].This due process theme, which would appear to be reflected in each of sub-paragraphs of Article X of the GATT 1994, has been referred to by the Appellate Body when interpreting that Article."[1311]

7.1015 These statements confirm our understanding that Article X:1 of the GATT 1994 is primarily concerned with the publication of "laws, regulations, judicial decisions and administrative rulings of general application" as opposed to the content of such measures. Paragraph 1 also reflects the "due process" concerns that underlie Article X as a whole. In particular, Article X:1 addresses the due process notion of notice by requiring publication that is prompt and that ensures those who need to be aware of certain laws, regulations, judicial decisions and administrative rulings of general application can become acquainted with them.[1312]

7.1016 We will address the legal questions before us by following a five-step analysis. First, we will determine whether the measures at issue are "laws, regulations, judicial decisions [or] administrative rulings of general application" within the meaning of Article X:1 of the GATT 1994. Second, if the answer to this question is in the affirmative, we will assess whether the measures at issue "pertain to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefore, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use". Third, if this assessment is also in the affirmative, we will determine whether the measures at issue were "made effective" within the

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[1311] Panel Report on *EC - Selected Customs Matters*, para. 7.107, as upheld by the Appellate Body. In that case, the Panel recalled that the Appellate Body in *US - Underwear,* DSR 1997: I, p. 29 referred to the fundamental importance of the transparency standards contained in Article X of the GATT 1994 and stated that Article X has due process dimensions.

[1312] In this context, we also refer to the Appellate Body in *US – Underwear*, finding that also Article X:2 "embod[ies] a principle of fundamental importance - that of promoting full disclosure of governmental acts affecting Members and private persons and enterprises, whether of domestic or foreign nationality. The relevant policy principle is widely known as the principle of transparency and has obvious due process dimensions." According to the Appellate Body, the "essential implication" of this due process dimension is "that Members and other persons affected, or likely to be affected, by governmental measures imposing restraints, requirements and other burdens, should have a reasonable opportunity to acquire authentic information about such measures and accordingly to protect and adjust their activities or alternatively to seek modification of such measures" (Appellate Body Report on *US - Underwear*, DSR 1997:I, p. 29). We consider that this statement, although addressing Article X:2, is equally applicable to Article X:1. We further note that in *China – Publications and Audiovisuals Products*, the Panel in para. 7.28 recalled that "[t]he Appellate Body has previously found that the obligation to afford due process is 'inherent in the WTO dispute settlement system' and it has described due process requirements as 'fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings". (Panel Report on *China - Audiovisuals Products*; para. 7.28 (quoting, respectively, the Appellate Body Reports on *Chile - Price Band System*, para. 176 and on *Thailand - H-Beams*, para. 88). That Panel also recalled the Appellate Body's conclusion that:

> "[T]he protection of due process is an essential feature of a rules-based system of adjudication, such as that established under the DSU. Due process protection guarantees that the proceedings are conducted with fairness and impartiality, and that one party is not unfairly disadvantaged with respect to other parties in a dispute." (Panel Report on *China - Publications and Audiovisuals Products*, para. 7.28 (quoting the Appellate Body Report on *US - Continued Suspension*, para. 433).

meaning of the provision. We will then consider, as a fourth analytical step, the moment of publication in order to determine whether it was "prompt" *vis-à-vis* the moment the measures were "made effective". Fifth, if the response to the latter is also in the affirmative, we will progress to the last analytical step and consider whether the "prompt" publication was done "in such a manner as to enable governments and traders to become acquainted with them."

(ii) Whether the measures at issue are laws, regulations, judicial decisions or administrative rulings of general application pertaining to the classification of products for customs purposes

Arguments of the parties

7.1017 The **United States** and **Chinese Taipei** argue that the measures at issue are either "regulations" or "administrative rulings" of "general application" within the meaning of Article X:1 of the GATT 1994 that "plainly pertain" to the classification of products for customs purposes.[1313] **Chinese Taipei** submits that the measures at issue are regulations or administrative rulings, within the meaning of Article X:1 of the GATT 1994, even if they are not formally called "regulations" or "administrative rulings". In Chinese Taipei's view, it is the content and substance of the measure that ultimately determine whether it is indeed a "regulation" or "administrative ruling", not the label given to it under domestic law.[1314] According to the **United States**, the measures at issue, in conjunction with the CN, are administrative rulings since "they are used by administrative authorities in the member States as a basis for determining tariff classification of an entire category of merchandise".[1315]

7.1018 The United States and Chinese Taipei further submit that the measures at issue are of "general application". The United States argues that "amendments to the CN Explanatory Notes, in conjunction with the CN, are used by administrative authorities in the EC member States as a basis for determining tariff classification of an entire category of merchandise" and that they apply to "all set top boxes with a communication function imported into the EC".[1316] It adds that the "CNEN set forth rules and norms that are intended to have general and prospective application" and that they are applied by the EC customs authorities "to all importers to ensure uniformity and administration of the CN".[1317] Chinese Taipei submits that a measure is of "general application" when it applies to a range of situations or cases, rather than being limited in its scope of application. It also points out that the CNEN relating to STBCs "apply to a range of situations or cases and affect an unidentified number of economic operators. They are thus of general application".[1318]

7.1019 The **European Communities** responds that the measures at issue do not constitute a "law, regulation, judicial decision or administrative ruling of general application" in the sense of Article X:1 of the GATT 1994. According to the European Communities, "this is, in particular, because of the factual features of the CNEN such as their non-binding nature combined with their essentially and inherently informative character".[1319] The European Communities argues that "[i]t is a well known and settled issue within the EC legal system that while Explanatory Notes to the CN may be

[1313] United States' first written submission, para. 115; Chinese Taipei's first written submission, para. 465.
[1314] Chinese Taipei's second written submission, paras. 259-260 (citing the Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, fn. 87).
[1315] United States' first written submission, para. 114; United States' second written submission, para. 121.
[1316] United States' first written submission, para. 114.
[1317] United States' response to Panel question No. 121.
[1318] Chinese Taipei's first written submission, para. 467.
[1319] European Communities' first written submission, para. 310.

considered as 'an important aid for interpreting' the CN, they do not have a legally binding force and cannot alter the CN"[1320], nor can they "preclude the exercise of discretion" by the customs authorities.[1321] The European Communities explains that the EC member States, when classifying imported goods, have to base their classification on the CN and the interpretative rules therein (GIR 1-6) and not on a CNEN. The European Communities submits that if some EC member States refer to a CNEN, "it is merely to inform the economic operator that with respect to its product, the Commission has already conducted the interpretative exercise and taken a non-binding view that the CN should be interpreted in a particular way".[1322] The European Communities further explains that the CNEN only comes into play at the eight-digit level of the CN[1323], and that "the CNEN serves to confirm the classification made on the basis of the CN, but it is not itself the legal reason and basis for that classification".[1324] It argues that this is confirmed by the complainants' own exhibits, which show that some EC member States were classifying certain STBCs with a hard disk in dutiable CN codes well before the challenged CNEN was adopted by the Commission, and well before it was even voted upon in the Customs Code Committee.[1325]

7.1020 **Chinese Taipei** responds that "the fact that the European Court of Justice has stated that the CNEN are 'not legally binding' is not dispositive of the issue whether they constitute 'laws, regulations, judicial decision or administrative rulings of general application' and thus fall within the scope of Article X:1 of the GATT 1994". It argues that the content and the substance of the CNENs

[1320] European Communities' first written submission, para. 289; European Communities' second written submission, para. 69 (citing the European Court of Justice (Develop Dr Eisbein), paras. 20-23 (Exhibit EC-56)).

[1321] European Communities' second written submission, para. 55.

[1322] European Communities' first written submission, para. 315. European Communities' second written submission, para. 55. However, when the European Communities was asked by the Panel about the flexibility EC member States' customs authorities have to classify a product contrary to the tariff heading as indicated in the CNENs, it responded, in part, that the "CNEN reflect a Commission's view on how the CN should be interpreted and applied with respect to a certain product or a category of product at issue [...]. If a Member State deviates in its classification practice from the approach taken in a CNEN, the Commission can institute infringement proceedings before the European Court of Justice against such a Member State [...]. Hence, with some simplification, the flexibility which the Panel asks about can be described as a flexibility to take a view different from that expressed by a non-binding opinion on the interpretation of a binding legislation, with the caveat that the authority expressing the non-binding opinion can try to convince the Member State that it is right before the court." (European Communities' response to Panel question No. 91). Responding to another question posed by the Panel, the European Communities also mentioned that it cannot be excluded that national customs authorities would classify a given product differently from the CNEN but that "[i]n such a case [...], there is a range of tools available to unify the classification" (European Communities' response to Panel question No. 23).

[1323] European Communities' response to Panel question No. 83 (explaining that "[t]he classification exercise begins, in accordance with GIR 1, with an examination of the terms of the 4-digit heading, rather than an 8-digit level analysis. If a set top box that is considered at this level contains a tuner and technological elements allowing it to perform a communication function, it will fall under heading 8528. If the same set top box also contains a hard disk performing a recording or reproducing function that qualifies it as a video recorder, it will be classified in heading 8521.[...] Once it is determined that the product at issue falls within heading 8528 (be it by virtue of GIR 1 or GIR 3, for example), then the relevant subheading at 6- and, ultimately, a 8-digit level will have to be identified. It is only at the 8-digit level that the CNEN comes into play. It acts as a confirmation of a correct classification analysis.").

[1324] European Communities' second oral statement, para. 53 (cross-referencing with the European Communities' response to Panel question No. 83).

[1325] European Communities' second oral statement, para. 53 (citing Exhibit US-28 and cross-referencing with the European Communities' first written submission, para. 321). See also European Communities' response to Panel question No. 83 (explaining that the CNEN at issue is expressed "in a rather categorical language (e.g. products with a hard disk drive performing a recording or reproducing function are excluded and classified elsewhere)" to reflect the fact that CNENs "are drafted with an understanding of the products as they currently exist in the market...").

are the elements that matter to qualify this instrument as a law, regulation, judicial decision or administrative ruling of general application, not its title.[1326] Chinese Taipei also asserts that despite the repeated claims of the European Communities that CNEN are not legally binding, an examination of their legal status confirms that they are "in fact" legally binding.[1327] Just because CNENs cannot alter the scope of the CN itself does not mean that EC customs authorities would be free to disregard them. More specifically, Chinese Taipei considers that the CNENs are legally binding for various reasons. First, a BTI will cease to exist when contrary to a CNEN.[1328] Second, as the statements of the Chair of the Customs Code Committee prove, EC customs authorities must follow CNENs.[1329] Third, EC member States that deviate from the content of a CNEN, and collect less import duties as a result thereof, are considered liable and the Commission has the option of instituting proceedings against such EC member States. Fourth, since CNENs are "tools for ensuring a uniform classification practice within the EC", they would not be able to ensure such uniformity if EC member States were free to decide whether to apply them or not.[1330]

7.1021 The **European Communities** confirms that the complainants are "correct" in saying that the CNENs fulfil a certain function in its customs system – a function which is well-explained in the case-law of the European Court of Justice. According to the European Communities, however, what the complainants "misunderstand" is that such case-law and statements of the European Communities on the significance of CNENs in the EC for classification purposes only relate to CNENs which are existing, i.e., to CNENs which have been duly adopted and published by the European Communities. The European Communities argues that this situation does not and cannot relate to "events" such as "mere drafts " (and even less so to "intermediate drafts"); discussions; EC member States' votes; or Customs Code Committee opinions delivered in the "management procedure". According to the European Communities, "[t]hese events simply do not have any legal effect on the interpretation and application of the CN".[1331]

Consideration by the Panel

7.1022 The Panel is called upon to determine whether the CNEN amendments identified by the United States and Chinese Taipei are "laws, regulations, judicial decisions or administrative rulings of general application" that pertain to one of the specific subjects enumerated in Article X:1 of the GATT 1994. As indicated above, first, we will consider whether the CNEN amendments are a "law, regulation, judicial decision [or] administrative ruling" within the meaning of Article X:1. Second, if the answer to that question is in the affirmative, we will then consider whether the CNEN amendments are of "general application". Finally, if that assessment is also affirmative, we will consider whether the CNEN amendments qualify as pertaining to one of the specific subjects enumerated in Article X:1.

7.1023 We now turn to our first question. Whether a given instrument constitutes a "law", "regulation", "judicial decision" or an "administrative ruling" of general application within the

[1326] Chinese Taipei's second written submission, para. 260.
[1327] Chinese Taipei's second written submission, para. 132.
[1328] The United States makes a similar point (see United States' second written submission, para. 35).
[1329] In particular, the two complainants referred to the statements of the Chairman of the Customs Code Committee during the 413th, 432nd and 433rd meetings, see para. 7.1050 and following paras. below.
[1330] Chinese Taipei's second written submission, paras. 61-70 (adding that such "infringement proceedings" would be based on Article 10 of the EC Treaty); and paras. 132 and 261-268.
[1331] European Communities' second oral statement, paras. 88-90.

meaning of Article X:1 must be based primarily on the content and substance of the instrument, and not merely on its form or nomenclature.[1332] Most recently, the Appellate Body has stated that:

> "[F]irst ... the way in which a Member's domestic law characterizes its own measures, although useful, cannot be dispositive of the characterization of such measures under WTO law. Secondly, 'the intent, stated or otherwise, of the legislators is not conclusive' as to such characterization."[1333]

7.1024 Accordingly, "laws, regulations, judicial decisions and administrative rulings" can encompass more than those instruments formally characterized as such by a WTO Member. Otherwise, WTO Members themselves could determine which provisions would be subject to WTO obligations under Article X:1 of the GATT 1994 merely by the labelling of those instruments. Hence, we will first consider what is meant by "laws"; "regulations"; "judicial decisions" and "administrative rulings" in the sense of Article X:1, and in terms of substance, rather than form or nomenclature. Subsequently, we will consider whether the CNENs at issue fall within laws, regulations, judicial decisions or administrative rulings under Article X:1.

7.1025 Substantively, a "law" is "a rule of conduct imposed by secular authority"; a rule which "a particular State [...] may enforce by imposing penalties".[1334] A "regulation" is "a rule prescribed for controlling some matter, or for the regulating of conduct; an authoritative direction".[1335] A "ruling" is "the action of governing or exercising authority, the exercise of government, authority, control, influence" or "an authoritative pronouncement".[1336] The adjective "administrative" indicates that it is a ruling from an administrative body. Finally, a "judicial decision" is an action or pronouncement by a judicial body or authority.[1337]

[1332] A similar approach was taken by the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*, with respect to a similar language used in Article 18.4 of the Anti-Dumping Agreement ("…laws, regulations and administrative procedures …"). The Appellate Body stated:

> "We observe that the scope of each element in the phrase 'laws, regulations and administrative procedures' must be determined for purposes of WTO law and not simply by reference to the label given to various instruments under the domestic law of each WTO Member. This determination must be based on the content and substance of the instrument, and not merely on its form or nomenclature. Otherwise, the obligations set forth in Article 18.4 would vary from Member to Member depending on each Member's domestic law and practice." (Footnote 87 to para. 87).

[1333] Appellate Body Report on *China – Auto parts*, para. 178 (footnotes omitted) (citing the Appellate Body Report on *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 82, which, by its turn, refers to the Appellate Body Report on *US – Softwood Lumber IV*, para. 56). In *China – Auto parts*, the Appellate Body further noted, with approval, the Panel's recognition that "a degree of caution must be exercised in attributing decisive weight to characteristics that fall exclusively within the control of WTO Members, 'because otherwise Members could determine by themselves which of the provisions would apply to their charges'." Appellate Body Report on *China – Auto parts*, para. 178 (footnote omitted).

[1334] The *Shorter Oxford Dictionary* (2002), p. 1544.

[1335] The *Shorter Oxford Dictionary* (2003), p. 2516. In the GATT Panel Report on *Canada – FIRA*, para. 5.5, the Panel explained that the term "regulation" covered "mandatory rules applying across-the-board".

[1336] The *Shorter Oxford Dictionary* (2003), p. 2630.

[1337] We note that the Panel in *Dominican Republic – Import and Sale of Cigarettes* understood the term "judicial decisions" in Article X:1 as meaning "pronouncements with the force of *res judicata* issued by judicial authorities as a result of a legal process." (Panel Report on *Dominican Republic – Import and Sale of Cigarettes*, para. 7.404).

7.1026 Substantively, and when read as a whole within the context of Article X:1, the phrase "laws, regulations, judicial decisions and administrative rulings" reflects an intention on the part of the drafters to include a wide range of measures that have the potential to affect trade and traders.[1338] A narrow interpretation of the terms "laws, regulations, judicial decisions and administrative rulings" would not be consistent with this intention, and would also undermine the due process objectives of Article X referred to above.[1339]

7.1027 Based on the foregoing, we observe that the ordinary meanings of the terms "laws, regulations, judicial decisions and administrative rulings" indicates that the instruments covered by Article X:1 range from imperative rules of conduct to the exercise of influence or an authoritative pronouncement by certain authoritative bodies. Accordingly, we consider that the coverage of Article X:1 extends to instruments with a degree of authoritativeness issued by certain legislative, administrative or judicial bodies. This does not mean, however, that they have to be "binding" under domestic law. Hence, the fact that CNENs are not legally binding under EC law does not preclude them from being contemplated by the terms "laws, regulations, judicial decisions [or] administrative rulings" under Article X:1. However, whether a particular measure has a degree of authoritativeness such that it would be properly characterised as "laws, regulations, administration rulings or judicial decisions" requires a case-by-case assessment of the particular factual features of the measure at issue.

7.1028 We now turn to consider whether the CNEN amendments at issue have a degree of authoritativeness such that it would be considered a "law, regulation, judicial decision or administrative ruling" within the context of Article X:1. In this respect, we note the explanations from the European Communities that the CNENs are proposed by the Commission and discussed amongst the Commission and the customs authorities of the 27 EC member States in the Customs Code Committee; that the "CNEN reflect a Commission's view on how the CN should be interpreted and applied with respect to a certain product or a category of product at issue"[1340]; that the CNENs "constitute an important means of ensuring the uniform application of the Common Customs Tariff by the customs authorities of the Member States"[1341]; that they are "a valid aid to the interpretation of the tariff"[1342]; that the CNENs are "guidance"[1343]; and that EC member States "decide on the classification of products in individual cases" and that "in this role" they "consult" the CNEN.[1344] Furthermore, we note that the complainants have submitted BTIs issued by EC member States customs authorities mentioning the CNEN as a "classification justification"[1345]; that CNEN can have legal consequences for BTIs[1346] and that "if a Member State deviates in its classification practice from the approach taken

[1338] In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body similarly found that the expression "laws, regulations and administrative procedures" in Article 18.4 of the Anti-Dumping Agreement seemed to encompass the entire body of generally applicable rules, norms and standards adopted by Members in connection with the conduct of anti-dumping proceedings. (Appellate Body Report on *US - Corrosion Resistant Steel Sunset Review*, para. 87).

[1339] We observe, however, that Article X:1, as opposed to Article X:2, does not deal with "measures of general application" but only with "laws, regulations, judicial decisions and administrative rulings of general application".

[1340] European Communities' response to Panel question No. 91.

[1341] European Communities' second written submission, para. 69.

[1342] European Communities' second written submission, para. 69.

[1343] European Communities' second oral statement, para. 30.

[1344] European Communities' response to Panel question No. 23.

[1345] See para. 7.1064 below.

[1346] See Article 12(5)(a)ii of the CCC (Exhibits US-19; TPKM-16), which provides that BTI shall cease to be valid "where it is no longer compatible with the interpretation of one of the nomenclatures referred to in Article 20(6): at Community level, by reason of amendments to the Explanatory notes to the combined nomenclature".

in a CNEN, the Commission can institute infringement proceedings before the European Court of Justice against such a Member State".[1347]

7.1029 In the Panel's view, it is clear that CNENs are important in enabling the European Communities to maintain a uniform application of the Common Customs Tariff within its territory. Although the European Communities has noted that CNENs do not "preclude the exercise of discretion" by member State customs authorities, it is apparent that there is a clear expectation that such discretion will be exercised in a certain fashion and that infringement proceedings may apply in instances where such discretion is not so exercised. The Panel also finds it relevant that CNENs are issued by the Commission, a body with undisputed authority within the EC for ensuring the uniform application of the Customs Code Tariff, and with the power to challenge interpretations not consistent with its own. Indeed, according to Regulation No. 2658/87, as amended, the Commission establishes and manages the CN.[1348] In addition, according to its Article 9, the Commission adopts Explanatory Notes. Moreover, the Panel notes that BTIs will cease to be valid where they are no longer compatible "at Community level" with "the explanatory notes [...] adopted for the purposes of interpreting the rules".[1349] In these circumstances, the Panel considers that CNENs have a degree of authoritativeness such that they may be properly characterized as a "law, regulation, administration ruling or judicial decision" as those terms are used in Article X:1. The fact that CNENs are not "legally binding" under EC law does not diminish this conclusion.[1350]

7.1030 In our view, the transparency and due process purpose of Article X:1 would be defeated if CNENs, which evidently play a key role in EC classification practice, were not be covered by the obligations in Article X:1. We consider this supports our interpretation that CNENs qualify as "law, regulation, judicial decision [or] administrative ruling".

7.1031 In light of this affirmative finding, we proceed to our second question: whether CNENs are of "general application". We note the European Communities' argument that the measures cannot be of general application because of their "draft" character. We will consider their alleged draft character later, when analyzing the terms "made effective" (see paragraphs 7.1047-7.1048 below).

7.1032 In *EC – Selected Customs Matters*, the Panel found that:

> "'[L]aws, regulations, judicial decisions and administrative rulings *of general application*' described in Article X:1 of the GATT 1994 are laws, regulations, judicial decisions and administrative rulings that apply to a range of situations or cases, rather than being limited in their scope of application".[1351]

7.1033 Similarly, in *US – Underwear*, the Appellate Body upheld the Panel's interpretation that an administrative order was of "general application" "to the extent that the restraint affects an unidentified number of economic operators, including domestic and foreign producers."[1352]

[1347] European Communities' response to Panel question No. 91.

[1348] See Council Regulation No. 2658/87, Articles 1; 2 and 6 (Exhibits EC-49; US-13 and TPKM-5).

[1349] See Article 12(5)(a)ii of the CCC (Exhibits US-19; TPKM-16).

[1350] See paragraphs 7.1037-7.1062 in the Final Reports below. Assuming arguendo that the alleged "draft" character of the CNENs were relevant to the matters discussed in this section, for the reasons described in those paragraphs, the Panel does not consider the so-called "draft" character of the CNENs to alter its views on whether the measures in question are "laws, regulations, judicial decisions and administrative rulings".

[1351] Panel Report on *EC – Selected Customs Matters*, para. 7.116.

[1352] Panel Report on *US - Underwear*, para. 7.65.

7.1034 In line with the above understanding by the Panel in *EC – Selected Customs Matters* and also with that of the Appellate Body in *US – Underwear,* we consider that the CNEN amendments at issue in this dispute are of "general application" within the meaning of Article X:1 of the GATT 1994. This is so because the application of a CNEN is not limited to a single import or a single importer. Rather, the objective of the CNEN is to ensure the uniform application of the Common Customs Tariff to *all* products falling under a specific CN code upon importation into the European Communities. The CNEN at issue, for example, describes which STBCs are eligible for duty-free treatment under CN code 8528 12 91, indicating that STBCs with WLAN-, ISDN- or Ethernet- connectivity or with a recording or reproduction device such as a hard disk or a DVD-drive are excluded from duty-free CN code 8528 12 91. The CNEN at issue are thus of "general application" within the meaning of Article X:1 of the GATT 1994.

7.1035 Finally, we need to consider whether the CNEN pertain to one of the specific subjects enumerated in Article X:1. According to Article X:1, the CNEN should:

> - pertain to "the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefore" or
>
> - affect "their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use".[1353]

7.1036 We agree with the United States and Chinese Taipei, that, at the very least, the measures at issue "pertain[] to the classification of products for customs purposes".[1354] This much is evident from a superficial reading of the measures. In this respect, we again highlight the European Communities' confirmation that the CNENs are "an important means of ensuring the uniform application of the Common Customs Tariff by the customs authorities of the EC Member States and as such may be considered a valid aid to the interpretation of the tariff".[1355]

7.1037 In this section, we first determined that the CNEN amendments are "laws, regulations, judicial decisions [or] administrative rulings". Second, we determined that the CNEN are of general application". Finally, we determined that CNENs "pertain to the classification of products for customs purposes". We can therefore continue our analysis and consider whether, and if so when, the CNEN amendments were "made effective" within the meaning of Article X:1 of the GATT 1994. If we make a positive determination in that regard, the only outstanding issues under Article X:1 would be whether the CNEN amendments were "published promptly" and, if so, whether they were published "in such a manner as to enable governments and traders to become acquainted with them".

[1353] We understand the disciplines of Article X:1 to include a third group, not at issue in the present dispute, i.e.: "[a]greements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or governmental agency of any other contracting party ...".

[1354] The Panel notes that the European Communities does not seem to raise any objections in this regard. Rather, the European Communities confirmed that CNENs are an important aid for interpreting the CN (see, for example, European Communities' first written submission, para. 289).

[1355] European Communities' second written submission, para. 69.

(iii) Whether the draft CNENs were "made effective" in October 2006 and/or April 2007

Arguments of the parties

7.1038 The **United States** and **Chinese Taipei** argue that the CNEN amendments were "made effective" upon voting in the Customs Code Committee. The votes were cast in October 2006 for the first measure at issue (the CNEN amendment concerning the exclusion for certain types of modems) and in April 2007 for the second measure at issue (the CNEN amendment concerning the exclusion of set top boxes with a recording or reproduction device such as a hard disk or a DVD drive).[1356]

7.1039 In the United States' and Chinese Taipei's view, the term "made effective" requires a factual assessment of whether the CNEN amendment has been made "applicable".[1357] Such assessment should be made irrespective of the measure's formal status or legal qualification in the Member's domestic legal order.[1358] Accordingly, the characterization as "draft" does not change the fact that the CNEN amendments have been "made effective".[1359] Chinese Taipei points out that "made effective" means "having an effect or result, actual, de facto, in effect". Thus, a law, regulation, judicial decision or administrative ruling of general application is made effective as of the date a domestic authority may begin to apply that measure, even if it chooses to not yet apply it.[1360] Such understanding, it argues, is confirmed by the Spanish and the French versions of Article X:1, which translate "made effective" into "haya puesto en vigor" and "rendus executoires", respectively. The United States emphasizes that Article X:1 mentions "made effective" and not "adopt", which is used elsewhere in the GATT 1994. Thus, it claims, it would be incorrect to assume that there is no significance that the drafters chose to use the different term "made effective" in Article X:1.[1361] Nor, submits the United States, would the European Communities' approach make sense in the context of Article XX(g) of the GATT 1994, which also uses the term "made effective", since nothing in that provision would require

[1356] Chinese Taipei's response to Panel question No. 156.

[1357] Chinese Taipei's response to Panel question No. 154; United States' second written submission, paras. 122-123.

[1358] Chinese Taipei's comments on the European Communities' response to Panel question No. 154.

[1359] United States' response to Panel question No. 155.

[1360] United States' and Chinese Taipei's responses to Panel question Nos. 154-156 and their respective comments on the European Communities' responses to those Panel questions; Chinese Taipei's second written submission, paras. 272-273. In its response to Panel question No. 154, Chinese Taipei adds that "[a] measure of general application may be 'effective' but not yet 'enforced'. In this respect, 'made effective' and 'enforced' suggest a two-step situation. Generally, a WTO Member first makes a measure of general application 'effective' (Article X:1), and then it enforces the said measure (Article X:2). However, in this case, there is no substantive distinction --- the measure was both made effective and enforced before it was published, as it was both applicable and in fact applied by EC customs authorities." See also Chinese Taipei's comments on the European Communities' response to Panel Question No. 154. Chinese Taipei further argues that the European Communities' interpretation that Article X:1 requires "formal adoption" of the measure "could result in an absurd situation that an importer could be requested to comply with, e.g. new unpublished valuation guidelines but there would not be any infringement of Article X simply because the competent minister had not yet formally signed these guidelines". It points out that such an interpretation is precisely what Article X tries to avoid; Chinese Taipei's comments on the European Communities' response to Panel question No. 154.

[1361] United States' comments on the European Communities' responses to Panel question Nos. 154-156. The United States also refers to Article XII:3(a) of the GATT 1994, which uses the word "adopt", and also to Articles XX; XXXVI:9 and XXXVII:3(b) of the GATT 1994, which use the word "adoption".

that the measures be "adopted" in conjunction with restrictions on domestic production or consumption.[1362]

7.1040 In their view, various statements of the Chairman of the Customs Code Committee and BTIs issued by EC member State customs authorities prove that the CNEN amendments were "made effective" once voted in the Customs Code Committee[1363], even before their formal adoption and official publication.[1364] The BTIs, for example, would demonstrate that the EC customs authorities have relied on the CNEN as a "classification justification" to classify certain STBCs in a dutiable CN code.[1365]

7.1041 The **European Communities** responds that "made effective" means "entered into force"[1366] and that – under EC law - CNEN amendments only enter into force after adoption by the Commission and publication in the EU Official Journal.[1367] t emphasizes that the Customs Code Committee does not "adopt" measures. The vote in the Customs Code Committee is merely a "step" in the adoption procedure. According to the European Communities, the "Customs Code Committee opinions delivered in the management procedure ... simply do not have any legal effect on the interpretation and application of the CN".[1368] Since the CNEN amendments were "adopted" by the Commission only in April 2008, the CNEN amendments were not "made effective" before that time. The CNEN amendments were therefore merely "preparatory acts" to which, in the European Communities' view, Article X:1 does not apply.[1369] Allowing "preparatory" acts to fall within the disciplines of Article X:1 would mean that draft bills and laws could be challenged as they are "discussed in their parliaments."[1370] Such an understanding, claims the European Communities, would turn these GATT disciplines on their head and result in WTO Members' administrations not being able to function. It would mean that at the moment a WTO Member issued a "preparatory act", it would also have to publish it, even though the act itself would not yet have been adopted.[1371] The European Communities considers that this view is supported by the French and Spanish language versions of Article X:1[1372], and argues that the general language "made effective" was chosen to accommodate the inclusion of "judicial decisions" within the scope of Article X:1.[1373]

7.1042 Regarding the statements by the Chairman of the Customs Code Committee, the European Communities affirms that the statement by a "Commission official presiding" over the Customs Code Committee meeting "does not create any rights or obligations for the Member States". Such statement "has no law-creating effect" as "that would be beyond any powers of the Commission official acting

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[1362] United States' comments on the European Communities' responses to Panel questions Nos. 154-156. The United States also refers to Article XV:9(b) of the GATT 1994, in which the term "make effective" is used but which, according to the United States, again would make no sense to read as meaning "adopted".

[1363] Chinese Taipei's response to Panel question No. 156. See also United States' second written submission, para. 122.

[1364] United States' second written submission, para. 122; Chinese Taipei's first written submission, para. 473; Chinese Taipei's response to Panel question No. 154.

[1365] United States' response to Panel question No. 122.

[1366] European Communities' response to Panel question No. 154.

[1367] The European Communities submits that a measure can only "enter into force" when it can no longer be modified or withdrawn by the government without undergoing again the legislative or quasi-legislative process; European Communities' responses to Panel question Nos. 154 and 156.

[1368] European Communities' second oral statement, para. 88-90.

[1369] European Communities' response to Panel question No. 154.

[1370] European Communities' response to Panel question No. 156.

[1371] European Communities' responses to Panel question Nos. 155 and 156.

[1372] European Communities' response to Panel question No. 154.

[1373] European Communities' response to Panel question No. 154.

as Chairman of the Customs Code Committee (or even beyond any powers of the Customs Code Committee as a whole)."[1374] Consequently, those statements can by no means be interpreted as requiring the EC member States to comply with a draft CNEN. According to the European Communities, such an interpretation would be manifestly illegal under EC law, the EC Treaty and Article 249 thereof.[1375]

Consideration by the Panel

7.1043 The Panel is called upon to determine whether the CNEN amendments at issue were "made effective" within the meaning of Article X:1 of the GATT 1994. First, we will consider the meaning of the term "made effective" in Article X:1. Second, we will consider whether the CNEN amendments at issue were "made effective" and this will include an examination of the various statements of the Chairman of the Customs Code Committee and of the BTIs submitted by the United States and Chinese Taipei. Third, should we conclude that the CNEN amendments were made effective, we will determine *when* these amendments were "made effective". The latter point is relevant in determining whether the CNEN amendments were published "promptly". That issue, however, will be dealt with in the following section.[1376]

The meaning of "made effective"

7.1044 We now turn to the first step in our analysis, which is to identify the ordinary meaning of the term "made effective."

7.1045 We note that the term "made effective" in the context of Article X:1 of the GATT 1994 has not been addressed by the Appellate Body or by any Panel. However, in *US – Gasoline* the Appellate Body held in the context of Article XX(g) of the GATT 1994, that the ordinary meaning of "made effective when used in connection with a measure - a governmental act or regulation may be seen to refer to such measure being 'operative', as 'in force', or as having 'come into effect'".[1377] In the context of Article XX(g), the ordinary meaning of "made effective" thus indicates that a measure is "made effective" when it is "operative" and, following the Appellate Body's reasoning, operative means either "in force" or "come into effect".

7.1046 The Appellate Body's approach suggests that the meaning of "made effective" is not confined to "officially entered into force". In our view, "made effective" also covers measures brought into effect in practice. In other words, it may include measures that have not yet been formally adopted in accordance with municipal law. This understanding is supported by the ordinary meaning of "effective" as "actual, de facto, in effect; (of an order etc.) operative, in force"[1378] and "operative" as

[1374] European Communities' response to Panel question No. 92 (further arguing that, if the Chair would have such powers, there would be no need for a management procedure, for the Commission, or for the Customs Code Committee at all).

[1375] European Communities' response to Panel question No. 92. Article 249 of the EC Treaty (which became Article 288 of the Treaty on the Functioning of the European Union with the entry into force of the Lisbon Treaty) enumerates the EU instruments that are binding, i.e. "Regulations", "Directives" and "Decisions".

[1376] See paras. 7.1069-7.1070 below.

[1377] Appellate Body Report on *US - Gasoline*, DSR 1996:I, page 19 (citing the *Shorter Oxford Dictionary* (1993), p. 786) (footnote omitted). Article XX(g) of the GATT 1994 provides in relevant part that "... relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption".

[1378] The *Shorter Oxford Dictionary* (2002), p. 794.

"[b]eing in operation or force, exerting force or influence".[1379] Neither of these definitions suggests that "made effective" covers only measures that have officially entered into force.

7.1047 Given the foregoing, we consider that limiting the meaning of "made effective" to include only measures that have officially entered into force in accordance with municipal law could open the possibility for WTO Members to avoid the disciplines of Article X:1, merely by asserting that a certain "law, regulation, ..." has not yet formally entered into force under municipal law.[1380] This would run counter to the due process and transparency objectives reflected in the requirement in Article X:1 that governments and traders must be able to become acquainted with "laws, regulations, administrative rulings and judicial decisions" through prompt publication.

7.1048 In conclusion, we are of the view that the term "made effective" under Article X:1 of the GATT 1994 also covers measures that were brought into effect, or made operative, in practice and is not limited to measures formally promulgated or that have formally "entered into force". We see no basis to adopt the more restrictive view proposed by the European Communities, which considers that "made effective" under Article X:1 refers to measures formally adopted under its domestic system, i.e., adoption by the Commission.[1381] This being so, in circumstances where the relevant measure has been "made effective", the requirement to publish promptly will arise regardless of its formal adoption or whether it remains a "draft" measure under the Member's municipal legal order.

> Whether the CNEN amendments were made effective before adoption by the Commission

7.1049 We now proceed to examine the main question under this section, i.e. whether the CNEN amendments were made effective *before* their adoption by the Commission. The complainants argue that the CNEN amendments were made effective upon the voting in the Customs Code Committee; the European Communities argues that the CNEN amendments were not made effective before their adoption by the Commission. Thus we need to consider whether the measures were made effective at some time between their vote in the Customs Code Committee and their adoption by the Commission.

7.1050 We recall that the complainants have relied on various Statements of the Chairman of the Customs Code Committee ("the Chairman's Statements") during its 413th, 432nd and 433rd meetings, as well as the BTIs issued by certain EC member State customs authorities. They argue that this evidence proves that the CNEN amendments were made effective upon voting in the Customs Code Committee because it indicates "that the customs authorities of the EC member States must apply" the CNEN amendments "once the EC Customs Code Committee had issued an opinion", even before its formal adoption and official publication.[1382] We further recall that the first measure at issue was submitted to the Customs Code Committee for an opinion in October 2006. The opinion was favourable. The second measure at issue was submitted to the Customs Code Committee for an opinion in April 2007. The opinion was a so-called "no opinion", i.e. there was no qualified majority in favour (a favourable opinion) or against (a non-favourable opinion).

[1379] The *Shorter Oxford Dictionary* (2003), p. 2006.

[1380] That is also why the way in which a Member characterises its own measures under domestic law, although useful, cannot be dispositive of the characterization of such measures under WTO law (see footnote above).

[1381] On the issue of whether the measures were adopted through a vote in the Customs Code Committee, we note that the Commission is the EC body that formally adopts draft CNEN, not the Customs Code Committee.

[1382] United States' second written submission, para. 121; Chinese Taipei's first written submission, para. 473; Chinese Taipei's response to Panel question No. 156, para. 122-123.

7.1051 In analysing this evidence, we will first consider the Chairman's statements to determine whether they support the complainants' arguments: thereafter, we will turn to the BTIs.

7.1052 We start with a description of the Chairman's Statements as reflected in the minutes of the respective meetings. The minutes of the 413th Customs Code Committee meeting, which took place in January 2007, refer to a discussion concerning the implications of CNEN for Set top boxes that had already been voted on in the Customs Code Committee, but not yet "published". In particular, the Chairman's Statement was as follows:

> "Issuing of BTIs: Some MS asked the question 'What is the situation with issuing BTIs if the measure has already been voted on but still not published (for example, CNEN on set-top boxes) or if the measure has been voted on but there was no qualified majority (for example, CNEN on dual use vehicles)?' Chair stated that MS should follow the BTI guidelines (Point 11 (p. 18 to 19)). Detailed discussion on this question would be a matter for a meeting of the BTI sector".[1383]

7.1053 Point 11 of the "BTI Guidelines"[1384] provides that:

> "11. Invalidation of BTIs (ex nunc)
>
> A BTI ceases to be valid:
>
> - Where a legal measure, e.g. a regulation is adopted by the Community. For the sake of coherence and uniformity in the application of the CCT Member States should not issue new BTIs that are contradictory to a legal measure which has been voted in the Customs Code Committee, even if this measure is not yet published.
>
> - Where the BTI is no longer compatible with the interpretation of one of the customs nomenclatures, e.g. following amendments to the CN Explanatory notes, a judgment of the European Court of Justice, or, on international level, an HS classification opinion or amendments to the HS Explanatory notes." (emphasis added)

7.1054 The minutes of the 432nd Customs Code Committee meeting, which took place in October 2007, also made reference to the CNEN for set-top boxes, indicating the following:

> "Set top boxes: Some MS raised the issue of publication of the CN Explanatory Notes explaining the difficulties they encounter in practice. Chair informed that the publication of the CN Explanatory Notes was planned to be accompanied by the introduction of the autonomous duty suspension on these products. However, DG TAXUD was aware of the opposition by a number of MS to an autonomous duty suspension. Chair reminded the MS not to issue any contradictory BTIs and to follow

[1383] Customs Code Committee (413th meeting) (Exhibits US-75; TPKM-57); See also United States' first written submission, para. 116 and Chinese Taipei's first written submission, paras. 61 and 373. The Panel notes that the complainants did not submit any documents regarding such an eventual discussion in the Customs Code Committee, BTI Sector.

[1384] BTI Guidelines (Exhibits US-18; TPKM-85).

> the text that had been agreed upon and had been made public in the Annex to the report of respective meeting."[1385]

7.1055 The minutes of the 433rd meeting of the Customs Code Committee, which took place in October 2007, mention in relevant part:

> "Use of statements in the minutes of the Committee and the application of voted measures before their publication (Doc TAXUD/0716/2007).
>
> The Chairman presented the working document and invited Member States to reflect on the choice of the appropriate instrument to ensure uniform tariff classification in the EU. He pointed out that the adoption of classification regulations or explanatory notes should be limited to cases where they are the only way to ensure uniform application. The need to revoke conflicting BTIs is not a sufficient reason to adopt a classification regulation. The Chairman recommended the increased use of statements in the reports of the meetings of the Committee instead.
>
> Various Member States supported the use of statements as a means to ensure quick decision-making. One Member State highlighted the importance of having detailed product descriptions in such statements. Opinions were divided on the question of whether unanimity or a qualified majority is needed for the adoption of a statement. As statements do not have legally binding value, it was pointed out that a classification regulation can still be adopted if afterwards legally binding value is required. It was suggested to develop a database listing all statements which need to be applied by the customs administrations. One Member State suggested that a new box could be added to the template for submissions in which the outcome of the Committee's discussions could be indicated.
>
> The Chairman also recalled that as soon as the Committee has rendered an opinion on the classification of a specific type of product, no BTI should be issued contrary to that opinion and that this opinion should be respected by all Member States. It follows from the above that as soon as an opinion has been voted, Member States can issue BTIs for the products concerned, even before the measure has been adopted by the Commission and published in the Official Journal."[1386]

7.1056 We now turn to determine whether the Chairman's Statements support the contention that the CNEN amendments were "made effective" prior to their formal adoption.

7.1057 The first Chairman's Statement was made during the 413th meeting, which took place in January 2007 (i.e. after the October 2006 vote but before the April 2007 vote). We agree with the European Communities that this first Statement does not support the view that EC member States were thereby instructed to bring their classification practices into conformity with the CNEN amendments at issue upon their vote in the Customs Code Committee. In that statement, the Chairman merely indicated that EC member States should follow BTI Guidelines Point 11. According to the complainants, Point 11 of the BTI Guidelines makes it clear that a draft CNEN that was voted upon by the Customs Code Committee should be followed by the EC member States, even

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[1385] Customs Code Committee (432nd meeting) (Exhibit TPKM-58).

[1386] Customs Code Committee (433rd meeting) (Exhibits US–20; TPKM-17). See also United States' first written submission, para. 116; United States' second written submission, para. 122; Chinese Taipei's first written submission, para. 61; Chinese Taipei's second written submission, paras. 64 and 264.

if not yet published in the EU Official Journal.[1387] The Panel disagrees. Point 11, quoted above at paragraph 7.1053 above, must be looked at as a whole and it consists of two bullets. The complainants refer to the first bullet. It is true that this first bullet provides that a "legal measure" should be followed upon its vote in the Customs Code Committee, even if not yet published in the EU Official Journal. However, this first bullet deals with the interrelationship between BTIs and *regulations,* which was not the context in which the first Chairman's statement was made. Instead, the Statement concerned the interrelationship between BTIs and CNEN, which is expressly dealt with in the second bullet. The second bullet refers to the invalidation of BTIs due to incompatibility with "the interpretation of one of the customs nomenclatures, e.g. following amendments to the CN Explanatory notes". It is therefore more plausible that the Chairman was exhorting EC member States to follow Point 11, second bullet.[1388] For these reasons, we do not find sufficient basis in this first Statement to conclude that the CNEN amendments at issue should be followed as soon as they are voted upon by the Customs Code Committee.

7.1058 We now turn to the second Chairman's Statement relied upon by the complainants. This second Statement was made at the 432nd meeting of the Customs Code Committee, which took place in October 2007.[1389] Like the first Statement, the second Statement explicitly refers to the Explanatory notes for set top boxes, reminding "the EC member States not to issue any contradictory BTIs and to follow the text that had been agreed upon and had been made public in the Annex to the report of respective meeting." The Statement was made after the October 2006 and the April 2007 vote. The Statement clearly covers the first CNEN amendment at issue, which was "agreed upon" through a favourable opinion and which was published in the annex to the report of the 407th meeting of the Customs Code Committee. As for the second CNEN amendment at issue, we consider that it too is encompassed within the Chairman's remarks. Although the reference in this Statement is to "the text *that had been agreed upon*" (emphasis added), the fact that the second CNEN amendment received a "no opinion", as opposed to a favourable opinion, does not in our view bring that measure outside the scope of the Chairman's directions. Indeed, the European Communities itself has explained that both a "favourable opinion" and a "no opinion" indicate that the submitted text will be adopted by the Commission.[1390] "No opinion" also means that there was no qualified majority to disagree, i.e. to issue a "non-favourable" opinion. As such, we believe that the "text that had been agreed upon" covers both measures at issue. In addition, we note that the text of the second CNEN amendment was equally "made public in the Annex to the report of respective meeting", namely as an Annex to the report of the 420th meeting.

[1387] See para. 7.1050 below.

[1388] Chinese Taipei itself acknowledges that Point 11, *first* bullet "originally referred to classification regulations" but claims that "it equally applies to CN Explanatory Notes", see Chinese Taipei's answer to Panel question No. 122, para. 53.

[1389] See para. 7.1054 above.

[1390] In the Panel Report on *EC – Chicken Cuts*, the European Communities indeed stated that:

> "The Customs Code Committee is a committee of Member States representatives responsible for monitoring the adoption of detailed secondary (delegated) legislation by the Commission (the system is known as the "Comitology" system). The Committee is asked to vote for or against a particular proposal. A qualified majority vote is required in order for the Committee to issue either a positive or negative opinion (for the necessary majority, see Article 205 of the EC Treaty). The adoption of a positive opinion, or the failure to arrive at an opinion, means that the proposal will be adopted. Only in the event of a negative opinion will the matter be examined by the Council of the European Union [...]."(emphasis added, European Communities' response to Panel question No. 55).

7.1059 In the light of our analysis, we are of the view that this second Chairman's Statement, which expressly relates to CNEN for set top boxes, instructed the customs authorities of EC member States "to follow" the measures at issue once voted upon but before they were formally adopted by the Commission and officially published in the EU Official Journal. This Statement sent an unambiguous message to EC member states: an official of the EC, in his capacity as Chairman of the Customs Code Committee, instructed EC member States "to follow" the measures at issue once voted upon in the Customs Code Committee, but before they were officially published in the EU Official Journal.[1391] The impact of this Statement, together with the vote in the Customs Code Committee, must be considered in determining whether in the particular factual circumstances of this case the measures were indeed made effective. We will return to this below.

7.1060 We turn now to the third and last Chairman's Statement relied upon by the United States and Chinese Taipei, made during the 433rd meeting of the Customs Code Committee, which took place in October 2007 (i.e. after both the October 2006 and the April 2007 votes).[1392] This Statement differs from the two previous Statements in that it does not explicitly refer to the CNEN for set top boxes. As its title indicates, this Statement relates in part to the "application of voted measures before their publication". Read in isolation, it is not clear to us whether the key phrase in the third paragraph of the statement – "an opinion on the classification of a specific type of product" – refers to an opinion by the Customs Code Committee when assessing a proposal for a *CNEN amendment* or whether it refers to an opinion concerning a draft *classification regulation.* Under the circumstances, we will undertake an analysis of the language of the three paragraphs of this Statement.

7.1061 We begin by noting that in the third Statement's first paragraph, the Chairman recommends the increased use of statements, as opposed to classification regulations and explanatory notes. Then, in the Statement's second paragraph, reference is made to the fact that various EC member States supported the use of statements over regulations and explanatory notes as a means to ensure quick decision-making. Given that such statements are not legally binding, the third Statement also clarified that if a legally binding instrument was needed, a classification regulation would still be an option. Hence, the second paragraph does not seem to address CNENs. Finally, the more relevant third paragraph of the statement reads:

> "The Chairman also recalled that as soon as the Committee has rendered an opinion on the classification of a specific type of product, no BTI should be issued contrary to that opinion and that this opinion should be respected by all Member States. It follows from the above that as soon as an opinion has been voted, Member States can issue BTIs for the products concerned, even before the measure has been adopted by the Commission and published in the Official Journal."[1393]

7.1062 The third paragraph of the third Statement seems to refer to an opinion rendered in respect of a classification regulation, rather than a CNEN. While classification regulations deal with "the classification of a specific type of product", Explanatory Notes are more general in nature and deal with products falling under a specific (sub)heading of the CN. The reference to a "measure" in the last sentence of this third paragraph does not clarify the issue, since the European Communities

[1391] We also note in the Statement that the "Chair *reminded* MS not to issue any contradictory BTIs and to follow the text that had been agreed upon and had been made public in the Annex to the report of the respective meeting" (emphasis added). This indicates to us that this statement was not made in isolation, and was consistent with previous statements or discussions in the Customs Code Committee.

[1392] See para. 7.1055 above.

[1393] See para. 7.1055 above.

sometimes refers to CNENs as "measures."[1394] Additionally, when referring to classification regulations in *inter alia* the BTI Guidelines, the Commission has referred to "legal measures".[1395] Furthermore, both classification regulations and the CNENs are adopted by the Commission and published in the EU Official Journal.[1396]

7.1063 Although the European Communities argues that no legal value should be attributed to these three Chairman's Statements, we consider that, whatever formal legal authority is attributable to them, the Statements – in particular the second Statement – could be relevant in determining whether the CNEN amendments were "made effective" in the sense of Article X:1. In this regard, we note that the Chair of the Customs Code Committee is a representative of the Commission whose instructions on such matters may be presumed to carry weight and influence EC member States to follow them. We also note that under the Comitology procedure, EC member States are permitted to make comments in case of disagreement with the statements of the Chair.[1397] However, there is no indication that the EC member States took issue with the Chairman's statement on this point.

7.1064 We now turn to the BTIs, also submitted by the United States and Chinese Taipei as evidence to establish that the CNEN amendments at issue were followed after the vote in the Customs Code Committee. We will deal with these BTIs in detail later when considering whether the CNEN amendments were enforced before their official publication in the context of the Article X:2 claim.[1398] For the purpose of our current analysis, however, we emphasize four particular BTIs. These four BTIs refer explicitly to the measures at issue. Moreover, they were issued *after* the vote in the Customs Code Committee but *before* the CNEN amendments were published in the EU Official Journal. These BTIs are the following:

(1) FR-E4-2007-002839R1 (France, 11 July 2007);

(2) FR-E4-2007-001251 (France, 11 July 2007);

(3) FR-E4-2007-00261 (France, 11 July 2007); and

(4) CZ05-0187-2008 (Czech Republic, 23 April 2008)[1399].

[1394] This is the case, for example, in Article 12(5)(a), last paragraph, of the CCC which, when referring *inter alia* to the invalidation of BTI because of a CNEN, reads: "[t]he date on which binding information ceases to be valid for the cases cited in (i) and (ii) shall be the publication of the said *measures* (...)"(emphasis added) (Exhibits US-19; TPKM-16).

[1395] See para. 7.1054 above.

[1396] Here again, like in the Second Statement, the Chairman "reminded" the EC member States of the importance of the vote in the Customs Code Committee. In our view, the use of the term "reminded" suggests that this was not a Statement made in isolation.

[1397] We note that the EC member States did not make a comment on the minutes of these meetings. Article 12 (1), second paragraph of the Rules of Procedure of the Customs Code Committee provides that "[t]he committee members shall send any written comments they may have on the minutes to the Chairman. The committee shall be informed of this; if there are any disagreements, the proposed amendment shall be discussed by the committee. If the disagreement persists, the proposed amendment shall be annexed to the minutes". (Exhibits US-19; TPKM-16).

[1398] See paras. 7.1128 and following.

[1399] The three French BTIs mention under "classification justification": "[...] Decision of the Customs Committee during its 420th meeting held on 18, 19 and 20 April 2007", while the Czech BTI mentions "[e]xplanations for CN re subheading 8528 71 13". (see Exhibit US- 28: the Original French BTIs mention "Decision du Comité des douanes lors de la 420ème session des 18, 19 et 20 avril 2007". The two complainants provided a translation of the Czech BTI that was not contested by the European Communities).

7.1065 We stress that we do not consider that establishing that a measure was "made effective" necessarily requires proof that the measure at issue was indeed applied in practice. However, we consider that BTIs may nonetheless serve as an indication that the CNEN amendments at issue were made effective in the sense that term is used in Article X:1 of the GATT 1994. Moreover, the BTIs submitted by the complainants indicate that, in a number of instances, some EC member States did indeed use the measures at issue in making classification decisions, prior to their formal adoption by the European Communities.

7.1066 For all the foregoing reasons, we consider that the various elements discussed above – the votes of the Customs Code Committee; the statement of the Chair in the 432nd meeting and certain BTIs issued by EC member States with explicit reference to the measures at issue – form a particular constellation of facts, particular to this case, which supports the position of the two complainants that the draft CNEN were "made effective" as that term is understood in Article X:1 of the GATT 1994.

7.1067 At this point, we would underline the particular character of the facts before us. They are particular in the sense that in light of the submissions before us, they appear to deviate from ordinary EC law and practice. The European Communities has emphasized throughout its submissions that a vote in the Customs Code Committee on a measure should not have the consequences advocated by the two complainants. That is, a vote should not have been used as a basis for classification decisions prior to formal adoption and, to the extent that the Chair of the Customs Code Committee advised otherwise, such statements from the Chair would not be consistent with EC law. According to the European Communities, a vote in the Customs Code Committee is a step in the "legislative" process and should not be considered as anything more than that; a measure should take effect only once the "legislative" process is finalized. Under EC law, the European Communities states, such legislative process is finalized once the measure is adopted by the Commission and published in the EU Official Journal, and not when it is merely a "preparatory" act.

7.1068 In this regard, the Panel emphasizes that it has made no findings with respect to the general status and effect of a vote in the Customs Code Committee under EC law: nor has it made a finding that such a vote will in every case mean that a measure has been "made effective". Rather, the Panel considers that, in the particular circumstances of this case, the cumulative effect of the votes in the Customs Code Committee, the relevant BTIs and the Second Statement by the Chair, are such that the measures at issue were "made effective" within the meaning of Article X:1 of the GATT 1994.

When were the CNEN amendments made effective?

7.1069 Having determined that the CNEN amendments were "made effective", we must now determine *when* the CNEN amendments were "made effective". This will give us the necessary "reference point" for determining in the next section whether the CNENs were published "promptly" once "made effective". Up to now, we have determined that the CNEN amendments were made effective before their adoption by the Commission, and before their publication. We note that the votes in the Customs Code Committee took place in October 2006 and April 2007; that the second statement of the Chair is dated October 2007; and that some of the relevant BTIs were issued in July 2007. Bearing these factors in mind, we conclude that the CNEN amendments were made effective, at the latest, at the time of the October 2007 statement of the Chair. We emphasize that we reach this conclusion on the basis of the particular circumstances of the case considered as a whole, namely the votes on the CNEN amendments in the Customs Code Committee; the Chairman's statement and the BTIs citing the CNEN amendments as "classification justification". The cumulative effect of these factors leads us to the conclusion that the measures were made effective by October 2007, at the latest.

7.1070 Hence, we will now proceed to consider whether the measures at issue were published "promptly" and "in such a manner as to enable governments and traders to become acquainted with them".

(iv) Whether the measures at issue were published "promptly"

Arguments of the parties

7.1071 The **United States** argues that the CNEN amendments were not published "promptly" as required by Article X:1 of the GATT 1994. The United States submits that "prompt" means "done ... without delay".[1400] The United States refers to the GATT Panel in *EEC – Apples (US)* in which a violation was found because of the European Communities' failure to publish its measure until two months after it was in effect.[1401] With regard to the present dispute, the United States points out that the measures at issue were approved by the Customs Code Committee in October 2006 and April 2007, but that they "did not appear in the EC's official gazette for over a year after approval, making it virtually impossible for affected companies and other Members to access them in a reasonable manner".[1402] As a consequence, the United States submits, the eventual publication of the measures in the EU Official Journal does not constitute prompt publication. **Chinese Taipei** advances a similar understanding of the term "prompt" as used in Article X:1 and argues that "since the draft CNEN relating to STBCs with a hard disk drive was 'made effective' in April 2007, the publication thereof made in May 2008 cannot be considered to have been done 'promptly' or 'without delay'".[1403]

7.1072 The **European Communities**, however, argues that the amended CNEN was adopted by the Commission only at the end of April 2008 and that it was "promptly" published on 7 May 2008.[1404] In the alternative, the European Communities notes that even if the measures at issue had been made effective upon the vote in the Customs Code Committee – which it strongly contests – the CNEN amendments at issue were "published promptly via the Comitology website".[1405] In particular, the European Communities argues that the measures at issue were published as annexes to the minutes of the 407th and 420th meetings of the Customs Code Committee and that "[t]hese reports are available on the Comitology website usually within 3 weeks after the meeting".[1406]

Consideration by the Panel

7.1073 Having established that the measures at issue were "made effective" at the latest by October 2007, the Panel is first required to consider whether the measures at issue were published "promptly" within the meaning of Article X:1 of the GATT 1994. If we answer this in the affirmative, we will consider whether the prompt publication of the CNEN amendments was "in such a manner as to enable government and traders to become acquainted with them".

7.1074 We begin by recalling that Article X:1 of the GATT 1994 requires that "laws, regulations, judicial decisions and administrative rulings, made effective by a contracting party, pertaining to the classification ... of products for customs purposes shall be published promptly in such a manner as to

[1400] United States' response to Panel question No. 159.
[1401] United States' response to Panel question No. 159, para. 81.
[1402] United States' first written submission, paras. 112 and 116; United States' second written submission, para. 120.
[1403] Chinese Taipei's response to Panel question No. 159, para. 132.
[1404] European Communities' first written submission, para. 308.
[1405] European Communities' comment to the responses of the two complainants to Panel question No. 157, para. 196.
[1406] European Communities' first written submission, para. 299.

enable governments and traders to become acquainted with them". It does not, however, specify what "promptly" means, i.e. what is the permissible time span *between* the moment that such measure is "made effective" and the time it is "published". In this regard, we note that the adverb "promptly" is defined as "[i]n a prompt manner; readily, quickly; at once, without delay; directly, forthwith, there and then."[1407] The word "prompt", as an adjective, means, *inter alia,* "2. a. Ready in action; quick to act when occasion arises; acting with alacrity, or without undue delay; ready and willing; quick *to* do something."[1408] In our view, the meaning of prompt is not an absolute concept, i.e. a pre-set period of time applicable in all cases.[1409] Rather, an assessment of whether a measure has been published "promptly", that is "quickly" and "without undue delay", necessarily requires a case-by-case assessment.[1410] Accordingly, we will look at the time span between the moment the CNEN amendments were "made effective" and the time they were "published", and assess whether this is prompt in light of the facts of the case.

7.1075 The European Communities has suggested that the measures at issue were published twice, i.e. in the EU Official Journal and on the Comitology website. We note that the text of the measures indeed appears both in the EU Official Journal and in the Comitology website (more particularly, as Annexes to the minutes of the 407th and 420th meeting of the Customs Code Committee). Therefore, we will consider each in terms of whether such publication was "prompt" vis-à-vis October 2007 (our "reference point"). Only if at least one of these publications is considered "prompt", will we turn to the next step in our analysis and determine whether the prompt publication was "in such a manner as to enable governments and traders to become acquainted with them". This is because the requirement to publish promptly and the requirement with respect to the manner of publication (i.e., in such a manner as to enable governments and traders to become acquainted with them) are cumulative requirements under Article X:1.

7.1076 We start with the publication in the EU Official Journal. The CNEN amendments were published in the EU Official Journal on 7 May 2008, while "made effective" at the latest by October 2007. Thus, the CNEN amendments were published in the EU Official Journal at least eight months after they were made effective. In the circumstances of this case and in light of the nature of the measures at issue, we consider that publication after eight months does not meet the requirement to publish "promptly". A significant number of traders and trade can be affected during an eight-month period. We observe as well that the publication on 7 May 2008 followed shortly after the adoption by the Commission at the end of April 2008, and that minutes of meetings of the Customs Code Committee are available on the Comitology website "usually within 3 weeks after the meeting".[1411] This suggests that such information should be made public within weeks rather than months, and that such is the "usual" practice of the European authorities. Under the circumstances of this case, we are

[1407] The *Shorter Oxford Dictionary* (2003), p. 2366.

[1408] The *Shorter Oxford Dictionary* (2003), p. 2376. "Prompt" is also defined as "to move to action", see Merriam-Webster Online Dictionary. Retrieved 4 December 2009, from http://www.merriam-webster.com/dictionary/prompt.

[1409] In *EEC – Apples (US)*, para. 5.21, the GATT Panel found that "no lapse of time between publication and entry into force was specified" by Article X:1.

[1410] In *US - Wheat Gluten*, the Appellate Body used a similar approach when it considered the meaning of the term "immediately" with respect to the obligation under Article 12.1 of the Agreement on Safeguards to "immediately notify" the Committee on Safeguards upon certain actions they may take. The Appellate Body agreed with the Panel that the ordinary meaning of "immediately" "implies a certain urgency", adding however that the degree of urgency or immediacy required "depends on a case-by-case assessment." (Appellate Body Report on *US - Wheat Gluten*, para. 105).

[1411] European Communities' first written submissions, para. 299.

not persuaded, nor has the European Communities offered any support for its contention otherwise[1412], that publishing the CNEN amendments eight months after they were made effective qualifies as "prompt" under Article X:1. Hence, we find that the publication of the CNEN amendments in the EU Official Journal was *not* prompt. In view of this finding, we do not need to consider whether the publication in the EU Official Journal was "in such a manner as to enable governments and traders to become acquainted with them".

7.1077 We now turn to the publication of the CNEN amendments on the Comitology website as annexes to the minutes of the respective Customs Code Committee meetings. It is not clear when those minutes were posted on the Comitology website. We note that the minutes of the 407th meeting held from 18 to 20 October 2006 are dated "19 December 2006" (the date of the report) and that the minutes of the 420th meeting held from 18 to 20 April 2007 are dated "31 May 2007" (the date of the report). We will therefore consider whether publication was prompt on the basis of the dates of 19 December 2006 and 31 May 2007. At the outset, we note that both dates occur *before* the date we considered the latest date as from which the CNEN amendments became effective (October 2007). It is clear that publication prior to the date the measure was made effective satisfies the requirement to publish "without delay" and hence that the measure was published promptly. Having found that the publication of the CNEN amendment in the Comitology website was prompt, we must now determine whether the publication of the CNEN amendment in the Comitology website satisfies the requirement in Article X:1 of being published "in such a manner as to enable governments and traders to become acquainted with them".

(v) Whether the measures at issue were published "in such a manner as to enable governments and traders to become acquainted with them".

Arguments of the parties

7.1078 The **United States** and **Chinese Taipei** consider the publication in the EU Official Journal as not being prompt and argue that the publication of the measures at issue on the Comitology website does not meet the standard of publication required by Article X:1 of the GATT 1994. According to **Chinese Taipei**, to assess whether a publication has been made in such a manner as to enable governments and traders to become acquainted with them, "it is necessary to put oneself at the level of the newcomer wishing to enter a new market rather than at the level of the experienced insider who through his contacts or specialised knowledge is able to obtain information which is otherwise difficult to obtain". Chinese Taipei submits that, when applying this standard, it is "obvious" that the inclusion of a document on the EC Comitology website is insufficient to comply with the requirements of Article X:1 because "the Comitology website contains thousands of documents issued by hundreds of different Committees. Unless one knows the precise name of the Committee dealing with the issue of the specific document number" it argues, "it is impossible to retrieve information of how a product is treated". Chinese Taipei gives the example of searching for a decision relating to "set top boxes", where the result of the search would be "0 document(s) found".[1413] The United States argues that "the measures in question were not published for over a year after they were enforced and made effective, whether in the EC Official Journal or in another medium readily available to

[1412] The European Communities has limited itself to stating that "it is factually and legally incorrect to say that the CNEN were published over a year after their adoption", since in its view the CNEN amendment were only made effective upon adoption by the Commission (European Communities' first written submission, para. 307).

[1413] Chinese Taipei's comment on the European Communities' response to Panel question No. 157, paras. 44-45.

Members and traders"[1414] making it "virtually impossible" for affected companies and other Members to access them in a reasonable matter.[1415] Accordingly, the **United States** argues that making the text of the measures at issue available in the minutes of the Customs Code Committee does not satisfy the requirement of Article X:1 of the GATT 1994.

7.1079 The **European Communities** submits that the measures at issue were promptly published in the EU Official Journal because the measures were made effective on 29 April 2008 and that such publication meets the requirements of Article X:1. Alternatively, the European Communities notes that the opinions of the Customs Code Committee delivered in the management procedure "while only stages in the legislative procedure" were "made available" in the reports containing the minutes of the meetings of the Customs Code Committee "to allow for maximum transparency on the activities of the EC institutions".[1416] In this respect, the European Communities points out that the laws, regulations, judicial decisions and administrative rulings of general application covered by Article X:1 "do not need to be communicated via an official gazette and, depending on the circumstances, even a communication via a website may be sufficient". The European Communities argues that such circumstances "may also include the fact that the economic operators are used to getting information via the website and are aware that the government communicates certain matters in this way".[1417]

Consideration by the Panel

7.1080 The Panel recalls its finding in paragraph 7.1076 that in this case, the publication of the CNEN amendments in the EU Official Journal cannot be considered "prompt" and that hence, we do not need to consider whether that publication was "in such a manner as to enable governments and traders to become acquainted with them". Accordingly, we will consider only whether publication on the Comitology website, which we considered to be "prompt" in the circumstances of this case, was "in such a manner as to enable governments and traders to become acquainted with them".

7.1081 We note that Article X:1 contains two closely linked requirements. The first is that measures subject to Article X are "published", and the second is that such publication is "in such a manner as to enable governments and traders to become acquainted with them".

7.1082 Regarding the requirement that measures are "published", the Panel first notes a difference between Article X:1 and Article X:2. While Article X:1 requires that measures be "published", Article X:2 refers to measures having been "officially published". The absence of the adverb "officially" in Article X:1, which is present in Article X:2, clarifies that the publication of the relevant measure does not need to be in an "official" publication in order to satisfy Article X:1.

7.1083 The Panel in *Chile – Price Band System* analysed the meaning of the phrase "to publish" in light of the requirement to "publish" safeguard investigation reports under Article 3.1 of the *Agreement on Safeguards*. This analysis may be of some relevance in the present dispute, especially given that Article 3.1 of the *Agreement on Safeguards* expressly refers to Article X of the GATT 1994. [1418] In the relevant parts of its Reports, that Panel made the following observations and finding:

[1414] United States' response to Panel question No. 157, para. 79.
[1415] United States' first written submission, para. 116.
[1416] European Communities' first written submission, para. 299.
[1417] European Communities' response to Panel question No. 157, para. 167.
[1418] Article 3.1 of the *Agreement on Safeguards* states in relevant part:

"A Member may apply a safeguard measure only following an investigation by the competent authorities of that Member pursuant to procedures previously established and made public in

> "[W]e note that the Minutes of the relevant [Chilean Distortion Commission] sessions have not been 'published' through any official medium. Rather, they were transmitted to the interested parties and placed at the disposal of 'whoever wishes to consult them at the library of the Central Bank of Chile'. In order to determine whether it is sufficient under Article 3.1 of the Agreement on Safeguards to make the investigating authorities' report 'available to the public' in such a manner, we first refer to the dictionary meaning of 'to publish'. The term can mean 'to make generally known', 'to make generally accessible', or 'to make generally available through [a] medium'. We therefore turn to the context of Article 3.1 provided by similar publication requirements in the AD and SCM Agreements. (...) In addition, we also note that various 'transparency' provisions in the covered agreements, such as Article III of the GATS, Article 63.1 of the TRIPS Agreement, and Article 2.11 of the TBT Agreement all distinguish between 'to publish' and 'to make publicly available'. In the light of these considerations, we find that the verb 'to publish' in Article 3.1 of the Agreement on Safeguards must be interpreted as meaning 'to make generally available through an appropriate medium', rather than simply 'making publicly available'. As regards the minutes of the relevant [Chilean Distortion Commission] sessions, we therefore find that they have not been generally made available through an appropriate medium so as to constitute a 'published' report within the meaning of Article 3.1 of the Agreement on Safeguards."[1419]

7.1084 We agree with this approach and consider that the same reasoning can be applied to the publication obligation in Article X:1. As noted above, Article X:1 requires that publication be "in such a manner as to enable governments and traders to become acquainted with them". In our view, if measures are to be published "in such a manner as to enable governments and traders to become acquainted with them", it follows that they must be generally available through an appropriate medium rather than simply making them publicly available.[1420]

7.1085 We observe that the rationale behind the publication requirement in Article X of the GATT 1994 is to ensure due process and transparency about measures that affect governments and traders. If such measures were not published, governments and traders would not necessarily know what conditions would apply to their goods when imported into a Member's territory. Publication thus offers the possibility for governments and traders to learn of "laws, regulations, judicial decisions and administrative rulings of general application" applicable to trading with that Member or its nationals.

7.1086 A textual analysis of the publication requirement in Article X:1 bears out this understanding. The definition of the word "manner" is "senses relating to the way in which an action is performed" or "the way in which something occurs or is performed; a method of action; a mode of procedure."[1421] The term "to enable" can be understood as "to give power to (a person); to strengthen, make adequate

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> consonance with Article X of GATT 1994. (...) The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law."

[1419] Panel Report on *Chile – Price Band System*, para. 7.127 (referring to the *Shorter Oxford Dictionary*, p. 2405).

[1420] In other words, if a "medium" makes measures generally available to the public in such a manner as to "enable governments and traders to become acquainted with them", we consider that such medium should be regarded as "appropriate" and that publishing on that medium would fall within "published" a used in Article X:1.

[1421] The *Shorter Oxford Dictionary* (2002), p. 1692.

or proficient", "to impart to (a person or agent) power necessary or adequate for a given object; to make competent or capable", "to supply with the requisite means or opportunities to an end or for an object" or "to make possible or easy; also to give effectiveness to (an action)".[1422] Finally, the term "acquainted" means "personally known; familiar, through being known", or "having personal or experimental knowledge; possessed of personal knowledge, more or less complete."[1423] Thus, it is clear from the a textual analysis of Article X:1 that it is not any manner of publication that would satisfy the requirement, but only those that would give power to or supply governments and traders with knowledge of the particular measures that is "adequate" so that traders and Governments may become "familiar" with them, or "known" to them in a "more or less complete" way.

7.1087 In our view, making the minutes of the Customs Code Committee, with draft CNENs attached, available on the Comitology website does not meet this standard. In particular, we note that there is nothing in the minutes, or the draft CNENs attached, that would supply traders and governments with adequate knowledge of measures that are or would be applied in trading with the EC member States. Indeed, the publication of the respective reports of the Customs Code Committee meetings merely provided the text of the CNEN amendments, specifying that these were "drafts". In addition, the documents contain placeholders for the reference number of the measure, e.g. "(2006/C ... ../..)" in the first case and "(2007/C ... ../..)" in the second case.[1424] In light of this, the Panel finds that, in the circumstances described above, posting the draft CNEN on the Comitology website does not constitute publication "in such a manner as to enable governments and traders to become acquainted with them".

[1422] The *Shorter Oxford Dictionary* (2002), p. 819.

[1423] The *Shorter Oxford Dictionary* (2002), p. 20.

[1424] More particularly, the first CNEN amendment was published as Annex VI to the Summary of the conclusions of the 407th meeting of the Customs Code Committee. The text itself is titled "Draft CNEN on Satellite receivers with built-in modem", while the reference number "(2006/C ... ../..)" is not yet completed. The text of Annex VI begins as follows:

> "Draft CNEN on "Satellite receivers with built-in modem ":
> UNIFORM APPLICATION OF THE COMBINED NOMENCLATURE (CN)
> (Classification of goods)
> (2006/C …../..)
> Explanatory notes adopted in accordance with the procedure defined in Article 10 (1) of Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff
> The explanatory notes to the Combined Nomenclature of the European Communities shall be amended as follows:
> [...]"

The second measure at issue was published as Annex IV to the Report of Conclusions of the 420th meeting of the Customs Code Committee. Again, the text itself is titled "Draft CN Explanatory Notes: Set-top box incorporating a hard disk", while the reference number "(2007/C ... ../..)" is not yet completed. The text of Annex IV begins as follows:

> "Draft CN Explanatory Notes: Set-top box incorporating a hard disk
> UNIFORM APPLICATION OF THE COMBINED NOMENCLATURE (CN)
> (Classification of goods)
> (2007/C …../..)
> Explanatory notes adopted in accordance with the procedure defined in Article 10 (1) of Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff
> The explanatory notes to the Combined Nomenclature of the European Communities shall be amended as follows:
> [...]"

(vi) Conclusions regarding the complainants' claim under Article X:1

7.1088 The Panel determined in the above sections that the measures at issue were included in the scope of Article X:1 and that they were "made effective" at the latest by October 2007. We then considered two possible "publications" of the measures: (i) in the EU Official Journal (ii) on the Comitology website. We found that the publication in the first instance was not "prompt", while the publication in the second case, although prompt, was not "in such a manner as to enable governments and traders to become acquainted" with the measures at issue. Accordingly, we conclude that the European Communities violated its obligation in Article X:1 to publish promptly the CNEN amendments in such a manner as to enable governments and traders to become acquainted with them.

(d) The United States' and Chinese Taipei's claim under Article X:2 of the GATT 1994

(i) Main claims of the parties

Arguments of the parties

7.1089 The measures at issue are, as described above, the proposed amendments to the CNEN as voted by the Customs Code Committee in October 2006 and April 2007. The Chairman's Statements and the BTIs are submitted as evidence in support of the claims. These statements and the BTIs are thus not measures at issue.[1425]

7.1090 The **United States** and **Chinese Taipei** argue that, because some EC member States applied the measures at issue *before* the *official* publication of the CNEN amendments in the EU Official Journal on 7 May 2008, the European Communities has violated Article X:2 of the GATT 1994.

7.1091 The **European Communities** responds that Article X:2 of the GATT 1994 does not apply in the present case because the conditions for Article X:2 are not met. The European Communities argues that the CNEN amendments at issue cannot be a "measure of general application" because of their specific characteristics. Further, the European Communities submits that the CNEN amendments at issue did not effect an advance in rate of duty under an established and uniform practice. The European Communities also submits that their specific characteristics, together with their character as "preparatory" acts, excludes them from being "enforced". The CNEN amendments cannot be enforced. In the alternative, the European Communities argues that the United States and Chinese Taipei have not submitted sufficient proof that the measures at issue have violated Article X:2.

7.1092 Amongst the third parties only the Philippines submits arguments in relation to Article X:2. Like the United States and Chinese Taipei, the Philippines submits that the European Communities applied the measures at issue *before* the *official* publication of the CNEN amendments in the EU Official Journal on 7 May 2008 and that, in doing so, it violated Article X:2 of the GATT 1994.[1426]

Consideration by the Panel

7.1093 Article X:2 of the GATT 1994 provides that:

> "No measure of general application taken by any contracting party effecting an advance in a rate of duty or other charge on imports under an established and uniform practice or imposing a new or more burdensome requirement, restriction or

[1425] See paragraph 7.1008 above.
[1426] The Philippines' third party submissions, paras. 41 and 44.

> prohibition on imports, or on the transfer of payments therefor, shall be enforced before such measure has been officially published."

7.1094 The Panel recalls the following statement of the Appellate Body in *US - Underwear* that Article X:2 of the GATT 1994 embodies the principle of transparency and due process:

> "Article X:2, General Agreement, may be seen to embody a principle of fundamental importance – that of promoting full disclosure of governmental acts affecting Members and private persons and enterprises, whether of domestic or foreign nationality. The relevant policy principle is widely known as the principle of transparency and has obviously due process dimensions. The essential implication is that Members and other persons affected, or likely to be affected, by governmental measures imposing restraints, requirements and other burdens, should have a reasonable opportunity to acquire authentic information about such measures and accordingly to protect and adjust their activities or alternatively to seek modification of such measures."[1427]

7.1095 We understand Article X:2 of the GATT 1994 to contain five conditions: (i) the existence of a "measure"; (ii) the measure is of "general application"; (iii) the measure is taken by a contracting party (WTO member); (iv) the measure is of the type described in Article X:2 (i.e. a measure "effecting an advance in a rate of duty or other charge on imports under an established and uniform practice or imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefore"); and (v) the measure was enforced before its official publication. We will analyse each of these in turn.

(ii) Whether the measures at issue are a "measure" and, if so, whether they are of "general application" and "taken by a contracting party"

Arguments of the parties

7.1096 According to the **United States** and **Chinese Taipei**, the CNEN amendments at issue are "measures" of "general application" for the same reasons that they are a "law, regulation, ..." of "general application" under Article X:1. Similarly, the arguments invoked by the European Communities to reject the Article X:2 claim are similar to those raised in its defence against the applicability of Article X:1.[1428] The parties have not raised any particular arguments regarding the requirement that the measures are those taken by a WTO Member.

Consideration by the Panel

7.1097 We now turn to consider whether the first three conditions are met, i.e., whether each of the CNEN amendments at issue is a "measure" of "general application", "taken by a contracting party", i.e., a WTO Member. In our analysis of Article X:1 above[1429], we found that the CNEN amendments at issue are contemplated by that range, namely, a "law, regulation, judicial decision [or]

[1427] Appellate Body Report on *US - Underwear*, DSR 1997: I, p. 29.

[1428] See, in particular, the United States' response to Panel question No. 156 (invoking the Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 85); Chinese Taipei's second written submission, paras. 280-281 and 283-285 (invoking the Appellate Body Report on *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 187); and the European Communities' first written submission, para. 310; European Communities' second oral statement, para. 92; European Communities' response to Panel question No. 156, para. 166.

[1429] See paragraph 7.1027 below.

administrative ruling". Article X:2 refers simply to "measure" and hence encompasses an even broader category – namely, any act or omission by a WTO Member. It follows therefore that the drafters intended to include a broad range of measures that have the potential to affect trade and traders. We conclude that the CNEN amendments at issue qualify as "measures" in the sense of Article X:2. We also found above[1430] that the CNEN amendments are of "general application". We see no reason to depart from this finding when considering the identical terms "general application" in our Article X:2 analysis. Hence, we conclude that the CNEN amendments are a "measure of general application" in the sense of Article X:2. In addition, we note that the measure at issue must be "taken by a contracting party" (WTO member), as was the case here.

(iii) Whether the measures at issue are of a kind effecting an advance in rate of duty under an established and uniform practice

7.1098 We will divide the arguments of the parties and our analysis into two subsections. We will start with defining the meaning of the terms "effecting an advance in a rate of duty" and consider whether the CNEN amendments at issue effect an advance in a rate of duty. If we answer this in the affirmative, we will next assess the meaning of "under an established and uniform practice" and consider whether the CNEN amendments at issue effect an advance in a rate of duty under an established and uniform practice.

"effecting an advance in rate of duty"

Arguments of the parties

7.1099 The **United States** submits that an "advance" in a rate of duty is a "rise", an "increase" in the rate of duty. It argues that the CNEN amendments at issue "effect" an advance in a rate of duty since its application "resulted in the reclassification of STBCs from a duty-free tariff line into a tariff line with duties of up to 14 per cent".[1431] The United States argues that, "absent the CNEN, at least some member States would not have imposed duties on the products at issue", and that "[b]y imposing uniformity throughout the EC, the CNEN thus at a minimum 'effect[s] an advance in rate of duty' for those portions of the EC customs territory that were imposing non-uniform lesser duties".[1432] The United States further argues that to fall under the disciplines of Article X:2, the measures at issue need not be the *only* cause for such increase. It submits that Article X:2 does not contain any reference to a "causation requirement or set any particular threshold".[1433] As long as the measure "effects" an advance in the rate of duty, the measure would need to be officially published prior to its enforcement. **Chinese Taipei** similarly interprets an "advance" in rate of duty as an "increase" in the rate of duty.[1434] Chinese Taipei argues that the measures at issue effect an advance in the rate of duty in that they result in some types of STBCs – Chinese Taipei cites in particular those with a hard disk – becoming subject to duties pursuant to the new classification imposed by the measures at issue.[1435] In its view, "the CNEN have introduced certain classification criteria such as the presence or absence of a hard disk drive or of certain specific modem types that were not mentioned previously in the applicable customs legislation and this has led to a change in classification practice of the member States" and to higher duties for STBCs. Like the United States, Chinese Taipei also submits that

[1430] See paragraph 7.1034 below.
[1431] United States, first written submission, para. 118; United States' response to Panel question No. 160, para. 83.
[1432] United States' response to Panel question No. 161, para. 84.
[1433] United States' response to Panel question No. 160, para. 82.
[1434] Chinese Taipei's response to Panel question No. 160.
[1435] Chinese Taipei's first written submission, paras. 470 and 478.

nothing in the text of Article X:2 of the GATT 1994 requires that the measure at issue be the *sole* cause for such an increase.[1436] Both the United States and Chinese Taipei argue that the various BTIs they have submitted to the Panel constitute proof that the measures at issue effected an advance in the rate of duty.[1437]

7.1100 The **European Communities** submits that the measures at issue merely lead to a "technical reclassification" into another tariff line, but not to an "increase in the duty rate" levied by the European Communities. In the European Communities' view, the United States and Chinese Taipei fail to provide evidence of an increase in a rate of duty by virtue of the CNEN amendments at issue. The European Communities argues that none of the submitted BTIs classifies any of the products at issue in a duty-free code. To the contrary, it argues, all these BTIs indicate tariff lines bearing the same duty of 14 per cent and do not, therefore, constitute evidence of a breach of Article X:2 of the GATT 1994.[1438]

Consideration by the Panel

7.1101 Article X:2 requires that the measure "effect[s] an advance in a rate of duty or other charge on imports under an established and uniform practice or imposes a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefore". Given the way this claim has been presented and argued, the more specific question before us is whether the CNEN amendments at issue are of a kind "effecting an advance in the rate of duty" and whether they do so "under an established and uniform practice".

7.1102 As mentioned above, we will start by determining whether the CNEN amendments at issue effect an advance in a rate of duty. If this is answered in the affirmative, we will determine whether the CNEN amendments effect an advance in a rate of duty under an established and uniform practice and if so, whether they meet this requirement.

7.1103 We thus turn to the meaning of the terms "effecting an advance in a rate of duty".[1439] The Panel begins its analysis by noting that "effecting" comes from the verb "to effect". "[T]o effect" *inter alia* means to "bring about (an event or result)"[1440]; "to cause to come into being"; "to put into operation".[1441]

[1436] United States' response to Panel question No. 160, para. 82; Chinese Taipei's response to Panel question No. 160, para. 133. These BTIs will be analyzed in more detail below at 7.1133-7.1135.

[1437] United States' first written submission, para. 116; Chinese Taipei's response to Panel question No. 161, para. 135.

[1438] European Communities' comments on United States' and Chinese Taipei's responses to Panel question Nos. 157, paras. 190; 194-195; 197 and 160, para. 197.

[1439] The Spanish and French versions of the GATT 1994 confirm this view. The Spanish language version mentions "que tenga por efecto", literally "that has the effect of". In Spanish, "efecto" is defined as "[l]o que sigue por virtud de una causa", i.e. what follows by virtue of a cause. The French text mentions " qui entraînerait" which comes from the verb "entraîner" which means "4. [a]voir pour conséquence nécessaire, inévitable. amener, causer, impliquer, occasionner, produire, provoquer, déclencher" (see Diccionario de la lengua Española, Real Academia Española, vigésima primera edición, 2001, p. 558 and *Le nouveau Petit Robert* (2000), p. 874).

[1440] The *Shorter Oxford Dictionary* (2002), p. 794.

[1441] effecting. (2009). In Merriam-Webster Online Dictionary. Retrieved 7 December 2009, from http://www.merriam-webster.com/dictionary/effecting.

7.1104 The ordinary meaning of "bring about" is "cause to happen, accomplish".[1442] According to the Merriam-Webster online Dictionary, "[t]he verb effect goes beyond mere influence; it refers to actual achievement of a final result".[1443]

7.1105 We see similarities between the word "effecting" and "to cause". With regard to the verb "to cause" in particular, the Panel in *US – Lamb* clarified that "[t]he word 'to cause' means 'effect, bring about, occasion, produce, induce, make', or also 'to serve as cause or occasion of'. The word 'to cause' means 'that which produces an effect or consequence; an antecedent or antecedents followed by a certain phenomenon'; it 'indicates a condition or circumstance or combination of conditions and circumstances that effectively and inevitably calls forth an issue, effect or result or that materially aids in that calling forth'." In that same dispute, the Panel found that the ordinary meaning of "cause" requires "the showing of a link", but that it does not imply the need for there to be a sole or single cause.[1444] Likewise, we believe that the term "effecting" does not necessarily require that the measures at issue be the sole or single cause for the advance in rate of duty. However, it must be shown that it goes beyond mere influence and there must be a demonstrable link between the measures at issue and the advance.

7.1106 Turning to the term "advance", we note that it can mean "progress"; "a step forward"; "forward motion"; "a rise in amount, value or price".[1445] When viewed in this context, we understand that "advance" as used in Article X:2 means "a rise in amount, value or price." We also consider that both the French and Spanish versions of "advance" in Article X:2, "relèvement" and "aumentar", respectively, support such an understanding.[1446] The French "relèvement" is defined as "action de relever, de hausser, d'augmenter"[1447], while the Spanish "aumentar" is defined as "[a]crecentar, dar mayor extension, número o material a alguna cosa".[1448] "[A]crecentar" refers back to "aumentar".[1449] Accordingly, Article X:2 of the GATT 1994 covers measures of general application that "cause" an "increase" in a rate of duty.

7.1107 Hence, we can conclude that "effecting an advance in a rate of duty" means that the CNEN amendments at issue are of a type that "bring about" an "increase" in a rate of duty. The function of the language "effecting an advance in a rate of duty" is to further describe the type of measures that are subject to the obligation in Article X:2. That is, it operates to define the class of measures to which the injunction against enforcement before official publication applies. As such, the focus under this aspect of Article X:2 is on the type of measure under consideration. The question is whether the measures at issue are of the type that they are intended to have a certain effect, namely, an increase in a rate of duty. The issue is *not*, at this point in the analysis, whether they have actually had that effect in practice.[1450] In this particular case, therefore, the question at this stage of the analysis is not whether

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[1442] The *Shorter Oxford Dictionary* (2002), p. 290.

[1443] effecting. (2009). In Merriam-Webster Online Dictionary. Retrieved 7 December 2009, from http://www.merriam-webster.com/dictionary/effecting.

[1444] Panel Report on *US – Lamb*, para. 7.237-7.238.

[1445] The *Shorter Oxford Dictionary* (2002), p. 31.

[1446] We recall that the French and Spanish texts of the GATT 1994 are equally authentic (see the final clause of the WTO Agreement. See also the Panel Report on *China – Autos*, para. 7.159, and the Panel Report on *EC – Trademarks and Geographical Indications (United States)*, para. 7.607).

[1447] Le nouveau Petit Robert (2000), p. 2150.

[1448] Diccionario de la lengua Española, Real Academia Española (2001), p. 162.

[1449] Diccionario de la lengua Española, Real Academia Española (2001), p. 23.

[1450] In a sense, the distinction could be thought of as one between the intention or purpose of the measure, and the actual application of the measure in practice. Another way of thinking about it is, if the result of enforcing the measure is to increase the rate of duty applied to a particular product, then this would be strong evidence that the measure is of a type that "effects" an increase in the rate of duty.

the complainants have proved that the CNEN amendments have actually resulted in increased rates of duty in particular instances. Rather, the question is whether, in general terms, the CNEN amendments are measures of a type that can be said to be intended to effect an advance in the rate of duty.

7.1108 On their face, the CNEN amendments at issue indicate that certain STBCs are not classifiable as set top boxes with a communication function in duty-free CN code 8528 12 91. Instead, as a result of the CNEN amendments, those STBCs are classifiable in other tariff lines which are dutiable. The applicable rates of duty, however, are not specified in the measures at issue, but rather are set out in the Common Customs Tariff of the European Communities, which imposes varying duty rates of between 13.9 per cent and 14 per cent with respect to the relevant tariff lines. It seems clear to us that although the measures at issue themselves do not specify the rates of duty to be applied, the measures result in the exclusion of certain STBCs from duty-free treatment. The CNEN amendments at issue necessarily lead to certain STBCs being classified in tariff lines that impose a duty rate in excess of zero while other STBCs are classifiable in duty-free tariff lines.

7.1109 Under the CNEN amendments at issue, it became clear that STBCs with WLAN, ISDN or Ethernet connectivity, or with a recording and reproducing device (such as, for example, a hard disk or a DVD drive) would be excluded from CN code 8528 12 91 (now 8528 71 13) which was – and still is – subject to a 0 per cent duty. The BTIs demonstrate the lack of uniformity that existed *before* the CNEN amendments were voted on in the Customs Code Committee. Of the BTIs issued before that time, we find BTIS classifying STBCs with a hard disk or a DVD drive in CN code 8521 90 00 (13.9 per cent duty); in 8528 12 20 (14 per cent duty)[1451] and in CN code 8528 12 91 (duty free).[1452] The different classification of similar STBCs by different EC member States' customs authorities shows that there was a lack of uniformity in the classification of set-top boxes with hard disk drives among the EC member States during 2005 and 2006. As Chinese Taipei points out, "in such a situation, it is up to the Commission to adopt measures, either a CNEN or a classification regulation, in order to ensure the uniform application of the Common Customs Tariff." [1453]

7.1110 We therefore believe that, through the CNEN amendments at issue, the Commission sent a clear signal to all customs authorities of EC member States that STBCs with certain features were not eligible for classification in duty-free CN code 8528 12 91, leaving other dutiable codes as the only available classification options. Thus, EC member States that had granted duty-free treatment before the vote on the measures in the Customs Code Committee were thereafter required not to classify in CN code 8528 12 91. In consequence, the CNEN amendments at issue entailed a change in classification practices for some EC member States with the practical consequence that certain STBCs became dutiable. We therefore consider that, at least in some instances, as a result of the CNEN amendments at issue, some EC member States were required to change their classification practices in such a way that effected an advance in rate of duty. Hence, we conclude that the CNEN amendments at issue effect an advance in rate of duty and as such fall within the measures contemplated by Article X:2.

7.1111 While we do not consider that the complainants are required to submit proof of application on this point, we find support for our conclusions when comparing: (i) a French BTI issued in 2005 (before the vote in the Customs Code Committee), classifying an STB with a 160 GB hard disk in the

[1451] See the following BTIs presented by the United States in exhibit US-28: BTIs DEM-3358-05-1 (Germany, 11 August 2005); DEM/3971/06-1 (Germany, 13 June 2006); DEM/4638/06-1 (Germany, 24 July 2006); and BED.T.245.774 (Belgium, 23 March 2006).

[1452] French BTI FR-E4-2005-003506 (2 August 2005).

[1453] Chinese Taipei's comments on the European Communities' responses to Panel question Nos. 163 and 165.

duty-free heading 8528 12 91 with (ii) a French BTI issued in July 2007 (after the vote in the Customs Code Committee) that classifies an STB with a 160 GB hard disk in dutiable heading 8521 90 00, expressly mentioning the 2007 draft CNEN as a classification justification.[1454].

"Under an established and uniform practice"

Arguments of the parties

7.1112 The **United States** submits that the phrase "under an established and uniform practice" does *not* relate to an "advance in a rate of duty". Rather, it modifies the phrase "other charge on imports". The United States submits that "[t]he current dispute would thus not implicate the phrase 'an established and uniform practice'". The United States notes that in any event the measures at issue do in fact effect an advance in a rate of duty under an established and uniform practice since they are intended to ensure uniformity of administration of the EC-wide customs tariff.[1455] "[E]liminating divergences in classification is an ostensible purpose of CNENs, and after the CNEN was adopted, EC member States began to impose duties consistently on imports of set top boxes based on the criteria enumerated in the CNEN."[1456] According to the United States, the evidence presented in this dispute demonstrates the existence of an "established and uniform practice" since "at least some member State customs authorities did not impose duties on the set top boxes at issue"[1457] *before* the vote of the Customs Code Committee while "all BTI[s] issued after the vote provide for classification of set top boxes in the dutiable heading, consistent with the requirements contained in the CNEN"[1458] and the customs authorities of the EC member States "relied on the CNEN as a basis for their decisions to reclassify merchandise into a dutiable heading".[1459]

7.1113 According to **Chinese Taipei**, an established and uniform practice "would require that a certain classification, charge or duty is applied consistently and in the same manner to all imports of comparable goods".[1460] However, like the United States, Chinese Taipei argues that the phrase "under an established and uniform practice" does not relate to the advance "in rate of duty" but only to "or other charge on imports". The phrase "under an established and uniform practice" appears next to "other charge on imports", such that the former informs the latter. Further, there is no comma or any reference that permits the interpreter to determine that the phrase "under an established and uniform practice" also informs "a rate of duty". It argues that an advance "in a rate of duty" is "perfectly discernible, and traders may know what this duty is by simply looking into the tariff schedule". Moreover, an advance in "rate of duty" is necessarily "under an established and uniform practice" because it is understood that the duty will be levied "every time a product is imported". Consequently, it is not necessary to demonstrate a recurrence. Chinese Taipei submits that the term "other charge", in contrast, is a broad concept and may refer to a wide variety of charges, making it necessary that such other charge is levied under an "established and uniform practice" in order to

[1454]Compare French BTI FR-E4-2005-003506 (2 August 2005), submitted by the United States in Exhibit US-120 with French BTI FR-E4-2007-002839R1 (France, 11 July 2007), submitted by Chinese Taipei in Exhibit TPKM-61. Exhibit TPKM-61 shows that BTI FR-E4-2007-002839R1 expressly mentions as classification justification a "Décision du Comité des douanes lors de la 420ème session des 18, 19 et 20 avril 2007".

[1455] United States' responses to Panel question Nos. 162, 163 and 165.

[1456] United States' first written submission, para. 118 (Exhibit US-28).

[1457] United States' response to Panel question No. 160, para. 83.

[1458] United States' response to Panel question No. 165, para. 89.

[1459] United States' response to Panel question No. 160, para. 83.

[1460] Chinese Taipei's response to Panel question No. 162, para. 136.

ascertain the nature of that charge.[1461] Finally, it argues that, "from a grammatical viewpoint", "under an established and uniform practice" neither relates to "measure of general application" (the words "under an established and uniform practice" would have to be placed after "any contracting party"), nor does it indicate the required level of enforcement, since it would then have been placed after "enforced".[1462]

7.1114 The **European Communities** argues that it is "evident" from reading Article X:2 of the GATT 1994 that the phrase "an established and uniform practice" cannot "be divorced" from the text "advance in a rate of duty". According to the European Communities, the measure cannot be considered as only qualifying and pertaining to "other charge on imports". The European Communities argues that the phrase "effecting an advance in a rate of duty or other charge on imports under an established and uniform practice" has to be read *as a whole*. According to the European Communities, "the word 'other' in this phrase confirms the understanding that both 'advance in a rate of duty' and 'charge on imports' are subcategories of one larger category 'charges on imports under an established and uniform practice'".[1463] The European Communities adds that the statements of the United States and Chinese Taipei with regard to the elimination of divergences in classification through CNEN "naturally describe a situation that can only exist with respect to existing CNENs, i.e. CNENs duly adopted by the EC Commission". The European Communities considers that "[a]s such, these statements cannot be used in support of the complainants' arguments in the present case".[1464] In addition, the European Communities argues that the existence of an "established and uniform practice" cannot be evidenced essentially by two individual instances of application (by France and the Czech Republic) of that measure out of 27 EC member States.[1465] The European Communities submits that "[b]y asking the Panel to rely on the French and Czech BTIs as evidence of an enforcement of an allegedly existing Community-wide measure, the United States and Chinese Taipei are effectively asking the Panel to replace the missing evidence by a mere assumption that the remaining EC Member States did the same and for the same alleged reasons". The European Communities argues that the Panel cannot make such an "assumption".[1466]

Consideration by the Panel

7.1115 We now turn to consider whether the phrase "under an established and uniform practice" relates to an "advance in rate of duty". If we find this to be the case, we will consider the meaning of the phrase "under an established and uniform practice" and subsequently, whether such requirement is met.

7.1116 We agree with the European Communities that the phrase "under an established and uniform practice" relates to an "advance in a rate of duty". In our view, the phrase "under an established and uniform practice" qualifies the term "advance", which relates to both "rate of duty", and "or other charge on imports". We are persuaded that the term "or", as used in the phrase "advance in a rate of duty *or* other charge on imports" indicates that "rate of duty" and "other charge" are subcategories of the broader category of "charge on imports", which encompasses both "dut[ies]" and "other charge[s]". This interrelation between "rate of duty" and "other charge" – both subcategories of

[1461] Chinese Taipei's comments on the European Communities' response to Panel question No. 160, paras. 47-48.
[1462] Chinese Taipei's responses to Panel question Nos. 162-163.
[1463] European Communities' comments on United States' and Chinese Taipei's responses to Panel question No. 162.
[1464] European Communities' response to Panel question No. 163, para. 178.
[1465] European Communities' response to Panel question No. 163 (paras. 182-184) and No. 165 (paras. 189-195).
[1466] European Communities' response to Panel question No. 165, para. 195.

"charges on imports" - support the view that the phrase "under an established and uniform practice" must relate to both "rate of duty" and "other charge" and that it should not be read to refer only to "other charge" only. Accordingly, we conclude that the "advance in a rate of duty" must be "under an established and uniform practice".

7.1117 We now turn to the meaning of the terms in the phrase "under an established and uniform practice". In *Japan – Alcoholic Beverages II*, the Appellate Body interpreted the term "practice" in the context of the reference to "subsequent practice" under Article 31.3(b) of the Vienna Convention. In particular, the Appellate Body stated that "practice" entails the following features: "a 'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernible pattern...".[1467] In *EC – Selected Customs Matters*, the Panel considered that the same definition could be applied to explain the term "practice" in Article X:3(b) of the GATT 1994. We see no reason to depart from this approach and give a different meaning to the term "practice" in Article X:2 of the GATT 1994.[1468] Accordingly, we will apply the definition of "practice" provided by the Appellate Body in *Japan – Alcoholic Beverages II*.

7.1118 When analysing the term "uniform" in the context of the obligation of "uniform" administration in Article X:3(a) of the GATT 1994, the Panel in *European Communities - Selected Customs Matters*, concluded that:

> "[T]he dictionary defines the term 'uniform' as 'of one unchanging form, character, or kind; that is or stays the same in different places or circumstances, or at different times'. This definition, which has been relied upon by both the United States and the European Communities and was supported by a number of third parties to this dispute, indicates, that the term 'uniform' requires, *inter alia*, geographic uniformity."[1469]

7.1119 In line with these considerations, we find that "uniform practice", in its context, refers to the similar application of a measure in the customs territory of a Member. Accordingly, "uniform practice" means that the customs authorities of the EC member States apply the measures at issue similarly and consistently throughout the customs territory of the European Communities.

7.1120 In addition, we note that Article X.2 requires that such "practice" must also be "established". The ordinary meaning of "established" is "[i]nstitute[d] or ordain[ed] permanently by enactment or agreement" or "set up on a permanent or secure basis".[1470] Accordingly, "established" entails an element of duration. Hence, under Article X:2, measures must be of a type that effect an advance in a rate of duty under an established and uniform practice, which means that the advance in a rate of duty must be applied ("practice") in the whole customs territory ("uniform") and its application should be on a secure basis ("established").

7.1121 With the above understanding in mind, we will now analyse whether the CNEN amendments at issue effect an advance in a rate of duty "under an established and uniform practice". We begin by referring once more[1471] to the explanations of the European Communities that the CNENs "constitute an important means of ensuring the uniform application of the Common Customs Tariff by the customs authorities of the Member States"; that they are "a valid aid to the interpretation of the tariff";

[1467] Appellate Body Report on *Japan – Alcoholic Beverages II*, DSR 1996:I, p. 106.
[1468] Panel Report on *EC - Selected Customs Matters*, fn. 898.
[1469] Panel Report on *European Communities - Selected Customs Matters*, para. 7.123.
[1470] The *Shorter Oxford Dictionary* (2002), p. 860.
[1471] See para. 7.1028 above.

that the "CNEN reflect a Commission's view on how the CN should be interpreted and applied with respect to a certain product or a category of product at issue"; that they are "guidance"[1472]; and that the EC member States "consult" the CNEN in assessing the classification at importation.[1473] In consequence, we understand that the essence of the CNEN is to *inform* the customs authorities of the EC member States about the coverage of particular CN codes in order to ensure uniform tariff treatment throughout the customs territory of the European Communities. In the present dispute, the measures at issue inform the customs authorities of the EC member States about the coverage of CN code 8528 12 91 to ensure a Community-wide, uniform application of the Common Customs Tariff, regardless of the point of entry of the goods in the EC customs territory ("uniform"). In addition, the measures at issue are to be applied *every time* a set top box with a WLAN-, ISDN- or Ethernet connection or with a recording or reproduction device – such as, for example, a hard disk or a DVD drive – is imported into the customs territory of the European Communities ("established").

7.1122 Finally, we address the European Communities' argument that the two complainants have presented insufficient evidence to establish that the CNEN amendment effects an advance in rate of duty under an established and uniform practice. More particularly, the European Communities argues that the existence of an "established and uniform practice" cannot be evidenced essentially by two individual instances of application (by France and the Czech Republic) of that measure out of 27 EC member States.[1474] We observe that the BTIs were submitted as evidence of enforcement prior to publication rather than as evidence of an established and uniform practice. The established and uniform practice arises out of the nature and purpose of CNENs rather than any specific evidence of particular classification practice of EC member States provided by the BTIs. Accordingly, and similarly to the approach we took when considering the relevance of the BTIs to determine whether the CNEN amendments effect and advance in rate of duty, we reject this argument.[1475]

7.1123 In this section, we first defined the meaning of the terms "effecting an advance in a rate of duty". Second, we considered whether the CNEN amendments at issue effect an "advance in rate of duty". We concluded in the affirmative. Third, we considered whether the requirement of an "established and uniform practice" applies in this dispute. We concluded that it does. Fourth, we defined the meaning of "an established and uniform practice" and concluded that the CNEN amendments at issue effect an advance in rate of duty "under an established and uniform practice". We now consider whether the CNEN amendments were "enforced" before they were "officially published".

(iv) Whether the draft CNEN were enforced before official publication

Arguments of the parties

7.1124 The **United States** argues that the European Communities imposed duties on imports of STBCs using the reasoning contained in the measures at issue before the CNEN was officially published in the EU Official Journal on 7 May 2008.[1476] The United States claims that the BTIs before the Panel "support the conclusion" that EC member States relied on the CNEN in their classification decisions before the official publication of the CNEN amendment.[1477] More

[1472] See para. 7.1027 above.
[1473] European Communities' response to Panel question No. 23, para. 103.
[1474] See para. 7.1114 above.
[1475] See para. 7.1107 above.
[1476] United States' first written submission, para. 117; United States' second written submission, para. 122.
[1477] United States' second written submission, para. 122.

particularly, the United States points out that "five BTIs submitted as evidence to the Panel were issued between the vote and official publication classifying STBCs in the dutiable heading, and that four of the five BTI refer to the CNEN as a "justification" for the classification".[1478] The United States submits that "it is significant that the EC has offered no BTI issued by any member State reaching the opposite conclusion."[1479] **Chinese Taipei** argues that "[b]efore the official publication in May 2008 took place, several EC member States started to apply the adopted CNEN". It points out that the enforcement of the CNEN amendments by the EC member States prior to their official publication is consistent with the fact that the measures at issue were made effective upon their vote by the Customs Code Committee.[1480] Chinese Taipei submits that the evidence submitted by the United States and itself shows that customs authorities applied the CNEN amendment before the amendment to the CNEN was officially published.[1481] Chinese Taipei points out that the measures at issue were indeed "enforced" since the EC customs authorities took "*actual* decisions in specific cases compelling the observance with the measure, e.g., levying higher duties, withdrawing contrary BTIs or issuing BTIs consistent with the criteria laid down in the measure".[1482]

7.1125 The United States submitted 15 BTIs, i.e. BTIs (1) to (15) below.[1483] Chinese Taipei submitted six BTIs, five of which were also presented by the United States, i.e. numbers (5); (6); (7); (14) and (15).[1484] Chinese Taipei presented an additional BTI (16). These 16 BTIs are:

1. DEM-3358-05-1 (Germany, 11 August 2005) – 8521 90 00; [14 per cent duty]
2. BED.T.245.774 (Belgium, 23 March 2006) – 8528 12 20; [14 per cent duty]
3. DEM/3971/06-1 (Germany, 13 June 2006) – 8521 90 00; [13.9 per cent duty]
4. DEM/4638/06-1 (Germany, 24 July 2006) – 8521 90 00; [13.9 per cent duty]
5. FR-E4-2007-002839R1 (France, 11 July 2007) – 8521 90 00; [13.9 per cent duty]
6. FR-E4-2007-001251 (France, 11 July 2007) – 8521 90 00; [13.9 per cent duty]
7. FR-E4-2007-00261 (France, 11 July 2007) – 8521 90 00; [13.9 per cent duty]
8. BED.T. 248.255 (Belgium, 23 January 2008) – 8521 90 00; [13.9 per cent duty]
9. CZ05-0187-2008 (Czech Republic, 23 April 2008) – 8521 90 00; [13.9 per cent duty]
10. NLRTD-2008-000713 (Netherlands, 20 May 2008) – 8528 71 90; [14 per cent duty]
11. NLRTD-2008-000714 (Netherlands, 20 May 2008) – 8528 71 90; [14 per cent duty]

[1478] United States' second written submission, fn. 269; United States' second written submission, para. 124.
[1479] United States' response to Panel question No. 166, para. 90.
[1480] Chinese Taipei's first written submission, paras. 470-473. The complainants argue in their Article X:1 claim that the BTIs prove that the draft CNEN were "made effective" upon their vote in the Customs Code Committee, see paragraph 7.1064 above.
[1481] Chinese Taipei's second written submission, paras. 283-284.
[1482] Chinese Taipei's response to Panel question No. 154, paras. 114-115 (emphasis added).
[1483] The BTIs 1-13 were presented as Exhibit US-28 and the BTIs 14-15 were presented as Exhibit US-120.
[1484] Chinese Taipei's first written submission, para. 472, fn. 229 (Exhibits TPKM-60 and 61).

12. BGBG/2008/000072 (Bulgaria, 26 May 2008) – 8528 71 90; [14 per cent duty]

13. CZ05-0478-2008 (Czech Republic, 10 June 2008) – 8528 71 90; [14 per cent duty]

14. FR-E4-2005-003506 (France, 2 August 2005) - 8528 12 91; [0 per cent duty]

15. GB 114068108 (United Kingdom, 8 April 2005) – 8528 12 91; [0 per cent duty]

16. BED.T.235.330 (Belgium, 4 March 2004) – 8528 12 91; [0 per cent duty].

7.1126 The United States and Chinese Taipei argue that these BTIs establish that at least some EC member States enforced the CNEN amendments at issue before their official publication on 7 May 2008. More particularly, they point out that some of those BTIs issued before the official publication of the CNEN amendments in May 2008 expressly refer to the measures at issue as part of the classification justification to classify certain set top box outside the duty-free code. This is the case for BTIs 5; 6; 7 and 9.[1485] In addition, the two complainants argue that the BTIs preceding the vote of the CNEN amendments at issue in the Customs Code Committee demonstrate that there was no uniformity when classifying STBCs with a hard disk. Germany and Belgium, for example, classified STBCs with a hard disk in a different dutiable tariff line, while France and the United Kingdom classified such STBCs in a duty-free tariff line.[1486]

7.1127 Similarly to its arguments regarding "made effective" under Article X:1 of the GATT 1994, the **European Communities** argues that for a measure to be "enforced", it must first have been formally adopted by the Commission and published in the EU Official Journal.[1487] It argues that the measures at issue are merely "preparatory acts" that were formally adopted only in April 2008, a few days before the official publication of the CNEN amendment in the Official Journal on 7 May 2008. The European Communities contests the relevance of these BTIs in establishing the alleged Article X:2 violation. The European Communities submits that it cannot prevent measures by individual EC member States and questions whether or not the complainants also target the individual measures (BTIs) by the EC member States.[1488] In its view, the BTIs submitted by the complainants further confirm that the measures are measures taken by individual EC member States. Finally, the European Communities contends that the specific circumstances of the case might, at most, be considered as evidence of the way in which the European Communities "administered" in a particular instance measures of the kind described in Article X:1 in the sense of Article X:3 of the GATT 1994, but submits that neither the United States nor Chinese Taipei has brought such a claim.[1489]

Consideration by the Panel

7.1128 The final question before the Panel is to determine whether the CNEN amendments at issue – which it already considers to be of general application and effecting an advance in a rate of duty under an established and uniform practice – were *enforced before* their official publication. It is undisputed that the publication of the CNEN amendments in the EU Official Journal constitutes such official publication. Accordingly, we will consider whether the CNEN amendments were enforced *before* their official publication in the EU Official Journal on 7 May 2008.

[1485] United States' second written submission, fn. 269.

[1486] Compare BTIs 1, 3 and 4 classifying set top boxes with a hard disk in CN code 8521 90 00, with BTI 2 classifying a set top box in 8528 12 20 and BTIs 14-15 classifying a set top box in 8528 12 91.

[1487] See para. 7.1041 above.

[1488] European Communities' second written submission, para. 97.

[1489] European Communities' first written submission, paras. 321-327; European Communities' second oral statement, paras. 95-96.

7.1129 One of the meanings of "enforced" is "carr[ied] out effectively".[1490] In our view, proof that a measure has been applied would establish that it was enforced. This is supported by both the Spanish and French versions of Article X:2. The Spanish version expressly mentions "aplicada", which means "applied". The French version mentions "mise en vigueur". "En vigueur" means "en application" so that "mise en vigueur" means "put into application".[1491] This contrasts with "made effective" under Article X:1 which does not necessarily require an actual application of the laws, regulations, judicial decisions and administrative rulings of general application.

7.1130 Accordingly, we consider whether the European Communities indeed applied the CNEN amendments at issue before 7 May 2008. We will assess each CNEN amendment in turn. As the Appellate Body explained in *US – Wool Shirts and Blouses*, the general rule of the burden of proof is that the burden rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.[1492] Hence, it is for the two complainants to make their case. The complainants submitted BTIs with a view to proving this aspect of their claims.

7.1131 At the outset, we wish to point out that we see no basis in Article X:2 to require any particular threshold in terms of the number of instances of enforcement that must be demonstrated in order to establish that a relevant measure has been enforced prior to its official publication within the meaning of Article X:2. In our view, even a single instance of enforcement of a measure before its official publication could amount to a violation of Article X:2, depending on the facts of the case. To find otherwise, we believe, would undermine the due process objective embodied in Article X:2. We also recall our consideration that the "uniform and established practice" relates to the "advance".[1493] It does not qualify a required level of enforcement.

7.1132 We start with the October 2006 CNEN amendment. This is the CNEN amendment that excludes from duty-free CN code 8528 12 91 those STBCs with WLAN-, ISDN- or Ethernet connectivity. In reviewing the submitted BTIs and in considering whether they establish that this CNEN amendment was enforced before its official publication on 7 May 2008, we noted that they all concern STBCs with a hard disk or a DVD drive. None relates to a classification decision on STBCs with WLAN-, ISDN- or Ethernet- connectivity. As such, we have no evidence before us establishing that the October 2006 CNEN amendment was *enforced* by the Customs authorities of the EC member States before 7 May 2008. Accordingly, we conclude that the United States and Chinese Taipei have failed to prove that the October 2006 CNEN amendment was enforced before its official publication in the EU Official Journal as CNEN 2008/C 112/03 on 7 May 2008. Thus we conclude that the two complainants have not made out their claim that the October 2006 CNEN amendment is inconsistent with the European Communities' obligations under X:2 of the GATT 1994.

7.1133 We now turn to the April 2007 CNEN amendment. This is the CNEN amendment that excludes from duty-free CN code 8528 12 91 those STBCs with a recording or reproducing device such as, for example, a hard disk or a DVD drive. We have already established that all the BTIs submitted by the two complainants relate to STBCs with a hard disk or a DVD-drive. We note, however, that not all BTIs are relevant to this case. We can discard BTIs 10, 11, 12 and 13 since they were all issued after the date of official publication in the EU Official Journal, i.e. after 7 May 2008. Accordingly, they cannot serve to establish that the CNEN amendment in question was enforced before 7 May 2008. We can also discard BTIs 1, 2, 3, 4, 14, 15 and 16, because they were all issued before the CNEN amendment was voted on in the Customs Code Committee, i.e. before April 2007.

[1490] Webster's New Encyclopaedia Dictionary (1993), p. 332.
[1491] Le nouveau Petit Robert (2000), p. 2676.
[1492] Appellate Body Report on *US – Wool Shirts and Blouses*, DSR 1997:I, page 335.
[1493] See para. 7.1116 above.

Accordingly, these BTIs are equally irrelevant in establishing that the CNEN amendment in question was enforced prior to official publication. This leaves us with BTIs 5, 6, 7, 8 and 9 which could be relevant since they were all issued *after* the vote in the Customs Code Committee but *before* the official publication of the CNEN amendment in the EU Official Journal. We note that BTIs 5, 6, 7, and 9 seem particularly relevant since they expressly refer to this CNEN amendment as a "classification justification". More particularly, the text of French BTIs 5, 6, and 7 expressly refers to the topic "classification justification" to the Customs Code Committee during the 420th meeting held on 18, 19 and 20 April 2007. And, Czech BTI 9 mentions under "classification justification" that "[t]he product cannot be included in TARIC code 8528 71 13 00 because it is equipped with a hard disk".[1494] In other words, the BTI excludes the set top box with a hard disk from duty-free heading 8528 71 13 because of the presence of a hard disk to classify it in dutiable heading 8521 90 00. This is exactly what the CNEN amendment requires. Finally, there is BTI 8. BTI 8 shows that a set top box with a hard disk was classified in a dutiable heading. However, we find no explicit reference to the CNEN amendment in BTI 8; therefore, although in line with the measure at issue, we will not draw any conclusions with respect to BTI 8.

7.1134 We find that the explicit reference to this CNEN amendment in BTIs 5, 6, 7 and 9 clearly demonstrates that the customs authorities were well aware of the measure at issue. In addition, the fact that the measure at issue was explicitly mentioned as a "classification justification" demonstrates that at least those EC member States issuing those BTIs applied this measure at issue *before* the official publication of the amendment to the CNEN on 7 May 2008. As a consequence, we find that those four BTIs illustrate that the 2007 CNEN amendment at issue was enforced by EC member States to determine the tariff classification prior to the official publication of the CNEN amendment in the EU Official Journal. Consequently, we find that the United States and Chinese Taipei have established that the April 2007 CNEN amendment was enforced by at least some EC member States before its official publication in the EU Official Journal as CNEN 2008/C 112/03 on 7 May 2008. The United States and Chinese Taipei have therefore established that the European Communities has acted inconsistently with Article X:2 in respect of the April 2007 CNEN amendment.

7.1135 In sum, we have determined that the United States and Chinese Taipei did not establish that the European Communities enforced the October 2006 CNEN amendment before its official publication as CNEN 2008/C 112/03 in the EU Official Journal on 7 May 2008. On the other hand, we have found that the United States and Chinese Taipei have provided sufficient evidence to establish that the April 2007 CNEN amendment was enforced before its official publication as CNEN 2008/C 112/03 in the EU Official Journal on 7 May 2008, in violation of Article X:2 of the GATT 1994. Accordingly, we conclude that the European Communities has acted inconsistently with Article X:2 of the GATT 1994 with respect to the April 2007 CNEN amendment.

G. MULTIFUNCTION DIGITAL MACHINES (MFMS)

7.1136 In this section of the Reports the Panel will consider the **complainants**' claims that certain EC measures are inconsistent with Articles II:1(a) and (b) of the GATT 1994 because they result in less favourable tariff treatment to imports of certain multifunction digital machines ("MFMs") than that provided for these products under the EC Schedule and because the tariff treatment provided is in excess of that provided for in the EC Schedule. In the joint Panel request, the complainants explain that MFMs are machines which perform two or more of the functions of printing, copying, or facsimile transmission, capable of connecting to an automatic data-processing machine or to a

[1494] See Exhibit US- 28: the Original French BTIs mention "Décision du Comité des douanes lors de la 420ème session des 18, 19 et 20 avril 2007". The complainants provided a translation of the Czech BTI that was not contested by the European Communities.

network (including devices commercially known as MFPs (multifunctional printers), other "input or output units" of "automatic data-processing machines" (ADP), and facsimile machines).[1495]

7.1137 Throughout the course of the proceedings the complainants have divided MFMs into two sub-categories: i) ADP MFMs, which are capable of connecting to an ADP machine (e.g., a computer) or computer network; and ii) Non-ADP MFMs, which are not connectable to an ADP machine, but connect instead to a telephone line, such that they necessarily have a facsimile transmission function.[1496] In considering the substance of the complainants' claims with respect to MFMs in subsections VII.G.3 and VII.G.4 below, we will likewise divide them into these two subcategories of ADP MFMs and non-ADP MFMs.

7.1138 The **complainants** submit that when the ITA was concluded, MFMs entering the European Communities were classified in the duty-free HS1996 subheadings 8471 60 or 8517 21. They claim, however, that over a period of time beginning in 1999, the European Communities started to adopt measures based on "arbitrary classification criteria", which in turn resulted in the reclassification of MFMs under *dutiable* headings (i.e., as "photocopying apparatus" under HS1996 subheading 9009 12, which carries a 6 per cent duty). The complainants claim that this alleged reclassification "eroded", or "emptied", the ITA-based, duty-free concessions in the EC Schedule for these products, ultimately leading to the imposition of 6 per cent duties on most MFMs imported into the European Communities.[1497] It is the levying of this 6 per cent *ad valorem* duty to products which they believe should be afforded duty-free treatment that is the focus of the complainant's claims.

7.1139 The **European Communities** argues, however, that the products at issue do not fall exclusively within the tariff headings that embody the European Communities' duty-free concessions. Rather, they could also, *prima facie,* be properly classified as falling within a separate tariff heading that embodies a dutiable concession, which heading is currently being applied by EC customs authorities. According to the European Communities, in such a situation where a product may prima facie fall within more than one tariff heading, proper application of the rules of the HS will result in some of the products properly falling within the dutiable concession. Therefore, the European Communities submits that the dutiable tariff treatment of certain MFMs resulting from the measures at issue simply reflects a proper interpretation of the scope of these concomitantly applicable duty-free and dutiable EC concessions rather than any inconsistency with Article II. Consequently, the European Communities asks the Panel to reject the complainants' claims.

7.1140 The task before the **Panel,** therefore, is to determine: (a) the scope of the duty-free tariff concession in the EC Schedule; (b) whether the products at issue fall within the scope of the duty-free tariff concession; (c) whether the challenged measures result in the imposition of duties on the products at issue in excess of those provided for in the EC Schedule; and (d) whether the measures at issue result in less favourable treatment of the products at issue than that provided for in the EC Schedule.

[1495] Joint Panel Request, WT/DS735/8, 376/8, 377/6, fn. 15.

[1496] We use these terms with a view to aid our analysis. Our use of these terms is without prejudice to the positions of the parties, as well as our own, on any further or specific characteristics these products may contain, as discussed and considered below.

[1497] United States' first written submission, paras. 1 and 75; Japan's first written submission, paras. 52-56; Chinese Taipei's first written submission, paras. 493-495. The United States claims that evidence shows such "reclassification" by EC customs authorities from duty-free to dutiable headings (United States' second written submission, para. 103 and its fn. 219; comparing some BTIs that the United States claims classified MFMs in duty-free subheadings *prior to* and *during* ITA negotiations (Exhibit US-106) with various other BTIs that the United States claims classified MFMs in dutiable subheadings *after* the measures at issue came into place (Exhibit US-62)).

7.1141 We note that the approach we have outlined requires the Panel first to identify the measures and the products at issue. This is particularly important in this case as the European Communities has raised several points calling into question whether certain measures are within the Panel's terms of reference. Therefore, before proceeding to the substance of the complainants' claims, we first turn to whether particular aspects of those claims are properly before the Panel.

1. Preliminary issues

7.1142 During these proceedings, the European Communities raised various issues related to the jurisdiction of this Panel with respect to the MFM claims. First, the European Communities argued that several measures identified by the complainants' in their joint Panel request are effectively no longer applicable in practice and are therefore irrelevant to the Panel's analysis. Second, the European Communities argued that one of the measures challenged was not legally binding under EC law. Third, the European Communities has alleged that the complainants have added during the course of the proceedings new measures and new claims that were not included in the joint Panel request and are thus outside the Panel's terms of reference.

7.1143 We will address each of these issues in turn. We note that the Appellate Body has explained that, taken together, the identification of the specific measures at issue and the legal basis of the complaint comprise the "matter referred to the DSB", which forms the basis for a panel's terms of reference under Article 7.1 DSU.[1498]

7.1144 One of the essential purposes of the terms of reference is to establish the jurisdiction of the panel by defining the precise claims at issue in the dispute.[1499] The Appellate Body has also observed that the vesting of jurisdiction in a panel is a fundamental prerequisite for lawful panel proceedings.[1500] Therefore, we first must address these issues before we can proceed to address the substance of the complainants' claims.

7.1145 As the joint Panel request serves as the basis for the terms of reference of this Panel, we will start our analysis by first setting forth the relevant text of the joint Panel request.

(a) The measures at issue identified in the joint Panel request:

7.1146 In their joint Panel request, the **complainants** identified the following as the EC measures at issue in this dispute with respect to their claims of tariff treatment of MFMs by the European Communities that is inconsistent with Articles II:1(a) and II:1(b) of the GATT 1994:

- Commission Regulation (EC) No. 517/1999[1501];

- Report of the Conclusions of the 360th meeting of the Customs Code Committee (the "2005 Statement")[1502];

- Commission Regulation (EC) No. 400/2006[1503];

[1498] Appellate Body Report on *Guatemala – Cement I*, paras. 69-76.
[1499] Appellate Body Report on *Brazil – Desiccated Coconut*, DSR 1997:I, p. 186.
[1500] Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36.
[1501] Exhibits US-59; JPN-4; TPKM-35.
[1502] Exhibits US-60; JPN-6; TPKM-32.
[1503] Exhibits US-61; JPN-5; TPKM-36.

- Council Regulation (EEC) No. 2658/87, as amended (the "CN2007")[1504]; and

- Any amendments or extensions and any related or implementing measures.

7.1147 In particular the joint Panel request states that "Customs authorities of EC member States impose duties on MFMs" through various measures listed therein. Among these measures the "Council Regulation (EEC) No. 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, including all annexes thereto, as amended (including amendments adopted pursuant to Commission Regulation No. 1214/2007 of 20 September 2007)" is indicated.[1505]

7.1148 Next, the joint Panel request explains that the modifications to the EC Schedule that were made, "to reflect the commitments made under the ITA" included "the concessions for '[f]acsimile machines', as contained in HS 8517 21 00 and 'input or output units' of 'automatic data-processing machines', as in HS category 8471 60. The bound duty rate for both products is zero."

7.1149 Additionally, the joint Panel request alleges that the Commission Regulation No. 517/1999 and 400/2006 subject "certain MFMs" to "a duty rate of 6 per cent" by classifying them as "indirect process electrostatic photocopiers" and "photocopying apparatus", respectively. The joint Panel request also asserts that the 2005 Statement provides for "multifunctional devices" having a certain copy speed to be classified in the 6 per cent dutiable HS heading 90.09.

7.1150 The joint Panel request also claims that Council Regulation No. 2658/87, as amended (including the 2006 amendment which promulgated the CN2007), with the creation of three specific CN subcategories, is inconsistent with the European Communities' concessions. In particular, the joint Panel request alleges that:

> "On 31 October 2006, the EC amended Council Regulation (EEC) No. 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, creating CN 8443 31 10 ('[m]achines performing the functions of copying and facsimile transmission, whether or not with a printing function, with a copying speed not exceeding 12 monochrome pages per minute'), CN 8443 31 91 ('[o]ther; [m]achines performing a copying function by scanning the original and printing the copies by means of an electrostatic engine') and CN 8443 31 99 ('[o]ther'). By virtue of these subcategories, MFMs with copying speeds of more than 12 monochrome pages per minute and with an electrostatic engine are classified under CN 8443 31 91. The duty rate for CN 8443 31 91 is 6 per cent."[1506]

7.1151 Finally, the joint Panel request avers that the complainants are also raising claims against any amendments or extensions of the specifically listed measures as well as any related or implementing measures thereof.

[1504] As amended, *inter alia*, by Commission Regulation No. 1549/2006, which introduced the CN2007 (Exhibits JPN-2;TPKM-34). For a detailed explanation of the CN, see Section VII.B.4.(a), above.

[1505] Joint Panel Request, WT/DS375/8, 376/8, 377/6, page 5 and fn. 16 (original footnote omitted).

[1506] Joint Panel Request, WT/DS375/8, 376/8, 377/6, page 6 (original footnote omitted).

(b) Are Commission Regulation Nos. 517/1999 and 400/2006 and the 2005 Statement outside the Panel's jurisdiction because they are no longer effectively applicable?

(i) Arguments of the parties

7.1152 The **European Communities** argues that Commission Regulation Nos. 517/1999 and 400/2006 are both based on CN code 9009 12 00, which was permanently removed as a consequence of the implementation by the European Communities of the HS2007, as reflected in the CN2007 (and subsequent versions therein). It further notes that in the HS2007, heading 9009 was replaced by three entirely new HS subheadings, namely subheadings 8443 31, 8443 32 and 8443 39. The European Communities therefore claims that when the CN2007 entered into force on 1 January 2007, Commission Regulation Nos. 517/1999 and 400/2006, although still "formally in force", became "effectively inapplicable in practice" from that date and remain so as of the date of the establishment of this Panel. The European Communities submits that, due to the difference in language and structure between the old CN [HS] code 9009 and the new CN [HS] code 8443, it is very difficult, and even "pointless", to apply these two classification regulations today by "analogy". The European Communities also states that, as a consequence of these changes, it is in the process of formally repealing Commission Regulation Nos. 517/1999 and 400/2006, as well as all other Regulations providing for the classification of certain products under HS heading 9009. The European Communities further states that it intends to do so by the beginning of October 2009, at the latest.[1507]

7.1153 Finally, with respect to the 2005 Statement, the European Communities argues that the 2005 Statement has in any case been superseded by the advent of the 12 ppm copy speed criterion under the CN2007 and is therefore not a measure before the Panel since it is no longer applicable.[1508]

7.1154 The **United States** and **Japan** (with respect to Commission Regulation Nos. 517/1999 and 400/2006 as well as the 2005 Statement) and **Chinese Taipei** (only with respect to Commission Regulation Nos. 517/1999 and 400/2006)[1509] respond that these measures are still valid and in effect, and still form part of the EC legal system, at least so long as they have not been expressly and formally withdrawn, annulled, revoked or amended.[1510]

[1507] European Communities' response to Panel question No. 110, para. 20.

[1508] European Communities' second written submission, para. 160.

[1509] With respect to the 2005 Statement, Chinese Taipei considers that it "has effectively been superseded" by the CN2007 (and subsequent versions therein) due to incorporation of the 12 ppm copy speed criterion in that CN. (Chinese Taipei's response to Panel question No. 24).

[1510] Complainants' responses to Panel question Nos. 18 and 24; United States' second written submission, paras. 5 and 103; United States' second opening statement, para. 7; Japan's second written submission, para. 34; Chinese Taipei's second written submission, paras. 44, 46-51, 56 and 291-292. The United States further notes that the European Communities itself "concedes" that Commission Regulation Nos. 517/1999 and 400/2006 remain "formally in force" and that the 2005 Statement has "some interpretative value" (United States' second written submission, para. 105 (citing the European Communities' response to Panel question No. 24)). Chinese Taipei further submits that under EC law, there is no "implied annulment" or "annulment by analogy" (Chinese Taipei's responses to Panel question Nos. 18 and 24 and second written submission, para. 48). Chinese Taipei refers to the European Court of Justice in *Cabletron* (C-463/98) as an example of an *express annulment* of classification regulations (Chinese Taipei's second written submission, para. 48, fn. 35). Chinese Taipei also refers to Commission Regulation No. 705/2005 (Exhibits TPKM-83; EC-102) as an example of an *express amendment* and *repealing* of classification regulations due to changes in the CN that resulted *inter alia* in the elimination of certain CN codes (Chinese Taipei's second written submission, paras. 49-50). Japan, in the alternative, argues that, if these three measures are indeed "no longer in effect as a legal matter", then they at least serve to "help explain the current version of the measure at issue". (Japan's response to Panel question No. 18).

7.1155 The **complainants** also submit that evidence, in the form of a BTI from France, shows contrary to the European Communities' argument that these measures became "effectively inapplicable" with the advent of the new CN2007, that in fact EC customs authorities relied on these measures even after the CN2007 had entered into force.[1511] More generally, Japan and Chinese Taipei further claim that EC national authorities today can still make their tariff classifications based on such measures by simply using a "table of equivalence" or "conversion table" between the old CN and the current one, which allows these authorities to conclude, for example, that an apparatus previously classified under the old CN code 9009 12 00 would now fall under the new CN code 8443.[1512]

7.1156 The **European Communities** responds that the "conversion table", mentioned by Japan and Chinese Taipei, is not legally binding and does not amend the terms of earlier classification regulations based on a different nomenclature. Furthermore, as this table "has not been adopted by the Commission, [it] therefore, reflects exclusively the views of the Commission services responsible for customs matters".[1513] As to the French BTI that was cited by the complainants as evidence that the measures at issue are still applicable today, the European Communities explains that the reference made in this BTI to Commission Regulation No. 517/1999 served "merely as additional authority supporting the interpretation" taken by the French customs authorities.[1514]

(ii) Consideration by the Panel

7.1157 The **Panel** is faced with two questions. First, what is the factual status of Commission Regulation Nos. 517/1999 and 400/2006 and the 2005 Statement? Second, if the implementation of the CN2007 did indeed supersede and render inapplicable Commission Regulation Nos. 517/1999 and 400/2006 as well as the 2005 Statement, does this mean they can no longer be considered measures at issue with respect to the MFM claims?

7.1158 We understand the European Communities' argument in essence to be the following: The adoption of the CN2007 resulted in these three measures becoming "effectively inapplicable in practice"; therefore, the *only* measure at issue in this dispute is the *current* CN. We first note that there is no disagreement among the parties to this dispute that, at the time the Panel was established, Commission Regulation Nos. 517/1999 and 400/2006 were, as the European Communities itself puts

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[1511] More specifically, the complainants make reference to BTI FR-E4-2007-002262-R (issued by the French customs on 13 January 2007), which classified an ADP MFM in CN2007 code 8443 31 91 and cited Commission Regulation No. 517/1999 as one of the justifications for this decision (Exhibits US-62; TPKM-84). See United States' responses to Panel question Nos. 18 and 24; United States' second written submission, footnote 220 to para. 105; United States' second oral statement, para. 7; Japan's second written submission, para. 34 (referring to the United States' response to Panel question No. 18); Chinese Taipei's second written submission, para. 53, fn. 39.

[1512] Japan's and Chinese Taipei's responses to Panel question No. 24; Chinese Taipei's second written submission, paras. 52 and 53.

[1513] European Communities' second written submission, para. 156 (commenting on the complainants' responses to Panel question No. 24). In support of this view, the European Communities points to the language of the following disclaimer, contained in a document called "Conversion Tables for CN 2006-2007 and CN 2007-2006" (Exhibit EC-93):

> "*Disclaimer: these conversion tables are provided only for information and have no legal value. Only the Combined Nomenclature is binding.*"

[1514] European Communities' second written submission, para. 158 (commenting on the complainants' responses to Panel question No. 24).

it, still "formally in force" within the EC legal system.[1515] Additionally, although the European Communities has told the Panel that the measures would be repealed by October 2009, the European Communities submitted no information to the Panel confirming whether this had actually occurred.

7.1159 We note that, even if the formal repeal of the measures did occur after the Panel was established and its terms of reference had been set, it would still be within our discretion to decide how to take into account subsequent modifications or a repeal of the measures at issue.[1516] In deciding how to exercise that discretion, we take note that some past panels have proceeded to rule on repealed or expired measures if those measures still had lingering effects after the repeal[1517] or if they thought such a ruling would aid in securing a positive resolution to the dispute as required by Article 3.7 of the DSU.[1518] Other past panels have also decided to make rulings on repealed or expired measures in cases where the respondent Member had not conceded the WTO inconsistency of the repealed measure and such measure could be easily re-imposed.[1519]

7.1160 We discern no disagreement among the parties that the complainants specifically identified Commission Regulation Nos. 517/1999 and 400/2006 and the 2005 Statement in the joint Panel request. We also note that the complainants argue that the measures continue to have lingering effect as evidenced by the reliance of French customs authorities on the regulations and the use by other national customs authorities within the European Communities of a "conversion table" relating back to the pre-existing tariff headings. Furthermore, as will be discussed further below, in relation to the 2005 Statement, even if it were true that these documents are "effectively inapplicable" and have no particular legal weight within the European Communities' legal structure that does not *ipso facto* mean that they are not susceptible to challenge in WTO dispute settlement.[1520] Additionally, the complainants continue to request a finding from the Panel on these measures and are of the belief that a finding from the Panel on the consistency of these measures with the EC's obligations under the GATT 1994 would aid in securing a positive resolution of this dispute. Finally, the European Communities has not argued that the intended repeal of these measures was due to their inconsistency with the European Communities' WTO obligations nor has the European Communities conceded that they are indeed WTO-inconsistent. For all the foregoing reasons, the Panel will proceed to make findings with respect to the WTO consistency of these measures.

7.1161 As explained above, the European Communities indicated to the Panel that it intended to repeal the measures during the course of these proceedings; however, there us no evidence properly before the Panel as to whether such repeal actually took place or whether the measures continue to have legal effect. Additionally, any such repeal would have taken place after the Panel was

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[1515] We also note, as pointed out by the European Communities itself, that as recently as 2009 the European Court of Justice, in its decision in the *Kip* case, expressly "upheld the validity" of Commission Regulation No. 400/2006 (see the European Communities' second oral statement, para. 138; see also Chinese Taipei's response to Panel question No. 18 and Chinese Taipei's second written submission, para. 56). Furthermore, we consider the fact that the European Communities is "in the process of formally repealing" Commission Regulation Nos. 517/1999 and 400/2006 a further indication that these measures are indeed still "valid" and thus "formally in force".

[1516] Appellate Body Report on *EC – Bananas III* (*Article 21.5 – Ecuador II*), para. 270.

[1517] Panel Report on *US – Upland Cotton*, paras. 7.122, 7.128; upheld by Appellate Body Report on *US - Upland Cotton*, para. 274.

[1518] Panel Report on *China – Publications and Audiovisual Products*, para. 7.453.

[1519] Panel Report on *India – Additional Duties*, paras. 7.69-7.70.

[1520] See paras. 7.1164-7.1169 below.

established and its terms of reference set.[1521] Therefore, the Panel considers that it may proceed to make recommendations with respect to these measures.

(c) Is the 2005 Statement a measure that can be subject to WTO dispute settlement?

(i) Arguments of the Parties

7.1162 All complainants cite the 2005 Statement as a measure at issue.[1522] The **United States** and **Japan** argue that, through the 2005 Statement, the European Communities made explicit for the first time that output speed – pages per minute – would be the "key criterion" for determining whether or not an MFM would be subject to duties, even though copying speed had no basis in the language of the various headings at issue.[1523] The complainants submit that this page per minute criterion effectively moves MFMs with a fax function from duty-free heading 8517 (covering "[f]acsimile machines") into dutiable CN code 9009 12 00 (covering photocopying machines) and, as of HS2007, dutiable CN code 8443 31 91, both subject to a 6 per cent customs duty.[1524] Consequently, the application of this criterion results in certain MFMs being excluded from duty-free treatment. According to the United States, this constitutes a "*per se*" exclusion from duty-free treatment.[1525] Further, **Chinese Taipei** also mentions that, in addition to this new criterion applying on the Community-wide basis, some EC member States, such as Germany and the United Kingdom, have also incorporated the criterion of 12 pages per minute into their "national classification guidance".[1526]

7.1163 In response, the **European Communities** argues that the 2005 Statement was "never meant to have any legal effects".[1527] The European Communities submits that the 2005 Statement "records an opinion expressed by [the Customs Code Committee]" and that "[w]hile it may have some interpretive value, it is not a legal act under EC law".[1528]

(ii) Consideration by the Panel

7.1164 With respect to the 2005 Statement, the **Panel** understands the essence of the European Communities' argument to be as follows: The 2005 Statement "is not a legal act under EC law". Therefore, it cannot be a "measure" at issue subject to WTO challenge.[1529]

[1521] Appellate Body Report on *US – Certain EC Products*, para. 81; Appellate Body Report on *US - Upland Cotton*, para. 272; and Appellate Body Report on *EC – Bananas III* (*Article 21.5 – Ecuador II)*, para. 271.

[1522] United States' first written submission, para. 78 (Exhibit US-60); Japan's first written submission, paras. 42-43 (Exhibit JPN-6); Chinese Taipei's first written submission, para. 114 (Exhibit TPKM-32).

[1523] United States' first written submission, para. 78; Japan's first written submission, para. 57.

[1524] United States' first written submission, paras. 78 and also 79 (referring to BTIs issued in 2006 that allegedly demonstrate that EC member States classified MFMs in dutiable CN code 9009 12 00 as photocopiers on the basis of the page per minute criterion (Exhibit US-62)); Japan's first written submission, para. 44 (referring to BTIs that allegedly demonstrate that before and after 2007, EC member States classified MFMs in dutiable CN code 9009 12 00 as photocopiers on the basis of the page per minute criterion (Exhibits JPN-7 and 8)); Chinese Taipei's first written submission, para. 488.

[1525] United States' first written submission, para. 148.

[1526] Chinese Taipei's first written submission, para. 506.

[1527] European Communities' second written submission, para. 160.

[1528] European Communities' response to Panel question No. 24.

[1529] Panel Report on *China—Publications and Audiovisual Products*, 7.167-7.171 (finding that an analysis under Article 3.3 is required when a party asserts that an instrument should not be examined by a panel because it has no legal effect and that such analysis is required to ensure that a panel does not exceed its authority).

7.1165 Article 3.3 of the *DSU* allows a Member to challenge "measures taken by another Member" which it believes may be impairing benefits accruing to it directly or indirectly under the covered agreements. Prior panels have determined that, if something brought before them was not a "measure" within the meaning of Article 3.3 of the DSU, they lacked jurisdiction to hear the complaint about the measure.[1530] Previous panels have also concluded that, just as with other jurisdictional questions, a determination of whether what is brought before a panel is indeed a measure subject to WTO dispute settlement can and should be made regardless of whether it is raised by the parties to the dispute.[1531]

7.1166 The Appellate Body has clarified that "[i]n principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings." [1532] and that "acts or omissions that are so attributable are, in the usual case, the acts or omissions of the organs of the state, including those of the executive branch.[1533]"[1534]

7.1167 A determination of whether something is a "measure" "must be based on the content and substance of the instrument, and not merely on its form or nomenclature."[1535] The Appellate Body has clarified that the legal status of an instrument within the domestic legal system of a Member is not relevant for determining whether that instrument is a measure within the meaning of Article 3.3 of the DSU.[1536] Rather any acts, attributable to a Member, which set forth rules or norms that are intended to have general and prospective application are measures subject to WTO dispute settlement.[1537]

7.1168 When a Member brings a challenge to a rule or norm "as such", as is the case here, the Member must establish that it is a rule or norm which is attributable to the responding Member, its precise content, and that it has general and prospective application. Evidence to establish the required elements can be proof of the systematic application of the challenged "rule or norm".[1538] We note that we have dealt with the issue of what is required to challenge a measure "as such" in the context of our discussion of the European Communities' arguments on the CNEN. See paragraphs 7.153 - 7.160 above. We see no reason why the conclusions would be any different here.

7.1169 In view of the above, we find unpersuasive the European Communities' argument that the 2005 Statement should be excluded from the Panel's jurisdiction *solely* because it is not "legally binding" under EC domestic law. Having so found however, our analysis must not stop there. We must still determine whether the complainants have established that the 2005 Statement is attributable to the European Communities and whether it is a rule or norm of general and prospective application, such that it fits within the meaning of a "measure" which can be challenged "as such" in WTO dispute settlement pursuant to Article 3.3 of the DSU.

[1530] Panel Report on *China – Publications and Audiovisual Products*, para. 7.1694.

[1531] Panel Report on *China – Publications and Audiovisual Products*, para. 7.1658.

[1532] Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

[1533] (*footnote original*) Both specific determinations made by a Member's executive agencies and regulations issued by its executive branch can constitute acts attributable to that Member. See, for example, the Panel Report in *US – DRAMS*, where the measures referred to the panel included a USDOC determination in an administrative review as well as a regulatory provision issued by USDOC.

[1534] Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

[1535] Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, fn. 87.

[1536] Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 187. (finding that a non-binding "policy bulletin" had normative value because it provided administrative guidance and created expectations among the public and among private actors.)

[1537] Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 82.

[1538] Appellate Body Report on *US – Zeroing (EC)*, para. 198. While we note that the systematic application of the challenged rule or norm can be evidence of its general and prospective application such evidence is not necessarily required to substantiate an "as such" challenge to a particular rule or norm.

Is the 2005 Statement Attributable to the European Communities?

7.1170 We first observe that the complainants have asserted, and the European Communities has not refuted, that the 2005 Statement is a statement of the Customs Code Committee of the European Communities. We recall, in particular, that the Customs Code Committee consists of a representative from the Commission's service (who chairs it) and representatives from *all* EC member States.[1539] We further recall that:

> "... Article 8 of Regulation No. 2658/87, as amended, also provides that 'customs items' can be submitted by the Chairman of the Customs Code Committee for examination, either on its own initiative or at the request of a representative of an EC member State. Under this 'Article 8 procedure', the Customs Code Committee functions as a "discussion forum" between the Commission and the EC member States, and not as the 'Comitology Committee'. The result of such discussion is then reflected in the minutes of the meeting as an 'Article 8' topic. ..." (footnote omitted)[1540]

7.1171 The specific statement at issue resulted from a deliberation under item 3 of the agenda of the Customs Code Committee's 360th meeting, which contains "[i]tems submitted to the Committee for examination under Article 8 of the Regulation (EEC) No 2658/87".[1541] More specifically, the issue that resulted in such deliberation was included in sub-item 3.11 of that agenda ("Multifunctional digital copiers (doc. TAXUD/2072/2001)*").[1542] Among the deliberations under item 3.11, it is expressly stated that *all* EC member States "agreed" to have a "clarification" with respect to the classification of certain MFMs in a "Committee statement" to be included in Annex VII of that Customs Code Committee's meeting report.[1543] The Statement in Annex VII, again, indicates that the Customs Code Committee had "agreed" to what is stated therein.[1544]

7.1172 We note that the European Communities does not dispute that the 2005 Statement emanated from an official organ of the European Communities. Therefore, based on the foregoing, we conclude that the 2005 Statement is attributable to the European Communities.

Does the 2005 Statement set forth rules or norms of general and prospective application?

7.1173 With respect to whether the complainants have demonstrated that the 2005 Statement sets forth rules or norms of general and prospective application, we note that the complainants have provided the Panel with the precise content of the Statement and provided evidence that the application of the criteria therein led national customs authorities to classify MFMs in the dutiable tariff subheading. Additionally, Chinese Taipei pointed out that some national customs authorities incorporated the results of the statement into their own national classification guidance.[1545] We also note the opinion of the Committee seems to reflect the position of the European Communities as a whole and may therefore have "interpretative value"[1546]. We also recall that the panel in *EC - Selected Custom Matters* explained that, although the results from discussions under an "Article

[1539] See paragraph 7.47 above.
[1540] See paragraph 7.48 above.
[1541] See 2005 Statement, p. 2.
[1542] See 2005 Statement, p. 3. The other agenda item 3's subheadings were: "*Items for a first examination (fact finding)*" and "*Items for discussion*." *Id.*, at pp. 2-3.
[1543] See 2005 Statement, pp.7-8.
[1544] See 2005 Statement, p. 11.
[1545] Chinese Taipei's first written submission, para. 506.
[1546] European Communities' response to Panel question No. 24.

8 procedure", either in the form of "statements" or "opinions", are "not legally binding", the European Court of Justice has held that they nevertheless "constitute an important means of ensuring the uniform application of the common customs tariff by the authorities of the member States and, as such, can be considered as a valid aid to the interpretation of the Common Customs Tariff."[1547] Therefore, we believe that the 2005 Statement, although not "legally binding" within the European Communities' legal system, nonetheless does set forth rules or norms of general and prospective application within the European Communities.

Conclusion of the Panel

7.1174 In view of the foregoing, we conclude that the 2005 Statement is a measure within the meaning of Article 3.3 of the DSU as it is attributable to the European Communities and sets forth rules or norms of general and prospective application. Consequently, because the 2005 Statement is a measure and it is undisputed that it was specifically identified in the joint Panel request, the Panel will proceed to make findings with respect to the WTO consistency of this measure.

(d) Have the complainants added new measures and new claims that were not specified in the joint Panel request?

7.1175 The European Communities has argued that the complainants, by alleging that the European Communities has taken certain measures inconsistent with European Communities' tariff concessions embodied in codes of the CN other than in the CN codes specified in the joint Panel request, have raised new measures and new claims which are not within the Panel's terms of reference. The European Communities' arguments raise the issue of whether the complainants have complied with the obligations set forth in Article 6.2 of the DSU as to what must be contained in a request for establishment of a panel. Therefore, in this section, we will discuss the content of the obligations in Article 6.2 and whether the measures and claims which the European Communities' alleges are inadmissible are within our terms of reference.

(i) Article 6.2 of the DSU

7.1176 Article 6.2 of the DSU provides, in relevant part:

> "The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."

7.1177 In *Korea – Dairy,* the Appellate Body explained that Article 6.2 contains four distinct obligations with respect to the Panel Request:

[1547] Panel Report on *EC - Selected Customs Matters*, para. 2.40 (citing the European Court of Justice (Dittmeyer), para. 4). We find the description of the value of the 2005 Statement provided by the European Court of Justice itself is analogous to that of the Sunset Policy Bulletin of the US Department of Commerce which was challenged "as such" in several cases and found to be a measure by those panels and the Appellate Body. See Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 81; Panel Report on *US – Oil Country Tubular Goods Sunset Reviews,* para. 7.136. For example, the United States has explained that "under [US] law, the Sunset Policy Bulletin would be considered a non-binding statement, providing evidence of [the DOC's] understanding of sunset-related issues not explicitly addressed by the statute and regulations." Panel Report on *US – Corrosion-Resistant Steel Sunset Review,* para. 7.121.

> "The request must: (i) be in writing; (ii) indicate whether consultations were held; (iii) identify the specific measures at issue; and (iv) provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."[1548]

7.1178 The arguments of the European Communities in this respect concern the latter two obligations. The Appellate Body has explained that these requirements are intended to ensure that the complainant present[s] the problem clearly in the panel request.[1549] The particular importance of compliance with the two latter obligations in Article 6.2 was highlighted by the Appellate Body which has explained that together the identification of the specific measure and the legal basis of the complaint comprise the "matter referred to the DSB" which forms the basis for a panel's terms of reference under Article 7.1 of the DSU.[1550]

7.1179 The terms of reference have two essential purposes: first, to give the parties and third parties sufficient information concerning the claims at issue in the dispute to allow them an opportunity to respond to the complainant's case; and second, to establish the jurisdiction of the panel by defining the precise claims at issue in the dispute.[1551]

7.1180 Compliance with the requirements of Article 6.2 must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances.[1552] When reviewing a panel request, "it is important when examining the consistency of part of the request for establishment with Article 6.2 of the DSU, not to examine parts of this request in isolation . . . the request must be considered as a whole, and the different claims in the request for establishment must be read in their context."[1553] Additionally, a panel may consult the submissions and statement made during the course of the panel proceedings "in order to confirm the meaning of the words used in the panel request and as part of the assessment of whether the ability of the respondent to defend itself was prejudiced."[1554]

Identification of the specific measures at issue

7.1181 For purposes of compliance with Article 6.2 it is necessary for the complaining party to identify the measures at issue. Although it may be sufficient to identify a measure by its form, (i.e., by the name, number, date and place of promulgation of a law, regulation, etc. ...) this is not the only manner of identification which could serve to satisfy the obligation in Article 6.2 of the DSU. A measure may also be identified by its substance[1555], e.g. by providing a narrative description of the nature of the measure, so that what is referred to adjudication by a panel may be discerned from the panel request.[1556]

[1548] Appellate Body Report on *Korea – Dairy,* para. 120.
[1549] Appellate Body Report on *US – Continued Zeroing*, para. 160.
[1550] Appellate Body Report on *Guatemala – Cement I*, paras. 69-76; see also Appellate Body Report on *US – Carbon Steel,* paras. 125-127.
[1551] Appellate Body Report on *Brazil – Desiccated Coconut*, DSR 1997:I, p. 186.
[1552] Appellate Body Report on *Korea – Dairy*, paras. 124-127; *also* Appellate Body Report on *US - Carbon Steel,* para. 127.
[1553] Panel Report on *Mexico – Anti-dumping Measures on Rice*, para. 7.31 (*original footnote omitted*).
[1554] Appellate Body Report on *US - Carbon Steel*, para. 127.
[1555] Panel Report on *Argentina – Footwear (EC)*, para. 8.40; *also* Panel Report on *EC - Approval and Marketing of Biotech Products,* para. 7.47.
[1556] Appellate Body Report on *US – Continued Zeroing*, para. 168.

Provision of a brief summary of the legal basis of the complaint

7.1182 Article 6.2 of the DSU requires a complainant to provide a brief summary of the legal basis of its complaint. In *US – Oil Country Tubular Goods Sunset Reviews*, the Appellate Body found that the term 'legal basis' in Article 6.2 of the DSU refers to the claim made by the complaining party.[1557]

7.1183 The Appellate Body has also clarified that a claim sets forth the complainant's view that "the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement, [1558]

7.1184 Although a complainant must provide a "summary" of the legal basis of its complaint, this does not mean, however, that the complainant is required, in its request for establishment, to set out the arguments in support of a particular claim. We consider that there is a significant difference between the claims identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the arguments supporting those claims. While a claim sets forth the complainant's view that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement, arguments are what is adduced by a complaining party to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision. [1559] The arguments in support of a claim may be set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties.[1560] By contrast a party may not use its submissions to "cure" a deficient panel request.[1561]

Sufficient to present the problem clearly

7.1185 The Appellate Body has explained that the requirements in Article 6.2 to identify the specific measures at issue and the provision of a brief summary of the legal basis of the complaint "are intended to ensure that the complaining party 'present[s] the problem clearly' in its panel request."[1562]

7.1186 The "problem" is not solely the obligations in the covered agreements nor the respondent Member's measures but rather whether the respondent Member's measures comport with those obligations. Therefore, to sufficiently present the problem clearly, a complaining Member must "plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed, so that the respondent party is aware of the basis for the alleged nullification or impairment of the complaining party's benefits." [1563] As the Appellate Body has explained, "[o]nly by such connection between the measure(s) and the relevant provision(s) can a respondent "know what case it has to answer, and ... begin preparing its defence".[1564],[1565]

7.1187 This understanding is consistent with the essential purpose of the panel request which is to give the parties and third parties sufficient information concerning the claims at issue in the dispute to

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[1557] Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 162.
[1558] Appellate Body Report on *Korea – Dairy*, para. 139.
[1559] Appellate Body Report on *Korea – Dairy*, para. 139.
[1560] Appellate Body Report on *EC – Bananas III*, para. 141.
[1561] Appellate Body Report on *EC – Bananas III*, para. 143; Appellate Body Report on *United States - Carbon Steel*, para. 127.
[1562] Appellate Body Report on *US – Continued Zeroing*, para. 160.
[1563] Appellate Body Report on *US – Oil Country Tubular Goods Sunset Review*, para. 162.
[1564] (*footnote original*) Appellate Body Report on *Thailand – H-Beams*, para. 88.
[1565] Appellate Body Report on *US – Oil Country Tubular Goods Sunset Review*, para. 162; see also Appellate Body Report on *Brazil – Desiccated Coconut*, DSR 1997:I, p. 186.

allow them an opportunity to respond to the complainant's case[1566] which is concerned with the due process rights of the respondent.[1567] It is worth recalling that due process protections are "inherent in the WTO dispute settlement system"[1568] and are "fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings".[1569]

(ii) Codes of the CN other than 8443 31 91

Arguments of the parties

7.1188 The **European Communities** argues that it currently classifies *all* MFMs (as defined in the joint Panel request) under CN2007 code 8443 31, which contains only *one* dutiable code, i.e. CN2007 code 8443 31 91. Therefore, the European Communities understands the complainants' claim to only concern such eight-digit dutiable code.[1570] The European Communities asserts that because CN2007 code 8443 31 91 is the *only* code cited in the joint Panel request under the MFM claims, any claim concerning tariff treatment under any other code than CN2007 code 8443 31 91 would be outside the Panel's terms of reference.[1571]

7.1189 The European Communities contends that nothing in the joint Panel request suggests that the reference to the CN2007 codes of subheading 8443 31 was merely "illustrative" and that there might be tariff treatment under any *other codes* which the complainants believed was inconsistent with the European Communities' tariff concessions. The European Communities argues that a mere reference to Council Regulation (EEC) No 2658/87 (i.e. the CN2007) is not, on its own, specific enough to meet the requirements of Article 6.2 of the DSU, because the CN2007 covers thousands of different headings and subheadings.[1572]

7.1190 The European Communities has pointed out that the complainants have referred to the tariff treatment provided by other codes to ADP MFMs or to other products which the European Communities believes are not properly before the Panel.

7.1191 In particular, the European Communities points to Chinese Taipei's statement that the MFM-related claims also cover "ADP MFMs which perform a scanning and copy function but not a facsimile function", which are classifiable under the 6 per cent *ad valorem* dutiable CN2007 code 8443 32 91.[1573] The European Communities argues that such a claim is "manifestly outside the

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[1566] Appellate Body Report on *Brazil – Desiccated Coconut*, DSR 1997:I, p. 186.

[1567] Panel Report on *China – Publications and Audiovisual Products*, para. 7.28.

[1568] Appellate Body Report on *Chile – Price Band System*, para. 176. See also Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, para. 107.

[1569] Appellate Body Report on *Thailand – H-Beams*, para. 88.

[1570] The European Communities submits that Japan seems to confirm this understanding when it stated that the only "cure" for the "WTO inconsistency of imposing duties on MFMs that should be duty-free under the EC concessions" will be to "eliminate the duty under CN 8443 31 91 and to stop imposing duties" on these devices. (European communities' second oral statement, para. 98, citing para. 35 of Japan's first written submission).

[1571] European Communities' second written submission, paras. 195-199 (commenting on the complainants' responses to Panel question No. 37).

[1572] European Communities' comments on the complainants' responses to Panel question No. 123. More particularly, the European Communities observes that some arguments of critical importance for the complainants' claims are irrelevant in relation to the machines at issue because those machines have no *printing* function. Examples include the complainants' arguments to the effect that the MFMs at issue are "printers" for the purposes of Note 5(D) to HS1996 heading 84.71 or that printing is the principal function for the purposes of Note 5(B) to HS1996 heading 84.71 or of Note 2 to HS1996 Section XVI. *Ibid*.

[1573] Chinese Taipei's second written submission, para. 293.

Panel's terms of reference" because this specific CN2007 code was never expressly mentioned in the joint Panel request[1574] and this "new product" described by Chinese Taipei is not covered by the MFM description used in footnote 15 of the joint Panel request.[1575]

7.1192 Additionally, the European Communities points to the United States' answer to question 137, in which the United States argues

> "[W]hile non-ADP MFMs whose essential character is that of a facsimile machine, are included in the concession for 'facsimile machines' under subheading 8517 21, other non-ADP MFMs may not be 'facsimile machines' and therefore would fall within the concession for goods of subheading 8472 90. . . Moreover, as the United States has noted, the only other appropriate subheading for non-ADP MFMs is subheading 8472 90 — a subheading for which the EC has a bound duty of 2.2%. Thus, all complainants are equally in agreement that the EC measures — which subject non-ADP MFMs to a duty of 6 per cent — result in WTO-inconsistent duty treatment for all non-ADP MFMs."[1576]

7.1193 The European Communities objects to this assertion and considers that it "amounts to an entirely new claim, based on a different legal basis, which is not covered by the terms of reference of the Panel". In the European Communities' view, this "new claim" is outside the terms of reference because "the Panel request makes no reference to the EC's concession for HS96 8472 90" and, furthermore, "the Panel request makes it clear that the present dispute is concerned exclusively with the duty-free concessions made by the European Communities pursuant to the ITA". In addition to contending that this "new claim" is outside the terms of reference, the European Communities also submits that, should the Panel conclude that, as conceded by the United States, some non-ADP MFMs are not covered by the concession for HS1996 subheading 8517 21, but instead by the concession for HS1996 subheading 8472 90, the Panel should refrain from examining the consistency of the tariff treatment given to those non-ADP MFMs under EC Measures with the latter EC concession.[1577]

7.1194 Finally, the European Communities also objects to Chinese Taipei's reference, in response to Panel question No. 127(b), that the European Communities may have breached the concession in its Schedule covering products described in CN code 8472 90 90 by increasing the duties applicable to "stand alone digital copiers" from 2.2% to 6 per cent. The European Communities recalls that the joint Panel request makes no reference whatsoever to either "stand-alone digital copiers" or to the European Communities' concession for HS1996 subheading 8472 90. Furthermore, that concession was not even made pursuant to the ITA. Insofar as Chinese Taipei's assertion should be understood as raising a "new claim", the European Communities requests the Panel to rule that such claim is also outside its terms of reference.[1578]

7.1195 The **complainants** argue that the CN2007 *en toto* was listed as a measure at issue in the joint Panel request and that the claims are not limited to certain CN codes which were explicitly referenced

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[1574] The European Communities further notes that the complainants had not even cited CN2007 code 8443 32 91 in their submissions "until the issue of the scope of that code was raised by the Panel's questions after the first substantive meeting." (European Communities' comments on the complainants' responses to Panel question No. 123).

[1575] European Communities' comments on the complainants' responses to Panel question No. 123.

[1576] United States' response to Panel question No. 137.

[1577] European Communities' comments on the United States' response to Panel question No. 137.

[1578] European Communities' comments on Chinese Taipei's response to Panel question No. 127(b) (also commenting and/or citing Chinese Taipei's response to Panel question No. 44).

in the joint Panel request.[1579] In the complainants' view any tariff lines from the CN2007 that cover the "products at issue" are within the Panel's terms of reference. In support of this view, **Chinese Taipei** and **Japan** note that the description of MFMs contained in footnote 15 of the joint Panel request is *not limited* to products of CN2007 code 8443 31 91, for this description is wide enough to cover the machines matching the description of CN2007 code 8443 32 91.[1580] Chinese Taipei further notes that, in fact, the products covered by CN2007 code 8443 32 91 are described in identical terms as those described in CN2007 code 8443 31 91, namely "[m]achines performing a copying function by scanning the original and printing the copies by means of an electrostatic print engine" and they are equally "capable of connecting to an automatic data-processing machine or to a network".[1581] Japan agrees with Chinese Taipei, arguing that the discussion of the specific tariff lines within CN2007 code 8443 in the joint Panel request was simply *illustrative* and does not limit the panel request to only those tariff lines.[1582]

Consideration by the Panel

7.1196 The **Panel** understands the European Communities to be concerned that the complainants may be seeking to have the Panel make findings on the WTO consistency of the tariff treatment of MFMs under CN codes that were not specifically identified as measures at issue in the joint Panel request. Additionally, the European Communities does not want the Panel to make findings on the WTO consistency of the European Communities tariff treatment of "stand alone digital copiers", which were likewise not referred to by the complainants' as a product that was the subject of their claims in the joint Panel request. According to the European Communities, such claims are outside the Panel's terms of reference. On the other hand, the complainants maintain that the CN as a whole was identified as a specific measure at issue in the joint Panel request, and that any specific codes mentioned in the request were not meant to limit the complainants' claims to those codes, but were purely illustrative in nature.

7.1197 The arguments of the European Communities raise the question of whether the complainants may properly pursue claims that CN codes other than 8443 31 91 are inconsistent with the European Communities' obligations under the GATT 1994 or whether the European Communities is providing inconsistent tariff treatment to products other than the MFMs described in the joint Panel request. In essence, the European Communities is arguing that the complainants failed to comply with the obligations in Article 6.2 of the DSU. We recall that the Appellate Body has explained that determining the consistency of a panel request with the obligations in Article 6.2 must be done by examining the panel request as a whole and in light of the attendant circumstances. Therefore, the starting point for our analysis of whether these "claims" are within our terms of reference is the joint Panel request itself.

7.1198 We recall that the joint Panel request states that Customs authorities of EC member States impose duties on MFMs. The measures at issue through which they do so include:

1. Commission Regulation (EC) No. 517/1999 of 9 March 1999;

[1579] We note that the complainant's did not have an opportunity to respond the European Communities specific allegations that they were raising new claims with respect to CN code 8472 90 or stand alone digital copiers as the European Communities made these arguments in its comments on the complainants' answers to the Panel's question after the second substantive meeting, which was the last opportunity to make submissions to the Panel.

[1580] Chinese Taipei and Japan's responses to Panel question No. 123.

[1581] Chinese Taipei's second written submission, para. 293; Chinese Taipei's second oral statement, paras. 61-66; Chinese Taipei's response to Panel question No. 123.

[1582] Japan's response to Panel question No. 123.

2. Report of the Conclusions of the 360th meeting of the Customs Code Committee, Tariff and Statistical Nomenclature Section, TAXUD/555/2005-EN (March 2005);

3. Commission Regulation (EC) No. 400/2006 of 8 March 2006; and

4. Council Regulation (EEC) No. 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, including all annexes thereto, as amended,[1583]

as well as any amendments or extensions and any related or implementing measures.[1584]

7.1199 The joint Panel request then provides a narrative description of the measures and their effects. In particular with respect to Council Regulation No. 2658/87, the complainants note:

> "On 31 October 2006, the EC amended Council Regulation (EEC) No. 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, creating CN 8443 31 10 ("[m]achines performing the functions of copying and facsimile transmission, whether or not with a printing function, with a copying speed not exceeding 12 monochrome pages per minute"), CN 8443 31 91 ("[o]ther; [m]achines performing a copying function by scanning the original and printing the copies by means of an electrostatic engine") and CN 8443 31 99 ("[o]ther"). By virtue of these subcategories, MFMs with copying speeds of more than 12 monochrome pages per minute and with an electrostatic engine are classified under CN 8443 31 91. The duty rate for CN 8443 31 91 is 6 per cent.
>
> As a result, customs authorities of EC member States have been applying a 6 per cent duty on imports of certain MFMs, instead of providing duty-free treatment as required by the EC Schedules. The United States, Japan, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu consider that their commerce has been accorded treatment less favourable than that provided in the EC Schedules, and that ordinary customs duties, or other duties and charges, in excess of those set forth in the EC Schedules have been applied to certain "input or output units" of "automatic data-processing machines" and facsimile machines, inconsistent with the obligations of the EC and its member States under Articles II:1(a) and II:1(b) of the GATT 1994. The measures at issue nullify or impair, within the meaning of GATT Article XXIII, benefits accruing directly or indirectly to the United States, Japan, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu under the GATT 1994."[1585]

7.1200 Footnote 15 to the joint Panel request defines MFMs as machines which perform two or more of the functions of printing, copying, or facsimile transmission, capable of connecting to an automatic data-processing machine or to a network (including devices commercially known as MFPs

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[1583] (*footnote original)* Including amendments adopted pursuant to Commission Regulation No. 1214/2007 of 20 September 2007.

[1584] (*footnote original)* Including the actual application by customs authorities of EC member States of a 6 per cent duty on imports of certain MFMs.

[1585] Joint Panel Request, WT/DS375/8, 376/8, 377/6, p. 6.

(multifunctional printers), other "input or output units" of "automatic data-processing machines", and facsimile machines).[1586]

7.1201 The initial listing of the measures does refer to the entire CN, by referring to Council Regulation No. 2658/87. However, we recall that the conformity of a panel request with Article 6.2 of the DSU must be judged on the basis of the panel request as a whole. Therefore, we agree with the panel in *China – Publications and Audiovisual Products* that we should look not only at the formal names of the measures, but also at the complainants' narrative description of the measures at issue in the panel request.[1587] In their description, the complainants refer to three CN codes (8443 31 10, 8443 31 91, and 8443 31 99), and note that it is by virtue of the subcategorization of the relevant subheading into these three CN codes that MFMs with copying speeds of more than 12 monochrome pages per minute and with an electrostatic engine are classified in CN code 8443 31 91. The complainants assert that it is as a result of this classification that the customs authorities of EC member States have been applying a 6 per cent duty on imports of certain MFMs rather than the duty-free treatment the complainants believe is required.

7.1202 It is worth recalling here the important role the panel request plays in notifying the respondent Member of the claims it has to answer and to enable it to prepare its defence. Due process considerations, therefore, would caution against allowing measures and products into the Panel's terms of reference that a respondent party had not received notice of.

7.1203 We are aware that prior panels have found that there is no obligation in Article 6.2 to identify specific aspects of the specific measures or to identify the particular products at issue if these could reasonably be discerned from the Panel request.[1588]

7.1204 With respect to the joint Panel request in this case, however, we find that, by specifically listing the particular provisions of the CN under which the European Communities classifies MFMs, by defining in footnote 15 the universe of MFM products about which they were concerned, and by asserting that WTO-inconsistent, dutiable treatment arises as a "result" of the classification of the defined MFMs into the particular provisions of the CN, the complainants informed the European Communities that their complaints were limited to the products defined in footnote 15 and the dutiable tariff treatment of such products resulting from the subcategorization of the CN into CN codes 8443 31 10, 8443 31 91, and 8443 31 99. Moreover, we note that the complainants' narrative does not contain qualifying language that would indicate that the listing of the particular dutiable CN codes was illustrative, merely a listing of examples, or non-exhaustive.[1589] This lack of qualification is particularly important in the case of an instrument like the CN, which contains thousands of different headings and subheadings.[1590]

7.1205 We therefore conclude that, at least under the particular circumstances of the dispute before us, the identification of the specific measure at issue in this dispute was not accomplished solely by listing in the joint Panel request the Council Regulation which contained, as an Annex, the entire CN.

[1586] Joint Panel Request, WT/DS375/8, 376/8, 377/6, fn. 15.

[1587] Panel Report on *China – Publications and Audiovisual Products*, para. 7.47.

[1588] Appellate Body Report on *EC - Chicken Cuts*, para. 165.

[1589] We find support for our understanding in the Panel Report on *China – Publications and Audiovisual Products*, paras. 7.93-7.104 where that panel found that particular requirements in legislation which was listed as a measure at issue in the panel request were outside the panel's terms of reference because they had not been discussed in the narrative description of the measures in the panel request.

[1590] Panel Report on *Japan – Film*, para. 10.16 (That panel hesitated to say that a reference to a law with a very broad scope that dealt with a broad range of issues would be sufficient to bring all measures taken by a respondent under that law within the scope of the panel request).

Rather, via the narrative description in the joint Panel request, the complainants informed the European Communities that they were only challenging the specific CN codes, which resulted in the alleged less favourable and excessive tariff treatment, i.e., CN 8443 31 10, 8443 31 91, 8443 31 99. Additionally, via the definition provided in footnote 15 the complainants also notified the European Communities that their complaint was limited to the tariff treatment being accorded to the products described in such footnote. As a consequence, we find that any claims of inconsistency with Article II of the GATT 1994 raised during these proceedings which are based on CN codes not expressly cited in the joint Panel request or products other than the MFMs described in footnote 15 are outside the terms of reference of this Panel.

2. The measures at issue and their effects

7.1206 In their joint Panel request, the **complainants** identified the following as the EC measures at issue in this dispute with respect to their claims of less favourable tariff treatment and excessive duties for imports of MFMs:

- Commission Regulation No. 517/1999[1591];

- Report of the Conclusions of the 360th meeting of the Customs Code Committee (the "2005 Statement")[1592];

- Commission Regulation No. 400/2006[1593];

- Council Regulation No. 2658/87, as amended (the "CN2007")[1594]; and

- Any amendments or extensions and any related or implementing measures.

7.1207 We will discuss the substance of each of these measures and their effects, in turn, below.

(a) Commission Regulation No. 517/1999

7.1208 The preamble of Commission Regulation No. 517/1999 provides the following in its relevant parts:

> "Whereas in order to ensure uniform application of the Combined Nomenclature (…) it is necessary to adopt measures concerning the classification of the goods referred to in the Annex to this Regulation;
>
> (…)
>
> Whereas (…) the goods described in column 1 of the table annexed to the present Regulation must be classified under the appropriate CN codes indicated in column 2, by virtue of the reasons set out in column 3;"

7.1209 The Annex to Commission Regulation No. 517/1999, cited in its preamble, deals with two "multifunctional apparatus" and contains for each of them one column (1), where they are described, a

[1591] Exhibits US-59; JPN-4; TPKM-35.
[1592] Exhibits US-60; JPN-6; TPKM-32.
[1593] Exhibits US-61; JPN-5; TPKM-36.
[1594] Exhibits US-47; JPN-2; TPKM-34.

second column (2), where their respective classification within the CN is indicated, and a third column (3), where the reason for such classification is provided. It also contains two illustrations of such products. The relevant part of this Annex is set out below:

ANNEX

Description of goods	Classification (CN code)	Reason
(1)	(2)	(3)
1. A multifunctional apparatus capable of performing the following functions: — faxing, — line telephony, — telephone answering, — scanning, — printing, — photocopying. The apparatus operates either in an autonomous form (as a fax transmitter, a fax receiver and a copier) or in conjunction with a computer (as a printer, scanner and fax machine). The machine also includes a document copying function (four pages per minute) available in autonomous mode. See illustration A (*)	8517 21 00	Classification is determined by the provisions of General Rules 1 and 6 for the interpretation of the Combined Nomenclature, Note 3 to Section XVI, Note 5.E to Chapter 84 and the wording of CN codes 8517, 8517 21 and 8517 21 00. The principal function of the apparatus is considered to be that of faxing
2. A multifunctional apparatus (so-called 'digital copier') capable of performing the following functions: — scanning, — printing, — faxing, — photocopying (indirect process). The apparatus which has several paper feed trays is capable of reproducing up to 30 A4 pages per minute. The apparatus operates either in an autonomous form (as a copier, printer and a fax machine) or in conjunction with a computer or in a computer network (as a printer, scanner, fax machine and a copier). See illustration B (*)	9009 12 00	Classification is determined by the provisions of General Rules 1, 3c and 6 for the interpretation of the Combined Nomenclature, Note 5.E to Chapter 84 and the wording of CN codes 9009, 9009 12 and 9009 12 00. The apparatus has several functions none of which are considered to give the product its essential character

Illustration A

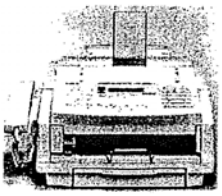
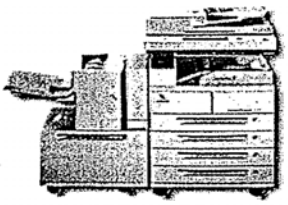


Illustration B



(*) The illustrations are purely for information.

(i) Arguments of the parties

7.1210 The complainants explain that via *Commission Regulation No. 517/1999*[1595] the European Communities began to reclassify certain MFMs as "photocopiers" in dutiable CN code 9009 12 00.[1596] In particular, the complainants refer to item 2 of the Annex to that regulation, which states that a device capable of scanning, printing, faxing, and photocopying (indirect process) which has several paper feed trays and is capable of reproducing up to 30 A4 pages per minute should be classifiable in dutiable CN code 9009 12 00, which sets a 6 per cent duty rate. The apparatus operates either in autonomous form or in conjunction with an automatic data-processing machine or in an automatic data-processing network.[1597]

7.1211 **Chinese Taipei** and the **United States** note that the main criterion for such "reclassification" is that the MFMs at issue have several functions, i.e., printing, scanning, copying and faxing, while none of the functions are considered to give to the apparatus its essential character.[1598] The European Communities, pursuant to the regulation, therefore classified the product on the basis of GIR 3(c) under the heading which comes last in numerical order, i.e., under CN subheading 9009 12 00.[1599]

7.1212 The complainants also noted that item 1 of the Annex of *Commission Regulation No. 517/1999* relied upon Note 3 to Section XVI of the CN, *inter alia*, to conclude that a multifunctional facsimile machine with a modem, scanner and printing device was classifiable in the duty-free CN subheading of 8517 21 because the facsimile function was its principal function.[1600]

7.1213 As noted in paragraph 7.1152 the European Communities contends that the only measure at issue is the current version of the CN.[1601] The European Communities did not provide specific argumentation on the effects of Commission Regulation No. 517/1999 .

(ii) Consideration by the Panel

7.1214 We note that the European Communities does not contest that the Annex to Commission Regulation No. 517/1999 states that a device capable of scanning, printing, faxing, and photocopying through (indirect process) which has several paper feed trays and is capable of reproducing up to 30 A4 pages per minute should be classifiable in dutiable CN code 9009 12 00 by virtue of the application of GIR 3(c). Nor does the European Communities contest that the preamble of Commission Regulation No. 517/1999 states that "the goods described in column 1 of the table annexed to the present Regulation *must* be classified under the appropriate CN codes indicated in column 2, by virtue of the reasons set out in column 3" (emphasis added).

7.1215 Therefore, the undisputed meaning of Commission Regulation No. 517/1999 is that: (1) a multifunction facsimile machine as described in item 1 of the Annex must be classified under CN

[1595] Exhibits US-59; JPN-4; TPKM-35.

[1596] United States' first written submission, para. 77, Japan's first written submission, paras. 53-54 and Chinese Taipei's first written submission, paras. 496-497 (all referring to European Court of Justice (Rank Xerox) (Exhibits US-58; TPKM-62)).

[1597] United States' first written submission, para. 77; Japan's first written submission, para. 39; Chinese Taipei's first written submission, paras. 487, 500.

[1598] United States' first written submission, para. 77; Chinese Taipei's first written submission, para. 486.

[1599] Chinese Taipei's first written submission, para. 487.

[1600] Japan's first written submission, para. 38, fn. 27; Chinese Taipei's first written submission, para. 500.

[1601] European Communities' first written submission, para. 342.

code 8517 21 00, which sets a duty rate of 0 per cent; meanwhile (2) a MFM meeting the description set forth in item 2 of the Annex must be classified under CN code 9009 12 00, which sets a duty rate of 6 per cent.

(b) The 2005 Statement

7.1216 From 26 to 28 January 2005, the European Communities' Customs Code Committee held its 360th meeting. According to the Report thereof, it was proposed during this meeting to make a clarification regarding an indicator for distinguishing between *fax-machines* and *digital copiers*. All EC member States agreed to have such a clarification, which was reflected as attached in Annex VII of the minutes of that meeting.[1602]

7.1217 The relevant parts of the 2005 Statement reads as follows:

> "Items for conclusion
>
> 3.11 Multifunctional digital copiers (doc. TAXUD/2070/2001)*
>
> Letter from EICTA was circulated.
>
> The Chair made it clear that the issue is not to classify multifunctional devices. This debate was closed. Regulation was issued in 1999 (Regulation 517/99) and discussions in the HS committee 'closed.' One needs to appreciate the product as a whole. Thus, the issue is to make a clarification and not a classification. Nevertheless an indicator for distinguishing between fax-machines and digital copiers could be the number of pages per minute.
>
> All MS agreed to have the clarification of the issue as reflected in the **Committee statement** in annex VII.
>
> (…)
>
> TAXUD/555/2005-EN
>
> ANNEX VII
>
> **Statement on the classification of "multifunctional devices"**
>
> The Committee agreed that if a multifunctional device (fax, printer, scanner, copier) has the capability of photocopying in black and white 12 or more pages per minute (A4 format) this indicates that the product is classifiable in heading 9009 as a photocopying apparatus."[1603]

[1602] See the United States' first written submission, para. 78 and fn. 121; Japan's first written submission, paras. 42-43; Chinese Taipei's first written submission, para. 114.

[1603] The 2005 Statement, pp. 7 and 11, respectively. Commission Regulation No. 517/99, cited in this excerpt of the 2005 Statement, is Commission Regulation No. 517/1999 , one of the measures at issue described above at paras. 7.1208-7.1209.

(i) Arguments of the parties

7.1218 The **United States** and **Japan** argue that, through the 2005 Statement, the European Communities made explicit for the first time that output speed – pages per minute – would be the "key criterion" for determining whether or not an MFM would be subject to duties –i.e., whether it would be a facsimile machine under duty-free 8517 or a photocopier under dutiable 9009 - even though copying speed had no basis in the language of the various headings at issue.[1604] The complainants submit that this page per minute criterion reclassifies MFMs with a fax function from duty-free heading 8517 (covering "[f]acsimile machines") into dutiable CN code 9009 12 00 (covering photocopying machines) and, as of HS2007, dutiable CN code 8443 31 91, both subject to a 6 per cent customs duty.[1605] They thus argue that the application of this criterion results in the exclusion for certain MFMs from duty-free treatment. According to the United States, it is a "*per se*" exclusion from duty-free treatment.[1606]

7.1219 Other than contesting the legally binding nature of the 2005 Statement (see paragraph 7.1163 above), the **European Communities** did not provide specific argumentation on the effects of this 2005 Statement.

(ii) Consideration by the Panel

7.1220 The language of the 2005 Statement clarifies that the number of pages per minute (A4 format) that a multifunctional (printer, scanner, copier, fax) device can "photocopy" in black and white can serve as an indication to national customs authorities that the device is a photocopier and therefore properly classifiable in the dutiable CN code 9009 12 00. The statement specifically sets 12 or more pages per minute (A4 format) as the tipping point of indicating that the product is a photocopier.

7.1221 We recall that a Statement of the Customs Code Committee constitutes an important means of ensuring the uniform application of the common customs tariff by the authorities of the member States and, as such, can be considered as a valid aid to the interpretation of the Common Customs Tariff.[1607] The guidance the 2005 Statement provides to national customs authorities with respect to the uniform application of the common customs tariff is to classify MFMs which can "photocopy" in black and white 12 or more pages per minute (A4 format) as a photocopier under CN code 9009 12 00 which sets a 6 per cent duty rate.

(c) Commission Regulation No. 400/2006

7.1222 The preamble of Commission Regulation No. 400/2006 provides the following in its relevant parts:

"Whereas:

[1604] United States' first written submission, para. 78; Japan's first written submission, para. 57.

[1605] United States' first written submission, paras. 78 and also 79 (referring to BTIs issued in 2006 that would demonstrate that EC member States classified MFMs in dutiable CN code 9009 12 00 as photocopiers on the basis of the page per minute criterion (Exhibit US-62)); Japan's first written submission, para. 44 (referring to BTIs that would demonstrate that before and after 2007, EC member States classified MFMs in dutiable CN code 9009 12 00 as photocopiers on the basis of the page per minute criterion (Exhibits JPN-7-8)); Chinese Taipei's first written submission, para. 488.

[1606] United States' first written submission, para. 148.

[1607] Panel Report on *EC - Selected Customs Matters*, para. 2.40 (citing European Court of Justice (Dittmeyer), para. 4).

(1) In order to ensure uniform application of the Combined Nomenclature … it is necessary to adopt measures concerning the classification of the goods referred to in the Annex to this Regulation.

(…)

(3) ... the goods described in column 1 of the table set out in the Annex to this Regulation should be classified under the CN codes indicated in column 2, by virtue of the reasons set out in column 3 of that table.

(…)

(5) The measures provided for in this Regulation are in accordance with the opinion of the Customs Code Committee."

7.1223 Article 1 of Commission Regulation No. 400/2006 states:

"Article 1

The goods described in column 1 of the table set out in the Annex shall be classified within the Combined Nomenclature under the CN codes indicated in column 2 of that table."

7.1224 The Annex to Commission Regulation No. 400/2006, cited in its preamble and Article 1, deals with four different products and contains for each of them one column (1), where they are described, a second column (2), where their respective classification within the CN is indicated, and a third column (3), where the reason for such classification is provided. The fourth product listed in this Annex is a certain "multifunctional apparatus." The Annex contains the following with respect to this product:

ANNEX

Description of the goods	Classification (CN code)	Reasons
(1)	(2)	(3)
(...)		
4. A multifunctional apparatus capable of performing the following functions: — scanning, — laser printing, — laser copying (indirect process). The apparatus, which has several paper feed trays, is capable of reproducing up to 40 A4 pages per minute. The apparatus operates either autonomously (as a copier) or in conjunction with an automatic data-processing machine or in a network (as a printer, a scanner and a copier).	9009 12 00	Classification is determined by General Rules 1, 3(c) and 6 for the interpretation of the Combined Nomenclature, Note 5(E) to Chapter 84 and the wording of CN codes 9009 and 9009 12 00. The apparatus has several functions none of which are considered to give the product its essential character.

(i) Arguments of the Parties

7.1225 The **complainants** also identify Commission Regulation No. 400/2006 as a measure at issue. In 2006, they argue, the European Communities adopted Commission Regulation No. 400/2006 which classifies multifunction printers, having scanning, laser printing, and laser copying (indirect process) capabilities up to 40 A4 pages per minute under dutiable CN code 9009 12 as photocopiers.[1608] According to **Japan**, Commission Regulation No. 400/2006 reaffirmed the European Communities' page per minute approach, "largely dismissing the importance of digital connectivity in understanding these products".[1609] According to **Chinese Taipei**, Commission Regulation No. 400/2006 classifies all MFMs without a fax function as photocopiers under CN code 9009 12 00 on the basis of GIR 3(c) because "the apparatus has several functions none of which are considered to give the product its essential character".[1610]

7.1226 As noted above, in paragraph 7.1152, the **European Communities** argues that this measure is no longer effectively applicable. Therefore, the European Communities has not provided any substantive discussion of the effects of the measure.

(ii) Consideration by the Panel

7.1227 We note that the European Communities does not contest that the Annex to Commission Regulation No. 400/2006 states that a device capable of scanning, laser printing, laser copying (indirect process) which has several paper feed trays and is capable of reproducing up to 40 A4 pages per minute should be classifiable in dutiable CN code 9009 12 00 by virtue of the application of GIR 3(c). Nor does the European Communities contest that Article 1 of Commission Regulation No. 400/2006 states that "the goods described in column 1 of the table set out in the Annex *shall* be classified within the Combined Nomenclature under the CN codes indicated in column 2 of that table." (emphasis added).

7.1228 Therefore, the undisputed meaning of Commission Regulation No. 400/2006 is that: (1) a multifunctional machine as described in item 4 of the Annex shall be classified under subheading 9009 12 00, which sets a duty rate of 6 per cent.

(d) The CN2007 codes 8443 31 10; 8443 31 91 and 8443 31 99

7.1229 On 31 October 2006, the European Communities enacted Commission Regulation No. 1549/2006 amending the CN to reflect the substantive revisions of the HS agreed by the WCO participants that resulted from the introduction of the HS2007. Among these changes in the HS, new subheadings were created to include certain multifunctional machines, in particular "machines which perform two or more of the functions of printing, copying or facsimile transmission, capable of connecting to an automatic data-processing machine or network." In connection with the implementation of these particular HS codes, the 2006 amendment of the CN, which entered into force on 1 January 2007 (and became the "CN2007"), contained the following relevant headings, subheadings and codes and corresponding product descriptions at the four- and six-digit levels (HS-based) and at the eight-digit level (CN-specific):

[1608] United States' first written submission, para. 79 (Exhibit US-61); Japan's first written submission, para. 41 (Exhibit JPN-5); Chinese Taipei's first written submission, para. 112 (Exhibit TPKM-36).
[1609] Japan's first written submission, para. 58.
[1610] Chinese Taipei's first written submission, paras. 489 and 508.

CN code	Description	Conventional rate of duty (%)	Supplementary unit
1	2	3	4
8443	Printing machinery used for printing by means of plates, cylinders and other printing components of heading 8442; other printers, copying machines and facsimile machines, whether or not combined; parts and accessories thereof:		
	(...)		
	- Other printers, copying machines and facsimile machines, whether or not combined		
8443 31	- - Machines which perform two or more of the functions of printing, copying or facsimile transmission, capable of connecting to an automatic data-processing machine or to a network:		
8443 31 10	- - - Machines performing the functions of copying and facsimile transmission, whether or not with a printing function, with a copying speed not exceeding 12 monochrome pages per minute	Free	p/st
	- - - Other		
8443 31 91	- - - - Machines performing a copying function by scanning the original and printing the copies by means of an electrostatic print engine	6	p/st
8443 31 99	- - - - Other	Free	p/st
8443 32	- - Other, capable of connecting to an automatic data-processing machine or to a network:		
8443 32 10	- - - Printers	Free	p/st
8443 32 30	- - - Facsimile machines	Free	p/st
	- - - Other		
8443 32 91	- - - - Machines performing a copying function by scanning the original and printing the copies by means of an electrostatic print engine	6	p/st
8443 32 93	- - - - Other machines performing a copying function incorporating an optical system	Free	p/st
8443 32 99	- - - - Other	2.2	-
8443 39	- - Other		
8443 39 10	- - - Machines performing a copying function by scanning the original and printing the copies by means of an electrostatic print engine	6	p/st
	- - - Other copying machines		
8443 39 31	- - - - Incorporating an optic system	Free	p/st
8443 39 39	- - - - Other	3	-
8443 39 90	- - - Other	2.2	-

(i) Arguments of the Parties

7.1230 The **complainants** argue that as a result of the eight-digit CN2007 codes 8443 31 10, 8443 31 91 and 8443 31 99, the products at issue are classified under the dutiable CN code 8443 31 91, which provides for the application of a 6 per cent ad valorem duty.

7.1231 While the complainants acknowledge that some MFMs, those with a copying and facsimile function with a copying speed not exceeding 12 monochrome pages per minute, are given duty free treatment, others are improperly subjected to the 6 per cent duty.[1611] Specifically, the complainants argue that the CN2007 provides that MFMs with copying and computer printing functions, but without a facsimile transmission function, are always subject to 6 per cent duty when using an electrostatic print engine regardless of copy speed. The complainants also allege that, pursuant to the new CN, MFMs with a facsimile function that have copying speeds of more than 12 monochrome pages per minute and with an electrostatic print engine are also always subject to a 6 per cent duty. [1612]

7.1232 **Chinese Taipei** summarizes the tariff treatment provided to MFMs incorporating an electrostatic print engine as follows;

(a) MFMs that perform a fax function are subject to 6 per cent customs duties if they are able to copy more than 12 ppm;

(b) MFMs that perform a fax function are treated as duty-free if they are able to copy 12 or less ppm; and

(c) all MFMs that do not incorporate a fax function are subject to 6 per cent duty irrespective of their copy speed.[1613]

7.1233 Chinese Taipei finds support for the complainants' understanding of the effect of the various subcategories in CN heading 8443 in the consolidated version of the CNEN to the CN2008[1614]. According to Chinese Taipei the CNEN 2008 clarifies that, in relation to CN2007 code 8443 31 91:

> "the scanning process can be performed by a digital or optical system. An electrostatic print engine operates in the same way as an electrostatic printer. The machines of this CN subheading will perform a fax or printing function in addition to the copying function. A machine that prints copies by inkjet or thermal print engines will be classified under CN subheading 8443.31.99".[1615]

7.1234 The **European Communities** does not seem to disagree with the complainants' view of the tariff treatment that results from the application of the sub-categories in CN2007 subheading 8443 31. The European Communities explains that all the machines that are connectable to an ADP system or

[1611] Chinese Taipei's first written submission, para. 510.

[1612] United States' first written submission, paras. 80, 81, 83 and 165 (submitting the following BTIs as examples of the application of these CN2007 criteria to MFMs: IE-07NT-14-136-2 (15 November 2007); IE-07NT-14-136-1 (Ireland, 15 November 2007); FR-E4-2007-002262-R (France, 31 January 2007); GB116669062 (UK, 19July 2007); GB116669160 (UK, 19July 2007); GB116669258 (UK, 19 July 2007); and IE-07NT-14-1684-02 (Ireland, 20 January 2009), (Exhibit US-62). See also the United States' second written submission, paras. 7, 103, 105-107, 109; the United States' second opening statement, para. 36; the United States' responses to Panel question Nos. 22 and 27; Japan's first written submission, para. 34.

[1613] Chinese Taipei's first written submission, paras. 118, 120-121, 509-512.

[1614] As noted above in Section VII.E.1(b), the panels terms of reference include the amendments to Council Regulation No. 2658/87, including the CN2008 which is substantively the same as the CN2007. We note that the CNEN 2008 provides some understanding as to how the CN2008 is implemented.

[1615] Chinese Taipei's first written submission, paras. 514-515 citing CNEN 2008/C 133/01 (30 May 2008 (Exhibit TPKM-23).

to a network and that can perform two or more of the functions of copying, printing or facsimile transmission are classifiable under one of these three eight-digit CN2007 codes.[1616]

7.1235 Elaborating on the meaning of these three specific codes, the European Communities submits that CN2007 code 8443 31 91, the only dutiable code among them, covers machines that: (i) perform the function of copying and, in addition, the functions of printing and/or of faxing; (ii) are connectable to an ADP machine or a network; (iii) use an electrostatic print engine; (iv) if they perform a faxing function, their copying speed exceeds 12 ppm.[1617]

7.1236 The European Communities further claims that, on the other hand, CN2007 code 8443 31 91 does not cover MFMs: (i) that do not use an electrostatic print engine (including e.g. MFMs using an "inkjet printer"); (ii) that use an electrostatic print engine, and with at least a copying and a faxing function, but with a copying speed not exceeding 12 ppm,; and (iii) that use an electrostatic print engine and with printing and faxing functions, but without a copying function. Additionally, the European Communities asserts that CN2007 code 8443 31 91 does not cover single-function copying machines, which may be covered by other eight-digit break outs in subheading 8443 31, depending on whether they are connectable to an ADP machine or a network, the type of print engine and whether they incorporate an optical system. Finally, the European Communities submits that CN2007 code 8443 31 91 does not cover single-function facsimile transmission.

(ii) Consideration by the Panel

7.1237 The **Panel** recalls that the complainants' referenced three CN2007 codes that are eight-digit break outs of HS2007 subheading 8443 31, which sets forth the duty treatment for certain multifunctional machines that perform "two or more of the functions of printing, copying or facsimile transmission, capable of connecting to an ADP machine or to a network."[1618] Of the three codes, 8443 31 10, 8443 31 91 and 8443 31 99, the complainants have alleged that classifying certain MFMs in 8443 31 91 results in the application of a 6 per cent *ad valorem* duty rate to products which they argue are covered by the European Communities' duty-free tariff concessions made in the context of the ITA. Therefore, according to the complainants, the European Communities' is applying duties in a manner inconsistent with its obligations in Articles II:1(a) and II:1(b). Our first task, then, is to

[1616] European Communities' first written submission, para. 343; European Communities' response to Panel question No. 126(a).

[1617] The European Communities' response to Panel question No. 38, submitting, as examples of devices captured by CN2007 code 8443 31 91, a brochure of the Xerox's model *WorkCentre M20/M20i*, an ADP MFM with printing, copying, scanning and faxing functions and "output" speed of 22 ppm (Exhibit EC-63) and the brochures of Panasonic's model *DP-4510* and Ricoh's model *MP 3500*, both ADP MFMs with printing, copying, scanning and faxing functions, and with copy/printing speeds of 45 ppm and 35/45 ppm, respectively (Exhibit EC-82) The United States and Chinese Taipei agree with the European Communities' explanation of the dutiable coverage of CN2007 code 8443 31 91 and also that the examples it submits would indeed be captured by this CN code (the United States' and Chinese Taipei's respective responses to Panel question No. 124). The United States adds, however, that in this dispute it is "not challenging how the EC classifies the products in question in its domestic nomenclature, but rather the duty treatment it accords to those products and whether the duty treatment is consistent with that provided in the EC's Schedule of Concessions." (the United States' response to Panel question No. 124).

[1618] As to the use of the term "network" in the product description of CN2007 code 8443 31, we note that the parties do not dispute that it also includes connection over the "phone line" as well as "wireless" connection (see the complainants' responses to Panel question Nos. 25(a) and 25(b)). We understand this to mean that CN2007 codes 8443 31 10, 8443 31 91 and 8443 31 99 capture non-ADP MFMs to the extent they mean apparatus that do not connect to an ADP machine, but instead connect to a "phone line". We also understand that the term "network", as used in CN2007 code 8443 31, is broader than "phone line" and could also mean, e.g. "computer or digital network" so as to also capture ADP MFMs.

determine whether the CN2007, in particular code 8443 31 91, results in the application of a 6 per cent *ad valorem* duty to the products in question.

7.1238 Based on the evidence and submissions before us, we see no disagreement among the parties to this dispute that the following products are classified under code 8443 31 91 and are therefore subject to a 6 per cent *ad valorem* tariff:

(a) ADP MFMs that have an *electrostatic print engine* and can *print*, *copy* and *fax* with a copying speed exceeding 12 monochrome pages per minute ("ppm");

(b) ADP MFMs that have an electrostatic print engine and can print and copy, but do not have a fax transmission function;

(c) non-ADP MFMs that have an *electrostatic print engine* and can *copy* and *fax* with a copying speed exceeding 12 monochrome ppm.

7.1239 Additionally, we see no disagreement among the parties that, under the CN2007 the *dutiable* CN2007 code 8443 31 91 does not apply to:

(a) ADP MFMs that have an *electrostatic print engine* but do not have a *copying* function, which may instead be covered by the duty-free CN2007 code 8443 31 99;

(b) ADP MFMs that can *print*, *copy* and/or *fax*, but do not have an *electrostatic print engine* (e.g. those with an "ink jet engine" or "thermal printer"), which may instead be covered by the duty-free CN2007 code 8443 31 99; and

(c) ADP MFMs that have an *electrostatic print engine* and can *print*, *copy* and *fax*, with a copying speed of 12 ppm or less, which may instead be covered by the duty-free CN 2007 code 8443 31 10.

(d) non-ADP MFMs that have an *electrostatic print engine* and can *copy* and *fax* are subject to 0 per cent customs duty if they have a *copy speed* of 12 ppm or less, which may instead be covered by the duty-free CN 2007 code 8443 31 10.

(e) non-ADP MFMs that can *copy* and *fax*, but do not have an *electrostatic print engine* (e.g. those with an "ink jet engine" or "thermal printer"), which may instead be covered by the duty-free CN2007 code 8443 31 99.

7.1240 As noted in paragraph 7.1138 the complainants allege that the above-referenced measures result in the improper application of a 6 per cent *ad valorem* duty to two subsets of multifunction digital machines, ADP MFMs and non-ADP MFMs which are, according to the complainants, covered by the duty-free concessions in the EC Schedule under headings 8471 and 8517, respectively. As the concession for each of these sub-categories of multifunction digital machines is different, the analysis of whether the European Communities is actually acting inconsistently with its obligations will also, necessarily, be different. Therefore, we will address the complainants' claims of tariff treatment that is excessive and less favourable than that in the EC Schedule separately for each concession. First, we will examine whether the tariff treatment effectuated by the challenged measures is inconsistent with the duty-free concession in heading 8471 of the EC Schedule, which the complainants allege covers ADP MFMs. Secondly, we will examine whether the tariff treatment effectuated by the challenged measures is inconsistent with the duty-free concession in 8517, which the complainants allege covers non-ADP MFMs.

3. Whether the European Communities' tariff treatment of ADP MFMs is consistent with its obligations under Article II of the GATT 1994

7.1241 The European Communities made duty-free concessions on certain information technology products as part of the its implementation of the ITA, which were incorporated in the EC Schedule which is based on the HS1996 nomenclature. The complaint with respect to the tariff treatment of ADP MFMs relates to one such concession embodied in the EC Schedule at subheading 8471 60. The complainants argue that by not affording duty-free treatment to products which are within the scope of this tariff concession, the European Communities is acting inconsistently with its obligations under Article II of the GATT 1994, which requires that Members not treat products coming from another Member less favourably than in their schedules or to charge duties in excess of the bound rates set forth in said Schedule.

7.1242 Therefore, as noted above, we begin our analysis of the complainants' claim by determining the scope of the relevant concession, subheading 8471 60, and whether that scope includes the products described by the complainants' as ADP MFMs. If the relevant products are covered within the scope of the tariff concession, we will then examine whether the tariff treatment effectuated by the application of the challenged measures results in the European Communities acting in breach of its obligations in Article II of the GATT 1994.

(a) The ordinary meaning CN 8471 60 of the EC Schedule

7.1243 The **complainants** submit that ADP MFMs are covered by the duty-free concession in subheading 8471 60 in the EC Schedule ("Automatic data-processing machines and units thereof"; - Input or output units, whether or not containing storage units in the same housing").[1619] Within the terms of this concession, they indicate that the terms "input or output units" are key to the ordinary meaning analysis under the Vienna Convention.[1620]

7.1244 **Japan** and **Chinese Taipei** further submit that ADP MFMs also fall more precisely under the eight-digit concession in the EC Schedule in tariff item number 8471 60 40 ("- - Other;" - - - Printers").[1621] Furthermore, Chinese Taipei claims that these products, if not covered by tariff item number 8471 60 40 as "printers," are at least covered by the residual eight-digit concession in tariff item number 8471 60 90 ("- - Other;" - - - Other").[1622]

[1619] The following third parties also take this view: Singapore (see Singapore's third party submission, para. 81; Singapore's oral statement, para. 35); The Philippines (The Philippines' third party submission, para. 50); Costa Rica (Costa Rica's third party submission, para. 28); Thailand (Thailand's oral statement, paras. 3-4).

[1620] United States' first oral statement, para. 36; Japan's first written submission, paras. 79 and 181 (contending that ADP MFMS are, more specifically, "output units"); Chinese Taipei's first written submission, paras. 544-545. Japan also deals with the meaning of the terms "units thereof" in HS1996 heading 8471 in the EC Schedule under its analysis of the ordinary meaning of the concession that cover ADP MFMs (Japan's first written submission, para. 79).

[1621] See, e.g., Japan's first written submission, paras. 78-79; Japan's second written submission, para. 38; Chinese Taipei's first written submission, paras. 528, 546 and 553; Chinese Taipei's second written submission, para. 332.

[1622] Chinese Taipei's first written submission, paras. 528 and 557.

7.1245 The relevant concession, subheading 8471 60 in the EC Schedule[1623], is summarized below.

HS96	Description	Base rate	Bound rate	Year of full implementation	Other duties and charges	Legal instrument where the concession is reflected
8471	Automatic data-processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included:					
(…)						
8471 60	- Input or output units, whether or not containing storage units in the same housing					
8471 60 10	- - For use in civil aircraft	0.0	0.0	1997	0.0	WT/Let/156
	- - Other					
8471 60 40	- - - Printers	2	0.0	1999	0.0	WT/Let/156
8471 60 50	- - - Keyboards	2	0.0	1999	0.0	WT/Let/156
8471 60 90	- - - Other	2	0.0	1999	0.0	WT/Let/156
(…)						
8471 90 00	- Other	2	0.0	1999	0.0	WT/Let/156

7.1246 We recall that the ITA provided for duty-free treatment of all products falling under HS1996 heading 8471 (i.e. including all its subheadings). We recall further that the European Communities implemented this obligation by incorporating into its schedule all the relevant subheadings under heading 8471, for which subheading 8471 60 is further subdivided in four eight-digit level tariff item numbers, which reflect the tariff treatment for products falling under subheading 8471 60. In order to determine the ordinary meaning of subheading 8471 60 in the EC Schedule, pursuant to Article 31 of the Vienna Convention, we will examine the text of the concession in its context and in light of its object and purpose.

(i) The meaning of the text of subheading 8471 60

Arguments of the parties

7.1247 The **complainants** argue that the ordinary meaning of the language of the concession at both the four digit and six digit level is dispositive and "focuses on whether a particular good can connect to a computer or not – whether it is a "unit" of a computer – and whether that good can thus serve as an "input or output unit" for a computer."[1624] Japan and Chinese Taipei also argue that the ordinary meaning of the term "printers" as used in tariff item number 8471 60 40 is also relevant to understanding the scope of the European Communities' duty-free concession and whether the products at issue are covered by the concession.[1625]

[1623] We note that the description in the heading 8471 and the subheading 8471 60 of the EC Schedule are identical to those in HS1996 heading 8471 and subheading 8471 60 and that sometimes the parties refer to the HS1996 and the EC Schedule interchangeably. Despite these references, we are always mindful that the obligation being interpreted is that in the EC Schedule.

[1624] United States' first written submission, paras. 110 and 94; Japan's first written submission, para. 78.

[1625] United States' first written submission, para. 153 and Exhibits US-82-83; Japan's first written submission, para. 78; Chinese Taipei's first written submission, at paras. 546-553. We note that the United

Input or output units

7.1248 The complainants first define the terms "input" and "output" in the "technological sense".[1626] In particular **Japan** notes that in computer science an "output unit" is defined as "a unit which delivers information from the computer to an external device or from internal storage to external storage."[1627] Japan also notes that an "input" is defined as "the information that is delivered to a data-processing device from the external world, the process of delivering this data, or the equipment that performs this process."[1628]

7.1249 The complainants also look at the use of the terms "input" and "output" together in a single phrase. In particular, the complainants note that an "input/output device" has been defined as "a unit that accepts new data, sends it into the computer for processing, receives the results, and translates them into a useable medium."[1629]

7.1250 The complainants find support for their interpretation of the terms of the concession not only from technical dictionaries, but from more general dictionaries as well, which define "output" as "an electrical signal delivered by or available from an electronic device" while defining "input" as the converse, namely "an electrical signal entering an electronic device."[1630]

7.1251 The complainants argue that a "unit" should properly be understood as "an individual thing, person, or group regarded as single and complete" or "a device with a specified function forming part of a complex mechanism."[1631] Relying on this broad understanding of the term unit, the complainants argue that "units thereof" in the heading 8471, of which the concession at issue is a subheading, covers "devices designed and engineered to be connected to and used in an integrated fashion with computers."[1632]

7.1252 **Chinese Taipei** follows Japan's logic and concludes that the phrase "units thereof" in HS1996 heading 8471 indicates that the "units" referred to in the phrase "input or output units" in HS1996 subheading 8471 60 are those of "automatic data-processing machines." According to Chinese Taipei, this means that under the EC Schedule "any" kind of ADP machine is covered by HS1996 heading 8471 and, as a consequence, merits duty-free treatment.[1633]

States does not argue that the products at issue fall more specifically within the 8 digit break-outs for "printers" and "other" under the subheading of 8471 60.

[1626] Japan's first written submission, para. 80 (arguing that it is appropriate to look at technical dictionaries, even though it does not believe the terms have a "special meaning" under Article 31(4) of the *Vienna Convention*, because the concessions at issue were made in pursuance of an agreement (the ITA) dealing with technological products.)

[1627] United States' first written submission, para. 153 and Exhibit US-82; Japan's first written submission, para. 81 (citing *McGraw Hill Dictionary*, at p. 1419 (Exhibit JPN-11)).

[1628] Japan's first written submission, para. 82 (citing *McGraw Hill Dictionary*, at p. 1021).

[1629] Echibit US-101; Japan's first written submission, para. 83 (citing *McGraw Hill Dictionary*, at p. 1021).

[1630] Japan's first written submission, paras. 86-87 (citing *Shorter Oxford Dictionary* (1993), at pp. 2040, 1375 (Exhibit JPN-11)).

[1631] Japan's first written submission, para. 86 (citing *Shorter Oxford Dictionary* (1993), at p. 3491).

[1632] Japan's first written submission, para. 86.

[1633] Chinese Taipei's first written submission, paras. 535 and 556. The United States, more generally, argues that "the terms of the heading 84.71 ... provide strong contextual support for the conclusion that [ADP MFMs] are included within the scope of the EC's tariff concession for 'input or output units.'" (United States' first written submission, para. 155).

7.1253 Japan claims that "input/output units" are also known as "peripheral devices," which are "any device connected internally or externally to a computer and used to enter or display data, such as the keyboard, mouse, monitor, scanner, and printer."[1634] Japan cites the following definition of "input/output instruction" to support its assertion that "input/output units" and "peripheral devices" are synonymous:[1635]

> "... [S]uch an instruction 'causes the transfer of data between peripheral devices and main memory, and enables the central processing unit [i.e., in the computer] to control the peripheral devices connected to it.'"[1636]

7.1254 The complainants submit that "input or output units" are terms that are very broadly defined in the EC Schedule.[1637] They claim that the above definitions indicate that the ordinary meaning of these terms focuses on the manner in which these "units" interact with an automatic data-processing machine in the sense that they are able to accept new data, send it to into the computer for processing, receive the results, and translate them into a useable medium. Thus, according to the complainants, the two key concepts underlying these specific terms are the ability to use digital data and computer connectivity.[1638]

7.1255 The **European Communities**, rather than disputing the plain meaning of the terms in the text of the concession, focuses its arguments instead on the contextual interpretation of CN subheading 8471 60.[1639] In particular, the European Communities considers that the concession at issue should be interpreted in light of the scope of another concession under the EC Schedule, i.e. that of HS1996 subheading 9009 12 ("indirect process electrostatic photocopying apparatus").[1640]

7.1256 However, the European Communities does disagree with Japan's claim that "input/output devices" and "peripheral devices" are synonymous because the latter is broader than the former. According to the European Communities, "input or output devices" are not necessarily "separate units" since they can also be incorporated in the central processing unit (CPU).[1641] In the European Communities' view, that "input/output devices" and "peripheral devices" are *not* synonymous, is

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[1634] Japan's first written submission, para. 83 (citing *McGraw Hill Dictionary (2003)*). Japan explains that in this dispute it has mostly relied on the 1994, fifth edition of *McGraw Hill Dictionary* because this is the edition that was available both during the time in which the ITA was negotiated and the time when the HS was revised to later become the HS1996. We note, however, that in a few instances, like in the case of "peripheral devices," defined above, Japan has also relied on the 2003 edition of *McGraw Hill Dictionary.*

[1635] We also note that the United States on some occasions uses the terms "input or output units" and "peripherals" as synonyms (see, e.g. United States' first written submission, paras. 72, 145; second written submission, para. 102).

[1636] Japan's first written submission, para. 83, fn. 53 (citing *McGraw Hill Dictionary (1994)*).

[1637] Japan also adds that these terms are in no way "limited by specific technologies." (Japan's second written submission, para. 81; Japan's first oral statement, paras. 13 and 33).

[1638] United States' first written submission, para. 153 (citing the *McGraw Hill Dictionary*); United States' second oral statement, para. 109; Japan's first written submission, paras. 77, 87-88 and 90; Japan's first oral statement, para. 11 (but also further indicating that the predominant printing function of ADP MFMs indicates that they fall under the ordinary meaning of "output units – printers"); Chinese Taipei's first written submission, paras. 543-545, 585. Japan more explicitly claims that these concessions cover *all* MFMs "with a digital connectivity", i.e. ADP MFMs. (Japan's first written submission, paras. 77, and 90; Japan's second written submission, para. 39; Japan's response to Panel question No. 110).

[1639] European Communities' second written submission, paras. 125-126.

[1640] The Panel will address the European Communities' contention that duty-free treatment is not owed because the products fall within the dutiable concession for HS1996 heading 9009 12 (see section VII.G.3(c)(ii) below, starting at para. 7.1469) or 8472 90 (see section VII.G.3(c)(iii) below, starting at para. 7.1482).

[1641] European Communities' response to Panel question No. 32.

further confirmed by the fact that in the EC Schedule, concessions other than that in HS1996 subheadings 8471 60 ("input or output units") include products that could also be considered "peripheral units" (e.g., the concession in tariff item number 8471 80 10, which includes " -- Peripheral units").[1642]

7.1257 The complainants respond that the European Communities has not explained why a key phrase such as "output units", which ordinarily has a broad meaning, should be read as narrowly as proposed by the European Communities. They consider that, instead of engaging in the ordinary meaning discussion of these terms under the Vienna Convention, the European Communities focuses its defence exclusively on the meaning of certain terms related to the concessions it made for certain "photocopiers", in particular those in HS1996 subheading 9009 12.[1643]

Printers

7.1258 As noted above, Japan and Chinese Taipei have argued that the eight digit break-out of subheading 8471 60 (tariff item number 8471 60 40 – Other -- Printers) which covers "printers" also covers the products at issue within its scope.[1644] Japan and Chinese Taipei have submitted various definitions of "printers."

(a) "[A] computer output mechanism that prints characters one at the time or one line at the time"

(b) [A device] that can "produce or reproduce (text, a picture, etc.) by mechanically transferring characters or designs to paper, vellum, etc. esp[ecially] from inked types, blocks, or plates" **or** "an output device which produces a printed record of data, text, etc." [1645]

(c) "[A]n output device which produces a printed record of data, text, etc."[1646] "b. a device used for printing; especially a machine for printing from photographic negatives; c. a device (as an ink-jet printer) that produces printout." [1647]

7.1259 **Japan** submits that the above definitions indicate that a "printer", from a technological sense, means an automatic data-processing machine's "output unit" that produces a printed copy or copies of

[1642] European Communities' response to Panel question No. 32.

[1643] United States' first oral statement, paras. 9 and 36; United States' first closing statement, para. 4; United States' second written submission, para. 108; United States' second oral statement, para. 38; Japan's first oral statement, para. 13; Japan's second written submission, paras. 36-37 and 81-82; Chinese Taipei's second written submission, para. 298.

[1644] We are aware that the joint Panel request refers only to subheading 8471 60 as the concession at issue in this dispute. However, we recall that Article 3(1)(a) of the HS Convention provides that the contracting parties must follow the HS nomenclature down to the six-digit level and Article 3(3) allows contracting parties the flexibility to establish eight-digit codes provided that any subdivision is added and coded at the level beyond that of the six-digit numerical code[s] of the HS. In our view this means that any eight-digit CN code merely sets forth an additional subdivision of what is covered by the six-digit subheading. Therefore, anything at the eight-digit level must necessarily be included within the scope of the subheading at the six-digit level, in this case 8471 60. Therefore, we see nothing inappropriate with Japan and Chinese Taipei arguing that the products at issue fall within a more specific subset of products covered by the concession raised in the joint Panel request.

[1645] Exhibit JPN-11.

[1646] Japan's first written submission, para. 89 (Exhibit JPN-11); Chinese Taipei's first written submission, para. 547, fn. 268.

[1647] Chinese Taipei's first written submission, para. 548, fn. 269 (citing Merriam-Webster Dictionary *available at* < http://www.merriam-webster.com/dictionary/printer > last viewed on 15 May 2010).

the "digital data" at issue. This "digital data" might come from the "computer" itself, from a" scanner" that has created "digital data" from an original document, or a "facsimile" that has received digital data. In all instances, claims Japan, the "printer" will produce a paper version of that "digital data" using digital technologies. Japan similarly submits that, from an ordinary sense, the above definitions indicate that a "printer" is a "computer output mechanism" that produces a paper version of some data stored on or otherwise being used in connection with an automatic data-processing system.[1648]

7.1260 Additionally, **Chinese Taipei** argues that the definition of "printer" in no way requires the information or data that are printed to come "exclusively" from an "ADP machine". According to Chinese Taipei, there are two requirements for an apparatus to be covered by the terms of the duty-free concession under tariff item number 8471 60 40: (i) it must "be able to connect" to an ADP machine and (ii) it must be "capable of producing printouts of data" received from an ADP machine. Chinese Taipei further notes that the "maximum or minimum number of pages" produced by an apparatus is not part of any of the above definitions of "printer".[1649]

7.1261 The **European Communities** does not engage in a discussion of the definition of the term "printer"; however, it does contend that a product (i.e., a MFM) that also performs other functions, in addition to printing, which may be of equivalent or even higher importance, cannot be a mere printer.[1650]

Consideration by the Panel

7.1262 The **Panel** notes that, in their arguments about the meaning and scope of the concession at issue, the complainants have relied on various dictionary definitions of the relevant terms of the concession. The Panel also notes that the complainants have cited to technical dictionaries in addition to more general dictionaries of the English language. Given the terms involved, we think this is appropriate.[1651]

7.1263 Before we start our analysis of the specific terms used in the concession based on these dictionary definitions, we recall the Appellate Body's statement that, while dictionaries are a "useful starting point" for the analysis of "ordinary meaning" of a treaty term they "are not necessarily dispositive".[1652] We are also aware that understanding the plain meaning of the text is the beginning

[1648] Japan's first written submission, paras. 84 and 89.

[1649] Chinese Taipei's first written submission, paras. 549-550. Singapore supports Chinese Taipei's view and similarly argues that "the definition of a 'printer' does not hinge upon the pages per minute that such a machine can produce." (Singapore's third party submission, para. 100, fn. 92).

[1650] European Communities' first written submission, para. 421.

[1651] Other panels have also examined technical dictionaries when conducting an ordinary meaning analysis pursuant to Article 31 of the Vienna Convention. See e.g., the Panel Report on *Mexico – Telecoms*, paras. 7.81-7.83 (using the Newton's Telecom Dictionary to interpret certain terms from Mexico's Services Schedule); Panel Report on *China – Auto Parts*, paras. 7.660-7-661 (using the Dictionary of Automobile Engineering, an automobile industry dictionary, to interpret China's Schedule); Panel Report on *EC - Approval and Marketing of Biotech Products*, para. 7.372 (using the Glossary of Biotechnology for Food and Agriculture, a biotech industry dictionary, to define the word "biodiversity"); *See also* the Appellate Body Report on *EC – Poultry*, para. 92 (citing the Dictionary of Trade Policy Terms and the Dictionary of International Trade).

[1652] The Appellate Body Report on *EC – Chicken Cuts*, para. 175 (citing the Appellate Body Reports on: *US - Softwood Lumber IV*, para. 59; *US - Offset Act (Byrd Amendment)*, para. 248; and *US - Gambling*, para. 166). See also the Appellate Body Reports on: *China - Publications and Audiovisual Products*, para. 348; and *India - Additional Import Duties*, para. 167, footnote 324.

of our inquiry and not the end. While we may organize our analysis of the ordinary meaning in different sections, for convenience sake, we remain cognisant that we are conducting an holistic analysis of the ordinary meaning and that the text of the terms cannot be divorced from their context and their object and purpose.[1653]

7.1264 As noted above the main terms that have been raised by the complainants have been "input or output units" and "printers." We will address each phrase in turn.

Input or output units

7.1265 The complainants provided a number of definitions of "input" and "output" in isolation as well as used together. All of these definitions support the understanding that "input" and "output" refer to electrical signals, data, or information. An "input" is the electrical signal, data, or information entering an electronic device, while an "output" is the electrical signal, data, or information leaving the electronic device.

7.1266 The concession in subheading 8471 60 of heading 8471 does not cover the inputs or outputs themselves, but "input or output units. A "unit", means *inter alia* "a device with a specified function forming part of a complex mechanism." Such definitions indicate to us that the meaning of "input or output units" cannot be dissociated from the question of what is the function or functions performed by such units and what complex mechanism are they a part of. To that end, we recall that 8471 60 is a subheading of 8471 which covers "automatic data-processing machines" and "units thereof". Therefore, the "units" covered by subheading 8471 60 are "units" of "automatic data-processing machines".

7.1267 We note that all parties agree that computers qualify as "automatic data-processing machines" as used in HS1996 heading 8471. We note further that "units" of "an automatic data-processing machine" are devices forming part and having at least one specified function in an ADP. Because the "units" in question are "input" or "output" units of ADPs, it logically follows that the functions such "units" are required to perform are the sending/ receiving of electrical signals, information, or data from an ADP.

7.1268 Therefore, we conclude that the plain meaning of the term "input or output units" in the concession, i.e., subheading 8471 60, are devices that form part of an automatic data-processing machine, such as computers, or an automatic data-processing system and that perform at least one specified function involving sending/receiving signals, information or data from the automatic data-processing machine.

7.1269 However, we cannot conclude our analysis with the plain meaning of the text. We must examine whether reading the term in its context and in light of its object and purpose leads us to change our preliminary understanding of the plain meaning of the term "input or output units" as used in subheading 8471 60 in the EC Schedule.

[1653] In this respect, we recall that the Appellate Body in *EC – Chicken Cuts*, noted that "Interpretation pursuant to the customary rules codified in Article 31 of the *Vienna Convention* is ultimately an holistic exercise that should not be mechanically subdivided into rigid components." (Appellate Body Report on *EC - Chicken Cuts*, para. 176).

Printers

7.1270 As for printers, as noted above, the complainants have provided dictionary definitions which define a "printer" as an output device or mechanism which prints, on paper, data received from an automatic data-processing machine. As "printers", in the concession, are a subcategory of the subheading covering "input or output units" of computers, we see no reason to disagree with these definitions.

7.1271 Therefore, the plain meaning of the text of tariff item number 8471 60 40 would cover within its scope output devices which print data on paper received from an automatic data-processing machine. We note the European Communities argument that the ability to print information received from an automatic data-processing machine is not dispositive of whether a particular product is a "printer" or might be more properly classified according to some other characteristic. However, we believe this argument is better addressed in section VII.G.3(b) below, where we discuss whether the products at issue in this dispute fit within the scope of the concession in subheading 8471 60, or even more specifically within the eight-digit tariff item number 8471 60 40.

(ii) The terms "input or output units" and "printers" in their context

7.1272 The **complainants** argue that the plain meaning of the terms in subheading 8471 60 are unambiguous.[1654] However, they also argue that examining the terms of the subheading in the context of the rest of heading 8471, the interpretative tools in the HS; such as the notes to Chapter 84, and other parts of the EC Schedule; will lead to the conclusion that the scope of heading 8471 60 is broad enough to cover "any" kind of ADP machine and, as a consequence, merit duty-free treatment for those products.[1655] In addition, Japan and Chinese Taipei argue that the HS1996 notes to Chapter 84 and Section XVI also support their interpretation of the term "printers" in tariff item number 8471 60 40 as including any device which can print output from an automatic data-processing machine.

7.1273 The **European Communities** argues, contrary to the complainants, that Note 5(B) to Chapter 84 supports its interpretation that heading 8471 60 does not cover each and every conceivable kind of MFM which may be connected to an automatic data-processing machine.[1656] The European Communities also argues that the positions of the complainants with respect to the relevant context are misplaced.[1657]

7.1274 The **Panel** will address each of the possible sources of context, in turn.

The terms of HS1996 heading 8471, other subheadings under it and its overall structure

Arguments of the parties

7.1275 The **complainants** argue that the duty-free concession in 8471 covers not only parts of the heading, but the entire heading. They believe this indicates that the duty-free treatment was intended

[1654] Japan's first oral statement, paras. 2 and 64; Japan's second written submission, para. 80.

[1655] Chinese Taipei's first written submission, paras. 535 and 556. The United States, more generally, argues that "the terms of the heading 84.71 ... provide strong contextual support for the conclusion that [ADP MFMs] are included within the scope of the EC's tariff concession for 'input or output units.'" (United States' first written submission, para. 155).

[1656] United States' first written submission, para. 155; European Communities' first written submission, paras. 410-422.

[1657] European Communities' first written submission, paras. 423-426.

to be offered to all devices that are computers or are used in conjunction with computers.[1658] This is confirmed, argues **Japan**, by the use of the term "units thereof" in the heading. Because the subheading in 8471 60 clarifies that "units thereof" includes "input or output units", the complainants believe that the concession broadly covers any devices that are used either to input information into an automatic data-processing machine or to output information coming from an automatic data-processing machine.[1659] Finally, Japan also claims that the meaning "units thereof" indicates that the language of HS1996 heading 8471 is not limited by the technology used in the products falling under it, which confirms that this heading "is broad enough to cover products using changed technology."[1660]

7.1276 The complainants also consider that the overall structure of HS1996 heading 8471, which includes several subheadings, confirms the broad scope of the European Communities' concession.[1661] The complainants consider that the terms of the other subheadings under HS1996 heading 8471, taken together, provide strong contextual support for understanding that all types of computers and all types of computer units – separately or in various combinations – fall within heading 8471.[1662]

7.1277 In particular, Japan points out that subheadings 8471 41, 8471 49, 8471 50 deal with products which combine an automatic data-processing machine with some other computer related devices. The text of these three headings is:

(a) **8471 41** ("- Other digital automatic data-processing machines; - - comprising in the same housing at least a central processing unit and an input and output unit, whether or not combined")

(b) **8471 49** ("- Other digital automatic data-processing machines; - - Other, presented in the form of systems")

(c) **8471 50** ("- Digital processing units other than those of subheadings No 8471 41 and 8471 49, whether or not containing in the same housing one or two of the following types of unit: storage units, input units, output units")[1663]

7.1278 The rest of the subheading deals with "units" of computers that do not themselves include computers. This next set of subheadings includes the concession at issue, 8471 60, as well as 8471 70 and 8471 80, which cover storage units on a stand-alone basis and other units of computers, respectively. In addition, the complainants note that subheading 8471 90 captures other devices that would otherwise be included in heading 8471, but that do not fall within any of the earlier subheadings. Japan notes that even for this broad residual category the EC concession codified in its schedule is a zero duty rate.[1664]

[1658] United States' first written submission, para. 155; Japan's first written submission, para. 130.

[1659] Japan's first written submission, para. 130.

[1660] Japan's response to Panel question No. 13.

[1661] United States' first written submission, para. 155; Japan's first written submission, para. 131; Chinese Taipei's first written submission, paras. 322-330.

[1662] United States' first written submission, para. 155; Japan's first written submission, paras. 132 and 140-141; Chinese Taipei's first written submission, paras. 322-330.

[1663] Japan's first written submission, paras. 132-136.

[1664] Japan's first written submission, paras. 72, 130-131 and 142-143; Japan's first oral statement, para. 21; Japan's response to Panel question No. 13; United States' first written submission, paras. 155-156; United States' first opening statement, para. 35; United States' second written submission, para. 109; United States' second opening statement, para. 38; Chinese Taipei's first written submission, paras. 589, 594 and 600; Chinese Taipei's response to Panel question No. 13.

7.1279 The **European Communities** argues that the mere presence of an "others" subheading within 8471 cannot have the effect of expanding the coverage of that heading beyond its own terms.[1665] In the European Communities' view, because the present dispute concerns issues with respect to concessions based on subheadings belonging to different HS1996 Chapters (Chapters 84 and 90), "in resolving those issues no relevant contextual guidance can be drawn from the mere fact that HS96 heading 8471 includes an 'Other' subheading."[1666]

7.1280 The European Communities also disputes that the concession in subheading 8471 60 must be interpreted in a "broad fashion" simply because the entire heading 8471 was included in the ITA or because the heading covers a wider range of products than the alternative heading proposed by the European Communities, 9009 12.[1667] In particular the European Communities cautions against giving too much weight to the inclusion of a heading in the ITA in the interpretation of its terms. This is because these headings also appear in the schedules of WTO Members who are not ITA participants, and also because the object and purpose of security and predictability of tariff concessions cannot be achieved if the same tariff concessions are considered "broader" for some simply because they are also participants in the ITA. [1668]

Consideration by the Panel

7.1281 We recall that the Appellate Body has confirmed that the HS may provide additional relevant context to the interpretation of a given tariff concession.[1669] The parties all agree that the 1996 version of the HS, on which the concession in CN 8471 60 in the EC Schedule is based, is the relevant document of the HS to provide context for the ordinary meaning of that concession.[1670] The **Panel** finds, therefore, that the other parts of heading 8471 are relevant context for determining the scope of the meaning of the terms used in the concession.

7.1282 In particular, the structure and wording of the heading seem to encompass all types of computer units within its parameters. The structure has the logic of first looking at computers themselves (8471 10 and 8471 30)[1671] and then moving on to "units" of those computers in the various ways they are presented – i.e., as part of an automatic data-processing machine, as systems, with digital processing units, input or output units, storage units on a stand-alone basis, and other. In particular, we note the residual category of "other". We agree with the European Communities that the inclusion of an "other" category in a heading or subheading cannot lead to an interpretation beyond its terms. However, the inclusion of an "other" subheading can indicate that the terms of the remaining subheadings do not by themselves delineate the limits of the scope of the main heading.

7.1283 At the same time, our understanding of the broad nature of the scope of 8471 is *not* informed by the fact that the entire heading was included in the duty-free concession in the ITA. Contrary to

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[1665] European Communities' first written submission, para. 424.
[1666] European Communities' response to Panel question No. 13.
[1667] European Communities' first written submission, para. 424.
[1668] European Communities' first written submission, para. 426.
[1669] Appellate Body Reports on *EC – Computer Equipment*, para. 89; *EC – Chicken Cuts*, para. 199 and *China – Auto Parts*, para. 151.
[1670] The parties' responses to Panel question No. 132 (arguing that the HS1996 applied at the time of the concession and that the HS2007 and the Explanatory Notes thereto are neither 'context' under Article 31(2) of the Vienna Convention, nor an element 'to be taken into account together with the context', under Article 31(3) of the Vienna Convention).
[1671] We do note that even within 8471 30 the term "unit" is used to describe the Central Processing Unit ("CPU") which is the main component of an automatic data-processing machine, therefore it seems that the term "unit" can also refer to parts of an automatic data-processing machine.

the complainants' arguments, we do not believe this fact provides any guidance to the effect that terms within that heading are to be interpreted broadly. It could be equally plausible that the entire heading was included in the duty-free category because it was narrowly construed and therefore, duty-free treatment would be limited to a small set of products. That being said, however, our broad understanding of the coverage of heading 8471 is based on the words in the heading itself in conjunction with its structure. On the other hand, our analysis cannot end with an understanding that 8471 has a broad coverage; indeed the relevant concession under consideration is not 8471 generally, but rather the specific subheading 8471 60 for input or output units.

7.1284 Although the context provided by the terms of 8471 and the subheadings within 8471 further informs our earlier understanding of the plain meaning of the text of the terms in the concession, our analysis must move on to examine the context provided by the HS rules relating to subheading 8471 60.

The HS1996: Note 5 to Chapter 84 and Note 3 to Section XVI

7.1285 The parties have discussed the contextual relevance of the text of the HS1996 Chapter Note 5 to Chapter 84 to understanding the scope of the European Communities' concession of duty-free treatment for "input or output units" in HS1996 subheading 8471 60.[1672] They have also discussed the relevance and interplay between Chapter Note 5 and Note 3 to Section XVI of the HS1996[1673]. The **complainants** are of the view that the Chapter Notes, in particular 5(B) and 5(D), provide further contextual support for the broad interpretation of the terms "input or output units" and "printers" in the text of 8471 60. By contrast, the **European Communities** argues that Chapter Note 5(B) confirms, at the very least, that products with a copying function that is not secondary or equivalent to the other capabilities are classifiable under subheading 9009 12, and thus subject to duties.

Notes 5(B) and 5(C) to Chapter 84

7.1286 The **complainants** submit that Note 5 to HS1996 Chapter 84 is very relevant to an interpretative analysis of the ordinary meaning of the concession at issue because it contains language that "speak[s] directly to the meaning of the terms" of the concession at issue, i.e. the meaning of "units" in HS1996 heading 8471 and subheading 8471 60 of the EC Schedule. The complainants argue that the language of Note 5 to HS1996 Chapter 84, as a whole, confirms that subheading 8471 60 covers products, such as ADP MFMs, whose defining characteristics, are their ability to connect to, and be used as an input or output unit of an automatic data-processing machine.[1674] The fact that the language of Note 5 only speaks of the need to be "connectable", rather than "actually connected", to an automatic data-processing machine also indicates that products which have some

[1672] Australia and Singapore, third parties to this dispute, also make reference to this Chapter Note with respect to MFMs. Australia only "notes" the existence of this Chapter Note, in particular Chapter Note 5(D), but without explaining how exactly this rule applies to ADP MFMs (Australia's third party submission, para. 17). Singapore, on the other hand, addresses the meaning of Note 5(B) in more detail and claims that this rule confirms that ADP MFMs fall in the concession under HS1996 heading 84.71 (Singapore's third party submission, paras. 84-85).

[1673] Section XVI is the section containing Chapter 84 (and also Chapter 85).

[1674] Japan's first written submission, paras. 74 and 146-147 (citing the Appellate Body report on *EC - Chicken Cuts*, para. 224, fn. 224); Chinese Taipei clarifies that while for *classification* purposes there is no hierarchy between sub-paragraphs (a), (b) and (c) of Chapter Note 5(B), for *contextual* purposes the "ability to connect to a computer", as required by sub-paragraph (b) of the Note, is the most relevant element to this case (Chinese Taipei's response to Panel question No. 36).

stand-alone features or capabilities still qualify as input or output units within the meaning of the subheading.[1675]

7.1287 The **European Communities**, on the other hand, argues that a proper reading of Note 5(B) indicates that the mere fact that a machine is connectable to an automatic data-processing machine does not make it classifiable under HS1996 subheading 8471 60. In particular, the European Communities focuses on the wording in Note 5(B)(a) that sets as one of the conditions for classification as being part of a "complete system" that the unit be "of a kind solely or principally used in an automatic data-processing system." Based on this understanding of Note 5(B)(a), the European Communities argues that it is erroneous to conclude that the EC concession under HS1996 heading 8471 60 covers "each and every MFM that can connect to a computer."[1676] Indeed, the European Communities argues that Note 5(B)(a) "makes it clear that a "unit" may not be classified under HS1996 subheading 8471 60 unless it is used 'solely or principally' with an ADP system."[1677]

7.1288 Chinese Taipei, however, responds that the phrase "of a kind" in Note 5(B)(a) should be interpreted as meaning "designed for" or "intended for", and defines the scope of the phrase "solely or principally." Therefore, according to Chinese Taipei, what counts is not the "actual use" of the apparatus but its "physical characteristics".[1678]

7.1289 Finally, Japan notes that the European Court of Justice, in particular in the recent *Kip* ruling, accepted the possibility that multifunctional machines could be of a kind used principally in an automatic data-processing system and instructed the European Communities to make classification decisions about such machines on a case-by-case basis.[1679] In Japan's view, this ruling indicates that the European Court of Justice recognized the key importance of the digital interface and computer connectivity in assessing these products.[1680]

7.1290 Additionally, Japan argues that Note 5(C) explicitly confirms that "units" of an automatic data-processing machine – whether being imported with or without computers that can use the "unit" in question – still belong in heading 8471.[1681]

Note 5(D) to Chapter 84 – "printers" and Note 3 to Section XVI

7.1291 **Japan** argues that this chapter note confirms that for any computer "printers" (i.e., devices that can receive and print output of an automatic data-processing machine), HS1996 heading 8471 must apply as long as the printers can "connect" to the computer (the rule of paragraph (B)(b)) and the

[1675] United States' first written submission, para. 153.

[1676] European Communities' first oral statement, paras. 55-59; European Communities' comments on Japan and Chinese Taipei's responses to Panel question No. 127(b).

[1677] European Communities' second oral statement, para. 121.

[1678] Chinese Taipei's comments on the WCO responses to Panel questions, para. 14.

[1679] Japan's first oral statement, paras. 23-27; Japan's second written submission, paras. 111, 114-117 and 120. However, Japan first qualifies its reliance on this ruling stating that, while it is useful in a number of respects in highlighting flaws in the European Communities' position, this ruling is merely the European Communities' interpretation of the HS under its domestic law within its jurisdiction and therefore does not bind this Panel. Further, Japan strongly disagrees with *Kip*'s "presumption" that "digital copiers" can be "photocopying apparatus" under HS1996 heading 9009. (see Japan's first oral statement, para. 24; Japan's second written submission, para. 113).

[1680] Japan's first oral statement, paras. 23-27; Japan's second written submission, paras. 111, 114-117 and 120. See also, below at fn. 1780 to paragraph 7.1380, Chinese Taipei's quotation from the *Kip* ruling.

[1681] Japan's first written submission, para. 150.

printers can "accept or deliver" the computer data (the rule of paragraph (B)(c)).[1682] According to Japan, Note 5(D) provides important interpretative guidance that the conditions in Note 5(B)(a) do not apply and that all devices which are computer "printers" belong in heading 8471 even if they have other uses that might arguably be considered "principal".[1683]

7.1292 Japan and Chinese Taipei also argue that the meaning of "printer" is not limited to single function printers.[1684] According to Japan when thinking about a multifunction device, it is entirely proper to think of that device as being the machine that performs the principle function of the device.[1685] Japan therefore claims that a device should be considered a "printer" when**:** (1) it can function as a "printer" and (2) the facts and circumstances demonstrate the device is more a "printer" than any other item. Inherent in the word "printer," claims Japan, is the notion that a device that is "essentially a printer" does not automatically become something else because of some other functions. The meaning of the word "printer" therefore does not have any such bright line as advocated by the European Communities.[1686] The complainants find support for their positions in the response of the WCO Secretariat to questions from the Panel, which they argue clarifies that the reference to "printers" in HS1996 Note 5(D) is not limited to "stand alone printers", and can include "multifunctional machines".

7.1293 Japan and Chinese Taipei also find contextual support for the interpretation of the word "printer" under Note 5(D) in Note 3 to Section XVI of the HS1996, which provides interpretative guidance for headings in HS1996 Chapters 84 and 85. According to the complainants, Section Note 3 confirms that when the printing function is the principal function of a multifunction device that device would still be classifiable as a "printer" under subheading 8471 60.[1687] Japan and Chinese Taipei find support for this position in the WCO Secretariat's responses to the Panel's questions on this matter[1688], which stated that

> "[B]y application of Note 3 to Section XVI, HS1996 heading 8471 could also have covered "certain multifunctional machines" for which the connectible printing function -- the function described Note 5 (D) to Chapter 84 -- was determined to be the machine's principal function, because Note 5 (D) to Chapter defined the scope of HS1996 heading 8471.[1689]

7.1294 The **European Communities** argues that Note 5(D) should be interpreted strictly and any machines not expressly described therein remain subject to the rule in Note 5(B)(a). The European Communities claims that evidence of the narrow scope of Note 5(D) can be found in its "negotiating history", which confirms that this Note was not meant to address multifunctional machines, such as

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[1682] Japan's first written submission, para. 151.

[1683] Japan's first written submission, para. 152; Japan's first oral statement, para. 29; Japan's second written submission, paras. 83 and 87.

[1684] Chinese Taipei's second written submission, paras. 328-332.

[1685] Japan's second written submission, para. 79; see also Chinese Taipei's second written submission, paras. 328-332 (arguing that classification of a MFM as a printer could, for instance, result from a classification on the basis of GIR 3(b), where the print module confers the essential character to the apparatus.).

[1686] Japan's second written submission, paras. 79, 90 and 88.

[1687] Japan's second written submission, paras. 90-93. See also Japan's second oral statement, paras. 44-46.

[1688] Japan's comments on the WCO responses to Panel questions, page 3; Chinese Taipei's comments on the WCO responses to Panel questions, paras. 28-29.

[1689] WCO responses to Panel questions, p. 14.

those at issue, but rather single-function printers, which may print indistinctly data received from an automatic data-processing machine and from a different office machine, such as a word processor.[1690]

7.1295 The European Communities also dismisses the relevance of Note 3 to Section XVI to the interpretation of the concession at issue. The European Communities submits that the application of Section Note 3 to Section XVI presupposes however that the product at issue is a multifunctional machine which is prima facie classifiable under two or more headings, each covering a different function. The European Communities therefore contends that, in the case at hand, before resorting to Note 3 to Section XVI, it is necessary to consider whether the product concerned is prima facie classifiable under HS1996 heading 8471 pursuant to Note 5 to Chapter 84. The European Communities also notes, however, that Note 3 to Section XVI only applies where a multifunctional machine is prima facie classifiable under two or more headings of that same Section (which includes Chapters 84 and 85). Thus, Section Note 3 cannot be applied in order to establish whether a multifunctional machine is to be classified under HS1996 heading 8471 or under HS1996 heading 9009, since the latter is included in another Section (Section XVIII).[1691]

7.1296 **Chinese Taipei** adds that if Note 3 to Section XVI would be inapplicable because HS1996 heading 9009 were also a possible classification option, classification should take place pursuant to GIR 3. According to Chinese Taipei, the "multifunctional machine" would still be classified under HS1996 heading 8471 pursuant to GIR 3(b) to the extent that the "essential character" of the device is that of a "printer".[1692]

7.1297 **Japan** responds that even if Note 3 to Section XVI might not be applicable to a classification determination it still provides useful context as part of the holistic application of the treaty interpretation rules codified in the Vienna Convention. Regardless of the applicability of Note 3 to Section XVI in a particular classification case, Japan and the United States both consider that it is relevant for purposes of interpreting the text of the concession in 8471 60, indeed, they argue that it would make little sense to ignore Section Note 3 – which applies to Chapter 84 and Chapter 85 – as context for understanding HS1996 heading 8471.[1693]

Consideration by the Panel

7.1298 The **Panel** notes at the outset that the discussion of the HS1996 Notes in this section of the Reports is related to the contextual value the Note provides for interpreting the ordinary meaning of the terms in subheading 8471 60 – i.e., "input or output units" and "printers." Although we recognize that the chapter note is used by customs authorities in making a classification determination about whether particular products, such as the ADP MFMs described by the complainants in footnote 15 of the joint Panel request, should be classified in a particular heading or subheading, consistent with

[1690] European Communities' first written submission, paras. 420-421; European Communities' second written submission, para. 133; European Communities' second oral statement, paras. 136-137.

[1691] European Communities' response to Panel question No. 20. The European Communities sees confirmation to the inapplicability of Section Note 3 when the prima facie issue is between headings from a Section other than Section XVI, based on the following reasons: first, the text of Note 5 to Section XVI itself limits the definition of "machine" to devices cited in Chapters 84 or 85. Second, the HSEN to Section Note 3 limits the definition of "composite machines" to those machines "described in different headings of Section XVI." Third, whereas Note 3 to Section XVIII states that "the provisions of Note 4 to Section XVI apply also to this Chapter", no similar provision has been made with respect to Note 3 to Section XVI. (European Communities' response to Panel question No. 20). See also the European Communities' second oral statement, para. 123.

[1692] Chinese Taipei's comments on the WCO responses to Panel questions, paras. 28-29.

[1693] United States' response to Panel question No. 20; Japan's second written submission, para. 96.

prior decisions of the Appellate Body we find that it can also provide context for the intended scope of the heading itself.[1694] With that said, we begin our analysis of what context the chapter note provides to an understanding of the concession in 8471 60.

7.1299 We observe that the relevant notes concerning HS1996 Chapter 84 that have been mentioned are Note 5 and Subheading Note 1 (for 8471 49), which read as follows:[1695]

"Chapter 84

Nuclear reactors, boilers, machinery and mechanical appliances; parts thereof

Notes.

[...]

5.(A) For the purposes of heading No. 84.71, the expression "automatic data-processing machines" means :

(a) Digital machines, capable of (1) storing the processing program or programs and at least the data immediately necessary for the execution of the program; (2) being freely programmed in accordance with the requirements of the user; (3) performing arithmetical computations specified by the user; and, (4) executing, without human intervention, a processing program which requires them to modify then-execution, by logical decision during the processing run;

(b) Analogue machines capable of simulating mathematical models and comprising at least: (1) analogue elements, control elements and programming elements;

(c) Hybrid machines consisting of either a digital machine with analogue elements or an analogue machine with digital elements.

(B) Automatic data-processing machines may be in the form of systems consisting of a variable number of separate units. Subject to paragraph (E) below, a unit is to be regarded as being a part of a complete system if it meets all of the following conditions:

(a) It is of a kind solely or principally used in an automatic data-processing system;

(b) It is connectable to the central processing unit either directly or through one or more other units; and

(c) It is able to accept or deliver data in a form (codes or signals) which can be used by the system.

(C) Separately presented units of an automatic data-processing machine are to be classified in heading No. 8471.

[1694] Appellate Body Reports on *EC – Computer Equipment*, para. 89; *EC – Chicken Cuts*, para. 199 and *China – Auto Parts*, para. 151.

[1695] Exhibits US-84, JPN-23; EC-15.

(D) Printers, keyboards, X-Y co-ordinate input devices and disk storage units which satisfy the conditions of paragraphs (B) (b) and (B) (c) above, are in all cases to be classified as units of heading No. 8471.

(E) Machines performing a specific function other than data-processing and incorporating or working in conjunction with an automatic data-processing machine are to be classified in the headings appropriate to their respective functions or, failing that, in residual headings.

[...]

Subheading Notes.

1.- For the purposes of subheading No. 8471.49, the term "systems" means automatic data-processing machines whose units satisfy the conditions laid down in Note 5(B) to Chapter 84 and which comprise at least a central processing unit, one input unit (for example a keyboard or scanner), and one output unit (for example, a visual display unit or a printer).

7.1300 We observe further that Notes 3 and 5 to Section XVI of the HS1996 read as follows:

Section XVI

MACHINERY AND MECHANICAL APPLIANCES;
ELECTRICAL EQUIPMENT; PARTS THEREOF;
SOUND RECORDERS AND REPRODUCERS, TELEVISION IMAGE
AND SOUND RECORDERS AND REPRODUCERS, AND PARTS
AND ACCESSORIES OF SUCH ARTICLES

Notes.

[...]

3. Unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines adapted for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function.

[...]

5. For the purpose of these Notes, the expression "machines" means any machine, machinery, plant, equipment, apparatus or appliance cited in the headings of Chapter 84 or 85.

7.1301 We observe that Note 5 to HS1996 Chapter 84 is organized in a way similar to the heading itself. Note 5(A) defines an automatic data-processing machine; Note 5(B) describes how a "unit" can qualify as part of a "complete system"; Note 5(C) addresses units presented separately; Note 5(D) to printers, keyboards and X-Y devices and disk storage units; and Note 5(E) to machines incorporating

or working in conjunction with an automatic data-processing machine and performing a specific function other than data-processing.

7.1302 With respect to the three criteria in Note 5(B), we note that the main disagreement among the parties is the relevance of the requirement in Note 5(B)(a) to a determination of the scope of the coverage of the term "input or output units" in subheading 8471 60. Namely, that to be regarded as part of a complete system, the "unit" must be "of a kind solely or principally used in an automatic data-processing system". The European Communities argues that Chapter Note 5(B) is directly applicable to the question of what types of products fit within the subheading 8471 60 and that a product must be solely or principally used in an automatic data-processing system in order to fall within the scope of the concession.[1696] The complainants respond that the term "of a kind" focuses more on the design or intended use of the product and not the actual use with an automatic data-processing system, which would require a case-by-case approach to a determination of whether a particular multifunction digital machine satisfied all three criteria in Chapter Note 5(B).

7.1303 In response to a question posed by the Panel on the meaning of the phrase "of a kind" in Note 5(B)(a), the WCO Secretariat explains that the Nomenclature Committee considered the issue, but declined to issue an Interpretative Rule defining the expression. Therefore, in the WCO Secretariat's view, it would "seem reasonable to conclude that the Nomenclature Committee was, in effect, leaving the interpretation of the expressions to each administration to apply, on a case-by-case basis, in the context of classifying specific articles." [1697]

7.1304 It seems to the Panel, that the European Communities' argument requires reading the term "of a kind solely or principally used" as "solely or principally used", which would deprive the phrase "of a kind" of any utility.[1698] Therefore, we agree with Chinese Taipei's position, which seems to be the one of the European Court of Justice in the *Kip* judgment, that the inclusion of the phrase "of a kind" means that a determination pursuant to Chapter Note 5(B)(a) requires an examination of the design and intended use of a product based on its objective physical characteristics., rather than a simple look at the actual use. This does seem to inform the conclusion, that with respect to units of a complete system, the issue is not actual use with the computer but whether the unit was designed or intended solely or principally for use with the computer system and also satisfies the criteria of Note 5(B)(b) and (B)(c), i.e., is capable of connecting to the central processing unit and able to accept or deliver data in a form (codes or signals) which can be used by the system.

7.1305 We note that the chapeau to Note 5(B) tells us that the note provides guidance in determining whether a unit can be regarded as being part of a complete system.[1699] Note 5(C) provides that

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[1696] European Communities' second oral statement, para. 121.

[1697] WCO responses to Panel questions, pp. 5-6.

[1698] European Communities' first written submission, para. 188; European Communities' first oral statement, para. 57; European Communities' response to Panel question No. 46; European Communities' second written submission, paras. 25 and 33; European Communities' second oral statement, paras. 121 and 131.

[1699] The Panel notes that HS96 subheading 8471 60 does not refer to "systems" or "complete systems", rather HS96 subheading 8471 49 is the only subheading of HS96 heading 8471 which refers to systems. Although not raised by the parties in this dispute, this may raise a question whether Note 5(B) is applicable to all "units" or only those units that are to be regarded as forming part of a complete system. We note that in paragraph 7.626 above, based on the plain meaning of the terms, we considered that a unit of an ADP is a device that forms "part of an ADP or an ADP system" and that performs "at least one specified function involving sending/receiving signals, information or data from the ADP or ADP system." While the Panel does not exclude an interpretation whereby "units" might nevertheless fall under Note 5(C), for example, the Panel does not consider that it makes a substantive difference in the circumstances of this dispute, and it therefore does not consider it necessary to rule on this matter.

separately presented units of an ADP machine "are to be classified in heading 8471." Additionally, Note 5(D) provides that printers, keyboards, X-Y co-ordinate input devices and disk storage units which satisfy the terms of Notes 5(B)(b) and (B)(c) are in all cases to be classified as units of heading 8471.

7.1306 We are of the view that these provisions of the Chapter Note must be read holistically and cannot be read in such a way that whether a particular device falls within heading 8471 would differ depending on how it is presented at the border, i.e., separately or as part of a complete system. We also note that the requirement in Note 5(B)(a) that units be "of a kind solely or principally used in an automatic data processing system" resonates with what we have already found to be the plain meaning of a "unit of an ADP machine".[1700] We also recall that an ADP system is defined in the subheading note as consisting of at least a CPU, one input unit, and one output unit.[1701] Therefore, regardless of whether a unit is presented as part of a complete ADP system or separately it must be "of a kind solely or principally used in an automatic data processing system".

7.1307 We also look to Note 5(D) which deals with printers, keyboards, X-Y co-ordinate input devices and disk storage units which are in all cases to be classified as units of heading 8471 if they satisfy the criteria in (B)(b) and (B)(c). As noted above, the features required under (B)(b) and (B)(c) are the ability to connect to the central processing unit either directly or through one or more other units and to accept or deliver data in a form which can be used by the system. We also note that Subheading Note 1 (for 8471 49) lists a printer as an example of an output unit. The European Communities seems to agree with the Subheading Note 1 (for 8471 49) that "printers" are "input or output units", as they created an eight-digit tariff item number underneath subheading 8471 60 for "printers" in their Schedule. Given the relationship between the eight-digit tariff item numbers and the six-digit subheading under which they fall, it is reasonable to conclude that the ability to connect to an automatic data-processing machine and to accept or deliver data in a form which can be used by the ADP machine or system are important criteria for determining not only what is a "printer" under CN 8471 60 40 in the EC Schedule, but also what "input or output" units are, generally.

7.1308 Japan and Chinese Taipei go on to contend that Note 5(D) clarifies that a printer which satisfies the terms of Notes 5(B)(b) and (B)(c) falls within the heading 8471 regardless of whether it has other functions. The WCO Secretariat explains that, "the reference to "printers" in Note 5 (D) to Chapter 84 covered all machines which "printed" but (A) neither (1) "copied" nor (2) "scanned" and "transmitted a representation of the printed page", when (B) such machine "met the terms of Notes 5 (B) (b) and 5 (B) (c) to Chapter 84."[1702] Therefore, it would seem that application of Note 5(D) on its own would not provide for the classification of multifunction machines in heading 8471. However, the WCO Secretariat also informed the Panel that via the application of Note 3 to Section XVI, which would classify composite machines adapted for the purpose of performing two or more complementary or alternative functions as being that machine which performs the principal function, a multifunction machine which had printing as its principal function might be classifiable in heading 8471, pursuant to Chapter Note 5(D).[1703] We note that both the European Communities and

[1700] See paragraph 7.626 above where we stated that, based on the plain meaning of the terms, units of an ADP are devices that form part of an ADP or an ADP system and that perform at least one specified function involving sending/receiving signals, information or data from the ADP or ADP system.

[1701] Subheading Note 1 (for 8471 49) cited in Japan's first written submission, fn. 69. Subheading Note 1 clarifies that for the purposes of subheading 8471 49 the term "systems" means computers "whose units satisfy the conditions laid down in Note 5(B) to chapter 84 and which comprise at least a central processing unit, one input unit (for example a keyboard or a scanner) and one output unit (for example a visual display unit or a printer).

[1702] WCO responses to Panel questions, p. 14.

[1703] WCO responses to Panel questions, p. 14.

Chinese Taipei seem to accept that Note 3 to Section XVI would not be of use in a situation where the product in question was also classifiable in a heading outside Chapters 84 or 85, because Note 5 to Section XVI limits the expression "machines" in the Notes to apparatus in the headings of those Chapters.[1704] Nevertheless, in terms of giving context to the terms in HS1996 subheading 8471 60, Note 3 further informs our understanding that in certain circumstances a multifunction machine could fall within the scope of heading 8471 if its principal function was one covered by the specific subheadings.

7.1309 Finally, Note 5(E) to HS1996 Chapter 84 provides for classification of machines incorporating or working in conjunction with an automatic data-processing machine and performing a specific function other than data-processing. According to this note, these "are to be classified in the headings appropriate to their respective functions or, failing that, in residual headings." Nothing in Note 5(E) instructs on how to determine whether a product which performs data processing *and* a specific function other than data processing may fall within the scope of heading 8471. We also note that pursuant to a reading of Note 5(E) in conjunction with Note 3 to Section XVI, and to the extent the latter note is applicable, if a multifunctional product's principal function was determined to be printing, scanning or some other form of data processing it might still fall within heading 8471.

7.1310 Our analysis of the Note 5 to HS1996 Chapter 84 and Note 3 to Section XVI has led us to understand that ADP "units", in a variety of forms, are to be covered under HS1996 heading 8471. This is true of units that are part of a complete system, that are presented separately, that are printers/keyboards/X-Y units or that are disk storage units. This provides important context for determining the scope of this concession. Subheading Note 1 (for 8471 49) also informs us that input or output units include such machines as scanners and printers. We have also concluded that the term "units" must be understood to be the same whether those units are part of a system or presented separately.

7.1311 In sum, our review of Note 5 to Chapter 84 and Note 3 to Section XVI further informs our understanding that input or output units of an ADP machine are devices that are of an "automatic data-processing machine", part of an "automatic data-processing machine system", that are connectable to the central processing unit either directly or through one or more other units and that perform at least one specified function that involves accepting or delivering data in a form (codes or signals) that can be used by the automatic data-processing machine or "automatic data-processing machine system". Chapter Note 5(E) also inform our understanding that not all devices capable of connecting to an ADP machine *necessarily* qualify as an input or output unit of heading 8471.

Other parts of the EC Schedule

Arguments of the parties

7.1312 **Chinese Taipei** first refers to the eight-digit tariff item numbers, which the European Communities has established within 8471 60. In particular, Chinese Taipei notes that 8471 60 contains an eight-digit tariff item numbers 8471 60 90 ("- - Other; "- - - Other"). Chinese Taipei

[1704] We note that the only argument the European Communities has made with respect to the possible classification of MFMs outside Chapters 84 and 85 is with respect to their classification in subheading 9009 12. The Panel has dealt with whether MFMs can be classified in subheading 9009 12 in paragraphs 7.1469 *et seq.* below.

submits that the existence of the "other"[1705] subcategory indicates therefore that, under the EC Schedule, *all* "input or output units" of computers that are not specifically covered by one of the tariff item numbers under the HS1996 subheading 8471 60 (i.e., as "printers" or "keyboards") fall under the "residual" tariff item number 8471 60 90. Chinese Taipei reasons that the existence of a "residual subheading" in the EC Schedule is important as it tends to underline the "broad scope" of the EC concession in HS1996 subheading 8471 60, under which it is included. Hence, concludes Chinese Taipei, even if the ADP MFMs at issue were not to be regarded as "printers" under tariff item number 8471 60 40, they nonetheless fall within the scope of the concession contained in tariff item number 8471 60 90 ("Other").[1706]

7.1313 The **European Communities** focuses on another aspect of its schedule as context for understanding its obligations under 8471 60, the subheading for photocopying apparatus in 9009 12. As noted above, the European Communities has focused its defence against these claims by arguing that the products in question actually fall outside the scope of the duty-free concession and thus the European Communities has not acted inconsistently with its obligations under Article II of the GATT 1994. The European Communities maintains that the products at issue actually fall within the scope of a dutiable concession in its schedule, HS1996 subheading 9009 12. These arguments will be dealt with in more detail in section VII.G.3(c) below. However, in response to the European Communities arguments, the **complainants** submit that the heading HS1996 subheading 9009 12 actually provides contextual support for their position that the products at issue fall within the broad scope of HS1996 subheading 8471 60.[1707]

7.1314 In particular, the **United States** argues that because subheading 9009 12 uses the term "photocopying" it clearly does not cover MFMs, which perform a range of functions, including scanning and printing, that are not performed by a photocopier. Additionally, the United States argues that while an MFM may perform a copying function, the manner in which it does so sets it apart from a photocopier.[1708] **Chinese Taipei** argues that the HS is structured logically with Chapter 84 including mechanical machines, Chapter 85 electrical machines and Chapter 90 optical instruments. Chinese Taipei argues that there is a fundamental difference in the nature between the products covered in Chapters 84 and 85 on the one hand on those covered by Chapter 90 on the other. According to Chinese Taipei Chapter 90 "exhaustively covers certain specific types of instruments which are exhaustively and precisely defined as 'optical, photographic, cinematographic, measuring, checking, precision, medical or surgical instruments'" Chinese Taipei concludes then that digital technology is excluded from Chapter 90 and therefore apparatus that use it must also be excluded from its scope.[1709]

7.1315 **Japan** finds relevance in the fact that, in its opinion, several headings within the EC Schedule, and not only subheading 9009 12 could cover "copying". Japan argues that 8471 covers output units that can print out one or multiple copies based on the outputting of digital data while heading 8472 10 covers "other office machines" which can make one or multiple copies of a document using technologies that are neither digital nor photocopying. Japan argues that because

[1705] Chinese Taipei's first written submission, para. 554 (citing the *Shorter Oxford Dictionary* (1993) defining "other" as "existing besides or distinct from that or those already specified or implied; further, additional).

[1706] Chinese Taipei's first written submission, paras. 555-557; Chinese Taipei's second written submission, para. 333. Japan, more generally, refers to EC concession in CN code 8471 60 90 ("Other"), together with the text of other subheadings, as part of its contextual arguments on the "structure" of HS1996 heading 84.71 (see Japan's first written submission, para. 142).

[1707] United States' first written submission, para. 155.

[1708] United States' first written submission, paras. 157-160.

[1709] Chinese Taipei's first written submission, paras. 597-598.

three distinct headings can cover "copying" the deciding factor of the scope of the coverage of these headings must come from another factor besides the simple ability to make copies. In Japan's view, the distinction comes from the underlying technology used.[1710] Japan then agrees with the other complainants that because MFMs use digital rather than optical technology they cannot be classified in subheading 9009 12.[1711]

Consideration by the Panel

7.1316 We begin our analysis with the eight-digit tariff item number of 8471 60 90, which falls under subheading 8471 60 in the EC Schedule. We note that subheading 8471 60 in the EC Schedule seems to follow the same type of structural logic as the main heading. It begins generally with input or output units and then specifies the coverage of printers, keyboards, and other. As with the main heading, 8471 60 contains very generic language (i.e., "input or output units") and then has eight-digit tariff item numbers which further subdivide the broader category. One of these eight-digit codes is "other", which as noted above can be a signal that the subheading under which it falls is not intended to be narrowly construed.

7.1317 As noted above, the Panel will address in detail below the European Communities' arguments that the products at issue properly fall within the scope of the dutiable concession at HS1996 subheading 9009 12. Here, we address only the argument that the distinctions between digital and photocopying technology in the EC Schedule must have some relevance for the interpretation of the scope of coverage of subheading 8471 60. We do take Japan's point that 8472 10 demonstrates that not all forms of copying are covered exclusively under the subheading in 9009 12 for photocopying. However, we do not find this lends much interpretative assistance to determining what types of products the terms "input or output units" of automatic data-processing machines in the concession at issue, 8471 60, cover and whether this includes products described as "digital copiers".

7.1318 Therefore, we find that an analysis of the other portions of the EC Schedule, outside the terms of 8471 60 and its eight-digit tariff item numbers, do not provide much guidance in interpreting the scope of the concession in 8471 60.

(iii) Object and purpose

Arguments of the parties

7.1319 The **complainants** note that a recognized object and purpose of the *WTO Agreement* and GATT 1994 is providing security and predictability in the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and barriers to trade.[1712] The complainants also note that both the *WTO Agreement* and the GATT 1994 recognize "expanding the production and trade in goods" as another core object and purpose that is furthered by reciprocal reductions in tariffs.

7.1320 **Japan** submits that the overarching object and purpose of the *WTO Agreement* and the GATT 1994 has been reinforced in the specific context of the ITA. In particular, Japan cites to the

[1710] Japan's first written submission, para. 124.
[1711] Japan's first written submission, paras. 125-128.
[1712] Japan's first written submission, para. 172 citing paragraph 3 of the Preamble to the Marrakesh Agreement; Panel Report on *China – Auto Parts*, para. 7.460 and Appellate Body Report on *EC – Chicken Cuts*, para. 243.

Ministerial Declaration on Trade in Information Technology Products which expressed the desire "to achieve maximum freedom of world trade in information technology products."[1713]

7.1321 **Chinese Taipei** argues that to promote such security and predictability, in the first place, the interpretation of a concession is to be limited by the terms used in that concession. Furthermore, the complainants argue that the objectives of security and predictability also require that concessions cover products even if they did not exist in that form at the time the concessions have been granted to the extent that they comply with the wording of the concessions concerned. Japan posits that the concession must cover all devices that fit squarely within its terms regardless of how their other functionality may change or improve over time.[1714] Chinese Taipei argues that it would run counter to such objectives if the European Communities could exclude from the scope of its concessions some apparatus just because they are more complete or more developed than when they initially existed.[1715] Japan also argues that allowing the European Communities to treat products falling within the ordinary meaning of "output units" or more specifically "printers" as being outside the scope of the duty-free concession because of characteristics unrelated to the core meaning of an "output unit", such as pages per minute, would undermine the security and predictability of the original concession.[1716]

7.1322 The **European Communities** reiterates the arguments it made with respect to the object and purpose of the concessions for flat panel displays, which are described in paragraph 7.540 above.

Consideration by the Panel

7.1323 We recall that Article 31(1) of the Vienna Convention requires that a treaty must be interpreted in light of that particular treaty's object and purpose. As we stated in paragraph 7.542 above, under Article II:7 of the GATT 1994 and Article II:2 of the *WTO Agreement*, the concessions contained in the EC Schedule, including the Annex to the EC Schedule, are treaty terms of the GATT 1994 and the *WTO Agreement*.

7.1324 The Appellate Body in *EC – Chicken Cuts*, explained that the "starting point for ascertaining 'object and purpose' is the treaty itself, in its entirety and not to place too much weight on the object and purpose of a particular concession in a Member's schedule, because "one Member's unilateral object and purpose for the conclusion of a tariff commitment cannot form the basis' for an interpretation of that commitment, because interpretation in the light of Articles 31 and 32 of the Vienna Convention must focus on ascertaining the common intentions of the parties."[1717]

7.1325 With respect to the relationship between the object and purpose of the GATT 1994 generally and a Member's tariff concession, we recall the Appellate Body's statement in *Argentina - Textiles and Apparel* that:

> "[A] basic object and purpose of the GATT 1994, as reflected in Article II, is to preserve the value of tariff concessions negotiated by a Member with its trading partners, and bound in that Member's Schedule. Once a tariff concession is agreed and bound in a Member's Schedule, a reduction in its value by the imposition of

[1713] Japan's first written submission, para. 173 citing Ministerial Declaration, WT/MIN(96)/16 (13 December 1996), at Preamble, Page 1, Clause 4.
[1714] Japan's first written submission, para. 177.
[1715] Chinese Taipei's first written submission, paras. 627-630.
[1716] Japan's first written submission, para. 179; Japan's first oral statement, paras. 33-34; Japan's response to Panel question No. 2; Japan's second written submission, paras. 4 and 12.
[1717] Appellate Body Report on *EC – Chicken Cuts*, paras. 238-239.

> duties in excess of the bound tariff rate would upset the balance of concessions among Members."[1718]

7.1326 Accordingly, the Panel considers that the object and purpose that is relevant to our analysis is the object and purpose of the treaty that is the subject of this dispute, namely the *WTO Agreement*, of which the GATT 1994 and the EC Schedule are an integral part. As noted above the security and predictability of the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade is an object and purpose of the *WTO Agreement*, generally, as well as of the GATT 1994.[1719]

7.1327 On this basis, we consider that tariff concessions made by WTO Members should be interpreted in such a way to further the objectives of preserving and upholding the "security and predictability" of "the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other trade barriers to trade". This includes consideration of the general objective of the expansion of trade and the substantial reduction of tariffs. However, a panel should take care not to disturb the balance of reciprocal and mutually advantageous concessions negotiated by parties.[1720]

7.1328 In this case, the complainants have also argued that provisions of the ITA, a plurilateral agreement that is separate from the *WTO Agreement*, are relevant in determining the object and purpose of the *WTO Agreement*.[1721] While the *WTO Agreement* represents a mutual agreement among all WTO Members, the ITA constitutes a separate plurilateral arrangement made among a subset of WTO Members and states and customs territories acceding to the WTO. Due to the application of the MFN principle and Article II of the GATT 1994, the duty bindings and eliminations agreed to by the ITA participants were also extended to all WTO Members. However, that does not mean that the objectives of the ITA participants of having participants' tariff regimes "evolve" in a manner that "enhances market access for information technology products"[1722], or "achiev[ing] maximum freedom of world trade in information technology products" and "encourag[ing] the continued technological development of the information technology industry on a world-wide basis"[1723] – can be considered a basis for determining the object and purpose of the *WTO Agreement* and the GATT 1994. The ITA participants are a subset of the Membership as a whole and their intentions with respect to an agreement amongst themselves, while relevant context for understanding the concessions they have made, are not appropriate for informing a determination on the object and purpose of the *WTO Agreement* and the GATT 1994.

7.1329 In summary, the relevant object and purpose with respect to this dispute is the general object and purpose of the *WTO Agreement* and the GATT 1994 as a whole, which is to provide security and predictability in the reciprocal and mutually advantageous concessions negotiated by parties for the reduction of tariffs and other barriers to trade. By interpreting the terms of the concession in subheading 8471 60 of the EC Schedule to provide duty-free treatment for all input or output units of automatic data-processing machines in light of this object and purpose, we see nothing that would override or contradict our preliminary conclusion that the concession requires duty-free treatment for

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[1718] Appellate Body Report on *Argentina – Textiles and Apparel*, para. 47; Panel Report on *EC - Chicken Cuts*, para. 7.319.

[1719] Appellate Body Report on *EC – Computer Equipment*, para. 82; see also Panel Report on *EC - Chicken Cuts*, para. 7.318.

[1720] See also Panel Report on *EC – Chicken Cuts*, para. 7.320.

[1721] Complainants' responses to Panel question No. 1; Japan's first written submission, paras. 173-176.

[1722] Para.1 of the ITA.

[1723] Preamble of the ITA.

devices that form part of an "automatic data-processing machine" or an "automatic data-processing machine system", and that perform at least one specified function that involves accepting or delivering data in a form (codes or signals) that can be used by the automatic data-processing machine or "automatic data-processing machine system."

(iv) Subsequent practice (Article 31(3)(b) of the Vienna Convention*)*

Arguments of the parties

7.1330 The **European Communities** argues that the customs classification practice of the Members, including itself, the complainants, and the third parties demonstrates that they have all considered that machines with digital copying capability were at least not solely classifiable under subheading 8471 60, but were also *prima facie* classifiable in HS1996 heading 9009 12 for photocopiers. According to the European Communities, this shows a common understanding that multifunctional products are not included in the concession for input or output units of ADP machines.

7.1331 The **complainants** dispute the European Communities interpretation of its own practice and refer to various BTI decisions from national customs authorities within the European Communities to demonstrate that the European Communities has not consistently maintained that MFMs fit within the scope of HS1996 subheading 9009 12.[1724] In addition, the complainants argue that the evidence adduced by the European Communities does not suggest that, *at the time of the negotiations*, the European Communities believed or had a practice according to which any device without a facsimile function is a "photocopier," or according to which, based on "pages per minute" (much less 12 ppm), one could deem all MFMs with a fax function as "photocopiers."[1725]

European Communities' Practice

7.1332 With respect to its own practice, the **European Communities** cites a 1995 classification regulation[1726], certain BTIs from national customs authorities[1727], the European Court of Justice decision in *Rank Xerox,* and the challenged measures themselves as evidence of its consistent practice. [1728]

7.1333 The **complainants** however, submit that evidence before the Panel in fact shows that EC customs authorities have issued decisions classifying MFMs in HS1996 subheading 8471 60 during and immediately following the ITA negotiations, in particular the **United States** and **Chinese Taipei** cite several BTIs from national customs authorities all from 1996 and 1997. [1729]

[1724] See, e.g., United States' second written submission, para. 116 and fn. 256.

[1725] United States' second oral statement, para. 43.

[1726] This is Commission Regulation No. 1165/95, providing for the classification under CN code 9009 12 00 of an MFM with a digital copying function (Exhibit EC-70).

[1727] Citing BTIs GB 61762, of 13 July 1994; GB 62735, of 15 August 1994; GB 79327, of 16 May 1996; and NL 199610225680135-0, of 30 October 1996 (all submitted as Exhibit EC-79). (European Communities' second written submission, para. 433).

[1728] European Communities' first written submission, paras. 385-389; European Communities' second written submission, paras. 431-433 and 190 (commenting on the complainants' responses to Panel question No. 35(b)).

[1729] United States' second written submission, para. 116 (citing Exhibit US-106, containing three decisions issued by EC customs authorities - two issued in early 1996 and one in mid-1997 - classifying MFMs in HS subheading 8471 60); Chinese Taipei's first written submission, para. 632 (arguing that CN code 8471 60 40 was applied by BTI UK 119109 and UK 119108 to MFMs defined as "colour printer/copier and

7.1334 The European Communities seeks to rebut the BTIs cited by the complainants by noting that two of them are related to ink jet ADP MFMs, which are not subject to this dispute. [1730] The European Communities clarifies however that "it cannot be excluded that imports of ADP MFMs may occasionally have been classified by some local customs offices under a different heading prior to the conclusion of the ITA." In fact, the European Communities argues, given the difficulties involved in determining the distinctions between the scopes of HS1996 subheadings 8471 60 and 9009 12, "the existence of some initial divergences between different local customs offices would be hardly surprising, despite the early guidance provided by Regulation 1165/95."[1731]

Complainants' Practice

7.1335 The **European Communities** submits that at the time of the conclusion of the ITA, none of the complainants or the third parties was of the view that all ADP MFMs with a digital copying function had to be classified necessarily under the HS1996 heading 8471 and that this is evidenced by their own classification practice.[1732]

7.1336 With respect to the United States, the European Communities concedes that US customs authorities issued a headquarters ruling in 1996 holding that the MFMs at issue had to be classified as "printers" under HS subheading 8471 60 pursuant to GIR 3(b), because the printing components conferred their "essential character" to the product. [1733] However, the European Communities contends that since the issuance of the 1996 headquarter ruling, the US customs authorities considered that ADP MFMs were prima facie classifiable under HS headings 9009, as "photocopiers", HS heading 8517, as "fax machines", and HS heading 8471, as "printers". The European Communities also contends that the classification of "stand-alone digital copiers" in subheading 9009 12 demonstrates that the United States believed that "digital copying" was a form of "photocopying." According to the European Communities it wasn't until 2002 that US customs authorities modified, once again, their interpretation and came to the conclusion that "digital copying" was *not* a form of "photocopying" and that MFMs with a digital copying function were *excluded* from the scope of the HS1996 heading 9009.[1734]

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scanner". Similarly, BTI FR 82152 also classified a "machine combinant une imprimante et un copier informatique (scanner)" under CN code 8471 60 40) (Exhibit TPKM-79).

[1730] European Communities' second written submission, paras. 431-433.

[1731] European Communities' second written submission, para. 433.

[1732] European Communities' second written submission, paras. 121-123 and para. 190 (commenting on the complainants' responses to Panel question No. 35(b)); European Communities' second oral statement, para. 139.

[1733] Ruling HQ 958348, of 17 January 1996 (submitted as Exhibit EC-73).

[1734] The European Communities' first written submission, paras. 390-396 (citing the following US customs rulings to support the EC claim that at least until 1994 the United States classified MFMs under HS subheading 9009 12: (i) NY 892321, of 8 December 1993; and (ii) NY 897540, of 9 May 1994 (Exhibit EC - 72). Citing the following US customs rulings to support the EC claim that as from 1996 the United States classified MFMs with a digital copying function under HS subheading 8471 60 pursuant to GIR 3(b) and that the application this GIR presupposes necessarily that the US customs remained of the view that the MFMs at issue were prima facie classifiable under HS subheading 9009 12: (i) NY A88887, of 31 October 1996; (ii) NY B87181, of 2 July 1997; (iii) NY B89972, of 2 October 1997; (iv) NY C81666, of 19 November 1997; (v) NY C83939, of 5 February 1998; (vi) NY D80267, of 20 July 1998; (vii) NY D80821, of 7 August 1998; (viii) NY D85157, of 24 November 1998; (ix) NY D85921, of 18 December 1998; (x) NY D87961, of 25 February 1999; (xi) NY D88682; of 3 March 1999; (xii) NY D88835, of 10 March 1999; (xiii) NY E80009, of 1 April 1999; (xiv) NY E80011, of 5 April 1999; and (xv) NY F80927, of 27 December 1999 (Exhibit EC - 74). Citing US customs ruling NY B87634, of 23 July 1997 to support its claim that the US customs authorities classified under HS heading 9009 certain *components* for a digital copier (submitted as Exhibit EC - 75). And also citing the

7.1337 The **complainants,** particularly the **United States**, argue that the European Communities is mistaken in its interpretation of the facts and that there is no evidence of any "practice" that would support the European Communities' arguments.[1735] The United States explains that in virtually all the US customs rulings from the individual ports no mention is made of HS heading 9009.[1736] These rulings, instead, classify MFMs in HS subheading 8471 60. In fact, the European Communities points to nothing more than two opinions predating the ITA negotiations, while ignoring the large number of opinions before the Panel in which the US Customs and Border Protection (CBP) treated MFMs as "input or output units" of HS subheading 8471 60.[1737]

7.1338 With respect to Japan, the **European Communities** does not rely on classification decisions as Japan asserted that it did not have information with respect to its classification of "digital copiers" and ADP MFMs with a copying function prior to the introduction of the HS2007.[1738] The European Communities instead relies on a proposal Japan made to the ITA Committee in 1997 with a view to including HS1996 subheading 9009 12 within the scope of the ITA, so as to cover "digital copiers". The European Communities argues that this suggests that, at that time, Japan took the view that digital copiers fell within that subheading.[1739]

7.1339 The **United States** notes that the European Communities has not cited subsequent practice, but rather the *absence* of Japanese classification practice. Both the United States and **Japan** dispute the relevance of Japan's proposal during the ITA II negotiations. First, Japan responds that its informal proposal to the CITA for the ITA II negotiation in 1997 was not a reflection of Japan's own view on the classification of MFMs, but rather to address the European Communities' imposition of duties on MFMs. Thus, it is not at all suggestive of any inference regarding the customs practice on MFMs at that time.[1740] Additionally, the United States recalls that in those negotiations it was recognized that a number of products proposed for inclusion in that future agreement may have already been covered by the original ITA. Thus a negotiating proposal says little about what was covered by the concessions at issue in this dispute, and certainly does not indicate a "common, concordant, and consistent" practice even on the part of Japan, the Member putting forward the proposal.[1741]

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following US customs HQ rulings to support the EC claim that only as from 2002 the United States started to expressly exclude MFMs with a digital copying function from the scope of the HS1996 heading 9009: (i) HQ 963680, of 30 August 2002; (ii) HQ 965697, of 30 August 2002; and (iii) HQ 965527, of 30 August 2002 (submitted as Exhibit EC - 69)). See also the European Communities' second written submission, paras. 122-123 and para. 190 (commenting on the complainants' responses to Panel question No. 35(b)).

[1735] United States' second oral statement, paras. 39-40; Japan's second written submission, paras. 29-32; Chinese Taipei's second written submission, para. 323.

[1736] We note that in response to the European Communities' question 1 to the complainants, the United States explained that the ruling with respect to "stand-alone digital copiers" cited by the European Communities was issued by the individual port director and did not reflect the view of US customs as a whole and was subsequently corrected by headquarters into a classification under heading 8472.

[1737] United States' second written submission, para. 116; United States' second opening oral statement, para. 42 (citing Exhibits EC-73 and EC-74, containing 16 rulings issued by CBP between 1996 and 1999, which the United States contends demonstrates that it classifies MFMs in HS subheading 8471 60); Japan's second written submission, para. 66; Japan's second oral statement, para. 34.

[1738] Japan's response to European Communities' question No. 1 after the first Panel meeting.

[1739] European Communities' second written submission, paras. 122-123 and 190 (commenting on the complainants' responses to Panel question No. 35(b)).

[1740] Japan's second oral statement, para. 34.

[1741] United States' second opening oral statement, para. 43.

7.1340 The **European Communities** submits that Chinese Taipei has classified all "digital copiers" as "photocopying apparatus" under HS1996 heading 9009 from the time prior to the conclusion of the ITA until the introduction of the HS2007, including ADP MFMs with a copying function under HS1996 heading 9009 where, on the basis of a "case-by-case examination", it was determined that no function was more "important" than the copying function. The European Communities notes that this is a very similar approach to that postulated by the European Communities itself and one that cannot, therefore, be reconciled with Chinese Taipei's position in this dispute.[1742]

7.1341 **Chinese Taipei** responds that, by citing Member's practice, the European Communities is once again trying to reframe this dispute as one over tariff *classification* rather than tariff *treatment*. The relevant question is not how Chinese Taipei classified a certain product but what tariff treatment did it accord to the product concerned. For instance, Chinese Taipei may well have classified "digital copiers" under HS heading 9009 in view of the WCO discussions on what constituted an "optical system" or even by applying the residual classification rule contained in GIR 3(c). However, this does not mean that Chinese Taipei considered that "digital copying" was equivalent to "photocopying". It merely indicated that Chinese Taipei had to decide on a uniform classification for such products and that it would be in compliance with its WTO obligations as long as it granted a zero tariff to such products. Since HS heading 9009 is subject to a zero tariff in its WTO Schedule, Chinese Taipei considered that a classification of "digital copiers" in this heading was in compliance with its WTO obligations.[1743] Additionally, the **United States** argues that the classification Chinese Taipei was referring to in its response to the question from the European Communities was that of "single-function digital copiers" and that a "case-by-case" approach to classification cannot support the conclusion that there exists a "practice" with respect to the classification of MFMs.[1744]

Third Parties' Practice

7.1342 Finally, with respect to the third parties, the **European Communities** submits that, among the third parties to this dispute, Singapore has expressly confirmed that it classified all "digital copiers" under HS1996 heading 9009 both before and after the conclusion of the ITA and that none of the other third parties, despite being specifically asked by the European Communities, have provided evidence that they did not classify digital copiers under HS1996 heading 9009 or that they classified all ADP MFMs with a copying function under HS1996 heading 8471. The European Communities therefore invites the Panel to draw appropriate inferences from these third parties' deliberate silence.[1745]

7.1343 The **United States** notes that the European Communities is attempting to rely on the *absence* of classification practice by the third parties, which cannot support the conclusion that there exists a "common, concordant, and consistent" practice on the part of other WTO Members that would give support to the European Communities' interpretation of the concessions. As with Chinese Taipei, the United States notes that Singapore's response to the European Communities question related to the classification of "*single-function* digital copiers", devices that *are not* MFMs, the product at issue in this dispute. The United States further notes that, with respect to MFMs, Singapore states that it

[1742] European Communities' second written submission, paras. 122-124 and 190 (commenting on the complainants' responses to Panel question No. 35(b)).

[1743] Chinese Taipei's response to European Communities' question No. 1 to the complainants; Chinese Taipei's second oral statement, para. 60.

[1744] United States' second opening oral statement, para. 41. The Panel understands that the United States' reference here to a "EC measure" means the CN2007, one of the measures at issue in this dispute with respect to MFMs.

[1745] European Communities' second written submission, paras. 122-123 and 190 (commenting on the complainants' responses to Panel question No. 35(b)).

classified devices based on the "physical component which imparted the device its essential character." Thus these answers do not support the conclusion that there exists a "practice" with respect to classification of MFMs.[1746]

Consideration by the Panel

7.1344 As noted above, pursuant to Article 31(3)(b) of the Vienna Convention the panel will take into account, together with context any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

7.1345 We recall that "'subsequent practice' in the application of a treaty "constitutes objective evidence of the understanding of the parties as to the meaning of the treaty."[1747] We recall that for something to qualify as "subsequent practice" within the meaning of Article 31(3)(b) of the Vienna Convention it must be "...'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties [to a treaty] regarding its interpretation".[1748] We are also mindful, particularly in light of the evidence adduced by the parties, that "[i]nconsistent classification practice . . . cannot be relevant in interpreting the meaning of a tariff concession".[1749]

7.1346 As to what may qualify as "common" and "concordant" practice, the Appellate Body stated that, although not each and every party must have engaged in a particular practice for it to qualify as a "common" and "concordant" practice, it would be difficult to establish a "concordant, common and discernible pattern" on the basis of acts or pronouncements of one, or very few parties to a multilateral treaty, such as the *WTO Agreement*.[1750] The Appellate Body further found that if only some of WTO Members have actually engaged in a certain practice, that circumstance may reduce the availability of such "acts and pronouncements" for purposes of determining the existence of "subsequent practice" within the meaning of Article 31(3)(b) of the Vienna Convention.

7.1347 Accordingly, on the basis of guidance provided by the Appellate Body on the assessment of subsequent practice for interpreting a treaty provision, the Panel must determine whether the evidence of practice in the European Communities, the United States, Japan, Chinese Taipei and the third parties constitutes evidence of "consistent, common and concordant" classification practice on the part of the Members with respect to the products at issue during the period between the submission of the EC Schedule until the present.

7.1348 We are not convinced that any of the evidence adduced can demonstrate a "consistent, common, and concordant" practice. Indeed, the BTIs submitted by the complainants demonstrate that even within the European Communities, national customs authorities did not necessarily follow the Commission's view on the classification of multifunction digital machines with a copying function. Likewise, in the United States, while customs headquarters may have had a consistent view, it seems that at least one port director issued contrary classification rulings. We have no evidence of Japan's classification practice and we do not accept that a negotiation proposal in the ITA II for all the

[1746] United States' second opening oral statement, paras. 41 and 43. The Panel understands that the United States' reference here to a "EC measure" means the CN2007, one of the measures at issue in this dispute with respect to MFMs.

[1747] Appellate Body Report on *Chicken Cuts*, para. 255, citing *Yearbook of the International Law Commission* (1966), Vol. II, page 219, para. (6); see also Panel Report on *China – Auto Parts*, para. 7.702.

[1748] Appellate Body Report on *Japan – Alcoholic Beverages II*, para. 106; Appellate Body Report on *US – Gambling*, para. 192.

[1749] Appellate Body Report on *EC – Computer Equipment*, para. 95.

[1750] Appellate Body Report on *EC – Chicken Cuts*, para. 259.

participants to provide duty-free treatment for products in subheading 9009 12 can serve as evidence of such practice.

7.1349 We do not believe the evidence of Chinese Taipei's classification practice, which is the practice of only one Member, can add to our understanding of what the Members intended when providing a concession for "input or output units" of computers in subheading 8471 60. We recognize that, because WTO tariff concessions are normally synonymous with the tariff headings in the HS, the classification practice of the Members may be relevant in determining their common intentions with respect to a particular concession. However, the relevance of classification practice diminishes when the concession on tariff treatment for both headings is the same, as is the case in Chinese Taipei's schedule for subheadings 8471 60 and 9009 12 , i.e., zero.

7.1350 With respect to the third parties' classification practice, we note the following. While Singapore's classification practice of "digital copiers" in HS1996 heading 9009 may be relevant for understanding the common intentions of the Members with respect to the scope of that heading, we do not believe it assists us in answering the question of what the Members meant by using the term "input or output units" of an ADP machine in subheading 8471 60, because it relates to a device that cannot connect to an ADP machine. Additionally, we have no evidence of the practice of the other third parties. We see no need to make an "appropriate inference" from this lack of evidence as there are a variety of reasons why the third parties may not have responded to the European Communities' question with regard to their practice of classifying stand-alone digital copiers which would have no bearing on the common intention of the Members in inscribing a concession for "input or output units" in their schedules.

7.1351 Finally, we note that whatever evidence of practice we do have is from a limited group of Members. We are aware that the European Communities, the United States and Japan were the driving forces behind the negotiation of the original ITA agreement. However, as the European Communities rightly pointed out, the concessions contained in these headings and subheadings are not limited to the participants of the ITA. They exist in most Members' schedules and many Members have been faced with the issue of determining whether the scope of the concession in HS1996 subheading 8471 60 covers a particular product that is presented at their border. Given the ubiquity of the products at issue we can only surmise that this has occurred more often and in more Members than the limited information presented to this Panel. Additionally, we note that the classification practices presented to us are by no means "consistent, common and concordant", and we cannot discern a pattern implying the agreement of the parties to the *WTO Agreement* and the GATT 1994 regarding the interpretation of the concession in 8471 60 from these documents.

7.1352 Based on the foregoing, we do not think that the evidence adduced by the complainants or the European Communities satisfies the conditions for being considered subsequent practice. Therefore we do not need to consider whether such "practice" informs our conclusions above made based on our interpretation of the ordinary meaning of the terms of subheading 8471 60 in its context and in light of its object and purpose.

(v) Other Arguments

Arguments of the Parties

7.1353 **Japan** and **Chinese Taipei** argue that the new heading 8443 and its explanatory note as well as the redrafted Chapter Note 5(D) to Chapter 84 in the HS2007 provide further interpretative

guidance to determine the meaning of the concessions for "units thereof" in heading 8471 and "photocopying" in heading 9009, as those words were used in 1996.[1751]

7.1354 In particular Japan and Chinese Taipei argue that heading 8443 in HS2007 confirms their understanding that the concession in HS1996 subheading 8471 for "input or output units" included multifunction machines, even if they had a copying function. According to Japan, the fact that the language of these new codes refer to devices that can perform multiple functions and also make explicit that they need to be "capable of connecting" to an automatic data-processing machine, confirms that the defining feature of ADP MFMs is their ability to be connected to an automatic data-processing machine or to a network.[1752]

7.1355 Additionally, Japan and Chinese Taipei argue that the explanatory note to heading 8443 in HS2007, provides further interpretative guidance to understand the meaning and scope of concessions made in the EC Schedule based on the HS1996 headings 8471 and 9009 because the 2007 HSEN draws a clear and explicit distinction between "digital copiers" and "photocopiers," discussing each of them in separate categories under the broader category "copying machines," which according to Japan and Chinese Taipei strongly suggests that this distinction already existed under the 1996 HSEN to heading 9009 and that such distinction was simply continued over into the 2007 HSEN to heading 8443, in more explicit terms.[1753]

7.1356 Finally, with respect to the HS2007 Chapter Note 5(D) to Chapter 84, Chinese Taipei argues that by finding it necessary to expressly exclude MFMs from the scope of heading, the new language of this Chapter Note gives further support to Chinese Taipei's argument that, under the HS1996-based EC concessions, ADP MFMs properly fell under heading 8471.[1754]

7.1357 Initially, the **European Communities** argues that subsequent versions of the HS are not relevant to the interpretation of the concessions at issue in this dispute which were made on the basis of the HS1996.[1755] The European Communities also notes that the language of the new heading 8443 and HSEN to heading 8443 was a result of a "pragmatic" and "hard fought" compromise reached at the WCO that involved "concessions on both sides" and that therefore resulted in this language being "studiously ambiguous" with regard to the issues at hand.[1756] The European Communities further submits that, in any case, it does not believe that the HS2007 material cited by the complainants has the meaning they argue.

7.1358 In particular, the European Communities argues that from the mere fact that the new HS2007 subheadings 8443 31, 8443 32 and 8443 39 distinguish between "connectable" and "non-connectable" MFMs it does not follow logically that *all* connectable MFMs were previously classified under

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[1751] Japan's first written submission, paras. 166 and 171; Chinese Taipei's first written submission, paras. 642-647; Chinese Taipei's response to Panel question No. 35(b); United States' response to Panel question Nos. 132 and 135. The United States notes that the HS2007 materials support its interpretation of "digital copying" and "photocopying", however it also notes that it has not relied on the 2007 HSEN to heading 8443 in its arguments in this dispute.

[1752] Japan's first written submission, para. 167; Chinese Taipei's first written submission, paras. 643-644.

[1753] Japan's first written submission, paras. 168-171; Japan's second written submission, paras. 71-73; Japan's response to Panel question No. 135; Japan's comments on the European Communities' response to Panel question No. 134; Chinese Taipei's first written submission, paras. 642-647; Chinese Taipei's second oral statement, para. 59; Chinese Taipei' response to Panel question No. 135.

[1754] Chinese Taipei's first written submission, paras. 645-646.

[1755] European Communities' first written submission, para. 407.

[1756] European Communities' response to Panel questions No. 35(b) and 135.

HS1996 heading 84.71. Since the purpose of creating new positions under the heading 84.43 was precisely to resolve a dispute arising from the lack of clarity of the criteria used in the HS1996, it is to be expected that the new positions in the HS2007 use different criteria.[1757]

7.1359 As to the 2007 explanatory note to heading 8443 in the HS2007, the European Communities submits that the purpose of that section of the explanatory note was simply to draw a "non-exhaustive list" of different types of apparatus included within this "group" of machines.[1758] Because the list is non-exhaustive the description that follows the term "photocopiers" does not necessarily imply that the "digital copiers" mentioned in the explanatory note are not "photocopying apparatus".[1759] Additionally, the European Communities argues that the list in the explanatory note, even if it were exhaustive, is much narrower than that included in the 1996 explanatory note to heading 9009. The European Communities submits that it would be improper to prejudge whether the process followed by "digital copiers" may be characterized as "indirect" for the purposes of the HS1996, where the term "photocopier" is used in a broader sense than in the 2007 HSEN. [1760]

7.1360 Finally, as to the new HS2007 Note 5(D) to Chapter 84, the European Communities contends that the reference to "copying machines" and MFMs made therein, merely seeks to dispel any possible remaining doubts with regard to their classification. Since the old HS1996 heading 9009 was entirely deleted, it was neither necessary nor possible to insert equivalent language excluding expressly from its scope digital copying machines or MFMs with a copying function.[1761]

Consideration by the Panel

7.1361 The **Panel** notes that Japan and Chinese Taipei have not specified that the Panel should consider the relevance of the HS2007 as supplementary means of interpretation under Article 32 of the Vienna Convention.

7.1362 We recall that under Article 32 of the Vienna Convention, recourse may be had to "supplementary means of interpretation" in two distinct circumstances, namely, either to confirm the meaning of the treaty terms resulting from the application of Article 31 or to determine such meaning, but only if the Article 31 interpretation left the meaning ambiguous or obscure, or led to a result manifestly absurd or unreasonable. We recall from paragraph 7.585 above that the Appellate Body has indicated that documents published, events occurring, or practice followed subsequent to the conclusion of the treaty may be relevant for consideration under Article 32 of the Vienna Convention to the extent that the instrument or document reflects the "common intentions of the parties' at the

[1757] European Communities' first written submission, para. 408, fn. 281.

[1758] The European Communities also contrasts this language with the description of "Electrostatic printers" under "item (1)" of "Section (A)" of the 2007 HSEN, which is introduced by the terms "Electrostatic printers, which employ a process…". Additionally, argues the European Communities, the non-exhaustive nature of the list of "copying machines" is further confirmed by the second (and last) paragraph of "Section B" of the 2007 HSEN, which states that "[t]his group also includes contact photocopying apparatus and thermo copying-apparatus." The "group" referred to in that second (and last) paragraph of "Section (B)" is the group of "copying machines", and not only the "photocopiers" described under "item (2)" of "Section (B)". (European Communities' response to Panel question No. 135).

[1759] European Communities' response to Panel question No. 135.

[1760] European Communities' first written submission, para. 408, fn. 281; European Communities' response to Panel questions No. 35 and 135.

[1761] European Communities' first written submission, para. 408, fn. 281.

time of the conclusion" of the treaty.[1762] The Appellate Body emphasized however, that such an assessment must be determined on a case-by-case basis.

7.1363 Furthermore, as to what material can qualify as "supplementary means of interpretation", we recall the Appellate Body's clarification in *EC – Chicken Cuts* that the reference made in Article 32 to "preparatory work of the treaty" and "circumstances of its conclusion" is not exhaustive, indicating that "an interpreter has a certain flexibility in considering relevant supplementary means in a given case so as to assist in ascertaining the common intentions of the parties."[1763]

7.1364 It follows therefore that the fact that the HS2007 is not preparatory work of the treaty or circumstances of the conclusion of the treaty, does not *per se* disqualify it from being considered supplementary means of interpretation under Article 32. Nor can the fact that the HS2007 occurred subsequently to the conclusion of the treaty be *per se* a reason to disqualify it under Article 32, so long as it serves to indicate what were the "common intentions of the parties" at the time of the conclusion of the treaty, i.e. at the time they bound their Schedules. [1764]

7.1365 We note that the HS is constantly evolving and that, in fact, the HS2007 is the second update to the HS since 1996.[1765] If the current version of the HS or its Chapter or Explanatory Notes contained information that indicated the common intentions of the parties at the time of the conclusion of the treaty it could serve as a supplementary means of interpretation.

7.1366 However, we conclude that the materials the parties have raised do not indicate the common intentions of the parties in 1996 when they were drafting their Schedules. The change from the HS1996 (and indeed the HS2002) to the HS2007 that is relevant for our analysis is the elimination of subheading 9009 12 and the redrafting of headings 8471 and 8443, such that heading 8443 now covers certain products such as stand-alone and multifunction devices that can perform the functions of printing, scanning, copying or facsimile transmission, some of these devices being connectable to computer, some not. The parties have raised the 2007 HSEN to 8443 as additional interpretative support for their positions with respect to the scope of the obligations in both 8471 60 and 9009 12 as they existed in the 1996 EC Schedule.

7.1367 Although the changes in the HS are certainly relevant to the *current* classification of the products at issue in this dispute and the explanatory note does contain similar language to that in prior versions of the HS we see nothing in the explanatory note to indicate that it is a reflection of the common intentions of the parties in 1996, such as an explanation that the 2007 HSEN, as part of the process of combining the coverage of the two subheadings, was codifying the distinctions between subheadings HS1996 subheading 8471 60 and 9009 12 as they existed in 1996 or if the Note 5(D) to Chapter 84 of the HS2007 specifically stated that the products not to be classified in 8471 had been classified therein in previous versions. However, the HSEN and Chapter Note do not say that. Indeed, we understand that the development of the new subheading 8443 31 was the result of consistent disagreement among the parties as to the scope of HS1996 subheadings 8471 60 and 9009 12 respectively, and whether there was any overlap. Therefore, we conclude that this particular

[1762] Appellate Body Report on *EC – Chicken Cuts*, para. 305.

[1763] Appellate Body Report on *EC – Chicken Cuts*, para. 283 and para. 305, fn. 574 (relying on the use of the word "including" in the text of Article 32 as an indication of its non-exhaustive nature).

[1764] Appellate Body Report on *EC – Chicken Cuts*, para. 305 (footnote omitted).

[1765] We note that the HS Committee undertakes a periodic review of the HS, approximately every 4 to 6 years. Since the version of the HS that came into force on 1 January 1996 (the version under which the concessions of this case were based on), new versions of the HS have come into force on 1 January 2002 (HS 2002) and 1 January 2007 (HS2007). It is envisaged that a fifth set of amendments will enter into force on 1 January 2012.

HS2007 heading, HSEN to that heading and the new Note 5 to Chapter 84 cannot serve as supplementary means of interpreting the concessions the European Communities made in its schedule in 1996.

(vi) Overall conclusions on the ordinary meaning of the terms of HS1996 subheading 8471 60 and CN 8471 60 in the EC Schedule

7.1368 Our analysis of the text of the tariff concession in its context and in light of its object and purpose led us to conclude that the ordinary meaning of the concession is such that it applies to devices that form part of an "automatic data-processing machine" or an "automatic data-processing machine system", and that perform at least one specified function that involves accepting or delivering data in a form (codes or signals) that can be used by the automatic data-processing machine or "automatic data-processing machine system". We are also of the view that not all devices capable of connecting to an ADP by accepting or delivering data from or to an ADP *necessarily* qualify as an input or output unit of heading 8471. We did not find any relevant subsequent practice on the matter. Furthermore, the documents proposed as supplementary means of interpretation by the parties cannot serve as such.

7.1369 Having now established the scope of the concession, i.e., the type of products covered by the European Communities' obligation under GATT Article II to provide duty-free treatment to products in subheading 8471 60 of its Schedule, we will turn to an analysis of whether the complainants have demonstrated that the products at issue, ADP MFMs, fall within the scope of that obligation.

(b) Whether ADP MFMs are "input or output units" within the meaning of 8471 60

7.1370 The **complainants** assert that ADP MFMs are "input or output units" within the meaning of subheading 8471 60 because they "receive signals from the computer and provide the results to the user in the form of a printed page, and take the information from hard copy and process it into an electronic file provided to the computer for storage or transmission, or to be converted into a printed image or deleted."[1766] Additionally, **Japan** and **Chinese Taipei** contend that the products are also "printers" which are an acknowledged subset of "input or output units" as evidenced by the European Communities creating an eight-digit tariff item number for printers under the relevant subheading, i.e., tariff item number 8471 60 40.

7.1371 The European Communities' asserts that because the multiple functions of the ADP MFMs include copying, there is a question whether they are properly classifiable for customs purposes as "output units" under HS1996 subheading 8471 60 or as "photocopying apparatus" under HS1996 subheading 9009 12. The European Communities argues that a proper application of the classification rules of the HS will lead to the conclusion that the products should be classified in subheading 9009 12 and therefore, the European Communities is not obligated to provide duty-free treatment for the products.

[1766] United States' first written submission, para. 153 (citing the definition *McGraw-Hill Dictionary*); United States' second oral statement, para. 109; Japan's first written submission, paras. 77, 87-88 and 90; Japan's first oral statement, para. 11 (but also further indicating that the predominant printing function of ADP MFMs indicates that they fall under the ordinary meaning of "output units – printers"); Chinese Taipei's first written submission, paras. 543-545, 585. Japan more explicitly claims that these concessions cover *all* MFMs "with a digital connectivity", i.e. ADP MFMs. (Japan's first written submission, para. 77; Japan's second written submission, para. 39; Japan's response to Panel question No. 110).

7.1372 As a general proposition, if ADP MFMs are determined to be within the scope of the concession in subheading 8471 60 then the European Communities is obliged to provide them with duty free treatment pursuant to the bindings in its Schedule.

7.1373 Normally, once the Panel has reached a conclusion on whether the products are within the scope of the tariff concession the next step would be to compare the obligation in the EC Schedule with the treatment provided for in the European Communities' measures in order to determine whether that treatment is less favourable than and charges duties in excess of that set forth in its schedule in contravention of its obligations in Articles II:1(a) and (b) of the GATT 1994. However, in this case, the European Communities asserts because ADP MFMs are classifiable under another tariff subheading means that the appropriate tariff concession is not necessarily the one put forth by the complainants. We will address the issue of whether the products at issue fall within more than one tariff concession and the ramifications of that for an analysis under Article II of the GATT 1994 in section VII.G.3(c) below. We begin our analysis, however, with the question of whether the ADP MFMs at issue are covered by the tariff concession in subheading 8471 60, given our understanding of the scope of that concession as set out above.

(i) Arguments of the Parties

7.1374 The **complainants** describe MFMs, in general, as "digital devices" that perform, in addition to *printing*, one or more of the functions of *scanning*, *copying*, or *facsimile transmission*. They further describe these machines as "generally" incorporating: (i) an "input unit" (i.e., a "scanner unit" to convert information into digital input for the device) and (ii) an "output unit" (i.e., a "printer unit"[1767] that allows the digital output from the device to be printed in paper form). The complainants argue that once a document has been converted into "digital information" by the MFM, such information can be "stored, manipulated on the computer, transmitted over phone lines, or sent over the internet."[1768] The complainants describe ADP MFMs, in particular, as MFMs that are "capable of directly connecting to an automatic data-processing machine or to a computer network in a digital form."[1769] Chinese Taipei further adds that these machines "normally incorporate," in addition to the *printing* function, a *scanning* and *copying* function, and they "sometimes" also have a *fax* function.[1770]

7.1375 The **European Communities**, however, argues that contrary to the complainant's assertions MFMs are not 'technologically advanced versions of printers' but rather are best described as "the result of a process of technological convergence whereby different devices, each with a specific function (photocopiers, printers and/or facsimile machines), have been merged into a single machine capable of performing simultaneously various functions."[1771] The European Communities asserts that these machines were developed from a "photocopier basis."[1772] The European Communities agrees with the complainants that the print engine is an important part of the MFM, however it argues that it

[1767] Chinese Taipei further adds, more specifically, that *all* MFMs at issue in the present dispute incorporate an "electrostatic print unit." (Chinese Taipei's first written submission, para. 17)

[1768] United States' first written submission, paras. 68-69, 71; Japan's first written submission, paras. 17-19;Chinese Taipei's first written submission, paras. 17-20, 551 and 483).

[1769] United States' first written submission, paras. 68-69, 71; Japan's first written submission, paras. 17-19;Chinese Taipei's first written submission, paras. 17-20 and 483).

[1770] Chinese Taipei's first written submission, para. 20. Chinese Taipei further explains that ADP MFMs make copies when their "scanning unit" and "printing unit" work "in tandem". This is done, elaborates Chinese Taipei, when "the digital image produced by the scanning unit is sent directly to the printing unit" and, as a result, "one or more copies of the digitized image will be printed directly." (Chinese Taipei's first written submission, para. 551).

[1771] European Communities' first written submission, para. 330.

[1772] European Communities' first written submission, para. 331.

is a necessary component, not only in printers, but in stand-alone digital photocopiers and facsimile machines. The European Communities argues that although the copying function (i.e., the instant reproduction of an original document) involves the use of a print engine it is distinct from the function of printing data received from an ADP machine.[1773]

7.1376 The copying function of ADP MFMs is central to the European Communities' argument that these products are not properly classified in subheading 8471 60. Relying on the decision of the European Court of Justice in the *Kip* case, the European Communities argues that the products at issue cannot be directly classified under subheading 8471 60 unless it is shown that the copying function is secondary in relation to the functions involving the use of an ADP. Additionally, the European Communities contends that if the copying function is "equivalent" then the goods are classified pursuant to GIR 3[1774] and may still be classified under heading 9009 in accordance with GIR 3(c).[1775]

7.1377 The European Communities concedes that all the MFMs at issue meet conditions (b) and (c) of Note 5(B). Therefore, the central point of disagreement between the complainants and the European Communities is whether, via the proper application of the rules of the HS, in particular Note 5(B)(a) to Chapter 84, the MFMs at issue can be classified under HS1996 subheading 8471 60.

7.1378 According to the **United States,** ADP MFMs respect all the conditions in Note 5 to Chapter 84 and hence qualify as computer "units", under HS1996 subheading 8471 60 in the EC Schedule. In particular, the United States argues that, as required by Chapter Note 5(B), ADP MFMs are "of a kind solely or principally used" in an automatic data-processing machine, "connectable" to an automatic data-processing machine, and "able to accept or deliver data in a form (codes or signals) which can be used by the system". Furthermore, the United States, argues that ADP MFMs are not "machines performing a function other than data procession" under Note 5(E), and that this note cannot serve as a basis for classifying the machines elsewhere.[1776]

7.1379 All three complainants focus on the fact that the machines are made up of "printer modules" and "scanning modules" which are designed to work with an automatic data-processing machine, to support their contention that these devices are "principally used" with an automatic data-processing machine or computer system. [1777] The complainants also point out that the printing function is the most significant and that the print module is by far the largest component of the MFM.[1778]

[1773] European Communities' first written submission, paras. 336-337.

[1774] The European Communities argues that, when the copying function of the MFMs is not secondary in relation to their ADP functions, they are prima facie classifiable under the HS96 headings 8471 and 9009 (and under the heading 8517 as well, if the MFM has also a fax function). It becomes necessary, therefore, the European Communities argues, to classify such MFMs in accordance with GIR 3. The European Communities notes that the heading for photocopiers (9009) occurs in the HS96 after the headings for printers (8471) and fax machines (8517). The European Communities considers GIR3(a) and (b) irrelevant. Therefore, it argues, in accordance with GIR 3(c), the MFMs at issue must be classified under HS96 9009 and, more specifically, within the subheading 9009 12 (European Communities' first written submission, paras. 435-441).

[1775] European Communities' first written submission, paras. 359, 364-365.

[1776] United States' first written submission, paras. 161-162 (also referring to the similar arguments it makes with regard to its FPDs claim based on the concession in EC Schedule in CN code 8471 60 90).

[1777] Chinese Taipei's first written submission, paras. 603-611; Chinese Taipei's second written submission, paras. 328-332.

[1778] United States' first written submission, para. 157; Japan explains that Note 5(B)(a) requires only that the device be "of a kind" principally used with a computer. Japan considers that the qualifier "of a kind" in Note 5(B)(a) serves to "limit the potentially broader language" of the phrase "solely or principally used," which follows it. In other words, explains Japan, the device need not to be "actually used" principally with a computer. Similarly, Note 5(B)(b) requires only that the device be "connectable," not that it actually be "connected", and

7.1380 According to the complainants "printing" and "scanning" are the objective characteristics of these devices and "digital copying" is simply an "incidental function" that occurs because of the combination of these two core objective characteristics.[1779] "Printing" and "scanning" are, thus, the tangible features of MFMs that provide the core functions that can operate on their own. The complainants note that a pre-existing digital file can be printed and that an original document can be converted into a digital file and then stored. Both the printing and scanning functions – and the equipment that makes these two functions possible – thus fall squarely within HS1996 heading 8471 as "units" of an automatic data-processing machine. In Japan's view, ADP MFMs do not cease being "units" of an automatic data-processing machine simply because these two functions, operating together – with no additional equipment – can also provide a digital copying function that can *mimic* "analogue" photocopying.[1780]

7.1381 Indeed, Japan asserts that the "printer unit" of an ADP MFM works just as any other "single function computer printer", in particular given that in both cases there exists a "laser scanning unit" ("LSU") that allows the device to "receive digital output from the computer and convert that digital output into laser light that can then be used to create the printed image on paper or some other medium." Japan submits that any other features MFMs may have simply "complement this basic printing function and simply increase the functionality of the device." Japan further submits that an ADP MFM's "printer unit" can operate "without any technical involvement" of its other units, i.e. the "scanner unit" and/or "fax unit". Japan thus considers that an ADP MFM's "printer unit" "is basically a computer printer."[1781]

7.1382 **Chinese Taipei** argues that, regardless of the application of Note 5(B), Note 5(D) indicates that apparatus that can *print* from computers (like ADP MFMs) are "in all cases" to be classified in HS1996 heading 8471, even though they are not "solely or principally used" with an automatic data-processing machine. Accordingly, ADP MFMs are nevertheless classifiable under subheading 8471 60, more specifically under tariff item number 8471 60 40.[1782]

Note 5(B)(c) requires only that the device be "able" to accept or deliver signals. Japan thus concludes that the rule of Note 5(B)(a) follows the Appellate Body logic in *EC - Chicken Cuts*, according to which it is necessary to look to the product based on its "objective characteristics" at the time it crosses the border. Japan argues that this means that even if a particular MFM might "actually" be used more often in some "non-computer use," the device would still belong under HS1996 heading 84.71, since it is of "a kind" principally used with a computer based on its "objective characteristics." (Japan's second written submission, para. 101 and Japan's comments on the WCO responses to Panel questions, page 2). See also Japan's second written submission, footnote 70 to para. 94.

[1779] Chinese Taipei's second written submission, paras. 328-332. Chinese Taipei quotes the following part of this European Court of Justice ruling to support such assertion:

"[a]ccordingly, those machines are likely simultaneously to meet the three requirements laid down in Note 5(B)(a) to (c) to Chapter 84 of the CN for them to be considered units forming part of an automatic data-processing system, that is to say to be of a kind used solely or principally in an automatic data-processing system, capable of connection to the central processing unit and receiving or supplying data in a form usable by that system."

(European Court of Justice (Kip and Hewlett Packard), para. 41 (Exhibit TPKM-63). See also, above at paragraph 7.1288.

[1780] Japan's second written submission, paras. 97-104. See also Japan's first written submission, paras. 146-154 (including para. 149, fn. 76); Japan's first oral statement, para. 29; Japan's second written submission, para. 83; Japan's second oral statement, paras. 44-46.

[1781] Japan's first written submission, paras. 91-95.

[1782] Chinese Taipei's first written submission, paras. 603-611; Chinese Taipei's second written submission, paras. 328-332.

7.1383 The United States concurs, arguing that if it is undisputed that printers and scanners are covered by the European Communities' concession it is then illogical to conclude that when these products are combined into a single unit, that a combined unit becomes a "photocopier" rather than an "input or output unit."[1783] Therefore, the possible use of an ADP MFM as a digital copier cannot somehow trump its objective characteristics of having a "printer unit" to output digital files as paper documents and having a "scanner unit" to create digital files from paper originals. In this regard, Japan recalls that the Appellate Body has focused on the objective characteristics of the device at issue, not its actual use. In the present case, claims Japan, the objective characteristics of ADP MFMs – their printer and scanner units – are both either directly or indirectly part of the device as a "printer." The other functions do not change these objective characteristics.[1784]

7.1384 Additionally, **Japan** further asserts that the language of Note 5(C) confirms that ADP MFMs are computer "units" under HS1996 heading 8471 even if imported *without* an automatic data-processing machine and it further claims that ADP MFMs cannot be excluded from being such an "unit" by virtue of Note 5(E), since their "digital copy function" does not work "in conjunction with" an automatic data-processing machine and does not therefore perform a "specific function other than data-processing."[1785]

7.1385 The **European Communities** submits that the complainants fail to properly take into account Note 5(B) to HS1996 Chapter 84. According to the European Communities, pursuant to that note, the MFMs at issue cannot be classified under HS1996 subheading 8471 60, unless it can be shown, on a case-by-case basis, that the copying function of each particular kind of MFM is secondary in relation to its ADP functions.[1786] The European Communities asserts that the relevant criteria for conducting such a case-by-case analysis, as noted by the European Court of Justice in its *Kip* judgment, may include print and reproduction speeds, the existence of an automatic page feeder for originals to be photocopied or the number of page feeder trays. The European Communities states that this list of criteria is not exhaustive and other objective characteristics of MFMs may be relevant as well.[1787] The European Communities does not consider that the *actual use* given to the products is relevant because, as confirmed by the Appellate Body in *EC – Chicken Cuts*, in characterizing a product for the purposes of tariff classification, it is necessary to look exclusively at the "objective characteristics" of the product in question when presented for classification at the border.[1788]

7.1386 According to the European Communities, a "unit" may not be regarded as being part of an automatic data-processing system and, hence, as covered by HS1996 subheading 8471 60, unless it meets each of the three conditions specified in Chapter Note 5(B). The European Communities argues that, whether MFMs also satisfy the condition in sub-paragraph (a) will depend on the "nature" and the "relative importance" of the functions performed by each particular kind of MFM.[1789]

7.1387 The European Communities argues that, as admitted by Japan, the digital copying function of an ADP MFM works independently from an automatic data-processing machine and, indeed, such function could continue to be operated even if the ADP MFM were disconnected from the computer. Therefore, in so far as an MFM is used for copying, it cannot be considered to be "used in a

[1783] United States' first oral statement, para. 35.
[1784] Japan's second written submission, paras. 79 (third bullet point), 94-95.
[1785] Japan's first written submission, paras. 146-154 (including para. 149, fn. 76); Japan's first oral statement, para. 29; Japan's second written submission, paras. 83 and 97-98.
[1786] European Communities' first written submission, para. 411.
[1787] European Communities' first written submission, para. 418.
[1788] European Communities' first written submission, paras. 414-419.
[1789] European Communities' first written submission, paras. 414-415.

computer". The European Communities further argues that the complainants have not submitted enough evidence to support their point that computer functions of ADP MFMs, such as printing, are such as to indicate that these devices are "principally" used with computers. Merely juxtaposing certain computer functions (i.e. scanning and printing) and non-computer functions (i.e. copying) of ADP MFMs to conclude that these devices comply with the "principally used" rule of Note 5(B)(a) because, numerically, there are more "computer" than "non-computer" functions, is, in the European Communities' view, too simplistic an argument. Such an argument overlooks, for example, the fact that the scanning function may be "purely instrumental" to the copy function and that the machine may have other non-computer functions, such as "facsimile transmission". More crucially, concludes the European Communities, this "quantitative approach" fails to take into consideration the "level of performance" of each of the different functions of the device.[1790]

7.1388 In the European Communities point of view, Japan's position that "printing" is *always* the *principal* functions of any ADP MFM is "unjustifiably rigid and manifestly unreasonable" because it assumes this conclusion irrespective of the specific objective characteristics of each model of ADP MFM. The European Communities contends that the argument that the "print unit" (or the "print module") is the "most important" component of ADP MFMs is wrong because most of the printing components, including in particular the "print engine", are themselves multifunctional (i.e. they can be used indistinctly for printing data received from an automatic data-processing machine, for copying or for printing an incoming facsimile message). Additionally, the European Communities argues that it does not follow from the mere fact that the printing components are the most important that the printing *function* is the most important. The European Communities rebuts the complainants' position that the copying function is "incidental" to the other functions as being based on the "implausible premise" that "digital copying" is not really "copying." And even if this premise were correct, it would be of no use in relation to Note 5(B)(a), because it is beyond dispute that digital copying, regardless of whether it is a distinct "function", does not involve "the use of an ADP system".[1791]

7.1389 According to the European Communities, when the copying function is not secondary (e.g., it is either primary or equivalent) then the MFMs in question are prima facie classifiable in both HS1996 subheadings 8471 60 and 9009 12 and the relevant rules of the HS, most notable GIR 3, must be applied. In particular, the European Communities argues that because the essential character of the MFM cannot be determined pursuant to GIR 3(b), then GIR 3(c) is the applicable rule.[1792] GIR 3(c) requires that when goods cannot be classified pursuant to GIR 3(a) or (b) they shall be classified in the heading which occurs last in numerical order among those which equally merit consideration. In the European Communities' view, this justifies the classification of MFMs under HS1996 subheading 9009 12 as photocopying apparatus.

7.1390 For their part, the complainants argue that GIR 3(c) is inapplicable. Most importantly, they argue that any "essential character" analysis under GIR 3(b) would result in classification under HS1996 heading 8741. Specifically, Japan argues that:

[1790] European Communities' first written submission, para. 422; European Communities' second written submission, para. 130.

[1791] European Communities' second oral statement, paras. 140-145.

[1792] GIR 3(b) requires classification of composite machines by the material or component which gives them their essential character. The European Communities concedes that it is the print engine which would confer the essential character on a MFM. However, the European Communities contends that the print engine can be intended for use as a copier, fax, or printer, therefore if a print engine were intended for use in a MFM its classification would give rise to the same difficulties as the classification of the MFM itself. The European Communities, therefore, concludes that application of GIR 3(b) is impossible. *See* European Communities' first written submission, paras. 437-441.

> "For purposes of the analysis under GIR 3(b), MFMs with digital connectivity are considered to be composed of the two key components – a printer module and a scanner module – and it is the printer module that gives MFMs their essential character because of the predominant printing function of MFMs. Moreover, both of the two key components –a printer module and a scanner module – belong to the same heading (i.e., 8471)."[1793]

(ii) Consideration by the Panel

7.1391 The **Panel** recalls its conclusion above that an "input or output unit" within the meaning subheading 8471 60 is a device that is of an "automatic data-processing machine" or part of an "automatic data-processing machine system", that is connectable to the central processing unit either directly or through one or more other units and that performs at least one specified function that involves accepting or delivering data in a form (codes or signals) that can be used by the automatic data-processing machine or "automatic data-processing machine system". We also recall our view that not all devices capable of connecting to an ADP by accepting or delivering data from or to an ADP *necessarily* qualify as an input or output unit of heading 8471.[1794]

7.1392 All the parties agree that ADP MFMs are apparatus that not only perform ADP functions, such as printing paper documents from an automatic data-processing machine, but also perform, autonomously, non-ADP functions, such as "digital copying" (and, sometimes, "facsimile transmission" as well). The parties all also agree that the apparatus are able to connect to an automatic data-processing machine and accept or deliver data from the central processing unit. Then, the issue as posed by the parties is whether the products at issue satisfy the criteria in Note 5(B)(a) of Chapter 84, i.e. that they are "of a kind solely or principally used" with an automatic data-processing machine.

7.1393 As noted above, we believe that the analysis should not be on actual use, but the design and intended use of the products based on an examination of the objective characteristics. This can clearly only be done on a case-by-case, product specific basis.

7.1394 The European Communities concedes that the print engine is the largest and most valuable component of a MFM.[1795] The European Communities also does not dispute that the way copying is achieved in a MFM is through the combined use of the print engine and the scanner.[1796] It is also undisputed by all parties that a "single function" machine which was solely a printer or solely a scanner would be presumed to be of a kind solely or principally used with an ADP machine and would fall within the concession in subheading 8471 60. However, the European Communities argues

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[1793] Japan's first oral statement, para. 31.

[1794] However, with regard to whether MFMs fall within the scope of subheading 9009 12, see paragraph 7.1476, below.

[1795] European Communities' first written submission, para. 438. We note that the European Communities, in paragraph 334 of its first written submission states that the essential components of an ADP MFM with the functions of copying, printing and facsimile are: a print engine, a scanning device, a modem and a print controller. On the other hand, Japan refers to the "printer unit" (see Japan's first written submission, paras. 93-97). The United States refers to both a "printer unit" and a "print engine" (see United States' first written submission, paras. 68 and 70). Finally, Chinese Taipei, in discussing the *Kip* judgment refers to the print module, the scanning module and the computer module (see Chinese Taipei's first written submission, para. 518.)

[1796] European Communities' first written submission, para 371-372 (explaining that in a digital photocopier, a source of light projects the image of the original document onto the photo-sensitive surface of a **scanning device**, which convert it into electrical signals which are then recreated in the electrostatic print drum)

that a machine which combines the printing and scanning functions and in the process creates a copying function, does not necessarily fall within the scope of subheading 8471 60. According to the European Communities, if the copying function is "equivalent" to the ADP function then the product is *prima facie* classifiable in both subheadings 8471 60 and 9009 12 and by virtue of GIR 3(c) would fall under dutiable subheading 9009 12. The European Communities also argues that if the combination of these two functions together, creates a machine where the copying function is primary, that machine is *necessarily* not of a kind principally used with an ADP machine and must also fall within the scope of subheading 9009 12.[1797]

7.1395 The European Communities points to several criteria set forth by the European Court of Justice in the *Kip* case, including the pages per minute copying capability. However, we observe that these criteria are not set out in the HS1996 Chapter Notes themselves[1798] and that the European Communities did not explain why these criteria would be more relevant than others, such as the function of the principal component or the value of the various components in the MFM.[1799] We are not persuaded that an MFM which can copy more than 12 monochrome pages per minute is necessarily not "of a kind solely or principally used with an automatic data-processing system". Similarly, we are not persuaded by the contention that this analysis will necessarily lead to the conclusion that all MFMs are input or output units. This is a determination that needs to be made on a case–by-case basis, taking into account the objective characteristics of each MFM.

7.1396 Additionally, we recall our conclusions in paragraphs 7.1306 through 7.1311, above that the requirement set forth in Note 5(B)(a) that a "unit" must be "of a kind solely or principally used in an automatic data processing system" is an expression of the plain meaning of the term unit of an ADP machine and applies equally to separately presented units described in Note 5(C).

7.1397 We also note that, in certain circumstances, some ADP MFMs pursuant to our understanding of the guidance in Note 3 to Section XVI for composite machines, will fall within the scope of subheading 8471 60 if the principal function of that machine is printing, scanning or another "input" or "output" function. While such a determination needs to be made on a case-by- case basis, it seems to us that reading the concession in light of the context of the HS Chapter and Section Notes and the object and purpose certain of the ADP MFMs at issue in this dispute will fall within the terms of the concession in subheading 8471 60.

7.1398 We note the EC position that at least some of the products at issue fall within the scope of its concessions that relate to HS1996 subheadings 9009 12 and 8472 90. We turn to that issue now.

[1797] European Communities' first written submission, para. 389.

[1798] We also note that the only criteria for a determination that copying is either primary or equivalent *reflected in the EC measures* is the number of pages per minute the apparatus can copy. We do not believe that this criterion alone can serve to determine "principal use" especially as copying speed is usually identical to printing speed in MFMs. See Exhibits US-87, US-104, JPN-13, US-108, EC-95 where the parties submitted the technical specifications of various MFM models of different brands (HP, Brother, Xerox, Lexmark, Ricoh). For all these models print and copy speed are the same. Sometimes print and copy speed are mentioned separately ("print speed"..."copy speed"), sometimes together ("print and copy speed")."

[1799] A focus on the function of the principal component seems more in line with Note 3 to Section XVI. We note that the European Communities has argued that if the principal component, in this case the print engine, is itself multifunctional then classification of the MFM, pursuant to GIR 3(b) based on the classification of the component which imparts the products essential character is not possible. (see European Communities' first written submission, paras. 438-440). However, the Panel is not persuaded by this argument.

(c) Are there other applicable tariff headings?

7.1399 The European Communities argues that because there are other *prima facie* applicable tariff headings for the products at issue, and the proper application of the rules of the HS would result in ADP MFMs with a primary or equivalent copying function being properly classified under a subheading other than subheading 8471 60 in the EC Schedule, it is not obliged to provide duty-free treatment to certain ADP MFMs. The first issue for the Panel to consider is whether the products at issue (or at least some of them) fall within the scope of the dutiable headings identified by the European Communities. If they do, the Panel would then need to consider what effect this may have on the issue of whether the EC is in breach of its obligations under Article II of the GATT 1994.

7.1400 The European Communities raises two possible alternative tariff headings related to subheading 9009 12 and subheading 8472 90. In order to determine whether either is applicable we will have to examine the ordinary meaning of the concession and whether the products at issue fall within the scope of that concession. We will address each concession in turn.

(i) Ordinary meaning of the terms of the concession under HS1996 subheading 9009 12[1800]

7.1401 The Panel will begin analysing the ordinary meaning of the terms of the concession under HS 1996 subheading 9009 12 by examining the plain meaning of the terms set forth in that concession.

HS96	Description	Base rate	Bound rate	Year of full implementation	Other duties and charges	Legal instrument where the concession is reflected
9009	Photocopying apparatus incorporating an optical system or of the contact type and thermo-copying apparatus:					
	- Electrostatic photocopying apparatus:					
9009 11 00	- - Operating by reproducing the original image directly onto the copy (direct process)	6.5	0.0	2000	0.0	WT/Let/156
9009 12 00	- - Operating by reproducing the original image via an intermediate onto the copy (indirect process)	7.2	6	1999	0.0	WT/Let/666
	- Other photocopying apparatus:					
9009 21 00	- - Incorporating an optical system	6.5	0.0	2000	0.0	WT/Let/156
9009 22 00	- - Of the contact type	4.9	3	1999	0.0	WT/Let/666
9009 30 00	- Thermo-copying apparatus	4.4	3	1999	0.0	WT/Let/666
9009 90	- Parts and accessories					

[1800] We recall that the EC Schedule is based on the HS1996 and that the language in the two are identical. We also note that the parties often refer to the two interchangeably. Therefore, while we may refer to the HS1996 in our analysis, we are ever mindful that the concession at issue is the one in the EC Schedule.

HS96	Description	Base rate	Bound rate	Year of full implementation	Other duties and charges	Legal instrument where the concession is reflected
9009 90 10	- - Of electrostatic photocopying apparatus or other photocopying apparatus incorporating an optical system	6.5	0.0	2000	0.0	WT/Let/156
9009 90 90	- - Other	3.8	0.0	2000	0.0	WT/Let/156

Meaning of electrostatic photocopying apparatus operating by reproducing the original image via an intermediate onto the copy (indirect process)

Arguments of the parties

7.1402 The **European Communities** argues that the terms of the concession in HS1996 subheading 9009 12 for electrostatic photocopying apparatus "operating by reproducing the original image via an intermediate onto the copy (indirect process)" are broad, and cover products, such as the MFMs at issue, which make copies using digital technology.[1801] By contrast, the **complainants** argue that the HS1996 subheading 9009 12 is very narrowly tailored to a particular type of copying process, also known as analogue photocopying, and that it does not include products that make copies using digital technology.[1802]

7.1403 All of the parties begin their analysis of the ordinary meaning of the concession in subheading 9009 12 by looking at the term "photocopying apparatus" in HS1996 heading 9009. The European Communities, first notes that the prefix "photo" comes from the Greek word "*phos*" (φώς) and means *light*. The European Communities asserts that the use of light is what distinguishes photocopiers from other types of copying machines, such as the thermo-copying apparatus in subheading 9009 30 or the mechanical duplicating machines in subheading 8472 90.[1803] The complainants provide several definitions of variations of the term, such as for "photocopier", "photocopy" and "photocopying process", in support of its contention that what is described in subheading in 9009 12 is a very specific and narrow technological process.[1804] However, the European Communities argues that these definitions support their contention that the description in subheading 9009 12 is broad enough to encompass "digital copying".[1805]

7.1404 In particular, all parties rely on the definition of a photocopier as "an electrical machine for producing immediate, often full-size paper copies of text or graphic matter by a process usually involving the electrical or chemical action of light;"[1806] a photocopy as "a copy of usually printed

[1801] See, e.g., European Communities' first written submission, paras. 366-367; European Communities' first oral statement, paras. 65-66; European Communities' response to Panel question No. 29, European Communities' second written submission, para. 107; European Communities' second oral statement, para. 106; European Communities' comments on the complainants' responses to Panel question No. 124.

[1802] United States' second written submission, para. 112; United States' second oral statement, para. 37; Japan's second oral statement, para. 22; Chinese Taipei's first written submission, para. 593.

[1803] European Communities' first written submission, para. 368.

[1804] See, e.g., the United States' first written submission, paras. 74, 157-159; Japan's first written submission, paras. 104-107; Japan's first oral statement, para. 12; Japan's second written submission, paras. 40 and 77; Japan's second oral statement, paras. 9 and 37; Chinese Taipei's first written submission, paras. 568-570 and 584.

[1805] European Communities' first written submission, paras. 368-370; European Communities' second written submission, para. 106; European Communities' second oral statement, para. 107.

[1806] The *Shorter Oxford Dictionary* (1993), p. 2193.

material made with a process in which an image is formed by the action of light usually on an electrically charged surface;"[1807] and photocopying process as "any of the means by which a copy is created on a sensitized surface (generally paper, film, or metal plate) by the action of radiant energy."[1808]

7.1405 While all the parties seem to rely on the same general definitions of what photocopying is, they do not agree on what type of technology is described in the concession as an electrostatic photocopying apparatus "operating by reproducing the original image via an intermediate onto the copy (indirect process)."

7.1406 The complainants argue that the term "indirect process" in the parenthetical does not impart additional meaning, but rather is used to distinguish it from the copying process used by "direct process electrostatic photocopying apparatus" under subheading 9009 11, in which the optical image of the original is projected directly onto a "special light sensitive paper" without being first projected onto an "intermediate."[1809] They essentially argue that "indirect process" electrostatic photocopying does not have a separate meaning from the words used in the concession, i.e., photocopying done by "reproducing the original image via an intermediate." **Japan** argues that, unlike direct process electrostatic photocopying, indirect process electrostatic photocopying inserts a light sensitive "intermediate" – usually a light sensitive metal curved plate or drum – to serve as an "intermediate" in the process, which is then used to finish the photocopying.[1810] Japan finds support for its understanding in the McGraw-Hill Dictionary of Scientific and Technical Terms which defines an "intermediate" as "that print which is used as a master for further reproduction."[1811] Japan also argues that because the concession refers to "an intermediate," the language contemplates technology that only uses a single intermediate – the light sensitive drum or plate – and not a series of steps.[1812]

7.1407 Based on the above definitions, the complainants argue that an electrostatic photocopying apparatus "operating by reproducing the original image via an intermediate" has a very specific meaning which does not include the use of digital data.[1813] In particular, Japan argues that a "photocopier" reflects light off the original document and then uses that reflected light to transfer the original image of the document to a light sensitive surface and that this reflected light is not digital data, and cannot be used or manipulated in the same way as digital data.[1814] The complainants also argue that the photocopying process requires one exposure of the original document for each copy. According to Chinese Taipei, for each copy being made, an exposure of the optical image of the original document is required.[1815] Japan argues that this one-to-one requirement is reflected in the terms of the concession because the terms "image" and "copy" are in the singular, which, to Japan, indicates that the photocopying apparatus covered by HS1996 subheading 9009 12 should reproduce a single copy from a single original image. According to Japan, the language of the concession

[1807] Merriam Webster Dictionary online available at http://www.merriam-webster/dictionary/photocopy.
[1808] The *McGraw-Hill Dictionary*, p. 1494 (Exhibit JPN-11).
[1809] Japan's first written submission, paras. 105-107; Japan's first oral statement, para. 12.
[1810] Japan's first written submission, para. 106.
[1811] Japan's first written submission, para. 106 citing the *McGraw-Hill Dictionary*, p. 1034 (Exhibit JPN-11).
[1812] Japan's second written submission, para. 53. See also United States' first written submission, para. 158 and Exhibit US-90; United States' second written submission, para. 111.
[1813] Japan's first written submission, para. 106; Chinese Taipei's first written submission, para. 584; United States' first written submission, para. 95.
[1814] Japan's first written submission, para. 107; Japan's second written submission, para. 54.
[1815] Chinese Taipei's first written submission, para. 579.

precisely captures the one image to make one copy correspondence that characterizes analogue photocopying technology.[1816]

7.1408 The European Communities, however, focuses on the requirement of a source of light to project an image of the original, and argues that this definition of photocopying encompasses not only analogue technology, but other technologies, such as digital copying, which also rely on a source of light to project an image of the original document onto the photo-sensitive surface of an "electrostatic drum." The European Communities argues that an "intermediate may consist of an electrostatic drum alone, as in the case of analogue photocopiers, or of various devices operating together (e.g., a scanning device, a laser beam and an electrostatic drum), as in the case of the digital photocopiers using a laser printer."[1817] The European Communities argues that Japan's definition does not belong to the field of photocopying, but to printing machinery. The European Communities argues that the ordinary meaning of "intermediate" is "coming or occurring between two things in time, place, order, character, etc."[1818]

7.1409 Given the foregoing, the European Communities concludes that the ordinary meaning of the terms of the concession in HS1996 subheading 9009 12 includes both digital and analogue copying technologies because they both use light to make copies[1819], and because, as required by the terms of the concession, both processes use an intermediate to make copies, although in the case of "digital copying", rather than one intermediate (the drum), various intermediates are used by working together (i.e., a scanner*;* a laser beam and then an electrostatic drum).[1820] Finally, and as a result of the above, "digital copying" can be described as performing an "indirect process", even if in a "more indirect" way than in analogue copying.[1821]

Consideration by the Panel

7.1410 The **Panel** recalls that its first task here is to determine the ordinary meaning of the scope of the concession in subheading 9009 12 in the EC Schedule. It is only after we have ascertained the meaning of electrostatic photocopying apparatus "operating by reproducing the original image via an intermediate onto the copy (indirect process)" that we can determine whether the products at issue, certain ADP MFMs, are such apparatus.

7.1411 We consider that to accomplish such a task we are required to consider the following key terms of this concession: "electrostatic photocopying apparatus" and the "indirect process" where the copy is produced "via an intermediate."

[1816] Japan's first oral statement, para. 17; Japan's second written submission, para. 52.

[1817] European Communities' first written submission, paras, 371-372, 374.

[1818] European Communities' second written submission, para. 113 (citing the definition of "intermediate" from the *Shorter Oxford Dictionary*) (1993) (Exhibit EC-96).

[1819] European Communities' first written submission, paras. 369-370; European Communities' second written submission, para. 106, fn. 76; European Communities' second oral statement, paras. 107-110.

[1820] European Communities' first written submission, paras. 371-372 and 374. The European Communities also considers that the complainants' narrow reading of "intermediate" as *only* meaning an "electrostatic drum" has no basis on the ordinary meaning of this term, which is "coming or occurring between two things in time, place, order, character, etc". Even if the terms "via an intermediate" had to be read as meaning "via an electrostatic drum", this requirement would be satisfied provided that the image is reproduced onto the copy with the intervention of an "electrostatic drum" (as it is the case with *all* the "digital copiers") and would not exclude the possibility that the image may have been processed by *other* devices, such as a "scanner", *before* it reaches the "drum". European Communities' second written submission, paras. 112-115; European Communities' second oral statement, paras. 115-117.

[1821] European Communities' first written submission, para. 372.

7.1412 We note that all the parties rely on definitions that describe "photocopying" as the process whereby a paper copy is being produced by the action of light on a photo-sensitive surface. The complainants argue that "photocopying" is a very specific type of technology, while the European Communities contends that any technology that uses light to project an image of the original document onto the photo-sensitive surface can be photocopying. We have reviewed the definitions provided by the complainants and also looked at other definitions of photocopying.

7.1413 We find particularly informative, a definition from the World Encyclopaedia which explains photocopying as:

> "[R]eproduction of words, drawing, or photographs by machine. In a photocopying machine, a light shines on the item to be copied, and an optical system forms an image of it. *Various techniques may be used to reproduce this image on paper.* In a *modern plain-paper copier*, the image is projected onto an electrically charged drum, coated with the light-sensitive element selenium. Light makes the selenium conduct electricity, so bright areas of the drum lose their charge. The dark areas, which usually correspond to image detail, retain their charge, and this attracts particles of a fine powder called toner. Electrically charged paper in contact with the drum picks up the pattern of toner powder. A heated roller fuses the powder so that it sticks to the paper and forms a permanent image."[1822] (emphasis added)

7.1414 The complainants explained that photocopying technology is based on an invention of the process by Chester Carlson known as xerography.[1823] We note that in the Oxford English Dictionary "photocopying" is indicated as a synonym to "xerography", the latter term being defined as "[a] dry copying process in which an electrically charged surface retains both the charge and a pigmented powder on areas not illuminated by light from bright parts of the document, so that a permanent copy may be immediately obtained by placing paper on the surface and applying heat to fuse the powder to it; photocopying."[1824] The Britannica Online Encyclopaedia explains that in xerography:

> "[T]he photoconductive layer is selenium, and the image is made visible by dusting the plate with an electrostatically charged powder (toner) having a charge that is the opposite of that of the electrostatic image. The powder adheres to the image portions only and is then transferred to a sheet of plain paper also under the influence of electrostatic fields. A final heat treatment fuses the powder into the paper for a permanent picture. The process usually makes a positive from a positive original."[1825]

7.1415 We note that the definitions of photocopying provided by the parties are quite generic and that the World Encyclopaedia recognizes that a photocopy can be made by a variety of methods, indeed

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[1822] "photocopying" World Encyclopaedia 2005. *available at* http://www.encyclopedia.com (last viewed 23 May 2010).

[1823] Xerox, the Story of Xerography" page 12 (Exhibit US-89) (explaining that "analogue photocopiers" rely on a copy process called "xerography", invented in 1938 by Chester Carlson, and which is based on the combination of two well-known natural phenomena: that materials of "opposite electrical charges" are attracted to each other and that certain materials become "better conductors of electricity when exposed to light.") See also Abramsohn, Dr. Dennis A, "*A Comparison of Photocopying to Digital Printing from Hardcopy"* (Exhibit US-90). See, e.g., the Unites States' first written submission, paras. 158-159; Japan's first written submission, paras. 98-122; Chinese Taipei's second written submission, paras. 313-314; European Communities' first written submission, paras. 371-372.

[1824] *Oxford English Dictionary*, 2nd ed. 1989 (emphasis added).

[1825] "photography, technology of" *Encyclopaedia Britannica. Encyclopaedia Britannica Online.* available at http://www.search.eb.com/eb/article-36511 (last viewed 23 May 2010).

heading 9009 itself speaks of "contact type" photocopiers. However, it goes on to describe the method of the "modern plain paper" photocopier which uses an electrostatically charged drum. We are of the view that this type of photocopying does seem to be synonymous with "xerography" which uses electrostatically charged powder (toner) and "electrostatic fields". For this reason, we are of the view that the definitions of "modern photocopying" and of xerography describe an electrostatic photocopying process.

7.1416 We note that subheading 9009 12 does not cover just any electrostatic photocopying apparatus, but one which operates by reproducing the original image onto the copy *via an intermediate,* which is also described in the concession with the parenthetical "(indirect process)". The reference to "indirect process", distinguishes this process from the "direct process" technology covered in subheading 9009 11. Essentially, in "indirect process" photocopying which operates via an intermediate, the original image is not projected directly onto the paper, but is rather first projected onto something other than the final paper on which the copy will appear. This is confirmed by the definition of "intermediate" at paragraph 7.1406 as meaning "that print which is used as a master for further reproduction." It is also confirmed by the explanation of the "electrostatic photocopying process" above, that in a "modern" plain-paper photocopier the image is projected onto an electrically charged drum or plate, coated with the light-sensitive element selenium. It is in this drum or plate that a latent and invisible image is created when light from the original document is directly reflected onto it. This is also consistent with the dictionary definition of photocopying which refers to a process where a copy is "created on a sensitized surface" using light. This also indicates that the meaning of "... reproducing the original image via an intermediate ..." as used in the concession requires the creation of the copy on a sensitized surface as a "latent image" before the copy is adhered to the paper.

7.1417 Therefore, the plain meaning of indirect process, as used in the concession, describes an electrostatic photocopying apparatus, operating by using light to project the original image onto a light-sensitized surface creating a latent image which is subsequently adhered to plain paper using electrostatically charged powder (toner) and heat to form a final copy of the original image on the paper.

7.1418 We note that the above definitions of electrostatic photocopying/xerography match the evidence presented by the complainants to explain the process used by apparatus known as "analogue photocopiers."[1826] We understand that all of the parties concur that "analogue" electrostatic photocopying apparatus are unquestionably included within the scope of the concession in HS1996 subheading 9009 12. The complainants describe analogue photocopying as having the following characteristics: First, the "reflected light" from the original document has to be immediately used, or else it disappears. In other words, the copy from the original document must be made immediately.[1827] Second, under the above process, the original document is needed each time a hard copy is made. Put differently, each "flash of light" that illuminates the original document serves to produce one single hard copy that outputs from the machine. So, for instance, ten copies would need ten "flashes of light".[1828] Third, under the above process, the "reflected light" has only one purpose, that is, to make

[1826] Exhibit JPN-35 (providing a graphic description of the process). See also Exhibit EC-66 (also providing a graphic description of the process). See European Communities' first written submission, para. 371, fn. 255.

[1827] Japan's first written submission, paras. 113-114; Japan's second oral statement, paras. 15-16; Chinese Taipei's first written submission, paras. 575-584.

[1828] United States' first written submission, paras. 158-159; United States' second written submission, para. 111; Japan's first written submission, paras. 109, 113-114; Chinese Taipei's first written submission, paras. 575-584.

an instant "copy" of the original document in the drum or on a plate, with the consequence that the image created can never be shared or transferred to another machine or device.[1829] Finally, the image created in the drum can be manipulated in only one way: by enlarging or reducing the size of the copy by using adjustments to the lens and the position of the lens.[1830]

7.1419 The complainants argue that this is the only type of technology covered by the ordinary meaning of the concession in subheading 9009 12. In particular, Japan points to the singular tense used to describe original, copy, and intermediate to support its view that what is described in the concession is analogue photocopying technology.[1831] However, the European Communities argues that the ordinary meaning of subheading 9009 12 simply requires the reproduction of the original image onto the copy via an intermediate and does not exclude the possibility that the image may have been processed by other devices such as a scanner, before it reaches the drum.[1832]

7.1420 We do not believe that this interpretative question can be answered by looking merely at the plain meaning of the text in the absence of context or the object and purpose. In this respect, we will examine the *structure* of Chapter 90, to which heading 9009 and subheading 9009 12 belong within the EC Schedule, and the rest of heading 9009. Additionally, we will proceed to examine other materials of the HS, raised by the parties, as offering context for the interpretation of the ordinary meaning of the concession. In particular, we will review the language of the 1996 HSEN to heading 9009, which, the complainants claim, confirms that the scope of the concession in HS1996 subheading 9009 12 is limited to analogue photocopying.

The terms in Subheading 9009 12 in their context

7.1421 The parties refer to several materials within the HS as context for understanding the ordinary meaning of the concession in 9009 12 as it appears in the EC Schedule. In particular, the parties refer to the structure of Chapter 90 of the HS1996 (including heading 9009) in light of the structures and coverage of Chapters 84 (including heading 8471), and the HSEN for heading 9009. The complainants contend that all of these materials confirm that the concession in 9009 12 should be narrowly construed to only apply to the specific type of photocopying technology commonly seen in "analogue" photocopiers. The European Communities, however, argues that nothing in the context demands such a narrow reading of the scope of the concession.

Arguments of the parties

HS 1996 and CN Heading 9009, 1996 HSEN to 9009, and Chapters 90, 84, and 85

7.1422 The **complainants** begin their contextual arguments by focusing on the *structure* of HS1996 Chapter 90, which they argue demonstrates that products with digital technology are not within the scope of the tariff concessions in this Chapter.[1833] In particular, the complainants point to the

[1829] Japan's first written submission, paras. 115-117; Japan's second oral statement, paras. 15-16, 43-44; Chinese Taipei's first written submission, paras. 575-584; Chinese Taipei's first written submission, paras. 575-584.

[1830] Japan's first written submission, paras. 118-119; Chinese Taipei's first written submission, paras. 575-584.

[1831] Japan's first oral statement, paras. 18-19; Japan's second written submission, paras. 52-53.

[1832] European Communities' second written submission, para. 115.

[1833] Japan, for example, submits that the relevant headings under Chapter 90 – HS1996 headings 90.01 to 90.10 –, "all refer to analogue optical technologies, an inherent technological distinction that precludes

language of the other headings within Chapter 90 to support their premise, which include products that depend on "optical," "analogue" and "photographic" technologies, instead of "digital" technologies.[1834] The language of the headings in Chapter 90 are set forth below:

Chapter 90 "Optical, photographic, cinematographic, measuring, checking, precision, medical or surgical instruments and apparatus; parts and accessories thereof"	
Heading **90.01**	"Optical fibers ..."
Heading **90.02**	"Lenses, prisms, mirrors and other optical elements ..."
Heading **90.03**	"Frames and mounting for spectacles ..."
Heading **90.04**	"Spectacles, goggles ..."
Heading **90.05**	"Binoculars, monoculars ..."
Heading **90.06**	"Photographic ... cameras"
Heading **90.07**	"Cinematographic cameras and projectors ..."
Heading **90.08**	"Image projectors ...; photographic ... enlarges and reduces"
Heading **90.09**	"Photo-copying apparatus incorporating an optical system or of the contact type and thermo-copying apparatus."
Heading **90.10**	"Apparatus and equipment for photographic ... laboratories ... not specified or included elsewhere in this Chapter ..."

7.1423 The complainants argue that Chapter 90 covers optical, photographic, cinematographic ... instruments and apparatus and that the relevant heading titles all depend on optical and photographic technologies.[1835] The complainants contrast the language of Chapter 90 and its headings with that of Chapter 84 which covers "Nuclear reactors, boilers, machinery and mechanical appliances; parts thereof" and Chapter 85 which covers "Electrical machinery and equipment and parts thereof; sound recorders and reproducers, television image and sound recorders and reproducers, and parts and accessories of such articles."[1836] **Japan** argues that there is a distinction between the coverage of products in Chapter 90 and Chapter 84 based on the underlying type of technology used.[1837] In the complainants' view there is an inherent technological distinction that precludes products built around digital technologies from the scope of Chapter 90 which deals with optical or photographic products and thus it would be unreasonable to construe the terms of heading 9009 12 so broadly as to include a fundamentally different technology, such as digital technology.[1838]

7.1424 To illustrate and give further support to the claim that Chapter 90 concessions are restricted and have no relation with "digital technology", **Chinese Taipei** makes reference to the example of the different tariff treatment given under the EC Schedule for "digital cameras" in one hand and

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products built around digital technologies from the scope of heading 9009." (Japan's response to Panel question No. 34). In the same vein, see also the United States' first written submission, para. 160.

[1834] United States' first written submission, para. 160; Japan's first written submission, paras. 126. Rather than citing specific language from each of the "relevant" headings under Chapter 90, Chinese Taipei makes a more general reference to Chapter 90's "title": "Optical, photographic, cinematographic, measuring, checking, precision, medical or surgical instruments and apparatus; parts and accessories thereof." (Chinese Taipei's first written submission, para. 595).

[1835] Japan's first written submission, para. 126.

[1836] Chinese Taipei's first written submission, paras. 595-596.

[1837] Japan's first written submission, para. 126; see also Chinese Taipei's first written submission, paras. 596, 598.

[1838] United States' first written submission, para. 160; Japan's first written submission, paras. 126-128; Japan's first oral statement, para. 33; Chinese Taipei's first written submission, paras. 592-598. Chinese Taipei also sees confirmation to this view on the fact that, unlike HS1996 headings 8471 and 8517, heading 9009 does not contain a "residual subheading" (Chinese Taipei's first written submission, para. 593).

"photographic cameras" on the other. In the EC Schedule, it argues, "digital cameras" fall under HS1996 subheading 8525 40, more precisely under tariff item number 8525 40 11 as "still image video cameras – digital." On the other hand, in the EC Schedule, "photographic cameras" fall under HS1996 heading 9006.[1839]

7.1425 The **European Communities** rejects the argument that when Chapters 84, 85 and 90 are read together in context, because Chapter 90 is more "specific," it then follows that it should be interpreted restrictively. The European Communities claims that it is not aware of any such rule of interpretation under the HS that would support such an approach. If anything, submits the European Communities, the fact that Note 1(m) to Section XVI of the HS expressly excludes Chapter 90 from that Section (where Chapters 84 and 85 belong) indicates the HS drafters saw a potential overlap between these three chapters and resolved this by giving preference to Chapter 90, not the other two.[1840]

7.1426 The European Communities also rejects the complainants' claim that "digital photocopiers" do not "belong" in Chapter 90 because they supposedly do not use "optical technology". The European Communities claims that, in fact, these devices contain a scanner which is itself composed of an "optical system consisting of lamps, lenses and mirrors." Furthermore, HS1996 heading 9009 also includes photocopiers without an optical system, namely the photocopiers "of the contact type," mentioned in HS1996 subheading 9009 22.[1841] The European Communities argues that there is no rule or principle whereby any product must be excluded from Chapter 90 headings just because it uses "digital technology".[1842] Indeed, the European Communities asserts that various "optical products with digital technology" clearly fall under Chapter 90.[1843]

7.1427 As to the example of the different treatment in the EC Schedule between "digital" and "photographic" cameras, the European Communities submits that in fact HS1996 subheading 8525 40 covers all kinds of "still image video cameras", whether "digital" or "analogue." The European Communities argues that this is confirmed by the fact that in the ITA, the concession under HS1996

[1839] Chinese Taipei's first written submission, para. 597. We note that, when dealing with the "HS as context", Chinese Taipei also makes a similar argument, claiming that not only in the EC Schedule, but also under the HS, "digital" and "photographic" cameras are classified differently, i.e. the former in HS1996 heading 8525 and the latter in HS1996 heading 90.06 (Chinese Taipei's first written submission, para. 620).

[1840] European Communities' first written submission, para. 425.

[1841] European Communities' first written submission, paras. 376-377.

[1842] European Communities' response to Panel question No. 125.

[1843] The European Communities submits that the following products are "optical products with digital technology" that nevertheless fall under Chapter 90: (1) "pocket cameras ... controlled by a microprocessor"; (2) "Laser Photoplotter for creating latent printed circuit board images on photosensitive film, generally from digital formats ..."; (3) "Laser Photoplotter for creating images on photosensitive film, generally from digital formats ..."; (4) "digital film recorders"; (5) "digital microscopes". It further lists the following "medical, scientific and laboratorial analysis machines" that also incorporate digital technologies but nevertheless fall in Chapter 90: (6) "digital oscilloscopes"; (7) "sound analysis apparatus"; (8) "spectrum analysers"; (9) "spectrometers"; (10) "network analysers"; and (11) "pH meters." The European Communities argues that the evidence that products (1) to (3) fall under heading 9006 is the language of the HS2007 HSEN to subheading 9006 (Exhibit EC-103). It argues that the evidence that product (4) falls under heading 9006 is a 2000 EC classification regulation and a 2001 US HQ ruling (Exhibits EC-104; EC-105); It argues that the evidence that product (5) falls in heading 9011 (which, we note, is more precisely a "micro inspection station system" incorporating *inter alia* a "digital CCD microscope") is a 2006 UK BTI (Exhibit EC-106). Finally, the European Communities offers as evidence in support of its allegation that products (6) to (11) fall, respectively, under headings 9030, 9027, 9030, 9027, 9031 and 9027, various brochures and two 2007 WCO classification decisions (Exhibit EC-117). See European Communities' second written submission, paras. 184-185 (commenting on Japan's response to Panel question No. 34) and European Communities' response to Panel question No. 125.

subheading 8525 40 is preceded by the word "ex", which indicates that the duty-free concession was limited to only a subset of products within that subheading, i.e. only "still image video cameras" that are "digital". According to the European Communities, the fact that in this "ITA concession" a term not present in HS1996 subheading 8525 40 (i.e., the word "digital" which precedes the phrase "still image video") was included, combined with the fact that the rest of the text of that HS subheading was omitted (i.e., the phrase "and other video camera recorders"), confirms that the scope of HS1996 subheading 8525 40 includes all kinds of "still video cameras". In the European Communities' view, it was the fact that the device was a "still video camera," not its "digital" nature, that caused it to fall within the scope of HS1996 subheading 8525 40. Therefore, the European Communities concludes, this example does not support the argument that digital products are *per se* excluded from Chapter 90.[1844]

Heading 9009

7.1428 Regarding the breadth of the concessions in HS1996 heading 9009, **Chinese Taipei** argues that, unlike headings 8471 and 8517, the wording includes a very limited category of apparatus (photo-copying and thermo-copying) as well as their parts and accessories. Chinese Taipei also notes that 9009 does not have a residual category.[1845] **Japan** argues that the sub-grouping of "electrostatic photocopying apparatus" in 9009 only includes two more detailed six-digit subheadings 9009 11 for direct process electrostatic photocopying and 9009 12 for indirect process electrostatic photocopying. Japan submits that the language of the two subheadings informs the definition of "photocopying" in the main heading. Additionally, Japan argues that the exhaustive nature of the descriptions in the two subheadings "makes clear that subheading 9009 12 has no role as a 'catch all' category that captures any 'photocopying apparatus' using an 'electrostatic' mechanism other than a 'direct process' one."[1846] Consequently, according to Japan, the terms of subheading 9009 12 must be interpreted strictly in accordance with its text.[1847]

7.1429 The complainants further note that, with respect to photocopiers, heading 9009 and its subheadings only apply to those photocopying apparatus incorporating an "optical system." The **United States** explains that an "optical system" is a system composed of a "light source", "mirrors" and "lenses" that allow the optical image of the original to be projected onto the drum (the intermediate).[1848] Therefore, according to the complainants, a product cannot fall within the scope of 9009 12 if it does not use an optical system of a light source, mirrors, and lenses to project the original onto the drum.[1849]

[1844] European Communities' response to Panel question No. 125 (citing the full text of HS1996 heading 8525 as well of the 1996 HSEN to heading 8525). The European Communities also refers to the language of HS1996 Chapter Note 1 h) to Chapter 90, claiming that it indistinctively excludes from Chapter 90 all still image video cameras, whether they are digital or not).

[1845] Chinese Taipei's first written submission, para. 593.

[1846] Japan's second oral statement, para. 22.

[1847] Japan's second oral statement, para. 22.

[1848] United States' second written submission, para. 112; United States' second oral statement, para. 37.

[1849] See, for example: United States' first written submission, paras. 71, 157, 159; United States' first oral statement, para. 37; United States' second written submission, paras. 111-114; United States' second oral statement, para. 37; Japan's first written submission, paras. 70-73, 107-122, 158-161 and 207; Japan's first oral statement, para. 37; Japan's second written submission, paras. 40-41; Chinese Taipei's first written submission, para. 574-584; Chinese Taipei's second written submission, paras. 299-300, 314, 319; complainants' responses to Panel question No. 29 (arguing that the WCO endorsed their view that digital copiers are not photocopiers); Japan's responses to Panel questions Nos. 124; 131 and 136.

7.1430 The **European Communities** first argues that the distinctions in the six-digit subheadings under 9009 for electrostatic photocopying apparatus are exhaustive. According to the European Communities:

> "[A]ll photocopying apparatus with an optical system and an electrostatic print engine fall within one of those two categories. Since it is beyond dispute that digital copiers do not operate according to the 'direct process', it must be concluded that they follow the 'indirect process.'"[1850]

7.1431 Additionally, in rebuttal to the United States, the European Communities argues that "digital copiers", do have "optical systems" as required by the terms of the concession, indeed, according to the European Communities they include not only one, but two "optical systems" (i.e., the CCD of the scanner and the laser beam).[1851] The European Communities rejects the view that there can only be one single "optical system" because this term appears in the concession in the singular form. The European Communities argues that even if the wording of the concession had to be narrowly interpreted as excluding the use of "more than one optical system", it is possible to consider that "all the optical elements" used in digital copying constitute a "single system" because they "operate in a related and interconnected manner in order to accomplish a common function," which in this case is to make copies. [1852]

1996 HSEN to Heading 9009

7.1432 The **complainants** argue that the 1996 HSEN to heading 9009 provides relevant contextual material for understanding the concession because it speaks directly to the meaning of the terms of the concession in 9009 12 for electrostatic photocopying apparatus operating by reproducing the original image via an intermediate onto the copy (indirect process) and confirms that such a concession is limited only to machines that use analogue copying technology.[1853]

7.1433 The complainants claim that the 1996 HSEN to heading 9009 supports their view that the ordinary meaning of the term "photocopying" in the concession is only related to an analogue copying process and, consequently, not related to "digital copying". They attach particular importance to the 1996 HSEN's definition of what constitutes the "optical system" that "photocopying apparatus" must incorporate under the concession. They recall this definition's explanation that an "optical system", which is comprised mainly of a "light source", "lenses" and "mirrors," is used, similarly to what happens in "analogue photocopiers", to project "the optical image of an original document on to a light-sensitive surface".[1854]

[1850] European Communities' second written submission, para. 110.

[1851] The European Communities' second oral statement, para. 114.

[1852] European Communities' comments on the complainants' responses to Panel question No. 124 (citing the definition of "system" from the *Merriam-Webster Online Dictionary*, as "a group of devices or artificial objects … forming a network especially for … serving some common purpose.").

[1853] See e.g., United States' first written submission, para. 163; Japan's first written submission, para. 74; Japan's first oral statement, para. 30; Japan's second written submission, paras. 40, 49 and 163. Japan's second oral statement, paras. 28-30; Chinese Taipei's first written submission, paras. 617-619; Chinese Taipei's second oral statement, para. 59.

[1854] The United States' first written submission, para. 163; the Unites States' second written submission, para. 112; Japan's first written submission, paras. 155-161; Chinese Taipei's first written submission, paras. 617-619.

7.1434 **Japan** further submits that the explanation of "indirect process" in the 1996 HSEN to heading 9009 is very important to the interpretation of the phrase "reproducing the original image onto the copy via an intermediate (indirect process)" in the concession. The HSEN states that:

> "In the indirect process, the optical image is projected onto a drum (or plate) coated with selenium or other semiconducting substance charged with static electricity. After the latent image has been developed by means of a powdered dye, it is transferred onto ordinary paper by applying an electrostatic field and fixed to the paper by heat treatment."[1855]

7.1435 Japan argues that this explanation thus confirms Japan's reading of "reproducing" (as used in the concession) in the sense of "projecting" the original image. It further confirms Japan's reading of the concession term "an intermediate" as meaning the photosensitive "drum (or plate)." Japan argues that the HSEN describes a process whereby the optical image is projected immediately onto the intermediate rather than converted into digital data that can be stored, manipulated, or in other ways processed before being used.[1856]

7.1436 Japan asserts that the language of the 1996 HSEN to heading 9009, which gives "very specific" contextual guidance for exactly what "via an intermediate" in HS1996 subheading 9009 12 really means, quite specifically explains that "the optical image is projected onto a drum (or plate)" and that after the "latent image has been developed" on the photosensitive drum, that latent image "is transferred onto ordinary paper." Japan concludes that this language is entirely consistent with its interpretation of HS1996 subheading 9009 12 and largely at odds with the European Communities' broad interpretation of this concession as allowing "a wide range of technologies requiring multiple 'intermediaries,'" which do not fit the descriptions contained in the HSEN.[1857]

7.1437 The **European Communities** claims that the 1996 HSEN to heading 9009 is of limited probative relevance to this case because besides not being binding under the HS, this particular EN was drafted well before "digital copiers" came into existence. The European Communities asserts that the HSEN to the HS1996 heading 9009 reproduces the wording of the EN to that heading of the 1988 version, which in turn was based upon the EN to the Brussels Nomenclature, going back as far as 1966.[1858] The European Communities further argues that the descriptions of the specific types of machines included in the group of photocopying apparatus in the 1996 HSEN to heading 9009 does not purport to be exhaustive and does not exclude the possibility that there may be other types of "photocopying apparatus" belonging to the same "group".[1859] With respect to the "optical system" the European Communities argues that "digital copiers" meet each and every element of the description in the HSEN First, because in a digital copier the optical image of a document is projected on to a "light-sensitive surface": the CCD array. Second, because this is done by means of an

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[1855] Japan's first written submission, para. 162 citing Vol. 4 Harmonized Commodity Description and Coding System, Explanatory Notes (2nd ed. 1996), at p. 1592. (Exhibit JPN-23).

[1856] The United States' first written submission, para. 163; the Unites States' second written submission, para. 112; Japan's first written submission, paras. 155-161 and 163; Chinese Taipei's first written submission, paras. 617-619.

[1857] Japan's first written submission, paras. 162-163; Japan's first oral statement, para. 30; Japan's second oral statement, paras. 31-32.

[1858] European Communities' first written submission, para. 381 and fn. 202.

[1859] European Communities' first written submission, paras. 381-384; European Communities' second written submission, paras. 116-117 and 186-191 (commenting on the complainants' responses to Panel question No. 35(b)); European Communities' second oral statement, para. 119. See also Exhibit EC-71, which reproduces the different versions of this HSEN.

"optical system". Last, because "it is beyond dispute" that digital copiers include "components for the developing and printing of the image".[1860]

7.1438 The complainants reject the European Communities view that the language of the 1996 HSEN to heading 9009 is "largely obsolete" and thus of little probative use. Even if true that the original version of the HSEN to heading 9009 was drafted in the 1960s, they wonder why in editions of the HS that were prepared *after* "digital copiers" were prevalent on the market parties to the HS (including the European Communities) did not modify the language in the HSEN to heading 9009 in order to cover "digital copiers".[1861] Japan further argues that regardless of whether the HSEN is merely "illustrative", "digital copying" cannot fall under the language of HS1996 heading 9009 and subheading 9009 12 because it does not operate through indirect process electrostatic photocopying that involves projecting an optical image onto a drum or plate, and then making a photocopy onto plain paper from the photosensitive drum or plate, as the 1996 HSEN to heading 9009 specifies.[1862]

Consideration by the Panel

7.1439 We recall that the Appellate Body has confirmed that the HS may provide additional relevant context to the interpretation of a given tariff concession.[1863] The parties all agree that the 1996 version of the HS, on which the concession in subheading 9009 12 in the EC Schedule is based, is a relevant document of the HS to provide context for the ordinary meaning of that concession.[1864] The **Panel** finds, therefore, that HS1996 Chapter 90 and other Chapters of the HS, HS1996 heading 9009, and other parts of the HS, such as the explanatory notes are relevant context for determining the scope of the meaning of the terms used in the concession.

HS1996 Chapter 90 and Chapters 84 and 85

7.1440 The **Panel** understands that the complainants' view that HS1996 Chapter 90 is limited to optical and photographic technology comes from the wording of the Chapter heading itself, which specifically refers to "[o]ptical, photographic, cinematographic, measuring, checking, precision, medical or surgical instruments and apparatus; parts and accessories thereof." We also note that GIR 1 provides that the titles of Sections, Chapters and sub-Chapters "are provided for ease of reference only" and that "for legal purposes, classification *shall* be determined according to the terms of the headings and any relative Section or Chapter Notes...".[1865]

7.1441 The European Communities has provided evidence to the Panel in the form of its own and in some instances the United States' classification practice, some decisions from the WCO and the

[1860] The European Communities' first written submission, paras. 382-384.

[1861] See. the United States' response to Panel question No. 35(b); Japan's first written submission, para. 74; Japan's first oral statement, para. 30; Japan's second written submission, para. 40. Chinese Taipei's first written submission, paras. 617-619; Chinese Taipei's second oral statement, para. 59.

[1862] Japan's second written submission, para. 59.

[1863] Appellate Body Report on *EC – Computer Equipment*, para. 89 and Appellate Body Report on *EC – Chicken Cuts*, paras. 196 and 199.

[1864] The parties' responses to Panel question No. 132 (arguing that the HS1996 applied at the time of the concession and that the HS2007 and the Explanatory Notes thereto are neither 'context' under Article 31(2) of the Vienna Convention, nor an element 'to be taken into account together with the context', under Article 31(3) of the Vienna Convention).

[1865] GIR 1 provides that "[t]he titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section and Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions."

HSEN for heading 9006 to demonstrate that Chapter 90 does indeed cover some digital technologies.[1866]

7.1442 It is not clear to us that the complainants have sufficiently demonstrated that HS1996 Chapter 90 is exclusively limited to optical technology. However, nor has the European Communities sufficiently demonstrated that Chapter 90 includes a variety of technologies. We do note that the Chapter titles of Chapter 84 and 85 are certainly broader than that of Chapter 90. While the titles of Chapter 84 and 85 do refer to some specific technologies, such as nuclear reactors, they also refer to " machinery and mechanical appliances " and "electrical machinery and equipment." This leads us to believe that the HS drafters knew how to be broadly inclusive when they intended to and that they did not do so in the title to Chapter 90. While we cannot conclude based on this element alone that HS1996 Chapter 90 excludes all digital technology, we do recognize that the Chapter Title is worded narrowly and that, subject to the limitation in GIR 1 that the Chapter titles are for ease of reference only, this can inform our interpretation of the headings therein.

7.1443 Finally, we consider that the discussion concerning the different HS Chapters in which "digital cameras" and "photographic cameras" are classified –HS1996 Chapters 84 and 90 respectively- to be helpful to a certain extent. We believe that a lengthy analysis of the debate between the parties on classification of those cameras[1867] will not aid us in providing a positive resolution to the dispute, because, in our opinion, the resolution of that classification question would not solve the question of the scope of subheading 9009 12. We do note that all the parties accept, with respect to the example of cameras, that two products which perform substantially the same function, but utilize different technologies, are classifiable in different headings of different Chapters.

Heading 9009

7.1444 We note that, in the EC Schedule, electrostatic photocopying apparatus operating by reproducing the original image via an intermediate onto the copy (indirect process) is a dutiable concession related to one of the sub-set of machines belonging to a larger group of other machines falling under HS1996 heading 9009. In particular, heading 9009 covers two types of copying apparatus: "photocopying apparatus incorporating an optical system or of the contact type" and "thermo-copying apparatus". Thus photocopying apparatus that fall under heading 9009 that are not of the contact type must incorporate an optical system.[1868]

7.1445 With respect to the term "optical system" as used in heading 9009, we note that the Encyclopaedia Britannica explains that an optical system:

> "consists of a succession of elements, which may include lenses, mirrors, light sources, detectors, projection screens, reflecting prisms, dispersing devices, filters and thin films, and fibre-optics bundles."[1869]

We also note that the Explanatory Note to HS1996 heading 9009 confirms the definition above when it refers to an optical system "comprising mainly a light source, condenser, lenses, mirrors, prisms or

[1866] European Communities' first written submission, paras. 397-399; European Communities' response to Panel question No. 29; European Communities' second written submission, paras. 161-175.

[1867] These include: whether HS1996 subheading 8525 40 covers "digital" and "analogue" video cameras.

[1868] We note that neither the complainants nor the European Communities has claimed that the ADP MFMs in question are "contact type" photocopiers.

[1869] "optics" (2010). In Encyclopædia Britannica. last viewed June 09, 2010, from Encyclopædia Britannica Online: http://www.britannica.com/EBchecked/topic/430511/optics.

an array of optical fibres."[1870] Therefore, the Panel finds that in the context of HS1996 subheading 9009 an optical system, is a system composed of the above elements that is used to project the optical image of the original onto a light-sensitive surface.

7.1446 In heading 9009, photocopying apparatus are divided into two categories, each of which are further subdivided in six-digit subheadings within them. First is "electrostatic photocopying apparatus" which has two six-digit subheadings, i.e. 9009 11 and 9009 12. As noted before, subheading 9009 11 covers those electrostatic photocopying apparatus operating by reproducing the original image directly onto the copy (direct process), while subheading 9009 12 covers those operating by reproducing the original image via an intermediate onto the copy (indirect process). The second grouping of photocopying apparatus are "[o]ther photocopying apparatus"; within this category there are also two six-digit subheadings for photocopying apparatus incorporating an optical system (9009 21) and for photocopying apparatus of the contact type (9009 22). Therefore, the structure of heading 9009 is such that machines under it are divided in subgroups and further subdivisions based on descriptions that refer to the copying technology they use. In other words, *how* these machine make copy is a vital element of the structure and logic of the concessions under this heading and, consequently, also a crucial element that informs their scope. This view is confirmed by the use in these two subheadings of the term "operating by", which denotes the intention to explain how these machines "work."[1871] More importantly, we observe that heading 9009 does not make use of residual categories in the form of "other" categories, which strongly suggests to us that the heading is meant to cover very specific forms of producing a copy.

7.1447 We agree with the complainants that this structure of the heading leads to the conclusion that subheadings 9009 11 and 9009 12 are both limited and exhaustive. First, we cannot accept the European Communities' proposition that everything not "direct process" is necessarily, therefore "indirect process." The subheadings describe particular processes with specificity, which supports the conclusion that these subheadings are not to be broadly construed. At the same time neither subheading refers to itself as a residual or "other" category. Had the drafters intended to include under 9009 12 all forms of electrostatic photocopying which were not "direct", they would have described the category as "other", which is the normal practice throughout the HS. Therefore, we cannot conclude that "indirect process" in the concession in subheading 9009 12 simply means all electrostatic photocopying apparatus not included in subheading 9009 11. The concession must have meaning, and for an electrostatic photocopying apparatus to fall within the scope of the concession in subheading 9009 12 it must produce photocopies by using an optical system and via an intermediate (i.e., indirect process).

7.1448 Additionally, when the terms of the subheading 9009 12 are seen in the context of the rest of the heading, we consider that "indirect process" photocopying entails a very specific process in which the optical system has a very precise role, i.e. to reflect the image of the original document directly onto an intermediary, generally an electrostatic drum, in the form of a latent image which is then, from this drum, transposed and fixed onto ordinary paper using electrostatically charged powder and heat. We further note that none of the definitions submitted to us with respect to "photocopying", or any other related terms, mention "light" in association with any purpose other than producing an "immediate" latent image of the original. No reference is made, e.g., to the use of light as part of the

[1870] (Exhibit JPN-23).

[1871] In this regard we note that the transitive verb "operate" means "to cause to function: work" (The Merriam-Webster Online dictionary defines "operate" as "*transitive verb* **1 :** bring about, effect; **2 a :** to cause to function **:** work **b :** to put or keep in operation; **3 :** to perform an operation on; *especially* **:** to perform surgery on" ("operate." Merriam-Webster Online Dictionary. 2010. Merriam-Webster Online. 31 May 2010 <http://www.merriam-webster.com/dictionary/operate>).

digitalization of the original document. This indicates to us that under the concession at issue, the meaning of "optical system" and "intermediate" are incompatible with the an interpretation that would see these terms as including the use of a scanner[1872] or of an even more indirect process where the image is projected onto the drum by something other than the optical system. Again, we consider that this directs us to read these two terms ("optical system" and "intermediate") as having very specific meanings that limit them to the analogue copying process described above.

7.1449 Based on the foregoing, we conclude that the phrase "... reproducing the original image via an intermediate ...", as used in the concession, indicates that "indirect process" electrostatic photocopying requires the apparatus to use an optical system to project the original image directly and immediately onto a light-sensitized surface creating a latent image (in an electrostatically charged drum or on a plate) which is subsequently adhered to plain paper using electrostatically charged powder (toner) and heat to form a final copy of the original image on the paper.

1996 HSEN to Heading 9009

7.1450 We begin with the parties' arguments on the relevance of the 1996 HSEN to heading 9009. We disagree with the European Communities that this HSEN is irrelevant. In fact, we consider it valuable contextual material that confirms our textual conclusions above on the scope of the concession at issue. While it is true that, as any HSEN, the 1996 HSEN to heading 9009 is not binding under the HS and may have less probative value than other binding HS material, such as the texts of the headings themselves and HS Chapter or heading Notes, this does not mean that, by definition, HSENs do not have probative value at all under the Vienna Convention. In fact, as stated by the Appellate Body in *EC – Chicken Cuts*, the "probative value" of HS material has more to do with "how relevant" such material is "to the interpretative question at issue" than necessarily with the fact that this material is binding or not. Therefore, "it cannot be excluded that an Explanatory Note that directly addresses a given interpretative question will be more probative than a Chapter Note that does not relate specifically to that interpretative question"[1873], to the extent that the HSEN provides further clarifications and does not contradict the Chapter Note. We consider that the 1996 HSEN to heading 9009 at issue here falls exactly in the kind of situation described in the above statement from the Appellate Body. By defining precisely various terms of the concession in HS1996 subheading 9009 12 (e.g. what is an "optical system" and how it works and, more importantly, what is "indirect process"), this HSEN "directly addresses" the "interpretative question" before us: the scope and meaning of the concession under 1996 HSEN to heading 9009. We thus conclude that 1996 HSEN to heading 9009 provide us with a very high probative value.

7.1451 The language of Part (A)(1) starts by reproducing verbatim the language of HS1996 subheadings 9009 11 and 9009 12 and then it defines what "direct" and "indirect" processes are. We consider that this means, at least with respect to "indirect process", that the definition in the HSEN is rather exhaustive. We note that in this definition no reference is made to anything that would resemble the digital copying process (e.g. the digitalization process through a scanner, the saving of the data in the memory of the machine before being printed), other than the use of an electrostatic process to print the image (and, even in this case, the printing is done differently by reconstructing the

[1872] We note that while a scanner might have within it an optical system, it is not itself an optical system and it does not use the optical system to project the original image onto the drum, but rather to digitalize the original image and store it as data. See How Scanners Work (Exhibit EC-65).

[1873] Appellate Body Report on *EC - Chicken Cuts*, para. 224, fn. 431.

digital image onto the drum), which can be used in other technologies that could be classified under other headings.[1874]

7.1452 We further recall our observation above that the "incorporation" of an "optical system" is part of the description in the concession. This means that an "optical system" is part of the understanding of what constitutes an electrostatic photocopying apparatus using the indirect process and, ultimately, of what the scope of the concession is. We recall our conclusion above that heading 9009 indicates that the required "optical system" relates to the combination of, *inter alia*, a "light source", mirrors and lenses that are necessary elements to the analogue copying process, so as to allow the projection of the optical image of the original onto the electrostatic drum. We consider that the 1996 HSEN confirms such an understanding not only by defining what are the main components of the "optical system" ("a light source, a condenser, lenses, mirrors, prisms or an array of optical fibres"), but also, and more importantly, by explaining what is its purpose and how it works: to "project[] the optical image of an original document on to the light-sensitive surface."

7.1453 Given the forgoing considerations, we consider that the context provided by the language of the 1996 HSEN to heading 9009, furthers our understanding of the plain text of the terms of subheading 9009 12 in the EC Schedule. Reading the concession in its context with respect to the rest of the relationship between Chapters 90, 84, and 85; based on the structure and scope of heading 9009, and given the explicit and direct references to the relevant terms in the 1996 HSEN to heading 9009; we conclude that the ordinary meaning of electrostatic photocopying apparatus operating by reproducing the original image via an intermediate onto the copy (indirect process) in HS1996 subheading 9009 12, is limited to the very specific "analogue" photocopying process described in the HSEN.

Object and purpose

7.1454 The parties provided no specific additional argumentation on the object and purpose of this tariff concession, outside their more general arguments on the object and purpose of the *WTO Agreement* and the GATT 1994.

7.1455 We recall our finding in paragraph 7.547 above, that the object and purpose of the *WTO Agreement* and the GATT 1994 is to ensure the security and predictability of mutually advantageous and reciprocal tariff reductions. We see nothing in our understanding that the subheading 9009 12 in the EC Schedule is limited to the type of technology explicitly described therein, that would contradict that object and purpose of the *WTO Agreement* and the GATT 1994.

Subsequent practice

Arguments of the Parties

7.1456 The **European Communities** presents argumentation on the classification practice of itself, the complainants, and other Members which it argues supports its position that digital copying is a form of photocopying within the meaning of HS1996 heading 9009, and more specifically subheading 9009 12. In particular, the European Communities mentions a 1995 Classification Regulation from the Commission, the challenged measures, and the European Court of Justice judgment in the *Kip*

[1874] For example, we note that all parties agreed that the print engine (or print module) contained in the products at issue, might also be used as a component in other technologies that would not connect to a computer and therefore not be classifiable in subheading 8471 60.

case.[1875] The European Communities also presents examples of purported practice by the United States and Chinese Taipei of classifying digital copiers in subheading 9009 12.[1876] Finally, the European Communities also cited discussions over the scope of subheading 9009 12 in the WCO, which it argues evidences that the position of the complainants' put forward in this dispute was not shared by many other WTO Members.[1877]

7.1457 The **United States** disputes the European Communities' interpretation of its customs classification practice with respect to digital copiers.[1878]

7.1458 Japan rebuts the arguments of the European Communities that it had a consistent practice by bringing up a declaration from the European Communities made in the context of laying out the scope of coverage of an anti-dumping duty order, that digital copying is not photocopying.[1879]

Consideration by the Panel

7.1459 The **Panel** recalls that much of the material referenced by the European Communities as subsequent practice demonstrating a common, consistent and concordant practice of the Members is similar or identical to that submitted in relation to the discussion of subheading 8471 60. We also note that the anti-dumping order submitted by Japan, if it were even evidence of subsequent practice, would only serve to inform that within the European Communities there has been inconsistency.

7.1460 Therefore, we reiterate our conclusion in paragraph 7.1351 above that the documents presented to us are by no means "consistent, common and concordant", and we cannot discern a pattern implying the agreement of the parties to the *WTO Agreement* and the GATT 1994 regarding the interpretation of the concession in 9009 12 from these documents.

7.1461 With respect to the discussions at the WCO, we note that they took place between 1998 and 2003 and that there was significant disagreement among the Members as to the parameters of HS1996 headings 8471 and 9009 and whether there was any overlap. In fact when the issue came to a vote there was a tie.[1880] Therefore, while these discussions do show that the views of the complainants were not shared by many WTO Members, they also show that the position of the European Communities, was also not shared by many WTO Members. Therefore, we do not see how these discussions could reflect the common intentions of the parties and inform our interpretation.[1881]

[1875] European Communities' first written submission, paras. 385-389.

[1876] European Communities' first written submission, paras. 390-396; European Communities' second written submission, paras. 121-124.

[1877] European Communities' first written submission, paras. 397-399.

[1878] United States' first oral statement, paras. 9 and 11; United States' second oral statement, para. 42 (arguing that "[t]he EC in fact points to nothing more than two opinions predating the ITA negotiations — while ignoring the large number of opinions before the Panel in which US Customs and Border Protection (CBP) treated MFMs as "input or output units" of subheading 8471 60" and referring to the 16 CBP rulings between 1996 and 1999 in Exhibits EC-73 and EC-74 classifying MFMs in 8471.60).

[1879] Japan's second written submission, para. 60.

[1880] WCO's letter of 29 September 2009, para. 27 (explaining that, "[w]hen the matter was put to a roll-call vote, 33 delegates voted in favour of the proposition that "photocopying" was not limited to the projection of an image onto a photosensitive surface and that present heading 90.09 did cover digital copying, while 33 delegates voted against these propositions. There was one abstention.").

[1881] We also note that one of the parties to the dispute, Chinese Taipei, is not a Member of the WCO and could therefore not participate in those discussions.

Other Arguments

Arguments of the Parties

7.1462 The **European Communities** cited the negotiating history of the ITA and the ITA II as supplementary means of interpretation of the concession in 9009 12.[1882] We also note that **Japan** and **Chinese Taipei** have cited to material from the HS2007, including an HSEN, with respect to their arguments regarding the scope of the concession for electrostatic photocopying apparatus "operating by reproducing the original image via an intermediate onto the copy (indirect process)" under HS1996 subheading 9009 12. In particular, they argue that the heading 8443 in the HS2007 as well as the HSEN to that heading provide other interpretative guidance to determining the scope of the original concession in 9009 12.[1883]

7.1463 We note that the **United States** and the European Communities have argued that neither the HS2007 nor the 2007 HSEN to heading 8443 could serve as any sort of interpretative tool under Articles 31 and 32 of the Vienna Convention to an understanding of the common intentions of the Members with respect to the meaning of the concession in subheading 9009 12 in 1996.[1884] While rejecting the use of these tools in the instant case, the European Communities does believe that the HS2007 and the 2007 HSEN could, in certain cases, be relevant as "supplementary means of interpretation" for the interpretation of an HS1996 heading-based concession under Article 32 of the Vienna Convention if both old and new headings had identical wording and *all* the relevant contextual elements (e.g. Section, Chapter and heading Notes; potentially overlapping headings and subheadings) had likewise been carried over unchanged from one version of the HS to the next.[1885] The United States, however, rejects even the theoretical possibility, raised by the European Communities, that subsequent versions of the HS following the version under which WTO tariff concessions were based on could qualify as "*other* supplementary means of interpretation" under Article 32 of the Vienna Convention. The United States considers that modifications to the HS, agreed upon nearly ten years after the relevant concessions were made, provide no insight into the meaning of those concessions.[1886]

Consideration by the Panel

7.1464 The **Panel** recalls that recourse may be had to supplementary means of interpretation in order to confirm the meaning resulting from the application of Article 31 of the Vienna Convention, or to

[1882] European Communities' first written submission, paras. 397-406.

[1883] Japan's first written submission, paras. 165-168; Japan's second written submission, paras. 71-73; Japan's comments on the European Communities' response to Panel question No. 134; Chinese Taipei's first written submission, paras. 171 and 636-638; Chinese Taipei's response to Panel question No. 134.

[1884] United States' response to Panel questions No. 132 and 134; United States' comments on the European Communities' response to Panel question No. 134 (also noting, in both its response and comment to the EC response to Panel question No. 134, that the fact that WTO Members' Schedules of Concessions have not yet been certified in HS2007 nomenclature indicates the lack of agreement on the relationship between the HS2007 and Members' Schedules); European Communities' first written submission, para. 408; European Communities' response to Panel questions No. 35(b) and 134.

[1885] European Communities' response to Panel question No. 134.

[1886] United States' response to Panel questions No. 132 and 134; Unites States' comments on the European Communities' response to Panel question No. 134 (also noting, in both its response and comment to the EC response to Panel question No. 134, that the fact that WTO Members' Schedules of Concessions have not yet been certified in HS2007 nomenclature indicates the lack of agreement on the relationship between the HS2007 and Members' Schedules).

determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.[1887]

7.1465 With respect to the landscape papers submitted as part of the negotiations of the ITA, we recall our determination in paragraphs 7.581 above, that consideration of "landscape papers", which were only reviewed by a subset of the negotiating ITA participants (the "Quad" members, in particular) and were not circulated at any point in time prior to this dispute, should not have any bearing on our interpretation of the concessions arising under the ITA, that were subsequently incorporated into ITA participants' Schedules.

7.1466 Regarding Japan's proposals during the ITA II negotiations, we recall our finding in paragraph 7.587 above that we should not give much weight to statements made in the context of negotiations for a separate, successor agreement that has not yet been concluded, and where the extent of progress towards reaching an agreement is unclear.

7.1467 Finally, we recall our conclusion in paragraph 7.1367, that the HS2007 and the 2007 HSEN to heading 8443 cannot serve as means of supplementary interpretation for the concessions in HS1996 8471 60 and 9009 12.

Conclusion on ordinary meaning

7.1468 The **Panel** notes that the context examined, in particular the 1996 HSEN to heading 9009, informs the view that the "indirect process" utilized by an electrostatic photocopying apparatus, that is covered under subheading 9009 12, is identical to the process utilized by "analogue photocopiers" to make photocopies. We thereby conclude that the ordinary meaning of the concession for electrostatic photocopying apparatus operating by "indirect process" in subheading 9009 12 of the EC Schedule, seen in context and in light of the object and purpose of the Agreement, is limited to the photocopying process used by "analogue photocopiers".

(ii) Are ADP MFMs covered by the concession in Subheading 9009 12?

7.1469 Now that we understand the scope of the tariff concession set forth in HS1996 subheading 9009 12 of the EC Schedule, we must determine whether the products at issue, ADP MFMs, are covered by the scope of this concession, which carries with it a 6 per cent *ad valorem* duty. If ADP MFMs are covered by the scope of this concession, then the European Communities may be entitled, as it argues, to assess a 6 per cent *ad valorem* duty on some of these products rather then the duty-free treatment the complainants claim these products deserve.

7.1470 We note that the parties have explained the process by which ADP MFMs create copies. The United States and Japan describe a digital copier as a digital device with an input unit (a scanner unit) and an output unit (a printer unit that allows the digital output from the device to be printed).[1888] They submit that a document is converted into digital information and that the print unit allows that digital information to be printed in paper form. The United States explains that it is the scanner component that creates the digital master file of the document by converting points of light into electrical signals and then digital data. Further, the United States explains that it is the printer component that converts the file into one or more prints. Both the United States and Japan submit that the MFM scanner uses light only once, to convert the original document into digital data. Japan and Chinese Taipei explain

[1887] See para. 7.65 above.

[1888] See, e.g., United States' first written submission, para. 157-160; United States' second written submission, paras. 111-112; Complainants' response to Panel question No. 79.

that digitalization is done through a "charged couple-device" (CCD) array consisting of numerous diodes that convert photons of light into electrical impulses that become the digital signal. The digital data can then be transmitted in order for such data to be printed. Once the image is digitalized, as many prints as necessary can be made. According to Chinese Taipei, an MFM then uses a laser to transmit the digital data onto an electrostatic drum to form an image of the original document, this image is then printed using an electrostatic print engine to transfer this image by means of toner to a carrier media such as paper.

7.1471 The European Communities explains that when the image is placed on the glass plate of the digital photocopier, it is illuminated and reflected by an angled mirror to another mirror and that there can be more than two mirrors. It explains that each mirror is slightly curved to focus the image it reflects onto a smaller surface. The last mirror then reflects the image onto a lens. The lens focuses the image through a filter on the "charged-couple device" (CCD) array which converts the original image into electrical signals. The light source thus projects the image of the original document onto the "charged-coupled device" (CCD) , which converts it into electrical signals and creates a digital image. Through a laser beam the digitalised image is transferred to an "electrostatic drum". Subsequently, the image is developed and printed.

Arguments of the parties

7.1472 The **European Communities** contends that ADP MFMs which have an electrostatic print engine and have a copying function that is not secondary or is at least equivalent to the other functions of the apparatus are electrostatic photocopying apparatus within the scope of the dutiable concession in HS1996 subheading 9009 12. The European Communities considers that because *light* is used in digital copying, albeit in different ways than in analogue photocopying, it follows that the latter process is also "photocopying" under the terms of the concession. The European Communities further argues that in this latter process, when the original document is digitalized before the image is (re)created in the drum, not only one, but two "optical systems" are used, namely, the CCD of the scanner and then the "laser". Finally, the European Communities contends that, consistent with the terms of the concession, the digital process involves the use of not only one but various "intermediates" working together: a scanner, the laser and finally the "electrostatic drum". As the terms of the concession at issue have a broader meaning than that professed by the complainants, the European Communities concludes that they also include digital copying as a form of "indirect process electrostatic photocopying", despite the technological difference between this process and the analogue copying process.

7.1473 The **complainants** argue that because ADP MFMs copy using a digital technology far different from "indirect process electrostatic photocopying", and because they have other functions unrelated to copying, these products can never fall under the dutiable concession under HS1996 subheading 9009 12. They contrast their understanding of what electrostatic photocopying using an "indirect process" means with the way copies are made using a "digital copying" process. They consider that the differences between these two processes confirm that "digital copying" can never be covered by the concession at issue.

7.1474 In particular, the complainants focus on the different manner in which light is used by these two processes to support their views that ADP MFMs are not within the scope of the concession in subheading 9009 12.[1889] Although they agree with the European Communities that light is used and needed in "digital copying", they argue that it is used with a very different purpose in digital copying;

[1889] See, e.g., United States' first written submission, para. 158 and Exhibit US-90.

i.e., to enable the CCD-based scanner to convert the original document into "digital data", which, if needed, can then be printed by the machine's electrostatic print engine.

7.1475 Given that that the meaning of "photocopying" is limited to reflecting an optical image of the original onto the electrostatic drum to produce the latent image and not to collect digital data, the complainants contend that what digital copiers do is not photocopying within the meaning of heading 9009. Likewise, because the purpose of the optical system as described in heading 9009 is to project the original image onto an electrostatic drum, the complainants argue that neither the "scanner" nor its CCD component can be understood as making up an "optical system" as is meant by the terms of the concession. Similarly, they also assert that reading the concession properly means that the "intermediate" refers to the electrostatic drum, which has the latent image projected onto it and then transfers it to the paper using electrostatically charged powder (toner). Therefore, according to the complainants neither the "scanner unit" nor the "laser printer unit" that are necessarily used in "digital copying" can be seen, in isolation or conjunction, as the "intermediate" the concession describes. This confirms, they submit, that the concession is limited by a single and specific "intermediate", i.e., the "electrostatic drum".[1890]

Consideration by the Panel

7.1476 The **Panel** starts by recalling that it is undisputed that all ADP MFMs at issue only make copies digitally and that they do this using a scanner unit. As a consequence, these machines *never* use the analogue copying process, which, as we have concluded above, characterizes indirect process electrostatic photocopying under the concession at issue. We recall that we have concluded that the ordinary meaning of the terms of the concession for "indirect process electrostatic apparatus", seen in its proper context and in light of the object and purpose of the Agreement, in fact, does not include digital copying.

7.1477 Based on our review of the submissions and the evidence before us, we understand that ADP MFMs make copies via a process commonly known as "digital copying":[1891] which involves the use of a "scanner", which is a device or component that allows the conversion of information, such as text and images, into digital data.[1892] Scanners always have an "image sensor" as their core component, generally a charge-coupled device (or, simply "CCD").[1893] In "digital copying", when the original

[1890] See, for example: United States' first written submission, paras. 71, 157, 159; United States' first oral statement, para. 37; United States' second written submission, paras. 111-114; United States' second oral statement, para. 37; Japan's first written submission, paras. 70-73, 107-122, 158-161 and 207; Japan's first oral statement, para. 37; Japan's second written submission, paras. 40-41; Chinese Taipei's first written submission, para. 574-584; Chinese Taipei's second written submission, paras. 299-300, 314, 319; complainants' responses to Panel question No. 29 (arguing that the WCO endorsed their view that digital copiers are not photocopiers); Japan's responses to Panel questions Nos. 124; 131 and 136.

[1891] Exhibit JPN-35 (providing a graphic description); see also Exhibit EC-66 (containing a graphic description included in a 1998 non-paper allegedly tabled by Japan to the CITA). See European Communities' first written submission, footnote 255 to para. 371.

[1892] In other words, scanners are fundamental to the "digitizing" of the original document, i.e. the "capturing an analogue signal in digital form." Broadly speaking, "digitizing" means "the representation of an object, image, sound, document or a signal (usually an analogue signal) by a discrete set of its points or samples [,which occurs when these diverse forms of information] ... are converted into a single binary code," i.e. a sequence of 0s and 1s. (*Wikipedia*, "Digitalizing", http://en.wikipedia.org/wiki/Digitizing#cite_note-2 (visited on 13 May 2010)).

[1893] We observe that the CCD technology was invented in 1969 by Willard Boyle and George E. Smith, two scientists from AT&T Bell Labs. (*Wikipedia*, http://en.wikipedia.org/wiki/Charge-coupled_device). The CCD is "a collection of tiny light-sensitive diodes, which convert photons (light) into electrons (electrical charge)." How Scanners Work (Exhibit EC-65).

document is placed on the glass plate of the machine, a lamp is used to illuminate the document. The image of the scanned document then reaches the CCD array of the scanner used in the machine through a series of mirrors, filters and lenses[1894] and is then converted into electrical signals (digital data) and saved as a "digital file." This "digital data" is then stored as a "digital file" and arranged as "page data" which, through a "raster image processor" (or "RIP"), is then broken down "into an array of tiny dots" (so it can be used by the machine's laser). Once this is done, this "page data" is sent to the "laser print unit" of the machine, which is itself composed of a "laser beamer", a "moveable mirror" and "lenses". The "laser" receives the data (i.e., the tiny dots that make up the text and images) and through the "moveable mirror" and "lenses" "reconstructs" or "recreates" the original document that was scanned in the beginning of the process by beaming pulses of "laser light" onto an electrostatic drum. From this point onwards, the operation proceeds in the similar manner as described above in the case of "analogue photocopiers."[1895] There is however an important overall difference in the way machines using these two processes output hard copies: unlike the case of "analogue photocopying", in the case of "digital copying" there is no need to repeat the operation for each desired number of copies because, after a single scanning of the original document, a "digital file" is made and stored in the machine thus allowing the printing of as many copies as the memory of the device allows. The original document is thus no longer necessary after the scanning.[1896]

7.1478 With respect to CCD-based scanners, while it is true that these devices indeed contain a "light source", "mirrors" and "lenses", the mere fact that they have such components does not make them an "optical system" within the meaning of the HSEN and heading 9009. This is confirmed when the definition of "optical system" is seen in the context of the explanations of how the optical systems work in electrostatic photocopying apparatus – i.e., in the description of the indirect process in the 1996 HSEN to heading 9009, which is to project the image onto a drum. This function has no relation to the way a scanner works (to convert the text into digital data). While generally speaking both the "drum" (in the "indirect process" as described in the HSEN) and the scanner's CCD (in the digitalization process) are indeed "light sensitive", this fact alone cannot be dispositive because, as stated above, they fulfil different purposes. Further, evidence before us suggests that not all scanners use a CCD to convert text into digital data. Instead, some of them use the so-called CIS ("Contact Image Sensor"), in which, unlike the case of CCDs, the digitalization does not involve the use of "mirrors, filters, lamp and lens" that scan back and forth, right to left, to cover the whole document placed in the glass platen of the scanner. Instead, in CIS-based scanners, the whole surface below the glass contains a "row of red, green and blue light emitting diodes (LED)". The original document and the CIS are very close to each other. The whole row of LEDs is lit at once and then the image is captured and digitalized.[1897] Further, we have evidence indicating that CIS-based scanners are used in "digital copying".[1898] The point here is that the fact that digitalization can be done without "mirrors,

[1894] However, as explained in more details below, not all machines use CCD-based scanners and may instead contain a CIS-based scanner, which does not use "mirrors and lenses" at all.

[1895] However, one noteworthy difference between these two processes, even from this point onwards, is that generally a laser forms the image of the original document in a reversed manner than "analogue photocopiers". Rather than forming a latent image by discharging the areas of the drum protected from the light by the reflected image of the original document, what the laser light discharges are the lines of the original image itself, thus leaving the background "positively charged". ("How Laser Printers Work" – Exhibit US-86).

[1896] (Exhibit US-90); "How Laser Printers Work" (Exhibit US-86); "How Scanners Work" (Exhibit EC-65); "How do Digital Copiers Work?" (Exhibit US-55).

[1897] An explanation of CCD and, in particular, CIS is provided in Exhibit EC-65 ("how scanners work", see page 4).

[1898] For example, we notice that certain MFMs can have CIS-based scanners (and make copies using them) rather than CCD-based ones, can be found, e.g., in Exhibit TPKM-82 (a WCO document describing an

lens etc." in the case of CIS-based scanners, reinforces the conclusion that an "optical system" within the meaning of the 1996 HSEN (and, ultimately, within the meaning of the concession in HS1996 subheading 9009 12) has a very precise meaning that describes an analogue rather than a digital process.

7.1479 We consider that the above facts are sufficient for us to conclude that ADP MFMs are not covered by the concession in the EC Schedule for electrostatic photocopying apparatus operating by reproducing the original image via an intermediate onto the copy (indirect process), as described in HS1996 subheading 9009 12.

7.1480 We consider however that other objective characteristics ADP MFMs possess also support the conclusion that they are not captured by this dutiable concession, chiefly among them is the undisputed fact that these machines are connectable to computers and/or computer networks. It is this intrinsic characteristic of ADP MFMs that allows them to perform various tasks that further distance them from the "unifunctional", analogue character that characterizes machines under the concession in HS1996 subheading 9009 12. ADP MFMs, it is undisputed, can not only make digital copies, but also deal with digital data in various different ways: receiving and printing digital data from an automatic data-processing machine or network; creating and sending digital data to an automatic data-processing machine or network (if having an independent scanning unit) and, if containing a faxing function, scanning and transmitting facsimiles and receiving and printing facsimiles.

7.1481 Given the above considerations, because the ADP MFMs at issue are not photocopiers incorporating an optical system that operate by reproducing the original image onto the copy via an intermediate (indirect process), they cannot fall within the scope of the concession in subheading 9009 12 of the EC Schedule, regardless of the primary, secondary, or equivalent nature of the copying function *vis-à-vis* these machines' other functions.

(iii) Are ADP MFMs covered by the concession in HS1996 subheading 8472 90?

Arguments of the Parties

7.1482 The **European Communities** first mentions HS1996 subheading 8472 90 as a contextual argument in support of its view that digital copiers are covered under the subheading for photocopying apparatus in HS1996 subheading 9009 12. In particular, the European Communities argues that:

> "[E]ven on the complainants' overbroad interpretation of HS96 8471, stand-alone digital copiers could not be classified under that heading, because they are not connectable to an ADP machine. At the same time, the complainants' unduly narrow interpretation of the term 'photocopying' excludes these machines from HS96 9009. As a consequence, on the complainants' interpretation, stand-alone digital photocopiers would have to be classified under subheading HS96 8472 90 ('other'), a residual subheading within a residual heading covering

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ADP MFM, Brother MFC-8600, that could have a "scan input assembly" incorporating a "CIS unit") and Exhibit JPN-1 (a brochure of an ADP MFM, Panasonic KX-FLB881, indicating that its "scanning system" is CIS and stating the following about its copy function: " A CIS (Contact Image Sensor) makes possible high-speed scanning and high-speed image reproduction even when the spine is raised slightly above the glass plate.").

> Other office machines (for example hectograph or stencil duplicating machines, addressing machines, automatic banknote dispensers, coin sorting machines, coin-counting or wrapping machines, pencil sharpening machines, perforating machines or stapling machines
>
> Clearly, however, a digital photocopier has much more in common with an analogue photocopier, in terms of both technology and uses, than with any of the machines covered by HS96 8472."[1899]

7.1483 We observe that, in its first written submission, the European Communities seemed to think it absurd that MFMs or "stand-alone digital copiers" could be classified under HS1996 subheading 8472 90 based on the low-tech machines that were included in the illustrative list in the subheading.[1900] However, in its first oral statement, the European Communities submitted that if stand-alone digital copiers fall within 8472 90 then the MFMs at issue would also be prima facie classifiable under that subheading as well, in addition to being *prima facie* classifiable under heading 8471 60. Therefore, it would be necessary to determine on a case-by-case basis, and having regard to the relevant HS rules (Note 3 to Section XVI and GIR3), whether the products at issue are covered by concession 8471 60 or by the concession for 8472 90.[1901] The European Communities asks the Panel to rule on whether the MFMs at issue are covered by subheadings 8471 60 or 8472 90 in its schedule in order to secure a positive resolution to the dispute.[1902]

7.1484 **Japan** argues that the reasoning that because stand-alone digital copiers fall within subheading 8472 90 so do MFMs ignores the important difference between the two types of products: the MFMs ability to connect to an automatic data-processing machine and process data from an automatic data-processing machine.[1903] **Chinese Taipei** concurs with Japan that an ADP MFM can *only* be classifiable under heading 8471 60 in view of its computer connectivity and that 8472 90 will not be *prima facie* applicable to an ADP MFM.[1904] The **United States**, however, seems to agree that an ADP MFM could be *prima facie* classifiable under both subheadings 8471 60 and 8472 90. However, the United States believes that an ADP MFM is a "composite machine" within the meaning of Note 3 to Section XVI and, as such, must be classified as consisting only of that component or as being that machine which performs the principal function. In the case of ADP MFMs, the United States submits that the principal function of MFMs that connect to an ADP is imparted by the print module – whether printing a document scanned into the MFM's memory or printing a file from the ADP machine, therefore these devices must be classified under subheading 8471 60.[1905] The United States also notes that if the European Communities were correct, and the ADP MFMs at issue should be classified under 8472 90 and subject to a bound rate of 2.2 per cent, then the 6 per cent duty the European Communities is admittedly applying would still be in excess of its commitments and contrary to Articles II:1(a) and II:1(b) of the GATT 1994 and the EC Schedule.[1906]

[1899] European Communities' first written submission, paras. 378-379.
[1900] European Communities' first written submission, para. 340.
[1901] European Communities' first oral statement, paras. 67-68; European Communities' second written submission, para. 102.
[1902] European Communities' response to Panel question No. 127(c).
[1903] Japan's second oral statement, para. 11; Japan's response to Panel question No. 127(a).
[1904] Chinese Taipei's response to Panel question No. 127(a).
[1905] United States' response to Panel question No. 127(a).
[1906] United States' comments on the European Communities' response to Panel question No. 127(c).

Consideration by the Panel

7.1485 With respect to whether ADP MFMs could also be covered by the concession in HS1996 subheading 8472 90 we note that the European Communities has never specifically argued that it believes ADP MFMs should receive the tariff treatment for products falling within the scope of the concession in HS1996 subheading 8472 90. Rather it has asserted that this is a logical conclusion that flows from the *complainants'* arguments that digital products, including stand-alone digital copiers, belong in Chapter 84 of the HS. Additionally, although an understanding of the ordinary meaning of the concession is essential for any determination of whether a particular product or products falls within its scope, the European Communities has not provided any argumentation with respect to the interpretation of the terms of this subheading pursuant to the rules codified in the Vienna Convention.[1907]

7.1486 We recall that the United States did indicate that, in its view, some ADP MFMs might fall within the concession for "other" office machines in HS1996 subheading 8472 90 and therefore the current 6 per cent dutiable treatment would still be in excess of that provided for in the EC Schedule. However, like the European Communities, the United States provided no argumentation on the ordinary meaning of the concession. Additionally, we note that the complainants have not raised a claim that the current tariff treatment of ADP MFMs, i.e., 6 per cent, is inconsistent with the European Communities' obligations under Article II:1(b) of the GATT 1994 because those products should have received the tariff treatment set forth in the concession for "other" office machines in HS1996 subheading 8472 90. Indeed, the joint Panel request specifically asserts that the products at issue are entitled to *duty-free treatment* not a lesser dutiable treatment than that provided for under the challenged measures.

7.1487 Given the lack of argumentation on the possibility that ADP MFMs could fall within the scope of HS1996 subheading 8472 90 and the lack of argumentation on the ordinary meaning of the concession in HS1996 subheading 8472 90 we cannot conclude that the European Communities has demonstrated that the products at issue fall within the scope of this concession. With respect to the arguments of the United States, even if some of the products did fall within the concession in HS1996 subheading 8472 90, the complainants did not raise a claim in the joint Panel request alleging that the European Communities was charging duties in excess of those provided for in this subheading of its Schedule. To permit the United States to pursue such a claim now would be to exceed our mandate. Therefore, the Panel will not make any findings with respect to the scope of the concession in HS1996 subheading 8472 90 as it appears in the EC Schedule, whether ADP MFMs fall within the scope of that concession, or whether the European Communities is charging duties in excess of those provided for in subheading 8472 90 of its Schedule.

(iv) Conclusion

7.1488 In summary, the Panel has concluded that at least some of the MFMs at issue, as described by the complainants in footnote 15 of the joint Panel request, fall within the scope of the subheading 8471 60, and that none of the MFMs at issue fall within the scope of the concession in HS1996 subheading 9009 12. The Panel makes no finding as to whether some of the products at issue may also fall within the scope of subheading 8472 90 and tariff item number 8472 90 80 of the EC Schedule.

[1907] European Communities' response to Panel question Nos. 44 and 127(c), paras. 55-57; European Communities' comments on the complainants' responses to Panel question No. 127.

7.1489 We will now apply these conclusions about the scope of the coverage of the concessions in the European Communities schedule and whether ADP MFMs fall within that scope to a determination of whether the challenged measures provide for tariff treatment that is in excess of that required by the EC Schedule or provides less favourable treatment for the products at issue than that provided for in the EC Schedule.

(d) Do the Measures at Issue Provide for Duties on ADP MFMs which are in excess of those set forth in the EC Schedule?

7.1490 We recall our reasoning in paragraphs 7.97-7.102, above that Article II:1(b) of the GATT 1994 requires that Members not apply ordinary customs duties in excess of those provided for in their Schedule. Therefore, in this section we will compare the tariff treatment provided to ADP MFMs under the challenged measures with that provided for in subheading 8471 60 to determine whether the challenged measures provide for duties being applied to ADP MFMs which are in excess of those set forth in the EC Schedule, such that the European Communities is in breach of its obligations under Article II:1(b) of the GATT 1994.[1908]

(i) Commission Regulation No. 517/1999

7.1491 We note our conclusion in paragraph 7.1215 above, that Commission Regulation No. 517/1999 requires that a MFM meeting the description set forth in item 2 of the Annex must be classified under tariff item number 9009 12 00, which sets a duty rate of 6 per cent.

7.1492 We also recall our conclusion that the products at issue do not fall within the scope of products defined in tariff item number 9009 12 00, and that at least some of them will fall within the scope of tariff item number 8471 60, which is a duty-free concession. Therefore, because Commission Regulation No. 517/1999 requires the imposition of a 6 per cent duty on products that the European Communities is obligated to provide duty-free treatment for, the measure is inconsistent with the European Communities' obligations under Article II:1(b) of the GATT 1994.

(ii) The 2005 Statement

7.1493 We recall our conclusion in paragraph 7.1221 above that if a national customs authority were to follow the non-binding guidance in the 2005 Statement then it would proceed to classify MFMs which can photocopy in black and white 12 or more pages per minute as a photocopier under tariff item number 9009 12 00 which sets a 6 per cent duty rate.

7.1494 We also recall our conclusion that the products at issue do not fall within the scope of products defined in tariff item number 9009 12 00 of the EC schedule, and that at least some of them will fall within the scope of tariff item number 8471 60, which is a duty-free concession. Therefore, to because the 2005 Statement guides the European Communities, through its national customs authorities, to uniformly apply a duty of 6 per cent on products that the European Communities is obliged to provide duty-free treatment for, the measure is inconsistent with the European Communities' obligations under Article II:1(b) of the GATT 1994.

[1908] As noted in paragraph 7.102 and fn. 975 above, because of the relationship between the obligations in Articles II:1(a) and (b), we will begin our analysis of whether the tariff treatment provided for in the European Communities' measures is consistent with Article II of the GATT 1994 with an analysis of the obligation in Article II:1(b). Subsequently, we will move on to address the complainants' claim that the European Communities is also acting inconsistently with the obligation in Article II:1(a).

(iii) Commission Regulation No. 400/2006

7.1495 We recall our conclusion at paragraph 7.1228 above that Commission Regulation No. 400/2006 requires that a multifunction machine as described in item 4 of the Annex to the Regulation shall be classified under CN code 9009 12 00, which sets a duty rate of 6 per cent.

7.1496 We also recall our conclusion that the products at issue do not fall within the scope of products defined in tariff item number 9009 12 00, and that at least some of them will fall within the scope of tariff item number 8471 60, which is a duty-free concession. Therefore, because Commission Regulation No. 400/2006 requires the imposition of a 6 per cent duty on products that the European Communities is obligated to provide duty-free treatment for, the measure is inconsistent with the European Communities' obligations under Article II:1(b) of the GATT 1994.

(iv) CN2007 codes 8443 31 10, 8443 31 91, and 8443 31 99

7.1497 Unlike Commission Regulation Nos. 517/1999 and 400/2006 and the 2005 Statement, the CN2007 does not subject ADP MFMs to a 6 per cent duty via classification under HS1996 subheading 9009 12.

7.1498 The CN2007, as well as the subsequent versions of the CN to date, is based on HS2007, which made a variety of changes in headings covering the very products at issue in this dispute. In fact, we observed that the HS2007 completely removed HS1996 subheading 9009 12. Moreover, several products that used to be classifiable under different HS1996 subheadings, including *inter alia* some input or output units that used to be classifiable under HS1996 subheading 8471 60, were merged under a new HS2007 heading 8443. The European Communities contends that this was also the case for photocopiers covered under HS1996 subheading 9009 12, however this interpretation was not accepted by all the contracting parties to the HS.[1909] This new heading includes a subheading 8443 31 for "[m]achines which perform two or more of the functions of printing, copying or facsimile transmission, capable of connecting to an automatic data-processing machine or to a network".

7.1499 In implementing HS2007, the European Communities created its own eight-digit tariff item numbers as subcategories of the subheading. Subheading 8443 31 was subdivided in three categories as follows:

[1909] WCO response to Panel questions, pp. 6-12. We note, in addition, that WTO document G/MA/W/76 circulated tables with "correlation tables" linking HS2007 with the previous version of the nomenclature. While recognizing that the tables expressly indicate that they have "no legal value", we observe that page 25 contains a remark for HS2007 subheading 8443 31 explaining that the amendments were made "due to technological progress in the high technology sector, notably concerning the classification of apparatus with multiple reproduction functions". The table in page 25 of this document also explains that the new subheading results from moving certain products which were used to be classified under ex8443.51*, ex8471.60, ex8517.21, ex9009.11*, ex9009.12* and stressing that there is "no consensus" on the subheadings with the asterisk.

CN2007 code	Description	Conventional rate of duty (%)
8443	**Printing machinery used for printing by means of plates, cylinders and other printing components of heading 8442; other printers, copying machines and facsimile machines, whether or not combined; parts and accessories thereof:**	
	(...)	
	- Other printers, copying machines and facsimile machines, whether or not combine	
8443 31	- - Machines which perform two or more of the functions of printing, copying or facsimile transmission, capable of connecting to an automatic data-processing machine or to a network:	
8443 31 10	- - - Machines performing the functions of copying and facsimile transmission, whether or not with a printing function, with a copying speed not exceeding 12 monochrome pages per minute	Free
	- - - Other	
8443 31 91	- - - - Machines performing a copying function by scanning the original and printing the copies by means of an electrostatic print engine	6 per cent
8443 31 99	- - - - Other	Free

7.1500 We observe that one of these CN2007 codes 8443 31 91 provides for a 6 per cent *ad valorem* duty for products classifiable therein. Specifically, pursuant to CN2007 code 8443 31 91 the European Communities would apply a 6 per cent duty to "[m]achines performing a copying function by scanning the original and printing the copies by means of an electrostatic print engine." All the remaining products classifiable under 8443 31 are provided duty-free treatment and are, therefore, not relevant for our analysis. We recall our conclusion in paragraphs 7.1238-7.1239 above, that the existence of these two eight-digit tariff item numbers under the same subheading, means that ADP MFMs with a fax function which copy at a speed *exceeding* 12 monochrome pages per minute are subject to the 6 per cent duty under 8443 31 91 while those that copy at rates of 12 monochrome pages per minute or slower are exempt from duties.

7.1501 We recall our determination in paragraph 7.1397 above that certain ADP MFMs fall within the scope of the duty-free concession in the EC Schedule in subheading 8471 60.[1910] We also stated that a decision on whether a particular ADP MFM fell within the duty-free concession could only be made on a case-by-case basis, based on the objective characteristics of a product, with due regard to the guidance provided by the rules of the HS1996 (including relevant chapter and section notes and the GIRs). Although the European Communities itself has maintained that such an analysis of the objective characteristics is what is required, we find that the measure does not provide for this. Rather, the CN2007 requires that all ADP MFMs which do not have a facsimile function or make copies at a speed in excess of 12 monochrome pages per minute be classified in eight-digit tariff item number 8443 31 91 which provides for a 6 per cent *ad valorem* duty. As a result, certain ADP MFMs that are entitled to duty free treatment are subject to 6 per cent duty under the EC's measure.

7.1502 The European Communities contends that this duty treatment is justified, because tariff item number 8443 31 91 is the successor to subheading 9009 12 as it appears in the EC Schedule and that goods that were classifiable under subheading 9009 12 are now classifiable in tariff item number 8443 31 91 and should receive the same duty treatment, i.e. 6 per cent. Even assuming that products

[1910] We recall that some ADP MFMs, pursuant to Note 5(D) to HS1996 Chapter 84 may be "printers" and thus classifiable under CN code 8471 60 40 and some other ADP MFMs could fall under CN code 8471 60 90 for "other". In either case, as they would still be input or output units as defined by the concession in 8471 60 of the EC Schedule, they would nevertheless be entitled to duty-free treatment.

that were covered under subheading 9009 12 of the EC Schedule are now covered under CN2007 code 8443 31 91, that does not mean that CN code 8443 31 91 *only* covers products that were once in subheading 9009 12. This is demonstrated by the plain difference in the language of the two concessions. While subheading 9009 12 covered electrostatic photocopying apparatus which operate by reproducing the original image via an intermediate onto the copy (indirect process), CN code 8443 31 91 applies to machines which are capable of connecting to an ADP or a network that perform a copying function by scanning the original and printing the copies by means of an electrostatic print engine. Thus, even though, as explained in paragraph 7.1481, ADP MFMs do not fall within the scope of subheading 9009 12 of the EC Schedule, they undisputedly fall within the meaning of the terms of CN2007 code 8443 31 91. Therefore, the issue before us with respect to the CN2007, and any subsequent versions, is not whether the goods are properly classified, but whether the tariff treatment comports with the concessions set forth in the EC Schedule.

7.1503 We have found that certain of the ADP MFMs at issue, fall within the scope of subheading 8471 60 of the EC Schedule. The CN2007 requires a duty of 6 per cent *ad valorem* be charged on at least some products that properly fall within the scope of the duty-free concession for input or output units of an ADP in subheading 8471 60 of the EC Schedule. Therefore, because the CN2007 requires that a duty in excess of that set forth in the EC Schedule be levied against certain ADP MFMs which fall within the scope of the duty-free concession in subheading 8471 60 in the EC Schedule, the measure is inconsistent with Article II:1(b) of the GATT 1994.

(e) Do the measures at issue provide less favourable treatment than that set forth in the EC Schedule?

7.1504 With respect to whether the European Communities' measures provide for less favourable treatment than that set forth in the EC Schedule, we recall the explanation of the Appellate Body, in *Argentina – Textiles and Apparel*, that paragraph 1(b) of Article II prohibits a specific kind of practice that will always be inconsistent with paragraph 1(a).[1911] In particular, the Appellate Body found that "the application of customs duties in excess of those provided for in a Member's Schedule inconsistent with the first sentence of Article II:1(b), constitutes 'less favourable' treatment under the provisions of Article II:1(a)."[1912] Therefore, as prior panels have before us[1913], we find that a violation of Article II:1(b) necessarily results in less favourable treatment which is inconsistent with the obligations in Article II:1(a).

7.1505 In light of the foregoing, given that we have found that Commission Regulation No. 517/1999, Commission Regulation No. 400/2006, the 2005 Statement, and the 2007CN are inconsistent with Article II:1(b) of the GATT 1994, those measures also provide for less favourable treatment in a manner inconsistent with Article II:1(a) of the GATT 1994.

4. Whether the European Communities' tariff treatment of Non-ADP MFMs is consistent with its obligations under Article II of the GATT 1994

7.1506 We recall that the complainants have divided their claims with respect to multifunctional digital machines into two parts. The first claim, discussed above, dealt with MFMs that could connect to an automatic data-processing machine and which the complainants argued fell within the duty-free concession in subheading 8471 60. The second claim, which will be discussed in this section of the

[1911] Appellate Body Report on *Argentina – Textiles and Apparel*, para. 45.
[1912] Appellate Body Report on *Argentina – Textiles and Apparel,* para. 47.
[1913] Panel Report on *EC – Chicken Cuts*, para. 7.65.

Reports, deals with MFMs that have a facsimile function, but do not have the ability to connect to an automatic data-processing machine.

(a) Are non-ADP MFMs covered by the concession in Subheading 8517 21 of the EC Schedule?

(i) Arguments of the parties

7.1507 The **complainants** refer to these products as non-ADP MFMs. The complainants argue that these products fall within the European Communities' duty-free concession in the EC Schedule for "facsimile machines" in subheading 8517 21.[1914] The complainants argue that by not affording duty-free treatment to products which are within the scope of this tariff concession, the European Communities is acting inconsistently with its obligations under Article II of the GATT 1994, which requires that Members not treat products coming from another Member less favourably than in their schedules, nor charge duties in excess of the bound rates set forth in said Schedule.

7.1508 The **European Communities** argues that "since the non-ADP MFMs at issue in this section have both a copying function and a facsimile transmission function, they are *prima facie* classifiable under the concessions for both HS96 8517 21 and 9009 12."[1915] According to the European Communities, given that MFMs at issue are *prima facie* covered by the concessions for both HS1996 8517 21 and 9009 12, and in the absence of any relevant HS1996 chapter or heading notes[1916], it becomes necessary to resort to GIR 3. The European Communities maintains that the essential character of these products cannot be determined pursuant to GIR 3(b), thus the MFMs must be classified in accordance with GIR 3(c), i.e., in the subheading that occurs later in the HS. In this case that would mean that non-ADP MFMs fall within the scope of the concession in subheading 9009 12 of the EC Schedule and are subject to duty.[1917]

7.1509 The complainants disagree with the European Communities and renew their arguments noted at paragraphs 7.1473-7.1475 above that the concession in HS1996 subheading 9009 12 does not cover digital copying.[1918]

[1914] We note that the European Communities' concession relating to "facsimile machines" is included in the EC Schedule with an eight-digit CN code, i.e. CN code 8517 21 00. However, in this dispute we will refer to this CN code and to subheading 8517 21 interchangeably because we consider their scope to be identical based on the following three reasons: (i) the use of "00" in the last two digits of that CN code; (ii) the identical product descriptions that appear next to both the CN code and subheading; and (iii) the absence, in this case, of CN-specific "break-outs" in the EC Schedule.

[1915] European Communities' first written submission, para. 449.

[1916] Although the European Communities is correct that there are no relevant chapter or heading notes we do recall that Japan cited the HS Explanatory Note for heading 8517 which it argues confirms that facsimile machines are those that can connect to a telephone line and have the ability both to send and to receive original documents by converting them into digital data and sending them over telephone lines. (Japan's first written submission, paras. 209-210 citing Vol. 4 Harmonized Commodity Description and Coding System, Explanatory Notes (2nd ed. 1996), p. 1475 (Exhibit JPN-23).

[1917] European Communities' first written submission, para. 451.

[1918] See, for example: United States' first written submission, paras. 71, 157, 159; United States' first oral statement, para. 37; United States' second written submission, paras. 111-114; United States' second oral statement, para. 37; Japan's first written submission, paras. 70-73, 107-122, 158-161 and 207; Japan's first oral statement, para. 37; Japan's second written submission, paras. 40-41; Chinese Taipei's first written submission, para. 574-584; Chinese Taipei's second written submission, paras. 299-300, 314, 319; complainants' responses to Panel question No. 29 (arguing that the WCO endorsed their view that digital copiers are not photocopiers); Japan's responses to Panel questions Nos. 124; 131 and 136.

7.1510 The European Communities responds that even if the complainants were right about non-ADP MFMs falling outside the scope of HS1996 subheading 9009 12 as photocopiers, they would then have to be classified under HS1996 subheading 8472 90. Therefore, according to the European Communities "non-ADP MFMs would fall *prima facie* within both HS96 8517 21 and HS96 8472 90 and their classification would have to be determined, on a case-by-case basis, pursuant to Note 3 to Section XVI of the HS96."[1919]

(ii) Consideration by the Panel

7.1511 We take note of the fact that the European Communities agrees with the complainants that *all* non-ADP MFMs are *prima facie* classifiable in HS1996 subheading 8517 21. Considering the agreement among all the parties on this point, the **Panel** does not see the need to do an extensive analysis of the ordinary meaning of the terms of this concession to determine whether the products are covered within its scope. However, as with the claims regarding ADP MFMs, the European Communities has argued that a proper classification exercise will lead to the products falling under a different, dutiable concession, namely subheading 9009 12 of the EC Schedule. Alternatively, the European Communities argues that if they do not fall within subheading 9009 12 they would fall within a different dutiable concession, this time subheading 8472 90 of the EC Schedule.

7.1512 Thus, the relevant issue with respect to the complainants' claim that non-ADP MFMs are entitled to duty-free treatment is whether non-ADP MFMs (or at least some of them) may be covered by subheadings other than HS1996 8517 21, that are dutiable. We will begin our analysis by determining whether the products at issue also fall within the scope of the tariff concessions in HS1996 subheadings 9009 12 and 8472 90.

(b) Are there other applicable tariff headings?

7.1513 The European Communities raises two possible alternative tariff headings related to subheading 9009 12 and subheading 8472 90. In order to determine whether either is applicable we will have to examine the ordinary meaning of the concession and whether the products at issue fall within the scope of that concession. We will address each concession in turn.

(i) Are non-ADP MFMs covered by the concession in Subheading 9009 12 of the EC Schedule?

Arguments of the parties

7.1514 As noted above, the **European Communities** contends that because the products at issue have a copying function they are *prima facie* classifiable within subheading 9009 12 of the EC Schedule and that a proper application of the GIRs of the HS, in particular GIR 3(c), will result in all of the non-ADP MFMs at issue falling within the scope of that dutiable concession.[1920]

7.1515 The **complainants** disagree. They renew their arguments, made with respect to the classification of ADP MFMs, that digital copying is not the type of photocopying covered by the concession in subheading 9009 12 of the EC Schedule and as such, non-ADP MFMs which make

[1919] European Communities' second written submission, para. 135.
[1920] European Communities' first written submission, paras. 446-451; European Communities' response to Panel question No. 129; European Communities' comment to Japan's and Chinese Taipei's response to Panel question No. 129.

copies using digital technology combining the work of a scanner and a print engine, cannot fall within the concession in subheading 9009 12 of the EC Schedule.[1921]

Consideration by the Panel

7.1516 We recall our finding in paragraph 7.1468 above that the ordinary meaning of electrostatic photocopying apparatus operating by reproducing the original image via an intermediate onto the copy (indirect process) in subheading 9009 12 in the EC Schedule, is limited to the photocopying process used by "analogue photocopiers" and does not include within its scope digital copying technology.

7.1517 We also note that the non-ADP MFMs utilize the same digital copying process as ADP MFMs, which was described in paragraph 7.1470 above. Given that the copying process utilized by non-ADP MFMs is not the type of photocopying process covered by the concession in subheading 9009 12 of the EC Schedule, then we find that non-ADP MFMs cannot fall within the scope of the concession in subheading 9009 12 of the EC Schedule.

(ii) Are Non-ADP MFMs covered by the concession under subheading 8472 90 of the EC Schedule?

Arguments of the parties

7.1518 The **European Communities** argues that if digital copiers are not photocopiers under subheading 9009 12, then digital copiers would have to be classified under subheading 8472 90.[1922] Following this logic, the European Communities argues that "non-ADP MFMs would fall *prima facie* within both HS96 8517 21 and HS96 8472 90 and their classification would have to be determined, on a case-by-case basis, pursuant to Note 3 to Section XVI of the HS96."[1923]

7.1519 The **United States** seems to agree with the European Communities on this point, when it states that non-ADP MFMs whose "essential character" is that of a facsimile machine are included in the concession for "facsimile machines" under subheading 8517 21, while other non-ADP MFMs may not be "facsimile machines" and therefore would fall within the concession for goods of subheading 8472 90.[1924]

[1921] See, for example: United States' first written submission, paras. 71, 157, 159; United States' first oral statement, para. 37; United States' second written submission, paras. 111-114; United States' second oral statement, para. 37; Japan's first written submission, paras. 70-73, 107-122, 158-161 and 207; Japan's first oral statement, para. 37; Japan's second written submission, paras. 40-41; Chinese Taipei's first written submission, para. 574-584; Chinese Taipei's second written submission, paras. 299-300, 314, 319; complainants' responses to Panel question No. 29 (arguing that the WCO endorsed their view that digital copiers are not photocopiers); Japan's responses to Panel questions Nos. 124; 131 and 136.

[1922] European Communities' second written submission, para. 135 citing the Complainants' responses to Panel question No. 44.

[1923] European Communities' second written submission, para. 135.

[1924] United States' response to Panel question No. 137. We understand the United States' reference to the "essential character" of the non-ADP MFMs to be a reference to GIR 3(b). Assuming that the United States was correct that some non-ADP MFMs could be prima facie classifiable in both HS1996 subheadings 8472 90 and 8517 21, under HS rules, to the extent that the essential character of a particular non-ADP MFM could not be determined pursuant to GIR 3(b), GIR 3(c) would suggest that the appropriate classification would be the duty free subheading 8517 21 as the latest subheading in the Schedule.

7.1520 **Japan** and **Chinese Taipei** maintain that all non-ADP MFMs are included in the concession on HS1996 subheading 8517 21. Japan argues that the scanner module and printer module are what enable the device to transmit and receive facsimiles and that these modules are essential to the facsimile capabilities of the device.[1925]

7.1521 Finally, both Japan and the United States reiterate that even if some non-ADP MFMs were properly classifiable in subheading 8472 90 the duty treatment under the current EC measures would still exceed that provided for in that concession.[1926]

Consideration by the Panel

7.1522 The **Panel** recalls its determination in paragraph 7.1487 above that given the lack of evidence and argumentation on the scope of HS1996 subheading 8472 90 and that any claim of inconsistency with Article II:1(b) because of tariff treatment in excess of that provided for in 8472 90 is outside our mandate that we would not make any findings with respect to whether ADP MFMs fall within the scope of that concession. Given that the arguments on non-ADP MFMs mirrored and were sometimes even less than those presented on ADP MFMs, we see no reason to proceed with findings on whether non-ADP MFMs fall within the scope of the concession in HS1996 subheading 8472 90.

(c) Do the measures at issue result in the imposition of duties on the products at issue in excess of those provided for in the EC Schedule?

7.1523 We recall our reasoning in Section VII.D.4 (paragraphs 7.97-7.102) above that Article II:1(b) of the GATT 1994 requires that Members not apply ordinary customs duties in excess of those provided for in their Schedule. Therefore, in this section we will compare the tariff treatment provided to non-ADP MFMs under the challenged measures with that provided for in subheading 8517 21 of the EC Schedule to determine whether the challenged measures provide for duties being applied to non-ADP MFMs in excess of those set forth in the EC Schedule, such that the European Communities is in breach of its obligations under Article II:1(b) of the GATT 1994.[1927]

(i) Commission Regulation No. 517/1999

7.1524 We note our conclusion in paragraph 7.1491 above, that Commission Regulation No. 517/1999 requires that a MFM meeting the description set forth in item 2 of the Annex, which could include a non-ADP MFM with a facsimile function, must be classified under CN code 9009 12 00, which sets a duty rate of 6 per cent.

7.1525 We also recall our conclusion that the products at issue do not fall within the scope of products defined in tariff item number 9009 12 00 of the EC Schedule, but that at least some of them fall within the scope of subheading 8517 21 of the EC schedule, which is a duty-free concession. Therefore, as Commission Regulation No. 517/1999 requires the imposition of a 6 per cent duty on products that the European Communities is obliged to provide duty-free treatment for, the measure is inconsistent with the European Communities' obligations under Article II:1(b) of the GATT 1994.

[1925] Japan and Chinese Taipei's responses to Panel question No. 137.

[1926] Japan and the United States' responses to Panel question No. 137.

[1927] As noted in paragraph 7.102, because of the relationship between the obligations in Articles II:1(a) and (b), we will begin our analysis of whether the tariff treatment provided for in the European Communities' measures is consistent with Article II of the GATT 1994 with an analysis of the obligation in Article II:1(b). Subsequently, we will move on to address the complainants' claim that the European Communities is also acting inconsistently with the obligation in Article II:1(a).

(ii) The 2005 Statement

7.1526 We recall our conclusion in paragraph 7.1493 above that if a national customs authority were to follow the non-binding guidance in the 2005 Statement, then it would proceed to classify MFMs (including non-ADP MFMs with a facsimile function) which can photocopy in black and white 12 or more pages per minute as a photocopier under CN code 9009 12 00 which sets a 6 per cent duty rate.

7.1527 We also recall our conclusion that at least some of the products at issue fall within the scope of subheading 8517 21 of the EC Schedule, which is a duty-free concession, and that none of the products at issue fall within the scope tariff item number 9009 12 00 of the EC Schedule. Therefore, because the 2005 Statement guides the European Communities, through its national customs authorities, to uniformly apply a duty of 6 per cent on products that the European Communities is obliged to provide duty-free treatment for, the measure is inconsistent with the European Communities' obligations under Article II:1(b) of the GATT 1994.

(iii) Commission Regulation No. 400/2006

7.1528 We recall that the complainants have specifically raised item 4 of the Annex to the Regulation as the part of Commission Regulation No. 400/2006 which causes the European Communities to charge duties on non-ADP MFMs which should be covered by the duty-free concession in subheading 8517 21 of the EC Schedule for "facsimile machines". Item 4 of the Annex to the Regulation describes a

> "[M]ultifunctional apparatus capable of performing the following functions: scanning, laser printing, laser copying (indirect process). The apparatus, which has several paper feed trays, is capable of reproducing up to 40 A4 pages per minute. The apparatus operates either autonomously (as a copier) or in conjunction with an automatic data-processing machine or in a network (as a printer, a scanner and a copier)."[1928]

7.1529 The regulation goes on to say that such an apparatus shall be classified under CN code 9009 12 00, which sets a duty rate of 6 per cent.

7.1530 We note that the description does not mention the apparatus having a facsimile function. Therefore, we do not see how Commission Regulation No. 400/2006 would necessarily require national customs authorities within the European Communities to classify non-ADP MFMs with a facsimile function in CN code 9009 12 00. We note that the complainants have provided no specific argumentation as to how application of Commission Regulation No. 400/2006 results in duties being applied to non-ADP MFMs with a facsimile function. Therefore, with respect to the claim regarding the tariff treatment of non-ADP MFMs with a facsimile function, we find that the complainants have not established that, by virtue of this regulation, the European Communities is levying duties on non-ADP MFMs with a facsimile function in excess of those provided for in its Schedule.

(iv) CN2007 codes 8443 31 10, 8443 31 91, and 8443 31 99

7.1531 Unlike Commission Regulation Nos. 517/1999 and 400/2006 and the 2005 Statement, the CN2007 does not subject non-ADP MFMs to a 6 per cent duty via classification under HS1996 subheading 9009 12.

[1928] Commission Regulation No. 400/2006 (Exhibit JPN-5).

7.1532 The CN2007, as well as the subsequent versions of the CN to date, is based on HS2007, which made a variety of changes in headings covering the very products at issue in this dispute. In fact, we observed that the HS2007 completely removed HS1996 subheading 9009 12. Moreover, several products that used to be classifiable under different HS1996 subheadings, including *inter alia* some facsimile machines that used to be classifiable under HS1996 subheading 8517 21, were merged under a new HS2007 heading 8443. The European Communities contends that this was also the case for photocopiers covered under HS1996 subheading 9009 12, however this interpretation was not accepted by all the contracting parties to the HS.[1929] This new heading includes a subheading 8443 31 for "[m]achines which perform two or more of the functions of printing, copying or facsimile transmission, capable of connecting to an automatic data-processing machine or to a network".[1930]

7.1533 In implementing HS2007, the European Communities created its own eight-digit CN codes as subcategories of the subheading. Subheading 8443 31 was subdivided as follows:

CN2007 code	Description	Conventional rate of duty (%)
8443	**Printing machinery used for printing by means of plates, cylinders and other printing components of heading 8442; other printers, copying machines and facsimile machines, whether or not combined; parts and accessories thereof:**	
	(...)	
	- Other printers, copying machines and facsimile machines, whether or not combined	
8443 31	- - Machines which perform two or more of the functions of printing, copying or facsimile transmission, capable of connecting to an automatic data-processing machine or to a network:	
8443 31 10	- - - Machines performing the functions of copying and facsimile transmission, whether or not with a printing function, with a copying speed not exceeding 12 monochrome pages per minute	Free
	- - - Other	
8443 31 91	- - - - Machines performing a copying function by scanning the original and printing the copies by means of an electrostatic print engine	6 per cent
8443 31 99	- - - - Other	Free

7.1534 We observe that one of these CN2007 codes 8443 31 91 provides for a 6 per cent *ad valorem* duty for products classifiable therein. Specifically, pursuant to CN2007 code 8443 31 91 the European Communities would apply a 6 per cent duty to "[m]achines performing a copying function by scanning the original and printing the copies by means of an electrostatic print engine." All the remaining products classifiable under 8443 31 are provided duty-free treatment and are, therefore, not relevant for our analysis. We recall our conclusion in paragraph 7.1500 above, that the existence of these two eight-digit CN codes under the same subheading, means that non-ADP MFMs which copy at a speed *exceeding* 12 monochrome pages per minute are subject to the 6 per cent duty under 8443 31 91, while those that copy at rates of 12 monochrome pages per minute or slower are exempt from duties.

[1929] WCO response to Panel questions, pp. 6-12.

[1930] We note that all the parties confirmed that the term "network" in HS2007 subheading 8443 31 includes connections via a telephone line and thus non-ADP MFMs with a facsimile function would be covered by this subheading. See Parties' responses to Panel question No. 25.

7.1535 The Panel reiterates that our task is to determine whether the products at issue receive treatment that is less favourable than or in excess of the duties provided for in the concession in the EC Schedule.

7.1536 We recall that the parties all agree that all non-ADP MFMs could fall, at least *prima facie* within the scope of the duty-free concession in the EC Schedule in subheading 8517 21.[1931] We also stated that due to lack of evidence and argumentation we did not have a basis for making a finding as to whether some non-ADP MFMs might also fall within the scope of the dutiable concession in 8472 90. As noted above, by virtue of the effect of the relevant HS rules which provide important context in interpreting the scope of these concessions, it appears to the Panel that at least some non-ADP MFMs will fall within the scope of the concession in subheading 8517 21 of the EC Schedule. Although the European Communities itself notes that the Appellate Body has confirmed that tariff treatment of a particular product must be determined according to its objective characteristics at the time of its importation[1932], we find that the measure does not provide for this. Rather, the CN2007 requires that all non-ADP MFMs which make copies at a speed in excess of 12 monochrome pages per minute be classified in eight-digit CN code 8443 31 91 which provides for a 6 per cent *ad valorem* duty. As a result, certain non-ADP MFMs that are entitled to duty free treatment are subject to 6 per cent duty under the EC's measure.

7.1537 The European Communities contends that this duty treatment is justified, because tariff item number 8443 31 91 is the successor to subheading 9009 12 as it appears in the EC Schedule and that goods that were classifiable under subheading 9009 12 are now classifiable in tariff item number 8443 31 91 and should receive the same duty treatment, i.e., 6 per cent. Even assuming that products that were covered under subheading 9009 12 of the EC Schedule are now covered under CN2007 code 8443 31 91, that does not mean that tariff item number 8443 31 91 *only* covers products that were once in subheading 9009 12. This is demonstrated by the plain difference in the language of the two concessions. While subheading 9009 12 covered electrostatic photocopying apparatus which operate by reproducing the original image via an intermediate onto the copy (indirect process), tariff item number 8443 31 91 applies to machines which are capable of connecting to an ADP or a network that perform a copying function by scanning the original and printing the copies by means of an electrostatic print engine. Thus, even though, as explained in paragraph 7.1517, non-ADP MFMs do not fall within the scope of subheading 9009 12 of the EC Schedule, they undisputedly fall within the meaning of the terms of CN2007 code 8443 31 91. Therefore, the issue before us with respect to the CN2007, and any subsequent versions, is not whether the goods are properly classified, but whether the tariff treatment comports with the concessions set forth in the EC Schedule.

7.1538 We have found that certain of the non-ADP MFMs at issue, fall within the scope of subheading 8517 21 of the EC Schedule. The CN2007 requires a duty of 6 per cent *ad valorem* be charged on at least some products that properly fall within the scope of the duty-free concession for facsimile machines in subheading 8517 21 of the EC Schedule. Therefore, because the CN2007 requires that a duty in excess of that set forth in the EC Schedule be levied against certain non-ADP MFMs which fall within the scope of the duty-free concession in subheading 8517 20 of the EC Schedule, the measure is inconsistent with Article II:1(b) of the GATT 1994.

[1931] United States' first written submission, paras. 103-104; United States' first oral statement, para. 36; Japan's first written submission, para. 193; Chinese Taipei's first written submission, para. 566, European Communities' first written submission, para. 449.

[1932] European Communities' first written submission, para. 447.

(d) Do the measures at issue provide less favourable treatment than that set forth in the EC Schedule?

7.1539 With respect to whether the European Communities' measures provide for less favourable treatment than that set forth in the EC Schedule, we recall the explanation of the Appellate Body, in *Argentina – Textiles and Apparel*, that paragraph (b) of Article II prohibits a specific kind of practice that will always be inconsistent with paragraph (a).[1933] In particular, the Appellate Body found that "the application of customs duties in excess of those provided for in a Member's Schedule inconsistent with the first sentence of Article II:1(b), constitutes 'less favourable' treatment under the provisions of Article II:1(a)."[1934] Therefore, as prior panels have before us[1935], we find that a violation of Article II:1(b) necessarily results in less favourable treatment which is inconsistent with the obligations in Article II:1(a).

7.1540 In light of the foregoing and given that we have found that Commission Regulation No. 517/1999 , the 2005 Statement, and the CN2007 result in tariff treatment of non-ADP MFMs that is inconsistent with Article II:1(b) of the GATT 1994, those measures also provide for less favourable treatment in a manner inconsistent with Article II:1(a) of the GATT 1994.

VIII. RULINGS AND RECOMMENDATIONS

8.1 The Panel recalls the complainants' request that the Panel issue its findings in the form of a single document containing three separate reports with common sections on the Panel's conclusions and recommendations for each complaining party.[1936] In accordance with the requests by the complaining parties, we therefore provide three separate sets of conclusions and recommendations.

8.2 We recall that the complainants have brought claims not only against the European Communities, but also its member States. We note that it is the member States' national customs authorities that implement the customs measures enacted by the European Communities. We also are mindful of the fact that EC member states are WTO Members in their own right and that, like all WTO Members, they are bound to act consistently with their WTO obligations. Thus, if one or more EC member States were found to have applied WTO inconsistent measures, be they enacted by the States themselves or by the European Communities, it could be appropriate to find that the member States have acted inconsistently with their WTO obligations. However, we note that the complainants have framed their claims as challenging the European Communities measures "as such" and have confirmed to the Panel that they are not making claims with respect to specific applications of those measures by national customs authorities of any member States. Under the circumstances, the Panel considers that it is not required to make, and does not make, findings with respect to member States' application of the European Communities' measures that were challenged "as such" in this dispute.

[1933] Appellate Body Report on *Argentina – Textiles and Apparel*, para. 45.
[1934] Appellate Body Report on *Argentina – Textiles and Apparel*, para. 47.
[1935] Panel Report on *EC – Chicken Cuts*, para. 7.65.
[1936] See para.2.4 and its fn. 17.

Moreover, we are of the view that findings with respect to the measures adopted by the European Communities will provide a positive solution to the dispute.[1937]

[1937] We recall that the European Communities assured the Panel that to the extent the Panel were to find that any of the measures specified in the joint panel request breach WTO obligations, the European Communities stated it will bear full responsibility for such breach of its Schedule. See Letter from the Delegation of the Commission (4 February 2009).

A. COMPLAINT BY THE UNITED STATES (DS375): CONCLUSIONS OF THE PANEL

1. FPDs

8.3 The United States has made claims with respect to Council Regulation 2658/87, as amended, CNEN 2008/C 133/01, Commission Regulation Nos. 634/2005 and 2171/2005. The Panel analyzed how these measures worked in conjunction with and in the absence of the duty suspension under Council Regulation No. 179/2009.

8.4 With respect to the CNEN 2008/C 133/01, which operates in conjunction with the CN, the Panel finds that:

(a) In the absence of the duty suspension under Council Regulation No. 179/2009, the measures direct national customs authorities to classify some flat panel display devices that are capable of receiving and reproducing video images both from an automatic data-processing machine and from a source other than an automatic data-processing machine, that fall within the scope of the FPDs narrative description and/or within the scope of the CN code 8471 60 90, under dutiable headings. Because the concessions call for duty-free treatment of products falling within their scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.

(b) In the absence of the duty suspension under Council Regulation No. 179/2009, the measures direct national customs authorities to classify some flat panel display devices that have a DVI interface, whether or not they are capable of receiving signals from another source, that fall within the scope of the FPDs narrative description and/or within the scope of the CN code 8471 60 90, under dutiable headings. Because the concessions call for duty-free treatment of products falling within their scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.

(c) Given the duty suspension currently in effect for certain products in dispute falling within the scope of the FPDs narrative description or within the scope of CN code 8471 60 90, the inconsistency with Article II:1(b) referred to in subparagraphs (a) and (b) above is eliminated because the duties are suspended and hence are not in excess of those provided for in the EC Schedule.

(d) For those products in dispute falling within the scope of the FPDs narrative description or within the scope of CN code 8471 60 90 and that are not covered by the duty suspension with the result that they are subject to dutiable treatment, the duty suspension does not eliminate the inconsistency with Article II:1(b) for these products and therefore this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.

(e) The European Communities fails to accord treatment no less favourable than that set forth in its Schedule to the commerce of the other WTO Members, in particular certain flat panel display devices that are capable of receiving and reproducing video images both from an automatic data-processing machine and from a source other than an automatic data-processing machine, or that have a DVI interface, whether or not they are capable of receiving signals from another source. Thus, the European Communities is inconsistent with Article II:1(a) of the GATT 1994. This inconsistency is not eliminated by the duty suspension with respect to certain products in dispute falling within the scope of the FPDs narrative description or within the scope of CN code 8471 60 90 because the duty suspension measure does

not eliminate the failure to accord treatment no less favourable to the commerce of the other WTO Members.

8.5 With respect to item 4 in the Annex to Commission Regulation No. 634/2005 and items 2, 3 and 4 in the Annex to Commission Regulation No. 2171/2005:

(a) In the absence of the duty suspension under Council Regulation No. 179/2009, the measures direct national customs authorities to classify some flat panel display devices that are capable of receiving and reproducing video images both from an automatic data-processing machine and from a source other than an automatic data-processing machine, that fall within the scope of the FPDs narrative description and/or within the scope of the CN code 8471 60 90, under dutiable headings. Because the concessions call for duty-free treatment of products falling within their scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.

(b) In the absence of the duty suspension under Council Regulation No. 179/2009, the measures direct national customs authorities to classify some flat panel display devices that have a DVI interface, whether or not they are capable of receiving signals from another source, that fall within the scope of the FPDs narrative description and/or within the scope of the CN code 8471 60 90, under dutiable headings. Because the concessions call for duty-free treatment of products falling within their scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.

(c) Given the duty suspension currently in effect for certain products in dispute falling within the scope of the FPDs narrative description or within the scope of CN code 8471 60 90, the inconsistency with Article II:1(b) referred to in subparagraphs (a) and (b) above is eliminated because the duties are suspended and hence are not in excess of those provided for in the EC Schedule.

(d) For those products in dispute falling within the scope of the FPDs narrative description or within the scope of CN code 8471 60 90 and that are not covered by the duty suspension with the result that they are subject to dutiable treatment, the duty suspension does not eliminate the inconsistency with Article II:1(b) for these products and therefore this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.

(e) The European Communities fails to accord treatment no less favourable than that set forth in its Schedule to the commerce of the other WTO Members, in particular certain flat panel display devices that are capable of receiving and reproducing video images both from an automatic data-processing machine and from a source other than an automatic data-processing machine, or that have a DVI interface, whether or not they are capable of receiving signals from another source. Thus, the European Communities is inconsistent with Article II:1(a) of the GATT 1994. This inconsistency is not eliminated by the duty suspension with respect to certain products in dispute falling within the scope of the FPDs narrative description or within the scope of CN code 8471 60 90 because the duty suspension measure does not eliminate the failure to accord treatment no less favourable to the commerce of the other WTO Members.

2. STBCs

8.6 With respect to the CNEN 2008/C 112/03 which operates in conjunction with the CN, the Panel finds that:

(a) The measures direct national customs authorities to classify under dutiable headings some set top boxes which incorporate a device performing a recording or reproducing function and retain the essential character of a set top box and that fall within the scope of the STBCs narrative description in the Annex to the EC Schedule. Because the concession calls for duty-free treatment of products falling within its scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.

(b) The measures direct national customs authorities to classify under dutiable headings some set top boxes which utilise ISDN, WLAN or Ethernet technology, and that fall within the scope of the STBCs narrative description in the Annex to the EC Schedule. Because the concession calls for duty-free treatment of products falling within its scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.

(c) By virtue of the inconsistency with Article II:1(b) of the GATT 1994, the measures accord treatment less favourable to such set top boxes than that provided for under the STBCs narrative description in the Annex to the EC Schedule and thus the measures are also inconsistent with Article II:1(a) of the GATT 1994.

(d) The United States has failed to meet its burden to establish a *prima facie* case that the products at issue fall within the scope of concessions arising under CN codes 8517 50 90, 8517 80 90, 8525 20 99 and/or 8528 12 91 of the EC Schedule. Therefore, the United States has failed to establish that the measures are inconsistent with Articles II:1(a) and II:1(b) of the GATT 1994 because the concessions require duty-free treatment for the products falling within their scope.

8.7 With respect to claims regarding the consistency of the CNEN 2008/C 112/03 with Article X, the Panel finds that:

(a) The European Communities failed to publish promptly CNEN 2008/C 112/03, such as to enable governments and traders to become acquainted with them, and has thus acted inconsistently with Article X:1 of the GATT 1994.

(b) The European Communities has *not* acted inconsistently with Article X:2 of the GATT 1994 with respect to the October 2006 CNEN amendment because the complainants did not establish that the European Communities enforced the October 2006 CNEN amendment before its official publication as CNEN 2008/C 112/03 in the EU Official Journal on 7 May 2008.

(c) The European Communities has acted inconsistently with Article X:2 of the GATT 1994 with respect to the April 2007 CNEN amendment by enforcing the April 2007 CNEN amendment before its official publication as CNEN 2008/C 112/03 in the EU Official Journal on 7 May 2008.

3. MFMs

8.8 With respect to item 1of the Annex to Commission Regulation No. 517/1999, the Panel finds that:

(a) The regulation requires dutiable treatment of certain ADP MFMs that fall within the scope of the concession for "input or output units" in HS1996 subheading 8471 60 of the EC Schedule. Because the concession calls for duty-free treatment of products falling within its scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.

(b) By virtue of the inconsistency with Article II:1(b) of the GATT 1994, the measures accord treatment less favourable to certain ADP MFMs than that provided for under the EC Schedule and thus the measures are also inconsistent with Article II:1(a) of the GATT 1994.

(c) The regulation requires dutiable treatment of certain non-ADP MFMs that fall within the scope of the concession for "facsimile machines" in HS1996 subheading 8517 21 of the EC Schedule. Because the concession calls for duty-free treatment of products falling within its scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.

(d) By virtue of the inconsistency with Article II:1(b) of the GATT 1994, the measures accord treatment less favourable to certain non-ADP MFMs than that provided for under the EC Schedule and thus the measures are also inconsistent with Article II:1(a) of the GATT 1994.

8.9 With respect to the 2005 Statement, the Panel finds that:

(a) Because the measure has guided and serves to guide the European Communities uniform application of the common customs tariff in a way that results in the application of duties to those ADP MFMs that fall within the duty-free concession, the measure is inconsistent with Article II:1(b) of the GATT 1994.

(b) By virtue of the inconsistency with Article II:1(b) of the GATT 1994, the measures accord treatment less favourable to certain ADP MFMs than that provided for under the EC Schedule and thus the measures are also inconsistent with Article II:1(a) of the GATT 1994.

(c) Because the measure has guided and serves to guide the European Communities uniform application of the common customs tariff in a way that results in the application of duties to those non-ADP MFMs that fall within the duty-free concession, the measure is inconsistent with Article II:1(b) of the GATT 1994.

(d) By virtue of the inconsistency with Article II:1(b) of the GATT 1994, the measures accord treatment less favourable to certain non-ADP MFMs than that provided for under the EC Schedule and thus the measures are also inconsistent with Article II:1(a) of the GATT 1994.

8.10 With respect to item 4 of the Annex to Commission Regulation No. 400/2006, the Panel finds that:

(a) The regulation requires dutiable treatment of certain ADP MFMs that fall within the scope of the concession for "input or output units" in HS1996 subheading 8471 60 of the EC Schedule. Because the concession calls for duty-free treatment of products falling within its scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.

(b) By virtue of the inconsistency with Article II:1(b) of the GATT 1994, the regulation accords treatment less favourable to certain ADP MFMs than that provided for under the EC Schedule and thus the measures are also inconsistent with Article II:1(a) of the GATT 1994.

(c) The regulation does not require the dutiable treatment of non-ADP MFMs with a facsimile function. Therefore, the European Communities has not acted inconsistently with Article II:1(b) of the GATT 1994 with respect to non-ADP MFMs with a facsimile function as the measure does not impose duties in excess of those provided for in the EC Schedule.

8.11 With respect to the CN2007, the Panel finds that:

(a) The three relevant CN2007 codes require that certain ADP MFMs which fall within the scope of the duty-free concession for input or output units of an ADP in subheading 8471 60 of the EC Schedule be charged a duty of 6 per cent. Therefore, with respect to these products, the measure is inconsistent with Article II:1(b) of the GATT 1994.

(b) By virtue of the inconsistency with Article II:1(b) of the GATT 1994, the CN2007 accords treatment less favourable to certain ADP MFMs than that provided for under the EC Schedule and thus the measures are also inconsistent with Article II:1(a) of the GATT 1994.

(c) The three relevant CN2007 codes require that certain non-ADP MFMs which fall within the scope of the duty-free concession for "facsimile machines" in subheading 8517 21 of the EC Schedule be charged a duty of 6 per cent. Therefore, with respect to these products, the measure is inconsistent with Article II:1(b) of the GATT 1994.

(d) By virtue of the inconsistency with Article II:1(b) of the GATT 1994, the CN2007 accords treatment less favourable to certain non-ADP MFMs than that provided for under the EC Schedule and thus the measures are also inconsistent with Article II:1(a) of the GATT 1994.

4. Nullification and impairment

8.12 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent that the European Communities has acted inconsistently with Articles II:1(a), II:1(b), X:1 and X:2 of the GATT 1994, it has nullified or impaired benefits accruing to the United States under that agreement.

5. Recommendations

8.13 Pursuant to Article 19.1 of the DSU, having found that the European Communities has acted inconsistently with Articles II:1(a), II:1(b), X:1, and X:2 of the GATT 1994, we recommend that the Dispute Settlement Body request the European Communities to bring the relevant measures into conformity with its obligations under the GATT 1994.

8.14 We recall that the European Communities has indicated that the Commission Regulation Nos. 634/2005 and 2171/2005 would be repealed.[1938] In addition, the European Communities has indicated that Commission Regulation Nos. 517/1999 and 400/2006 would be repealed as of October 2009.[1939] However, there is no evidence properly before the Panel confirming such repeal. Therefore, the Panel has proceeded on the basis that the said measures are in force.

[1938] European Communities' first written submission, para. 95; European Communities' second written submission, para. 63.

[1939] European Communities' response to Panel question No. 110.

B. COMPLAINT BY THE JAPAN (DS376): CONCLUSIONS OF THE PANEL

1. FPDs

8.15 Japan has made claims with respect to Council Regulation 2658/87, as amended, CNEN 2008/C 133/01, Commission Regulation Nos. 634/2005 and 2171/2005. The Panel analyzed how these measures worked in conjunction with and in the absence of the duty suspension under Council Regulation No. 179/2009.

8.16 With respect to the CNEN 2008/C 133/01, which operates in conjunction with the CN, the Panel finds that:

(a) In the absence of the duty suspension under Council Regulation No. 179/2009, the measures direct national customs authorities to classify some flat panel display devices that are capable of receiving and reproducing video images both from an automatic data-processing machine and from a source other than an automatic data-processing machine, that fall within the scope of the FPDs narrative description and/or within the scope of the CN code 8471 60 90, under dutiable headings. Because the concessions call for duty-free treatment of products falling within their scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.

(b) In the absence of the duty suspension under Council Regulation No. 179/2009, the measures direct national customs authorities to classify some flat panel display devices that have a DVI interface, whether or not they are capable of receiving signals from another source, that fall within the scope of the FPDs narrative description and/or within the scope of the CN code 8471 60 90, under dutiable headings. Because the concessions call for duty-free treatment of products falling within their scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.

(c) Given the duty suspension currently in effect for certain products in dispute falling within the scope of the FPDs narrative description or within the scope of CN code 8471 60 90, the inconsistency with Article II:1(b) referred to in subparagraphs (a) and (b) above is eliminated because the duties are suspended and hence are not in excess of those provided for in the EC Schedule.

(d) For those products in dispute falling within the scope of the FPDs narrative description or within the scope of CN code 8471 60 90 and that are not covered by the duty suspension with the result that they are subject to dutiable treatment, the duty suspension does not eliminate the inconsistency with Article II:1(b) for these products and therefore this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.

(e) The European Communities fails to accord treatment no less favourable than that set forth in its Schedule to the commerce of the other WTO Members, in particular certain flat panel display devices that are capable of receiving and reproducing video images both from an automatic data-processing machine and from a source other than an automatic data-processing machine, or that have a DVI interface, whether or not they are capable of receiving signals from another source. Thus, the European Communities is inconsistent with Article II:1(a) of the GATT 1994. This inconsistency is not eliminated by the duty suspension with respect to certain products in dispute falling within the scope of the FPDs narrative description or within the scope of CN code 8471 60 90 because the duty suspension measure does

not eliminate the failure to accord treatment no less favourable to the commerce of the other WTO Members.

8.17 With respect to item 4 in the Annex to Commission Regulation No. 634/2005 and items 2, 3 and 4 in the Annex to Commission Regulation No. 2171/2005:

(a) In the absence of the duty suspension under Council Regulation No. 179/2009, the measures direct national customs authorities to classify some flat panel display devices that are capable of receiving and reproducing video images both from an automatic data-processing machine and from a source other than an automatic data-processing machine, that fall within the scope of the FPDs narrative description and/or within the scope of the CN code 8471 60 90, under dutiable headings. Because the concessions call for duty-free treatment of products falling within their scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.

(b) In the absence of the duty suspension under Council Regulation No. 179/2009, the measures direct national customs authorities to classify some flat panel display devices that have a DVI interface, whether or not they are capable of receiving signals from another source, that fall within the scope of the FPDs narrative description and/or within the scope of the CN code 8471 60 90, under dutiable headings. Because the concessions call for duty-free treatment of products falling within their scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.

(c) Given the duty suspension currently in effect for certain products in dispute falling within the scope of the FPDs narrative description or within the scope of CN code 8471 60 90, the inconsistency with Article II:1(b) referred to in subparagraphs (a) and (b) above is eliminated because the duties are suspended and hence are not in excess of those provided for in the EC Schedule.

(d) For those products in dispute falling within the scope of the FPDs narrative description or within the scope of CN code 8471 60 90 and that are not covered by the duty suspension with the result that they are subject to dutiable treatment, the duty suspension does not eliminate the inconsistency with Article II:1(b) for these products and therefore this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.

(e) The European Communities fails to accord treatment no less favourable than that set forth in its Schedule to the commerce of the other WTO Members, in particular certain flat panel display devices that are capable of receiving and reproducing video images both from an automatic data-processing machine and from a source other than an automatic data-processing machine, or that have a DVI interface, whether or not they are capable of receiving signals from another source. Thus, the European Communities is inconsistent with Article II:1(a) of the GATT 1994. This inconsistency is not eliminated by the duty suspension with respect to certain products in dispute falling within the scope of the FPDs narrative description or within the scope of CN code 8471 60 90 because the duty suspension measure does not eliminate the failure to accord treatment no less favourable to the commerce of the other WTO Members.

2. STBCs

8.18 With respect to the CNEN 2008/C 112/03 which operates in conjunction with the CN, the Panel finds that:

(a) The measures direct national customs authorities to classify under dutiable headings some set top boxes which incorporate a device performing a recording or reproducing function and retain the essential character of a set top box and that fall within the scope of the STBCs narrative description in the Annex to the EC Schedule. Because the concession calls for duty-free treatment of products falling within its scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.

(b) The measures direct national customs authorities to classify under dutiable headings some set top boxes which utilise ISDN, WLAN or Ethernet technology, and that fall within the scope of the STBCs narrative description in the Annex to the EC Schedule. Because the concession calls for duty-free treatment of products falling within its scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.

(c) By virtue of the inconsistency with Article II:1(b) of the GATT 1994, the measures accord treatment less favourable to such set top boxes than that provided for under the STBCs narrative description in the Annex to the EC Schedule and thus the measures are also inconsistent with Article II:1(a) of the GATT 1994.

3. MFMs

8.19 With respect to item 1of the Annex to Commission Regulation No. 517/1999, the Panel finds that:

(a) The regulation requires dutiable treatment of certain ADP MFMs that fall within the scope of the concession for "input or output units" in HS1996 subheading 8471 60 of the EC Schedule. Because the concession calls for duty-free treatment of products falling within its scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.

(b) By virtue of the inconsistency with Article II:1(b) of the GATT 1994, the measures accord treatment less favourable to certain ADP MFMs than that provided for under the EC Schedule and thus the measures are also inconsistent with Article II:1(a) of the GATT 1994.

(c) The regulation requires dutiable treatment of certain non-ADP MFMs that fall within the scope of the concession for "facsimile machines" in HS1996 subheading 8517 21 of the EC Schedule. Because the concession calls for duty-free treatment of products falling within its scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.

(d) By virtue of the inconsistency with Article II:1(b) of the GATT 1994, the measures accord treatment less favourable to certain non-ADP MFMs than that provided for under the EC Schedule and thus the measures are also inconsistent with Article II:1(a) of the GATT 1994.

8.20 With respect to the 2005 Statement, the Panel finds that:

(a) Because the measure has guided and serves to guide the European Communities uniform application of the common customs tariff in a way that results in the application of duties to those ADP MFMs that fall within the duty-free concession, the measure is inconsistent with Article II:1(b) of the GATT 1994.

(b) By virtue of the inconsistency with Article II:1(b) of the GATT 1994, the measures accord treatment less favourable to certain ADP MFMs than that provided for under the EC Schedule and thus the measures are also inconsistent with Article II:1(a) of the GATT 1994.

(c) Because the measure has guided and serves to guide the European Communities uniform application of the common customs tariff in a way that results in the application of duties to those non-ADP MFMs that fall within the duty-free concession, the measure is inconsistent with Article II:1(b) of the GATT 1994.

(d) By virtue of the inconsistency with Article II:1(b) of the GATT 1994, the measures accord treatment less favourable to certain non-ADP MFMs than that provided for under the EC Schedule and thus the measures are also inconsistent with Article II:1(a) of the GATT 1994.

8.21 With respect to item 4 of the Annex to Commission Regulation No. 400/2006, the Panel finds that:

(a) The regulation requires dutiable treatment of certain ADP MFMs that fall within the scope of the concession for "input or output units" in HS1996 subheading 8471 60 of the EC Schedule. Because the concession calls for duty-free treatment of products falling within its scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.

(b) By virtue of the inconsistency with Article II:1(b) of the GATT 1994, the regulation accords treatment less favourable to certain ADP MFMs than that provided for under the EC Schedule and thus the measures are also inconsistent with Article II:1(a) of the GATT 1994.

(c) The regulation does not require the dutiable treatment of non-ADP MFMs with a facsimile function. Therefore, the European Communities has not acted inconsistently with Article II:1(b) of the GATT 1994 with respect to non-ADP MFMs with a facsimile function as the measure does not impose duties in excess of those provided for in the EC Schedule.

8.22 With respect to the CN2007, the Panel finds that:

(a) The three relevant CN2007 codes require that certain ADP MFMs which fall within the scope of the duty-free concession for input or output units of an ADP in subheading 8471 60 of the EC Schedule be charged a duty of 6 per cent. Therefore, with respect to these products, the measure is inconsistent with Article II:1(b) of the GATT 1994.

(b) By virtue of the inconsistency with Article II:1(b) of the GATT 1994, the CN2007 accords treatment less favourable to certain ADP MFMs than that provided for under the EC Schedule and thus the measures are also inconsistent with Article II:1(a) of the GATT 1994.

(c) The three relevant CN2007 codes require that certain non-ADP MFMs which fall within the scope of the duty-free concession for "facsimile machines" in subheading 8517 21 of the EC Schedule be charged a duty of 6 per cent. Therefore, with respect to these products, the measure is inconsistent with Article II:1(b) of the GATT 1994.

(d) By virtue of the inconsistency with Article II:1(b) of the GATT 1994, the CN2007 accords treatment less favourable to certain non-ADP MFMs than that provided for under the EC Schedule and thus the measures are also inconsistent with Article II:1(a) of the GATT 1994.

4. Nullification and impairment

8.23 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent that the European Communities has acted inconsistently with Articles II:1(a) and II:1(b) of the GATT 1994, it has nullified or impaired benefits accruing to Japan under that agreement.

5. Recommendations

8.24 Pursuant to Article 19.1 of the DSU, having found that the European Communities has acted inconsistently with Articles II:1(a) and II:1(b) of the GATT 1994, we recommend that the Dispute Settlement Body request the European Communities to bring the relevant measures into conformity with its obligations under the GATT 1994.

8.25 We recall that the European Communities has indicated that the Commission Regulation Nos. 634/2005 and 2171/2005 would be repealed.[1940] In addition, the European Communities has indicated that Commission Regulation Nos. 517/1999 and 400/2006 would be repealed as of October 2009.[1941] However, there is no evidence properly before the Panel confirming such repeal. Therefore, the Panel has proceeded on the basis that the said measures are in force.

[1940] European Communities' first written submission, para. 95; European Communities' second written submission, para. 63.

[1941] European Communities' response to Panel question No. 110.

C. COMPLAINT BY THE CHINESE TAIPEI (DS377): CONCLUSIONS OF THE PANEL

1. FPDs

8.26 Chinese Taipei has made claims with respect to Council Regulation 2658/87, as amended, CNEN 2008/C 133/01, Commission Regulation Nos. 634/2005 and 2171/2005. The Panel analyzed how these measures worked in conjunction with and in the absence of the duty suspension under Council Regulation No. 179/2009.

8.27 With respect to the CNEN 2008/C 133/01, which operates in conjunction with the CN, the Panel finds that:

(a) In the absence of the duty suspension under Council Regulation No. 179/2009, the measures direct national customs authorities to classify some flat panel display devices that are capable of receiving and reproducing video images both from an automatic data-processing machine and from a source other than an automatic data-processing machine, that fall within the scope of the FPDs narrative description and/or within the scope of the CN code 8471 60 90, under dutiable headings. Because the concessions call for duty-free treatment of products falling within their scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.

(b) In the absence of the duty suspension under Council Regulation No. 179/2009, the measures direct national customs authorities to classify some flat panel display devices that have a DVI interface, whether or not they are capable of receiving signals from another source, that fall within the scope of the FPDs narrative description and/or within the scope of the CN code 8471 60 90, under dutiable headings. Because the concessions call for duty-free treatment of products falling within their scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.

(c) Given the duty suspension currently in effect for certain products in dispute falling within the scope of the FPDs narrative description or within the scope of CN code 8471 60 90, the inconsistency with Article II:1(b) referred to in subparagraphs (a) and (b) above is eliminated because the duties are suspended and hence are not in excess of those provided for in the EC Schedule.

(d) For those products in dispute falling within the scope of the FPDs narrative description or within the scope of CN code 8471 60 90 and that are not covered by the duty suspension with the result that they are subject to dutiable treatment, the duty suspension does not eliminate the inconsistency with Article II:1(b) for these products and therefore this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.

(e) The European Communities fails to accord treatment no less favourable than that set forth in its Schedule to the commerce of the other WTO Members, in particular certain flat panel display devices that are capable of receiving and reproducing video images both from an automatic data-processing machine and from a source other than an automatic data-processing machine, or that have a DVI interface, whether or not they are capable of receiving signals from another source. Thus, the European Communities is inconsistent with Article II:1(a) of the GATT 1994. This inconsistency is not eliminated by the duty suspension with respect to certain products in dispute falling within the scope of the FPDs narrative description or within the scope of CN code 8471 60 90 because the duty suspension measure does

not eliminate the failure to accord treatment no less favourable to the commerce of the other WTO Members.

8.28 With respect to item 4 in the Annex to Commission Regulation No. 634/2005 and items 2, 3 and 4 in the Annex to Commission Regulation No. 2171/2005:

(a) In the absence of the duty suspension under Council Regulation No. 179/2009, the measures direct national customs authorities to classify some flat panel display devices that are capable of receiving and reproducing video images both from an automatic data-processing machine and from a source other than an automatic data-processing machine, that fall within the scope of the FPDs narrative description and/or within the scope of the CN code 8471 60 90, under dutiable headings. Because the concessions call for duty-free treatment of products falling within their scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.

(b) In the absence of the duty suspension under Council Regulation No. 179/2009, the measures direct national customs authorities to classify some flat panel display devices that have a DVI interface, whether or not they are capable of receiving signals from another source, that fall within the scope of the FPDs narrative description and/or within the scope of the CN code 8471 60 90, under dutiable headings. Because the concessions call for duty-free treatment of products falling within their scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.

(c) Given the duty suspension currently in effect for certain products in dispute falling within the scope of the FPDs narrative description or within the scope of CN code 8471 60 90, the inconsistency with Article II:1(b) referred to in subparagraphs (a) and (b) above is eliminated because the duties are suspended and hence are not in excess of those provided for in the EC Schedule.

(d) For those products in dispute falling within the scope of the FPDs narrative description or within the scope of CN code 8471 60 90 and that are not covered by the duty suspension with the result that they are subject to dutiable treatment, the duty suspension does not eliminate the inconsistency with Article II:1(b) for these products and therefore this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.

(e) The European Communities fails to accord treatment no less favourable than that set forth in its Schedule to the commerce of the other WTO Members, in particular certain flat panel display devices that are capable of receiving and reproducing video images both from an automatic data-processing machine and from a source other than an automatic data-processing machine, or that have a DVI interface, whether or not they are capable of receiving signals from another source. Thus, the European Communities is inconsistent with Article II:1(a) of the GATT 1994. This inconsistency is not eliminated by the duty suspension with respect to certain products in dispute falling within the scope of the FPDs narrative description or within the scope of CN code 8471 60 90 because the duty suspension measure does not eliminate the failure to accord treatment no less favourable to the commerce of the other WTO Members.

2. STBCs

8.29 With respect to the CNEN 2008/C 112/03 which operates in conjunction with the CN, the Panel finds that:

(a) The measures direct national customs authorities to classify under dutiable headings some set top boxes which incorporate a device performing a recording or reproducing function and retain the essential character of a set top box and that fall within the scope of the STBCs narrative description in the Annex to the EC Schedule. Because the concession calls for duty-free treatment of products falling within its scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.

(b) The measures direct national customs authorities to classify under dutiable headings some set top boxes which utilise ISDN, WLAN or Ethernet technology, and that fall within the scope of the STBCs narrative description in the Annex to the EC Schedule. Because the concession calls for duty-free treatment of products falling within its scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.

(c) By virtue of the inconsistency with Article II:1(b) of the GATT 1994, the measures accord treatment less favourable to such set top boxes than that provided for under the STBCs narrative description in the Annex to the EC Schedule and thus the measures are also inconsistent with Article II:1(a) of the GATT 1994.

8.30 With respect to claims regarding the consistency of the CNEN 2008/C 112/03 with Article X, the Panel finds that:

(a) The European Communities failed to publish promptly CNEN 2008/C 112/03, such as to enable governments and traders to become acquainted with them, and has thus acted inconsistently with Article X:1 of the GATT 1994.

(b) The European Communities has *not* acted inconsistently with Article X:2 of the GATT 1994 with respect to the October 2006 CNEN amendment because the complainants did not establish that the European Communities enforced the October 2006 CNEN amendment before its official publication as CNEN 2008/C 112/03 in the EU Official Journal on 7 May 2008.

(c) The European Communities has acted inconsistently with Article X:2 of the GATT 1994 with respect to the April 2007 CNEN amendment by enforcing the April 2007 CNEN amendment before its official publication as CNEN 2008/C 112/03 in the EU Official Journal on 7 May 2008.

3. MFMs

8.31 With respect to item 1of the Annex to Commission Regulation No. 517/1999, the Panel finds that:

(a) The regulation requires dutiable treatment of certain ADP MFMs that fall within the scope of the concession for "input or output units" in HS1996 subheading 8471 60 of the EC Schedule. Because the concession calls for duty-free treatment of products falling within its scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.

(b) By virtue of the inconsistency with Article II:1(b) of the GATT 1994, the measures accord treatment less favourable to certain ADP MFMs than that provided for under the EC Schedule and thus the measures are also inconsistent with Article II:1(a) of the GATT 1994.

(c) The regulation requires dutiable treatment of certain non-ADP MFMs that fall within the scope of the concession for "facsimile machines" in HS1996 subheading 8517 21 of the EC Schedule. Because the concession calls for duty-free treatment of products falling within its scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.

(d) By virtue of the inconsistency with Article II:1(b) of the GATT 1994, the measures accord treatment less favourable to certain non-ADP MFMs than that provided for under the EC Schedule and thus the measures are also inconsistent with Article II:1(a) of the GATT 1994.

8.32 With respect to the 2005 Statement, the Panel finds that:

(a) Because the measure has guided and serves to guide the European Communities uniform application of the common customs tariff in a way that results in the application of duties to those ADP MFMs that fall within the duty-free concession, the measure is inconsistent with Article II:1(b) of the GATT 1994.

(b) By virtue of the inconsistency with Article II:1(b) of the GATT 1994, the measures accord treatment less favourable to certain ADP MFMs than that provided for under the EC Schedule and thus the measures are also inconsistent with Article II:1(a) of the GATT 1994.

(c) Because the measure has guided and serves to guide the European Communities uniform application of the common customs tariff in a way that results in the application of duties to those non-ADP MFMs that fall within the duty-free concession, the measure is inconsistent with Article II:1(b) of the GATT 1994.

(d) By virtue of the inconsistency with Article II:1(b) of the GATT 1994, the measures accord treatment less favourable to certain non-ADP MFMs than that provided for under the EC Schedule and thus the measures are also inconsistent with Article II:1(a) of the GATT 1994.

8.33 With respect to item 4 of the Annex to Commission Regulation No. 400/2006, the Panel finds that:

(a) The regulation requires dutiable treatment of certain ADP MFMs that fall within the scope of the concession for "input or output units" in HS1996 subheading 8471 60 of the EC Schedule. Because the concession calls for duty-free treatment of products falling within its scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.

(b) By virtue of the inconsistency with Article II:1(b) of the GATT 1994, the regulation accords treatment less favourable to certain ADP MFMs than that provided for under the EC Schedule and thus the measures are also inconsistent with Article II:1(a) of the GATT 1994.

(c) The regulation does not require the dutiable treatment of non-ADP MFMs with a facsimile function. Therefore, the European Communities has not acted inconsistently with Article II:1(b) of the GATT 1994 with respect to non-ADP MFMs with a facsimile function as the measure does not impose duties in excess of those provided for in the EC Schedule.

8.34 With respect to the CN2007, the Panel finds that:

(a) The three relevant CN2007 codes require that certain ADP MFMs which fall within the scope of the duty-free concession for input or output units of an ADP in subheading 8471 60 of the EC Schedule be charged a duty of 6 per cent. Therefore, with respect to these products, the measure is inconsistent with Article II:1(b) of the GATT 1994.

(b) By virtue of the inconsistency with Article II:1(b) of the GATT 1994, the CN2007 accords treatment less favourable to certain ADP MFMs than that provided for under the EC Schedule and thus the measures are also inconsistent with Article II:1(a) of the GATT 1994.

(c) The three relevant CN2007 codes require that certain non-ADP MFMs which fall within the scope of the duty-free concession for "facsimile machines" in subheading 8517 21 of the EC Schedule be charged a duty of 6 per cent. Therefore, with respect to these products, the measure is inconsistent with Article II:1(b) of the GATT 1994.

(d) By virtue of the inconsistency with Article II:1(b) of the GATT 1994, the CN2007 accords treatment less favourable to certain non-ADP MFMs than that provided for under the EC Schedule and thus the measures are also inconsistent with Article II:1(a) of the GATT 1994.

4. Nullification and impairment

8.35 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent that the European Communities has acted inconsistently with Articles II:1(a), II:1(b), X:1 and X:2 of the GATT 1994, it has nullified or impaired benefits accruing to Chinese Taipei under that agreement.

5. Recommendations

8.36 Pursuant to Article 19.1 of the DSU, having found that the European Communities has acted inconsistently with Articles II:1(a), II:1(b), X:1, and X:2 of the GATT 1994, we recommend that the Dispute Settlement Body request the European Communities to bring the relevant measures into conformity with its obligations under the GATT 1994.

8.37 We recall that the European Communities has indicated that the Commission Regulation Nos. 634/2005 and 2171/2005 would be repealed.[1942] In addition, the European Communities has indicated that Commission Regulation Nos. 517/1999 and 400/2006 would be repealed as of October 2009.[1943] However, there is no evidence properly before the Panel confirming such repeal. Therefore, the Panel has proceeded on the basis that the said measures are in force.

[1942] European Communities' first written submission, para. 95; European Communities' second written submission, para. 63.

[1943] European Communities' response to Panel question No. 110.

ANNEX A

SUBMISSIONS OF THE UNITED STATES

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ANNEX A–1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION BY THE UNITED STATES

1. The Information Technology Agreement (ITA) remains a crowning achievement of the post-Uruguay Round WTO system, widely hailed for eliminating duties on a vast range of information technology (IT) products and promoting the spread of innovative technologies throughout the developed and developing world. As a result of the ITA, the European Communities ("EC"), in its WTO Schedule of tariff concessions, committed to permit the importation of certain IT products duty-free. This dispute centers on recent actions by the EC and its member States to methodically dismantle tariff commitments that they made as part of the ITA.

I. SET-TOP BOXES WITH A COMMUNICATION FUNCTION

2. "Set top boxes with a communication function" are included in both Attachment A and Attachment B of the ITA. Under GATT 1994 Article II:1 and pursuant to the headnote, the EC is obliged to accord duty-free treatment to set top boxes with a communication function – as defined in Attachment B of the ITA – *wherever they are classified*. Following implementation of the ITA, set top boxes with a communication function imported into the EC were generally classified in CN line 8528 71 13 or its predecessor lines, and entered duty-free. However, as a result of the STB CNEN Amendments approved in 2006 and 2007, which impose a variety of arbitrary technical restrictions on qualifying for duty-free treatment, the EC and its member States began applying duties of 14% to set top boxes with a communication function.

3. Under the amendments, any set top box having a communication function – *i.e.*, a microprocessor based device, incorporating a modem for gaining access to the Internet and capable of interactive information exchange – is excluded from the duty-free heading and subject to a 13.9% duty – merely if it also happens to have a hard disk. These actions do not accord with the commitment in the EC Schedule to provide duty-free treatment to set top boxes with a communication function, wherever classified. The EC Schedule provides a definition of a "set top box with a communication function." This definition is reflected in ITA Attachment B. Under the terms of the Schedule, when a device has the following three characteristics, it is a set top box with a communication function (and thus is to be accorded duty-free treatment): (1) it is a microprocessor-based device; (2) incorporating a modem for gaining access to the Internet; and (3) having a function of interactive information exchange.

4. The devices the EC subjects to duties are "set top boxes with a communication function," and the EC has conceded as much. They are microprocessor-based devices (i.e., devices based on an electronic circuit (or chip) performing functions with assistance of internal memory). They incorporate modems for gaining access to the Internet, and have a function of interactive information exchange. Indeed, the EC concedes in the CNEN that devices subject to duties are "set top boxes," and also has acknowledged that they have a communication function.

5. In effect, the EC appears to read its obligations as if the definition in Attachment B and its WTO Schedule contained an additional requirement that, in order for a device to be considered a set-top box with a communication function, it must not be equipped with a hard disk. In no respect does the text of the EC Schedule support the view that STBs with a communication function may no longer qualify as such merely due to the presence of a hard disk or other "recording or reproducing" apparatus. Rather, the text sets forth three straightforward criteria – if present, the product qualifies as a set top box with a communication function, and is entitled to duty-free treatment.

6. This interpretation of the EC's tariff concession is consistent with, for example, the view of the Group of Experts in the GATT dispute *Greek Increase in Bound Duty*. As was the case with respect to gramophone records, ITA participants did not qualify the words "set top box with a communication function" other than by specifying the three attributes described above. Thus, by arbitrarily excluding set top boxes with a communication function from duty-free treatment due to the presence of a hard disk or other apparatus, the EC and its member States have acted inconsistently with their obligations.

7. The amendments to the EN for 8528 71 13 additionally operate to exclude from duty-free treatment devices that have particular types of modems. STBs with a communication function that do not have "modems" as the EC defines the term receive a 14% duty. Thus, under the EC measure, a set top box with a communication function is disqualified from duty-free treatment merely because it gains access to the Internet with a device that operates through an Ethernet or network connection, a wireless based connection (i.e., WLAN or "wireless LAN"), or a digital communications network (ISDN), using an RJ-45 connector, rather than an RJ-11 connector. The EC also states that STBs of the duty-free tariff line must incorporate a video tuner, and that "IP-streaming boxes" – STBs which use decoders and other technology instead of a tuner to enable a television set to display television signals sent by the service provider – are classified in a dutiable tariff line, notwithstanding the fact that these devices have all the attributes of a set top box with a communication function.

8. Both from a technical standpoint and based on the ordinary meaning of the terms in its Schedule, the EC measure is contradictory and lacks basis in logic. First, there is no basis to conclude, based on the ordinary meaning of the terms, that devices that communicate using ISDN-, WLAN- or Ethernet technology are not "set top boxes which have a communication function" – devices which, among other things, "incorporat[e] a modem for gaining access to the Internet." A "modem" is equipment that connects data terminal equipment to a communication line. Devices that operate through an Ethernet or network connection, a wireless based connection (i.e., WLAN or "wireless LAN"), or a digital communications network (ISDN) are modems — they connect the set top box to a communication line and convert signals produced by one type of device to a form compatible with another.

9. In the amended CNEN, the EC claims that these devices "perform[] a similar function to that of a modem" but "do not modulate and demodulate signals," and therefore are not entitled to duty-free treatment. Even as a technical matter this assertion is incorrect. Each of the devices in question modulates and demodulates signals — that is, they vary some characteristic of the electrical signal as the information to be transmitted on the communication medium varies, which is precisely what enables the device to communicate with another source.

10. The context in which the term "modem" appears in the EC Schedule (which under Article 31(1) of the Vienna Convention is also relevant to its interpretation) provides further support for this reading of the text. The text does not limit the term "modem" to devices of a particular type, and indeed the phrase "communication function" is broad. In this context, modems, of any type, which enable a set top box to gain access to the Internet, qualify as such. By arbitrarily singling out devices with certain types of modems (and certain connectors), the EC measure results in the imposition of 14% duties on set top boxes with a communication function.

11. Furthermore, as a technical matter, it is meaningless to rely on the type of connector – RJ-11 versus RJ-45 – as a basis to distinguish between the categories of devices that the EC claims are and are not modems. Indeed, cable modems (which the EN recognizes as a type of modem) typically have an RJ 45 connector. By treating the presence of an RJ 45 connector as indicative of whether or not the product has a modem, the EC measure results in the application of duties to products that even in

the EC's view have modems. Likewise, by excluding all devices that do not have a tuner – and, in particular, STBs with a communication function that receive signals via Internet Protocol (TCP/IP) – the EC imposes duties on STBs covered by its tariff concessions. An IPTV STB converts the television signals sent by the service provider to video and sound that can be displayed on a television – the mere fact the STB receives the signal over a broadband connection and does not rely on a tuner provides no basis to conclude that it is something other than a set top box with a communication function.

12. The commitments at issue were incorporated into the EC Schedule as a result of the conclusion of the ITA, and indeed, the headnote in the EC Schedule expressly refers to the ITA. Article 1 of the ITA in turn provides that Members' tariff regimes should "evolve" in a manner that "enhances market access for information technology products". This context further supports the conclusion that the EC's interpretation of the commitments in its Schedule is incorrect. Nor would it accord with other language contained in the Preamble to the ITA, including the stated desire of participants to "achieve maximum freedom of world trade in information technology products" and to "encourage the continued technological development of the information technology industry on a world-wide basis." In this regard, as explained previously, the negotiators of the ITA were well aware of the issue of technological development, and the possibility that customs authorities might reclassify merchandise covered by the Agreement. The text of the ITA – including Attachment B – and the EC tariff concessions incorporated into its Schedule as a result – including the ITA headnote affirming that certain products receive duty-free treatment "wherever...classified" – are written to ensure that duty-free treatment would be maintained, even as, for example, technology evolved and a single digital product came to have additional purposes previously assigned to other products. Indeed, under the headnote to the Schedule, these products are entitled to duty-free treatment "wherever classified" – even when the addition of functions or technologies such as a hard drive results in reclassification within the EC CN, the EC is obliged to maintain the tariff treatment contemplated by the Schedule for any device meeting the description of a "set top box with a communication function". It has failed to do so.

13. In addition to its obligation under the headnote to provide duty treatment to set top boxes with a communication function "wherever...classified", the EC also committed to provide duty-free treatment to goods described by individual tariff lines in its Schedule. In order to implement its obligations under the ITA, the EC bound three subheadings at zero duty that the EC identified as including STBs with a communication function, within the meaning of Attachment B. Each of these tariff lines has a bound duty rate of zero in the EC Schedule. In 2000, the EC modified its Schedule to add another tariff line – 8528 12 91 – which it also identified as including set top boxes with a communication function within the meaning of Attachment B, and which it bound at zero duty. The EC's failure to provide duty-free treatment to set top boxes with a communication function is also inconsistent with its obligation to provide duty-free treatment to the goods described in these tariff lines.

14. The CNEN amendments discussed above were approved by the Tariff and Statistical Nomenclature Section of the Customs Code Committee (Customs Committee) in October 2006 and May 2007, respectively. Yet the EC failed to publish the amendments in its official journal until May 2008, over a year after the amendments had been approved. This delay is not consistent with GATT 1994 Article X:1. These amendments, which plainly pertain to the classification of products for customs purposes, and affect the rates of duty for those products, were not published "promptly" as required by GATT 1994 Article X:1. Indeed, they did not appear in the EC's official gazette for over a year after approval, making it virtually impossible for affected companies and other Members to access them in a reasonable manner.

15. At the same time, member States were applying duties on imports of set top boxes with a communication function using the reasoning set forth in the amendments. Article 12(5) of the Community Customs Code provides that BTI shall cease to be valid "where it is no longer compatible with the interpretation of one of the nomenclatures referred to in Article 20(6)." Indeed, according to BTI Guidelines, "Member States should not issue new BTIs that are contradictory to a legal measure which has been voted in the Customs Code Committee, *even if this measure is not yet published*." Consistent with this view, during a discussion at the October 2007 meeting of the Customs Code Committee of "the use of statements in the minutes of the Committee and the application of voted measures before their publication," the Chairman noted that "as soon as the Committee has rendered an opinion on the classification of a specific type of product, no BTI should be issued contrary to that opinion and... this opinion should be respected by all member States. It follows from the above that as soon as an opinion has been voted, member States can issue BTIs for the products concerned, *even before the measure has been adopted by the Commission and published in the Official Journal*."

16. The EC's action is also inconsistent with GATT 1994 Article X:2. The CNEN constitutes a "measure of general application" – it is applied by EC and member State customs authorities in determining classification for all importers of flat panel display devices. The application of the CNEN resulted in the reclassification of STBs from a duty-free tariff line into a tariff line with duties of up to 14%, and thereby the CNEN "effect[ed] an advance in a rate of duty...on importers." The EC's failure to promptly publish these measures, while imposing duties on importers using the reasoning contained in them, created an untenable situation for importers and Members alike. Through its actions, the EC failed to accord to traders the treatment to which they are entitled, and thus the EC acted inconsistently with GATT 1994 Articles X:1 and X:2.

II. CERTAIN FLAT PANEL DISPLAY DEVICES

17. Flat panel display devices are included in both Attachment A and Attachment B of the ITA. Attachment B describes certain flat panel display devices as "Flat panel display devices (including LCD, Electro Luminescence, Plasma, Vacuum-Fluorescence and other technologies) for products falling within this agreement, and parts thereof." Based on the ordinary meaning in context of the terms in the EC's Schedule, LCD monitors are "flat panel display devices...for products falling within this agreement." In the ITA, the parenthetical following the terms "flat panel display devices" specifically identifies LCD flat panel display devices as one example of a flat panel display device. Computers ("automatic data processing machines") are among the "products falling within" the ITA. LCD monitors "for" computers are therefore among the devices covered by the EC's commitment with respect to flat panel display devices. Therefore, under the headnote, the EC and its member States are obliged to accord duty-free treatment to flat panel display devices for ITA products, and in particular LCD monitors, *wherever they are classified*.

18. Under the EC measures, any device with DVI is excluded from its tariff concession, ostensibly because in the EC's view it is not for a computer. Yet this single physical attribute provides little if any information about whether a FPD is "for" products falling within the ITA. DVI is a standard *computer* connector. As explained in paragraphs 45-55, supra, DVI was developed as a standard connector for the computer industry to allow computers to transmit digital signals to a display device. Approximately half of all LCD monitors have a DVI connector. Indeed, some devices with a DVI connector must be connected to a computer in order to receive video signals. For example, certain monitors with DVI are configured to accept a single signal and a single bandwidth. As their product manuals indicate, these devices *cannot* operate without a computer to convert the signal from one frequency to another. Yet even these devices are subject to duties in the EC simply because they have DVI.

19. Furthermore, by relying on individual technical characteristics to exclude devices simply because they *might* be used with something other than a computer, the EC and its member States fail to accord duty-free treatment to LCD monitors "for" a computer. As noted above, under the EC and member State measures, even if a monitor is mainly for use with an automatic data processing machine, it is dutiable if it is merely *capable of* being connected to a non-ADP machine. The text, however, contains no such limitation. Rather, the commitment uses the general term "for" – "a function word to indicate purpose." Indeed, the EC's own position on how the devices are used is contradictory – while the EC states in Regulation 493/2005 that LCD monitors are "mainly used as output units of automatic-data processing machines", it then finds that the devices are not "principally" used in an automatic data processing system. In essence, the EC has concluded that the devices in question both are and are not principally for use with a computer, and in either event, are not entitled to duty-free treatment. Similarly, the EC's reliance on a "sole *or principal*" use standard cannot be reconciled with its repeated assertion that monitors "capable" of connecting to a device other than a computer are not entitled to duty-free treatment. Thus, the EC's position, even setting aside the ordinary meaning of the tariff concession and simply focusing on its own description of its measures, accords neither with logic nor the facts.

20. By providing duty-free treatment only to devices that are "solely" for use with a computer (and even excluding devices that *are* solely for use with a computer merely because they have a DVI connector), the EC and its member States fail to accord duty-free treatment to many LCD monitors that are "for" ITA products.

21. As noted previously, Article 1 of the ITA provides that Members' tariff regimes should "evolve" in a manner that "enhances market access for information technology products." The tariff commitments in the ITA were designed to ensure that duty-free treatment would be maintained, even as new technologies, such as DVI, developed. Flat panel display devices for ITA products are entitled to duty-free treatment "wherever classified" – even when the addition of technologies such as DVI results in reclassification within the EC CN, the EC and its member States are obliged to maintain the tariff treatment contemplated by the Schedule for any device meeting the description of a "flat panel display device for" an ITA product. They have failed to do so.

22. In addition to its obligation under the headnote to provide duty-free treatment to flat panel display devices for ITA products "wherever...classified", the EC and its member States also committed to provide duty-free treatment to goods identified in individual tariff lines in the Schedule. In particular, tariff line 8471 60 90 (HS96) describes "input or output units, whether or not containing storage units in the same housing, other, other." LCD monitors are "input or output units" of this tariff line. The mere fact that a device uses a DVI connector to transmit the information displayed does not render it something other than an input or output unit.

23. Beyond the language used in the individual tariff line, other relevant context supports the conclusion that an LCD computer monitor, whether or not equipped with DVI and whether or not *solely* capable of being used with a computer, meets the description in 8471.60 (HS96). Heading 84.71 includes several subheadings that describe different types of computers, computer systems, and devices used in connection with computers, including printers, scanners, and other devices. Each one of these subheadings was included in the ITA, and all were included in the EC schedule of concessions. All types of computers and all types of computer units – separately or in various combinations – fall within heading 84.71. All of these items were included in the concessions negotiated and codified in the EC Schedule. Nothing in the language or structure of heading 84.71 would support the conclusion that by virtue of the presence of a DVI connector, monitors fall outside the scope of heading 84.71 and its associated tariff commitments. Nor does the language or structure of heading 84.71 limit coverage to LCD monitors that can *only* receive input from an ADP machine.

24. Note 5(B-C) to Chapter 84 of HS(1996) confirms that the *mere possibility* that a monitor could be connected to something other than an automatic data processing machine is not sufficient to exclude it from heading 8471. Rather, a device that is *either* "solely" *or* "principally" used in an automatic data processing system may be considered a "unit" for purposes of heading 8471. Under the EC and member State measures, however, as explained above, any device that is not "solely" for use with an ADP machine (and indeed some devices that are "solely" for use with an ADP machine) are excluded from heading 8471 and from duty-free treatment.

25. Therefore, in addition to failing to adhere to their obligations under the headnote incorporated into the EC Schedule by virtue of Attachment B, by imposing duties on these products, the EC and its member States have acted inconsistently with its obligation to provide duty-free treatment for products described in tariff line 8471 60 90 (HS96) of the EC Schedule.

26. The EC and its member States have also provided less favorable treatment within the meaning of Article II:1(a) of GATT 1994 to products subject to the temporary duty suspension. By providing flat panel display devices of 19 inches or less with a duty suspension, rather than permanent duty-free treatment, the EC and its member States provide treatment "less favorable" than that provided in its Schedule for these devices as well. The headnote to the EC Schedule provides that the duties on Attachment B products, such as flat panel display devices, shall be "bound and eliminated". The duty suspension, however, is temporary – as the regulation states, it is provided "for a limited period" only, lasting at most two years at a time. Furthermore, it is conditional: it may be terminated unilaterally at such time that the EC considers that the conditions for its continuation are no longer fulfilled. These conditions, it should be noted, are not contained in the EC Schedule.

27. The EC's failure to provide permanent duty-free treatment to the products adversely affects imports – for instance, companies have no certainty that LCD monitors will receive duty-free treatment upon importation into the EC, particularly as the termination date of the duty suspension draws near. After the duty suspension has terminated (as is currently the case), they are subject to duties. As with divergent tariff classification, the EC's use of duty suspensions rather than permanent duty-free treatment adversely affects the trading environment in the EC, and results in less favorable treatment than the bound duty-free treatment accorded by the EC Schedule.

III. CERTAIN MULTIFUNCTION DIGITAL MACHINES

28. Multifunction digital machines – devices that perform multiple functions such as printing, facsimile transmission, scanning, and digital copying – were included in Attachment A of the ITA, which provides for duty-free treatment for a wide range of computer peripherals and facsimile machines, including goods of subheading 8471.60 (HS96) ("Automatic data processing machines and units thereof" … "Input or output units, whether or not containing storage units in the same housing,") and subheading 8517.21 (HS96) ("Electrical apparatus for line telephony … and telecommunications apparatus for carrier-current line systems or for digital line systems" … "Facsimile machines").

29. Through these commitments, the parties agreed to treat as duty-free both (1) computer ("automatic data processing machine") peripherals ("input or output units") such as printers and scanners; and (2) facsimile machines. Pursuant to the ITA, the EC modified its Schedule to bind the duty rate for these products at zero. As a result of these tariff concessions, multifunction digital machines are entitled to duty-free treatment.

30. The EC and its member States impose duties on certain MFMs which are "input or output units". An "input or output" unit is a device which "accepts new data, sends it into the computer for processing, receives the results, and translates them into a useable medium." Multifunction digital

machines which connect to computers are input or output units – they, for example, receive signals from the computer and provide the results to the user in the form of a printed page, and take information from a hard copy and process it into an electronic file provided to the computer for storage or transmission, or to be converted into a printed image and deleted.

31. The number of pages per minute that a device produces has *absolutely no bearing* on the ordinary meaning of "input or output unit," nor any significance from a practical standpoint – most MFMs currently sold which connect to computers are capable of producing copies at a rate of more than 12 pages per minute. Instead, the ordinary meaning of the term focuses on the manner in which a device interacts with a computer. Thus, a page per minute standard, such as that adopted by the EC, does not provide a meaningful basis on which to identify "input or output units" eligible for duty-free treatment. The terms of heading 8471 and its subheadings provide strong contextual support for the conclusion that MFMs with computer connectivity are included within the scope of the EC's tariff concession for "input or output units". First, as noted above, the ITA covered a wide range of computer peripherals, including printers and scanners, as well as facsimile machines and some photocopiers. All types of computers and all types of computer units – separately or in various combinations – fall within heading 84.71 (HS96), all of which was included in the EC's ITA tariff concessions. MFMs operate by combining a scanner and a printer – both devices covered by heading 8471 and included in the ITA. The notion that two devices that are computer units covered by heading 8471 (HS96) and entitled to duty-free treatment would no longer be entitled to duty-free treatment merely because they are combined into a single product (and one that itself constitutes a computer unit) does not accord with a proper reading of heading 8471. Nothing in the language or structure of heading 84.71 (HS96) would support excluding MFMs – devices combining a scanner and printer, used in connection with computers both for inputting data through scanners and for outputting data through the printer unit – from the scope of heading 84.71 (HS96).

32. Furthermore, the terms of heading 9009 – the provision in which the EC claims these devices fall – in fact supports the conclusion that the tariff concession in line 8471.60 (HS96), not heading 90.09 (HS96), covers MFMs. In particular, heading 9009 uses the term "*photo*copying." MFMs are not "photocopiers". First, MFMs perform a range of functions, including scanning and printing, that are not performed by a photocopier. The printer function of the device is in many respects the most significant. While an MFM also typically performs a copying function, the manner in which it does so sets it apart from a "photocopier" in important ways. Digital copiers do not perform the function of *photo* copying – they do not use light to reproduce an image. Other relevant headings in Chapter 90 are consistent with this interpretation of the term "photocopying" – all of which refer to optical and photographic technologies. Each of these headings, like heading 9009, pertains to optical technologies – not digital devices such as an MFM.

33. Insofar as it may be considered relevant context, the HS provides additional support for the above interpretation of heading 8471. Consistent with note 5 to Chapter 84 of the HS, the multifunction digital machines in question are of a kind solely or principally used in an automatic data processing system, are connectable to the central processing unit (CPU) of an automatic data processing machine, and are able to accept or deliver data in a form (codes or signals) which can be used by the system. The Harmonized System Explanatory Note ("HSEN") to heading 90.09 (HS96) is also consistent with the interpretation of the term "photocopying" advanced above. An MFM is not a "photocopier" as this term is defined in the HSEN – an optical image of the original document is not projected onto a photosensitive surface to produce a copy. Therefore, these devices do not fall within heading 90.09 (HS96).

34. As has been noted with respect to the other ITA products of concern in this dispute, the ITA provides relevant context for interpreting the obligations at issue. As such, it equally supports the

conclusion that the obligation in the EC Schedule with respect to heading 8471, and subheading 8471.60 in particular, includes MFMs. In particular, Article 1 of the ITA provides that Members' tariff regimes should "evolve" in a manner that "enhances market access for information technology products." Given this language, it is appropriate to interpret the ITA tariff concessions reflected in the EC Schedule broadly, including the concessions for heading 8471. In view of this and the clear language of the commitments described above, MFMs which are connectable to computers fall within the EC concession for "input or output units".

35. As part of its tariff concessions following conclusion of the ITA, the EC provided for duty-free treatment for all products in heading 85.17, including "facsimile machines" of tariff line 8517 21 00. Certain facsimile machines – in particular devices that do not have the ability to connect to a computer or computer network, but have a scanner device and are able to reproduce more than 12 pages per minute with that device – have been subjected to duties of 6%. The facsimile machines in question have scanners, which are used to convert an original document into digital data that can be sent as a facsimile. As explained previously, while these devices may be able to digitally reproduce files, none of them perform a *photo*copying function. Thus, devices combining a printer, scanner, and facsimile machine, which are not covered by heading 8471, are otherwise covered by the terms of heading 8517, as "facsimile machines".

ANNEX A-2

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT BY THE UNITED STATES AT THE FIRST SUBSTANTIVE MEETING

1. This dispute centers on concessions made in connection with and following the conclusion of the Information Technology Agreement, or ITA. The ITA remains a major achievement of the post-Uruguay Round WTO system. Through the ITA, Members eliminated duties on a wide range of information technology products, in order to foster development, innovation, and the spread of technology across the globe. In the Preamble of the Agreement, Ministers acknowledged these vital goals.

I. EC IMPLEMENTATION OF ITA AND IMPOSITION OF DUTIES ON ITA PRODUCTS

2. One of the ITA's more significant features is a dual approach to product coverage: using tariff nomenclature as well as general product descriptions (Attachment B) to ensure duty-free treatment for information technology products "wherever...classified." Products may be covered by one or both of Attachments A and B. As a result of the ITA, the EC and certain of its member States modified their Schedules of Concessions in two ways: first they bound at zero duties on individual tariff items and second, they incorporated a headnote to their Schedules providing for duty-free treatment for Attachment B products "wherever...classified". In the process, the EC and its member States bound themselves to provide duty free treatment to a wide range of IT products, including the three products at issue in this case: set top boxes with a communication function, flat panel display devices, and multifunction digital machines. Yet, notwithstanding these express commitments, the EC and its member States (hereafter, "EC") now imposes duties on these products.

3. They have done so through a steady stream of measures singling out arbitrary technical characteristics to exclude a product from duty free treatment – such as the presence of a hard disk or the type of modem technology a product uses to communicate, the presence of a DVI interface, or the ability to reproduce more than 12 pages per minute. As products with these particular technical characteristics become increasingly ubiquitous, the effect of the measures becomes more pernicious. Half of LCD monitors today are equipped with a DVI plug, and therefore they in the EC's view fall outside the coverage of their concessions resulting from the ITA. A large and growing majority of MFMs can reproduce more than 12 pages per minute – *ergo*, they are subject to EC duties. Set top boxes increasingly use newer modem technologies or incorporate a hard disk and are thus according to the EC excluded from its duty-free obligations. Under the EC measures, the more industry innovates — even incremental improvements such as faster print speed or a new connector cable — the more duties will be levied on IT products entering the EC. As we will discuss, this approach is flatly inconsistent with the letter of the EC's WTO tariff schedule. It is also a perverse upending of the ITA and inconsistent with Ministers' stated intent to "encourage continued technological development."

II. OVERVIEW OF KEY THEMES IN EC SUBMISSION

4. Before responding to the EC's arguments on particular products, I would like to begin by briefly discussing three key themes evident in the EC's response, reflecting an overarching effort on the EC's part to distract from the core legal issues at hand: first, professing confusion about what products are at issue, when the measures themselves define the products; second, professing confusion about what concessions are at issue, despite individual tariff lines and a headnote that are identified clearly in the panel request and complainants' submissions; and third, professing uncertainty about the

measures at issue, claiming variously that the measures do not mean what they say because of CN amendments, court judgments, temporary duty suspensions, et cetera. What the EC never does in its 148 page submission, however, is face up squarely to the complainants' challenge of its measures and defend them on their own terms.

5. First, there is the matter of the product. Throughout its submission, the EC claims confusion about the products at issue in the dispute, and on this basis proceeds to recast the dispute as one over entirely different products than the ones the complainants have identified in their panel request and submissions. The EC's apparent confusion is curious, given that the EC's own measures define the scope of products that they improperly assume to be dutiable. In any event, the complainants have been clear. To supplement our discussion of the EC measures, we have offered detailed descriptions and supporting evidence concerning each of the products affected by those measures: (1) set top boxes which have a communication function – a type of electronic apparatus that sits atop (or below) a TV with the ability to communicate over the Internet, (2) multifunction digital machines – computer peripherals that can scan, print, copy and/or fax; and (3) flat panel display devices for computers – computer displays using technology such as LCD allowing them to achieve a thinner profile than conventional cathode ray tube monitors. These are the products described in and affected by the EC measures – not, as the EC claims, video recorders, or photocopiers, or so-called "multifunction monitors."

6. Beyond simple obfuscation, the EC's apparent insistence on a model-by-model description of each product appears either intended to convert this case into a classification matter (which it decidedly is not) or to set an impossibly high burden for demonstrating an "as such" breach of Article II. This is a tariff dispute. The question is whether the measures result in imposition of a tariff that is not consistent with Article II. To show that the measures are "as such" inconsistent, we are not required to demonstrate that they result in duties on every single model of FPD, STB, or MFM that crosses the EC border – rather, we need to show that the measures necessarily lead EC customs authorities to impose duties on one or more products subject to their commitments. As the United States demonstrated in its submission, by excluding from duty free treatment *any* FPD, or STB, or MFM, with a given technical characteristic – such as DVI, or a particular type of modem or presence of a hard drive, or the ability to reproduce more than 12 pages per minute – the measures result in the imposition of duties on products covered by the EC's duty-free tariff obligations. Thus, the EC measures do not accord with Article II.

7. Second, the EC ignores the text of the concessions at issue, contrary to the customary rules of interpretation reflected in the Vienna Convention on the Law of Treaties (VCLT). Sometimes it does so in favor of other concessions describing products that are not at issue in this dispute (such as CRT monitors or photocopiers). In other cases, it focuses on various extraneous material – miscellaneous ITA committee meeting documents, uninformative negotiating material, or assorted US customs classification opinions. Most of this material is simply irrelevant to interpreting the text at issue, and more careful review makes clear that none in fact even supports the EC interpretation. In the one instance in which the EC takes interest in the actual text of a concession that is the subject of this dispute – the Attachment B description of set top boxes – its argument is flatly contradicted by the text of a related concession it made in 2000. As we will shortly describe, "set top boxes *with* a communication function" was a concession that *the EC itself* drafted and formally added to its Schedule in 2000. The complainants have misquoted nothing; it is the EC that appears intent on disregarding the terms of its commitments.

8. The EC avoids directly addressing other important text in its Schedule: its commitment, made to implement ITA Attachment B, to provide duty free treatment to the products in question "wherever…classified." As the United States explained in its First Submission, this sentence was

incorporated into the EC's Schedules of Concessions, as a headnote. The concession in question was repeatedly quoted throughout the US submission and is contained in Exhibit US-7. Thus, when the United States and the co-complainants refer to this commitment, there should be no confusion about where the obligation rests. The commitment is explicit in the EC's Schedules. Rather than discuss the relevant concession, the EC claims confusion and instead focuses on particular tariff lines or provisions relating to entirely different products. Neither the concessions in particular tariff lines nor those for other products substitute for the overarching obligation to provide duty-free treatment to the Attachment B products in question "wherever …classified". Furthermore, while the EC concedes that the logic of the Harmonized System is not relevant to interpreting Attachment B concessions, it nonetheless relies on the HS throughout its submission – even when discussing Attachment B.

9. Finally, throughout its submission, the EC attempts to distract from the very actions that prompted this dispute: the Regulations, Explanatory Notes, provisions of the CN, et cetera, that have resulted in WTO-inconsistent tariff treatment. Instead, it describes the recent extension of a temporary duty suspension on monitors without even responding to complainants' claim that a temporary duty suspension provides less favorable treatment than that required by the EC's Schedule. It offers – and mischaracterizes – a handful of US customs classification opinions. Perhaps most remarkably, it attempts to defend its actions with two recent ECJ opinions that decidedly do not support the EC's position. The United States invites the Panel to review those opinions, some of the more salient elements of which are excerpted by Singapore in its third party submission. With regard to the measures at issue, the EC variously claims that they are not binding, that, owing to clarifications of "current EC law" provided by the ECJ, they do not mean what they say, that they have "effectively" lost their relevance due to modifications of the CN, or that the EC is "reviewing" them and may make "adjustments." If anything, these statements merely suggest that even the EC recognizes the flaws inherent in its own measures.

10. With these general themes in mind, I will now proceed to discuss the US claims regarding set-top boxes, responding to significant assertions by the EC. After that, I will turn briefly to highlight some of the more significant issues relating to FPDs and MFMs.

III. SET TOP BOXES "WITH" A COMMUNICATION FUNCTION (AND SET TOP BOXES "WHICH HAVE" A COMMUNICATION FUNCTION)

11. As the United States explained in its first submission, set top boxes which have a communication function were included in the ITA. In the headnote to its Schedules, the EC committed to provide duty-free treatment to these products "wherever...classified." Furthermore, it bound at zero duty four individual tariff lines which it identified as including the STBs described in Attachment B. As explained in the US submission, three of those lines were bound in 1997; the fourth was added in 2000, covering set top boxes "with" a communication function. However, as a result of the EC measures, any such device with a hard disk is no longer entitled to duty-free treatment when imported into the EC. Likewise, any such device with an Ethernet, WLAN, or ISDN modem, including any device that does not have a tuner, is subject to duties.

12. The EC first claims that the CNEN that led to this result is not binding. While we of course would be pleased if the CNEN did not apply, ample evidence submitted by complainants – including BTI, statements of the Customs Code Committee, ECJ opinions, and the EC's own statements in previous WTO disputes – demonstrates its legal effect. Following the CNEN, member State customs authorities consistently impose duties on any device with a hard disk or the particular modems described above. In some cases, they have even cited to the Customs Code Committee decision approving the CNEN as a basis for their action. The EC offers no evidence to the contrary. Related to its argument that the CNEN is non-binding, the EC asserts in this proceeding that the presence of a

hard disk can be a "significant" element in its consideration of where to classify a product, but is not "taken in isolation of the other elements." Yet again, the EC points to no instance since the CNEN was issued in which an STB with a hard disk has been accorded duty-free treatment by the EC. We can only conclude that this is because the CNEN has had its intended effect. The EC also points to nothing in the plain language of the CNEN that supports its insinuation that the presence of a hard disk is not dispositive – to the contrary, as the United States explains in its written submission, the text of the CNEN provides that if a set-top box contains a hard disk it is to be classified in a dutiable category. And this is precisely what EC customs authorities have done – any device with a hard disk is classified in the dutiable heading, regardless of other "objective characteristics" the product may have.

13. Beyond claiming (without support) that the measure does not result in the imposition of duties on STBs, the EC now attaches great significance to the use of the phase "which have" rather than "with" in Attachment B. It argues that this limits the concession to products that are *solely* comprised of the three characteristics enumerated after the colon in Attachment B. First, contrary to what the EC suggests, the United States has accurately quoted Attachment B in our submission. Furthermore, the substantive distinction between "with" and "which have" the EC now claims exists is without basis. The EC *itself* recognizes this. It added a tariff line to its Schedule in 2000, which it bound at zero, covering – and I quote – "set top boxes *with* a communication function." In that tariff line, *the EC itself* used the phrase "set top boxes *with* a communication function." Thus, the EC's Schedule also contains a concession with respect to "set top boxes *with* a communication function." Moreover, the EC indicated that goods meeting the Attachment B description of set top boxes were classified in that tariff line. If "which have" had the meaning the EC now attaches to it, this begs the question of why the EC itself opted to use "with" in place of "which have" when modifying its Schedule in 2000.

14. More remarkably, in addition to ignoring the text of its Schedule as modified in 2000, the EC claims that the 2000 modification covered a product not included in the ITA. It does so notwithstanding the fact that its own notification repeatedly refers to the product at issue as an "ITA product" and attaches the tariff line in question to the description of STBs in Attachment B. The EC now argues that set top boxes with a tuner "were not initially supposed to be covered by the ITA," and claims that it provided duty free treatment to this "new" product merely in response to a request from the United States. (I would note that this argument is rather ironic, given that, as the United States explained in its submission, the EC is also denying duty-free treatment to STBs *without* a tuner – the IP-streaming STB.) In any event, these assertions are quite simply contradicted by the facts, and in particular the notification submitted by the EC in 2000 and contained in Exhibit US-26. We would encourage the Panel to review this document. Furthermore, even if there were a substantive distinction between "which have" and "with" (and there is not), with the resulting modification to its Schedule, the EC is obliged to provide duty free treatment to set top boxes *which have* a communication function, by virtue of the headnote and Attachment B, *and* is obliged to provide duty-free treatment to set top boxes *with* a communication function by virtue of the tariff concession it made for tariff line 8528 71 13. Both phrases are in its Schedule, and therefore both may be used to describe the EC's obligations.

15. This begs the question of why the EC now goes to such lengths to disavow the action it took in 2000. Considering the rest of its argument, the reason is clear. The EC's acknowledgment in 2000 that STBs with tuners were covered by Attachment B is at odds with its assertion today that, if a device has components beyond the three elements contained in the Attachment B description, it is excluded from the ITA. Just as a device with a tuner may meet the terms of the description of an STB in Attachment B, even though the text does not specify tuners as one of the required attributes of an STB, a device with a hard disk or different type of modem may meet the terms of Attachment B, provided it has the three attributes specified therein.

16. The EC proceeds to protest that covered devices "cannot endlessly assume other additional features and technical elements" – yet this misses the point, and distorts the US position. The STBs in question do not "endlessly assume" additional features or technologies. They are STBs which have a communication function, within the ordinary meaning of the concession: they are microprocessor-based devices, incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange. For the EC, it is irrelevant that they have all of these essential attributes. The presence of but one additional feature – a hard disk – or the fact that they rely on a different modem technology is, according to the EC, a basis to deem them a "new" product and exclude them from duty-free treatment. Thus, the issue in this dispute is not, as the EC claims, whether a device is 1% STB and 99% "other." Under the EC measures, customs authorities look no further than the presence of a hard disk or a particular type of modem to exclude the devices from duty-free treatment.

17. The EC's position regarding modems illustrates how far from its "99%" hypothetical the measures in question in fact operate. For example, the EC concedes that, just like some of the devices it considers modems, an ISDN modem communicates using a telephone line. Yet, according to the EC, because it uses a technology "allowing for a faster transfer" than other telephony-based modems, it is not a modem. On that basis alone, it excludes any device with an ISDN modem from duty-free treatment. Yet, as explained in the US submission, all the devices in question, including ISDN modems, meet the ordinary meaning of the term "modem" – they modulate and demodulate signals. As this example illustrates, we are not confronted with devices so far afield even from those on the market when the concession was negotiated as to pose the difficult questions the EC claims are now presented. The devices in question contain fairly simple but important improvements over those that were available on the market at the time the ITA was negotiated – faster modem technologies, a hard disk. Most importantly, they meet the description in the text of the concession. The EC's tariff concessions do not disappear merely because a technology improves. Rather, provided the product in question meets the terms of the text, it is covered by the concession.

18. As with the other claims at issue in this dispute, the EC introduces various other ancillary material in what can only be described as an attempt to distract from the ordinary meaning of the core obligations at issue. First, in an apparent attempt to suggest that the scope of the concession is more limited than the ordinary meaning of the text itself, the EC describes a number of documents that were prepared during the negotiations. Some of these items describe proposals made during the negotiations, others offer an example of a product – WebTV – that Japan suggested would be covered. On the basis of this document, the EC claims that this proposal meant that only "WebTV-like" products were covered by the final concession. Yet another document appears to reflect notes prepared by an EC delegate which the EC asserts represents a failed proposal to modify the text of the concession from "which have" to "with". Strangely enough, after introducing these documents, the EC concedes that none sheds any light on the meaning of the actual terms used in the concession to which participants ultimately agreed.

19. Nevertheless, it must be emphasized that this material is at most negotiating history. The EC, in an attempt to elevate its importance, characterizes it as "surrounding circumstances" and claims that it may be used to understand the *ordinary meaning* of the text. This interpretative sleight of hand cannot be accepted: It is well established that, under VCLT Article 32, negotiating history and the circumstances of conclusion of a treaty may only be resorted to in order to confirm the ordinary meaning, or where the ordinary meaning is ambiguous or leads to a manifestly absurd or unreasonable result. The EC has failed to demonstrate that either is the case here, and therefore, even if it qualifies as negotiating history, the material in question is irrelevant.

20. With regard to the material the EC offers as context, here again, the EC attempts to read a concession out of the Agreement by relying on the tariff lines it and other participants identified in 1997 (as lines in which they classified the product) to define the universe of products covered today. The EC misses the point: Attachment B products receive duty-free treatment "wherever…classified." ITA participants did not limit the obligation to a single tariff line or group of tariff lines. Nor did they all specify the same lines in which the product was at the time classified. To narrow the concession based on participants' notification of the lines in which the products at the time were classified is to render the headnote inutile. That is, if the tariff lines themselves defined the scope of the commitment, it would have been unnecessary for participants to include the Attachment B headnote in their Schedules. They simply could have bound the relevant tariff lines at zero. Clearly, they did not do so.

21. Finally, as the EC correctly notes, the United States, like the other complainants, has not argued that the EC's classification of the products in question is otherwise inconsistent with its classification law. That is because classification is a question for the EC and its courts to decide; it is not a matter for this Panel to resolve. Yet the EC frequently confuses the issue of tariff treatment with that of classification. For example, the EC's assertion that it would not be feasible for its customs authorities to rely "solely on the narrative descriptions in the ITA" to classify goods is a *non sequitur*. The headnote to the EC's Schedule provides that the EC must provide duty free treatment to set top boxes with a communication function wherever classified. How the EC accomplishes that task is for it to decide, provided it does so in a manner consistent with its WTO obligations. It has failed to do so in this case.

22. **Article X**: As the United States explained in its submission, the set top box CNEN has not only resulted in the imposition of duties on STBs covered by the EC's duty-free concession, contrary to Article II. In addition, the EC did not publish it for over a year after it was approved, and applied it to collect the WTO-inconsistent duties even before it was published. The EC's response to the US claim regarding Article X, and Article X paragraphs 1 and 2, is equally unavailing. The EC claims that CNENs are not binding and that in any event votes of the Customs Code Committee are "merely a step in the procedure" for adopting CNENs. With regard to the former issue, the legal and practical consequences of CNENs are clear and I would refer the Panel to my earlier remarks on that subject. On the latter, the EC asks this Panel to disregard repeated statements by the chair of the Customs Code Committee to the contrary, as well as the BTI Guidelines, and begs the question of why member States would refer to the action of the Customs Code Committee in their decisions (and indeed why one would refer to it as a "decision"). The express reliance of member States on the CNEN, in combination with the General Interpretative Rules and CN, demonstrate that the GIRs and CN alone did not guide member State decisions.

23. Moreover, the fact that some member States were classifying devices in the dutiable heading before the CNEN was voted on does not support the conclusion that the vote itself had no impact on classification in the EC. If anything, it merely demonstrates that some member States had been acting inconsistently with Article II even before the CNEN was issued. With the CNEN, the EC, as well as all the member States, have come to act inconsistently with Article II. In effect, the EC attempts to hide behind the WTO-inconsistent actions of certain member States to suggest that its own WTO-inconsistent action has no consequence. This position is contradicted by multiple statements of the Customs Code Committee, the references in the BTI issued by member States, and the EC's own statements in other settings, and should not be accepted by this Panel.

24. Finally, regarding the EC procedural account of the measure's adoption: publication of the minutes of the Customs Code Committee meeting on the Internet is not, as the EC claims, sufficient to satisfy the obligation in Article X to publish the measure. The minutes of the meeting do not contain

the measure itself nor do they even contain enough detail to allow a trader to know what rule is in effect. Furthermore, the EC's claim that it waited until May 2008 to publish the final measure due to the possibility of additional elements being added to it is premised on the notion that it could not have published those elements that were in effect before applying them. This is quite simply wrong. Even if the EC intended to adopt additional restrictions on duty-free treatment for STBs, it need not have waited for an entire year to publish those already in effect, or to have imposed duties on imports based on those decisions prior to their publication. Nor is doing so consistent with the obligations contained in Article X.

IV. FLAT PANEL DISPLAY DEVICES

25. As it did with STBs, the EC mischaracterizes the products at issue – focusing on the so-called "multifunctional monitor" and pointing to other concessions in its Schedule rather than the text of the concessions complainants have identified. This is a dispute about the tariff treatment of flat panel display devices for computers. The EC measures subject those devices to duties, whenever they have a DVI interface or are capable of connecting to a device other than a computer. This is not a dispute concerning so-called "multifunctional monitors," as the EC claims in its submission. Indeed, it is unclear what the EC even means by "multifunctional monitor." Whatever that term means, it fails to capture the FPDs affected by the EC's measures, such as those that are primarily used with computers. In fact, the EC measures even result in duties on devices that are physically incapable of being used without a computer – simply because they have DVI.

26. Furthermore, the EC has failed to demonstrate that there is any ambiguity about the FPD concession. Instead, the EC again distracts, by focusing on an irrelevant discussion in the ITA Committee regarding whether "parts" were covered by the concession. *This* dispute pertains to finished products and on that question the EC itself has taken the view that the ITA provision does apply.

27. Moreover, while the EC attempts to attribute great significance to the CRT monitor concession in its Schedule, the concession at issue is that pertaining to flat panel display devices. Neither the United States nor any of the other complainants have contested in this dispute the EC's treatment of CRT monitors. The EC claims that "it is not particularly important to distinguish between immediate and broader context," contradicting the approach that has been endorsed by the Appellate Body on multiple occasions. The concession it discusses explicitly pertains to a device not at issue in this case: monitors using CRT technology. The EC does not explain why the CRT monitor concession is relevant "context" for the FPD concession, nor why a sentence in that provision which does not appear in the FPD concession should nonetheless be read into the FPD concession.

28. Taken together, the EC's mischaracterization of the product as a "multifunctional monitor", its insinuation that the FPD concession only covers parts, and its discourse on CRT monitors, lead to one conclusion: the EC is attempting to argue that the CRT monitor commitment is the *only* commitment in Attachment B on "ADP monitors," suggesting that in its view it has no obligation under its headnote to provide duty free treatment to *any* LCD monitors. This position is simply at odds with the text of the concessions.

29. With respect to complainants' claim on the EC's tariff concession for subheading 8471 60 – i.e., "input or output units" of ADP machines – the EC simply passes over the ordinary meaning of the terms used therein. The EC asserts that "there is no need to examine the arguments of the complainants in respect of the ordinary meaning of the tariff term." Thus, it does not even attempt to explain why it believes that FPDs do not fall within the ordinary meaning of terms used in the tariff concession. It fails to explain why, for example, FPDs with a DVI connector, or FPDs merely capable

of connecting to a device other than an ADP system, necessarily fall outside of that concession. Instead, it discusses the text of various *different* concessions not relevant to complainants' claim, and ignores the challenged measures entirely. In so doing, it fails to respond to complainants' claims.

V. MULTIFUNCTION DIGITAL MACHINES

30. Finally, with respect to multifunction digital machines, the EC's position appears to be as follows: notwithstanding the fact that printers, scanners, and fax machines are all covered by the ITA, when these products are combined into a single unit, that unit becomes a photocopier and falls outside of the ITA, rather than an "input or output unit" or "facsimile machine". From a technical perspective as well as based on the ordinary meaning of the text of the concessions, this position is unfounded.

31. As with the other claims in this dispute, the EC does not mount a direct defense to the claim on multifunctional digital machines. Instead, the EC again seeks to point the Panel's attention to other terms in its Schedule and inapposite, ancillary materials – rather than grappling with the language of the EC measures and the text of the EC concessions that are subject to this dispute. For instance, remarkably, the EC's argument on "ordinary meaning" is dedicated not to the ordinary meaning of the phrase "input or output unit" – the concession complainants have identified as subject to this dispute – but to an entirely different concession, that with respect to photocopiers.

32. Digital copiers are not "photocopiers". Only by characterizing the scanner as a system of "lamps, lenses, and mirrors", ignoring the fact that an MFM does not use light to produce a copy but rather to collect digital data, and incorrectly asserting that an MFM projects the image of the original document onto a photosensitive surface, can the EC reach the opposite conclusion. To be clear, an MFM operates as follows: a scanner records individual points of light reflected from the image as it is scanned, the scanned image is sent to the print controller, and is either stored as a file or is processed by the print controller and sent to a print engine.

33. The EC makes much of the fact that in the lexicon of sales brochures and other nontechnical sources, the term "photocopying" has acquired a popular usage that extends beyond its technical meaning to include the act of reproducing documents on an MFM. This is akin to the popular usage of the term "typing" to describe the act of word-processing on a computer, notwithstanding the fact that no typewriter is involved. This popular meaning has no relevance to a proper interpretation of the text of the concession, which is based on technical terminology.

34. Furthermore, as with the other products, the EC again relies on various ancillary documents in an attempt to support its position. As a threshold matter, unless the EC demonstrates that the ordinary meaning of the concession in context is ambiguous or leads to an absurd result, or is confirming the ordinary meaning, there is no basis under the Vienna Convention to resort to the various supplementary material it provides. The EC has not done so. Even were the material relevant, it does not support the proposition that the EC advances.

35. Finally, while the EC offers a lengthy defense of the standard articulated by the European Court of Justice in *Kip* for determining whether a product is classifiable in the duty-free heading, it ignores the actual measure in dispute in this case: the provisions in the CCT imposing duties on any device capable of copying more than 12 pages per minute (and, indeed, some devices regardless of their speed). It nowhere explains how that measure is consistent with its obligations (or even with the *Kip* standard), and indeed concedes that it may need to be amended. This aspect of the EC's submission is most telling of all. In effect, the EC's argument may be read as an admission that the 12 page per minute standard constitutes an utterly arbitrary criterion that results in the imposition of

duties on a significant share of MFMs on the market today, contrary to EC and member State obligations.

VI. CONCLUSION

36. Throughout its submission, the EC reveals its view that *any* change to a device results in a "new product" excluded from the ITA. This view is unsupported by the text of the concessions at issue. Furthermore, if this position were accepted, virtually no products on the market today would be covered by the ITA. Products have improved over time, incorporated advanced features or improved technologies, yet they still fall within the ordinary meaning of the original concessions. As the co-complainants have explained in their submissions, the prospect of technological change was well understood by the negotiators of the ITA. Had they believed that such change would rapidly eviscerate the commitments made, as the EC appears to believe, one may question why so many Members to this day attach such significance to the Agreement. Indeed, just two years ago, the ITA was characterized as a "major success since the establishment of the WTO." This sentiment cannot be reconciled with the EC's belief that, with every technological improvement, every new feature added, products fall out of the scope of the concessions, such that, from the moment the ink dried on the page, the list of ITA-covered products has been steadily dwindling to nothing.

ANNEX A-3

CLOSING ORAL STATEMENT BY THE UNITED STATES AT THE FIRST SUBSTANTIVE MEETING

1. In this closing statement I would like to highlight briefly a few aspects of our discussion over the past several days that in our view are of particular importance to resolving this dispute.

2. To evaluate this case one must first evaluate the text – the text of the measures that complainants have claimed give rise to a breach and the text of the concessions complainants argue have been breached. One must reason from the text.

3. First, with respect to the measures. Throughout its argument, the EC ignores the text of its own measures. It claims that classification is done on a case by case basis, and that no single attribute is dispositive, but that is not what the measures say. At times it appears to be defending two ECJ opinions that were issued a few months ago – but these opinions, while helpful illustrations of the numerous flaws in the EC measures, are not the measures themselves. The measures at issue are those identified in the panel request. They are in effect. The ECJ opinions did not result in their withdrawal or modification. The EC may be in the process of modifying them or considering modifying them, but it has not done so. Moreover, the measures mean what they say. They require customs authorities to impose duties on products with particular arbitrary technical attributes. For example, the STB CNEN states and I quote – "Set-top boxes which incorporate a device performing a recording or reproducing function (for example, a hard disk or DVD drive) are excluded from this subheading" (the duty-free subheading); it then identifies the dutiable subheading as the subheading in which the product is classified. We have provided ample evidence, including a number of BTI, to demonstrate that the CNEN has resulted in the application of duties to any STB with these attributes. The EC has offered no evidence to the contrary.

4. With respect to the concessions, the Vienna Convention recognizes the central importance of the text, in particular in Article 31(1) which provides that an interpreter consider "the ordinary meaning" of the terms of the treaty in context and in light of its object and purpose. As the complainants and virtually all of the third parties have stressed, proper application of the Vienna Convention is essential in interpreting the concessions at issue in this dispute. Yet, as we noted in our opening statement, the EC continues to avoid the text of the concessions the complainants have identified as covering the products in question. It has not offered an interpretation of the meaning of the text "flat panel display devices for products falling within" the ITA. It has not offered an interpretation of the meaning of "input or output unit." We can therefore only assume that the EC accepts the argument of the complainants regarding the ordinary meaning of those phrases, both with respect to flat panel display devices and with respect to multifunction digital machines.

5. As for the meaning of the set top boxes concessions, the theory the EC offers is supported neither by the text of Attachment B nor by the EC's modification in 2000. We do encourage the Panel to review that document. The EC's claim that it does not have a concession on STBs "with" a communication function, that there is a substantive difference between "with" and "which have", and that STBs with tuners were excluded from the Attachment B description of STBs is wrong and flatly contradicted by the 2000 modification.

6. What does the EC ask you to evaluate other than the text? Instead of the text, it would prefer a hypothetical discourse on "functionality," on classification, on various documents that say nothing about the meaning of the treaty.

7. As our remarks throughout this session suggest, the EC's discussion of "function" is particularly troubling, and therefore I want to spend a moment on it. The EC in essence appears to believe that, regardless of the text, if a device comes to perform a function that is also performed by a product for which the EC has not made a concession as a result of the ITA, that device becomes the non-ITA product and falls out of the EC's duty-free commitments. This position is completely at odds with the text of the concessions. I would like to spend a moment on it because it has deeply troubling implications for the Agreement as a whole.

8. Our position is simple. What a product does is only relevant to determining whether or not it is covered by a particular concession if the meaning of the text of the concession specifies that a product must do something to qualify or is disqualified if it does something else. One must look at the text. And looking at the text of the concessions at issue, none define the products in the manner suggested by the EC.

9. For example, the FPD concession states that an FPD must be "for" a product falling within the agreement. "For" is a function word indicating purpose. The "purpose" in question is use with another ITA product, e.g., a computer. The text of the concession does not, for example, exclude an FPD "for" watching video or an FPD "for" television. Indeed, as some of the Chairman's comments today suggest, today many people use their computers to watch video or even television. The question, again, is whether it is for another ITA product. The EC measures provide that any FPD with DVI and any FPD capable of receiving signals from something other than a computer is dutiable. As we have argued, this rule necessarily results in the application of duties to FPDs that are "for" computers. Just because something has a DVI plug, just because it could be connected to a device other than a computer, does not mean it isn't "for" a computer.

10. Likewise, with respect to STBs, the concession covers STBs "which have a communication function." Here, function is relevant only insofar as the STB must have a communication function – and to know whether it has that function, it must meet the criteria listed after the colon. The text does not provide that an STB may "only" have a communication function to qualify. It must be an STB, and it must have a communication function. That is all. On the first criterion, I would emphasize that the EC itself describes the products excluded from duty-free treatment as STBs. Thus we are not talking about microwaves (as the EC posited yesterday) or video recorders. How do you know an STB is an STB? By looking at the ordinary meaning of the term and the objective characteristics of the product in question.

11. To the EC, characteristics specified by the agreement text are not relevant. It is all about function. The EC approach, however, does not respect the text of the agreement. The text of the EC concessions was not written so as to enumerate even all of the functions that the products existing at the time of the ITA's conclusion had. For example, an STB may have the function of receiving television signals, as we discussed earlier. The text doesn't say anything about receiving television signals. Does this mean that these STBs were not covered? No. Indeed, the EC in 2000 modified its Schedule to add a new line containing these STBs and specifically attached this line to the Attachment B description.

12. The fact is that the ITA covers products. It does not cover "functions" in the abstract, as the EC at times suggests. Therefore, for example, when the EC says that the ITA excluded televisions it cannot mean that the ITA excluded all devices on which you can watch TV. Watching TV on your computer may rot your mind and keep you from getting your work done, but the ITA does not penalize you for using your computer to do so, nor does it allow participants to impose duties on computers that allow you to do so. Indeed, the ITA expressly includes computers with TV tuners in them. There is no such thing as an ITA-covered function and a non-ITA-covered function.

13. What lesson can one draw from this example? One must look at the text of the relevant EC concession to determine whether a product is covered. Function is only relevant insofar as the text of the relevant EC concession in the Schedule places requirements on function.

14. I would note that the implications of the EC position are serious and cannot be ignored. A key product that lies at the heart of the ITA is the computer. Think of all of the functions that computers perform – for example, you can listen to music on your computer, watch TV or DVDs, record video, do your taxes. Does that mean that a computer is now a stereo, a television, a video recorder – an accountant? Acceptance of the EC position would eviscerate the tariff concessions resulting from the ITA.

15. It may be for these reasons that so many Members have taken a keen interest in this dispute, and why so many, including developing country Members, expressed their concerns so eloquently yesterday in defense of complainants' position regarding the EC approach. The ITA concessions were and remain a critical tool in encouraging development, technological innovation, and expansion of trade.

16. On behalf of the United States, I would like to thank you for this opportunity to present our views on some of the important issues presented by this case, and for your time, hard work, and patience. I would also like to thank the Secretariat for the time they have dedicated to this dispute; we greatly appreciate your work. We look forward to answering your written questions; to submitting our rebuttal submission; and to seeing you again at the second panel meeting.

ANNEX A-4

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION BY THE UNITED STATES

I. EC INTERPRETATION OF THE HEADNOTE AS "EXHAUSTED" BY OTHER PROVISIONS

1. A central pillar of the EC's response to the US complaint rests on a theory that is without basis in the text and utterly contrary to basic principles of treaty interpretation: that the headnote has no meaning, and is a nullity, " exhausted" by other provisions in the EC Schedule. In its answers to the Panel's questions, the EC could not be clearer on this point. The EC's response of course begs the question as to *why* it included the headnote in its Schedule in the first place, if as it asserts, the HS codes alone define its commitments. The EC's insistence that the headnote be read as a nullity does not accord with the approach to treaty interpretation providing that interpretations should not be adopted that render entire provisions of the Agreements inutile, and moreover, underscores two persistent flaws in the EC's analysis of the concessions at issue. First, rather than evaluate the meaning of the headnote and associated product description in Attachment B, the EC repeatedly conflates its analysis of the headnote with that for concessions for individual tariff lines, on the assumption that those lines *define* its commitments. This material is quite simply irrelevant to an analysis of the headnote — the headnote provides for duty free treatment for the goods in question " wherever...classified" , and moreover the concessions in Attachment B for the products at issue are not drafted using HS terminology. Therefore there is no basis to rely on the HS to interpret them.

II. DEFINING THE PRODUCT: THE UNITED STATES HAS ADEQUATELY IDENTIFIED THE PRODUCTS AT ISSUE

2. Another assertion repeatedly made by the EC is that the United States has failed to " define the product" with sufficient clarity for the EC to respond to the claims. On this issue, the EC appears to be again advancing an argument it unsuccessfully made in *EC – Computer Equipment* – that, independent from the obligation to specify the measures that complainants consider to breach the EC concessions and the concessions that have been breached, complainants must also offer a " definition" of the product at issue in the dispute. There is no such requirement. The EC now concedes that "[c]learly...one can define the products at issue through the challenged measures." While it then proceeds to "comment" on the "complexity" of the products at issue, the number of criteria the measures use in classifying them, and that the measures are "classification measures," all of these points are *non sequiturs*. The products at issue in *EC – Computer Equipment* were equally "complex", yet there as well the Appellate Body rejected the EC's argument that the US description of the product was insufficiently specific. As for its second "comment" , that assertion is simply incorrect and again, its supposed relevance is nowhere explained. Finally, the fact that the measures are classification measures is equally true of the measures at issue in *EC – Computer Equipment* and *EC – Chicken Cuts* yet, as noted, the Appellate Body did not consider that that imposed any additional hurdle to complainants in those cases. Furthermore, while the measures may pertain to classification, this dispute, as both the relevant concessions and the relevant obligations reflect, is about the *tariff treatment* of the products in question. The obligations at issue are those described in the EC's concessions, which are tariff concessions, and in some cases, as noted previously, pertain to products "wherever...classified."

III. TO DEMONSTRATE THAT THE MEASURES ARE " AS SUCH" INCONSISTENT, THE UNITED STATES NEED NOT PROVE THAT MEASURES RESULT IN A BREACH IN THEIR EVERY APPLICATION

3. Repeatedly, the EC attempts to to suggest that complainants can only prevail by demonstrating that all products with the characteristic in question are subject to the concession, rather than demonstrating that the measure results in the imposition of duties on products with the characteristic in question, at least some of which are subject to the concession. Thus, for example, with respect to flat panel displays, the EC characterizes the US argument as being that "the mere existence of the DVI interface makes an LCD monitor an ADP monitor" , and on this basis, urges the panel to reject the US claim. Yet, even if some flat panel displays with a DVI interface are not subject to the EC concession, this begs the question of whether the EC measure results in the imposition of duties on some products that are subject to its concession. As the United States explains, by treating as dutiable any FPD with DVI, the EC measures result in the imposition of duties on some products that are subject to the concession.

IV. SET TOP BOXES WHICH HAVE A COMMUNICATION FUNCTION

4. The EC's defense rests on two sleights of hand: first, complete disregard of the text of the measures being challenged, and second, complete disregard of the text of the concessions at issue. As a result of the amendments to the CNEN, EC customs authorities impose duties on *any* set top box "which incorporate[s] a device performing a recording or reproducing function (for example, a hard disk or DVD drive)." The language of the CNEN for 8528 71 13 could not be clearer in this regard. The United States has submitted over ten examples of BTI issued by various member States that confirm this interpretation is shared by the EC's own customs authorities. Indeed, the EC itself describes the language in the CNEN as "categorical" – an adjective meaning " absolute, unqualified."

5. When asked by the Panel how it would treat a set top box with a communication function and a hard disk, the EC has proceeded to offer an abstract discussion of EC classification practice. Of course, the EC offers no evidence that the measure *in fact* permits its customs authorities to consider other headings, nor is there any evidence that its customs authorities in fact *opt* for other headings, nor indeed is there evidence that even if it did opt for one of these other headings that it would result in duty-free treatment being accorded to the products. To the contrary, all the evidence indicates otherwise.

6. More fundamentally, the EC position is misguided in three key respects, and appears again to reflect an attempt to convert this dispute into a customs classification exercise. First, as a factual matter, the EC's position ignores a basic technological fact – a hard drive and a recording functionality are *additions* to a set top box, not a different product. Second, the EC's position is divorced from the text of its own measure, which does not by its terms distinguish between devices that have a "main purpose" communication function and a "main purpose" recording function. Third, the EC's analysis begs the question of whether the presence of a recording function is a permissible basis, *under its WTO tariff concessions*, to exclude a product from duty-free treatment – particularly where the EC is obliged to provide duty free treatment to set top boxes which have a communication function "wherever...classified". The concession in question is by its terms not limited to "main purpose communication function" devices.

7. At the heart of the EC's argument is the notion that it is entitled to impose duties on products that are set top boxes, and that have a communication function, merely because they also have a recording function. This position simply does not accord with the ordinary meaning of the text of the concessions, in context, and in light of the object and purpose of the GATT 1994. While the EC

spends a great deal of time explaining its *classification* practice, nowhere does it even attempt to explain how imposition of duties on these devices is consistent with the terms of its *tariff concessions*.

8. First, there is no dispute that the devices in question are "set top boxes". Throughout its measure, the EC describes the products in question as "set top boxes." Even the EC recognizes that the term used by the drafters of the ITA, and in turn, the term that delimits the EC's tariff concessions pursuant to the headnote, is *not* confined to a particular subcategory of set top box (other than those "which have a communication function"), nor does the EC dispute that the products in question meet the ordinary meaning of the term. Likewise, in its answers to Panel questions, the EC repeatedly states that the products on which it imposes duties are a "type of *set top box* product." Second, there is no dispute that the products in question have "a communication function." The EC agrees that a set top box with a hard disk "still has a communication function." Thus, while the EC appears to believe that it is entitled to impose duties on any device that also happens to be able to record video, it points to nothing in the text that would explain why this is so.

9. Quite simply, nothing in the text of the concession supports the EC's position. Nor is the EC's position consistent with its own actions, in particular its acknowledgment in 2000 that STBs with tuners were covered by the description of "set top boxes which have a communication function" contained in Attachment B. The position of complainants is straightforward – the text of the concession defines what is and is not covered, and the text must be interpreted using the principles of treaty interpretation reflected in the Vienna Convention. In this case, the products are "set top boxes" and they "have a communication function." *Importantly, the EC agrees.*

10. In an effort to support its misguided interpretation of the text, the EC has offered a description of the STB market during the ITA negotiations and various historical documents, which it characterizes as informing the "surrounding circumstances" of the treaty and in turn the "ordinary meaning" within the meaning of VCLT Article 31. Much of the EC's description of the development of STBs is offered without citation or support, and evidence before the Panel confirms that it is in fact incorrect in a number of respects. As for the "negotiating history" the EC provides, the documents do not provide any useful insight into the outcome of the negotiation, and do not constitute "preparatory work of the treaty" within the meaning of VCLT Article 32, much less "surrounding circumstances" relevant to interpreting the ordinary meaning of text under VCLT Article 31.

11. Just as the Amended CNEN directs customs authorities to impose duties on any STB which has a communication function, merely because it has a hard disk or other device "performing a recording or reproducing function", the EC measure provides that STBs equipped with ISDN, Ethernet or WLAN ("wireless LAN") modems are not entitled to duty-free treatment. The EC does not dispute that these devices are *per se* excluded from duty-free treatment. With respect to " cable modems" the EC argument is technically flawed and reveals fundamental contradictions in its own interpretation of the term " modem." First, as a technical matter, as the United States explained in detail in its answers to Panel questions, ISDN, Ethernet, and WLAN devices are "modems". The EC by contrast offers *no evidence* to support its various assertions regarding modems.

12. The mere fact that a device modulates and demodulates digital signals without converting analogue to digital signals does not support the conclusion that a device is not a " modem." **The text does not limit the term "modem" to devices of a particular type, and indeed the phrase "communication function" is broad.** With regard to the EC's assertion that only devices that "send and receive data in the form of audible tones transferred by telephone lines" are modems, again, nothing in the text of the concession, including the ordinary meaning of the term "modem", when read in context, supports the EC position, nor has the EC offered any evidence to support its claim. Third, while the EC concedes that at least some of the devices at issue are "technologies for gaining access to

the Internet", the EC asserts that Ethernet and WLAN devices are not modems because they do not allow "direct" access to the Internet. Here again, no evidentiary support is offered for the EC position, and as a factual matter, the EC is simply incorrect.

13. Finally, with regard to STBs that do not have a tuner – and, in particular, STBs with a communication function that receive signals via Internet Protocol (TCP/IP) – the EC measure by its terms excludes all such devices from duty-free treatment merely because they lack a tuner. In so doing, the EC imposes duties on STBs covered by its tariff concessions. To date, the EC has offered no defense of this aspect of its measure, other than the statement that these devices connect to the Internet through an Ethernet modem, nor indeed can its position be reconciled with the text of its tariff concessions.

V. FLAT PANEL DISPLAY DEVICES

14. The EC now takes the position that it merely considered a DVI connector " a strong indicator" that a monitor is not an output unit of a computer. The only support it offers for this proposition is item 4 in the annex to the April 2005 Regulation and items 3 and 4 in the December 2005 Regulation, which it claims support the view that "the existence of a DVI has not been *necessarily* dispositive." For each of these items the EC concluded that the device in question is classified in a dutiable heading. This does not support the conclusion that DVI is not dispositive – to the contrary, it simply provides further confirmation that any device with DVI is dutiable. Furthermore, item 1 is a device that is not equipped with DVI, or for that matter any other connector that might be used by products other than a computer. Quite simply, the EC has pointed to *no evidence* – whether from the text of its measures or from the decisions of its customs authorities applying the measures – demonstrating that a device with DVI or a device actually capable of receiving signals from a source other than a computer could be classified in the duty-free subheading. Furthermore, the EC's response ignores the text of the CNEN *entirely*, which could not be clearer. As for the EC's discussion of its position since *Kamino*, the EC has offered no evidence that EC law has changed as a result of the *Kamino* decision, or that *Kamino* shows that the United States has misunderstood EC law, and its repeated statements that it is "reviewing" the measures and may modify or repeal them suggests the opposite is true, as do prior opinions of the ECJ and other evidence submitted by the United States regarding the legal effect of an ECJ opinion on regulations that are not the subject of the case.

15. With regard to the concessions at issue, as the United States has explained, the products affected by the EC measures are "flat panel display devices." As the United States has also explained, the EC measures result in the imposition of duties on FPDs that are " for products falling within" the ITA. All parties agree that " for" is "a function word to indicate purpose." Nor does the EC appear to dispute that computers are among the products falling within the ITA. From this, it follows logically that an FPD that is "for" a computer is covered by the concession. However, rather than arrive at a conclusion based on the terms of the FPD concession read in context, the EC proceeds to argue that the concession is narrower.

16. Regarding the CRT monitor concession, first and foremost, unlike the FPD provision, the CRT monitor concession is expressly limited to a single technology – CRT monitors – which are not at issue in this dispute. The "exclusion" is not, therefore, a "general" exclusion. Second, the sentence does not constitute a "categorical exclusion" of all devices on which one can watch video – it refers to "televisions" *only*. Thus, as the EC response to panel questions reveals, the EC must make several additional logical leaps to draw the conclusion that not just televisions (the only product referenced) but also "video monitors" (what it claims to be the product at issue in this case) are generally excluded. Finally, as the United States noted during the first panel meeting, insofar as the EC

believes that any device on which one can watch television or video is per se excluded from its obligations, this cannot be reconciled with the text of its concessions.

17. Specifically with regard to LCD monitors with DVI, the EC defends its approach on the grounds that "the presence of a DVI connector indicates the presence of certain electronic components inside the monitor that allows the LCD monitor to function with many different devices that are not covered by the ITA." Some devices with a DVI connector are *incapable* of functioning with anything other than a CPU. Thus, contrary to what the EC argues, the fact that a device has a DVI connector does *not* "indicate[] the presence of certain electronic components inside the monitor that allows the LCD monitor to function with many different devices not covered by the ITA." Second, the EC is incorrect in asserting that DVI is a connector that was not developed for computers. The EC claims that this view is supported by the fact that DVI is "display technology independent" and that therefore it was "foreseen to function with monitors using the CRT or LCD or other technologies." Of course, the fact that DVI was not designed for a particular display technology begs the question of whether the connector was in fact designed for computers (and, as is clear from the ITA itself, CRT as well as LCD technology is used in computer monitors). Third, the EC offers a number of unsubstantiated and factually incorrect assertions regarding the use of DVI in consumer electronics devices, in an attempt to support its presumption that monitors equipped with DVI are "multimedia" devices. The only difference between DVI-I and DVI-D is that DVI-I accepts both analog and digital signals and DVI-D accepts only digital signals. Moreover, even if the prevalence of particular interfaces in non-ADP devices could be enough to support a *per se* rule such as that established by the EC (which it could not), the fact is that *virtually no* consumer electronics devices are today equipped with DVI, whether DVI-D or DVI-I; a large share of computers, on the other hand, are equipped with a DVI connector.

18. As explained in the first submission and in responses to panel questions, the US argument is not limited to flat panel display devices with DVI. As noted, the EC measures also provide for duties on any product that is merely *capable* of accepting signals from a device other than a CPU (whether through a DVI interface or another technology). This does not accord with the EC concession, which requires it to provide duty-free treatment to any flat panel display device "for" products falling within the ITA.

19. In an effort to support its argument the EC cites to various material that it describes as the "specific classification practice of the United States," the"practice" of the ITA parties following the conclusion of the agreement, and various proposals to include products such as video monitors and a "multimedia monitor" as part of the ITA II negotiations. None of this material is relevant and none in fact supports the EC position. First, regarding classification, the concession at issue pertains to FPDs for products falling within the ITA, "wherever...classified." Thus, classification is simply not relevant to determining the scope of the concession. Regarding the supposed classification practice of the United States and other ITA participants, the EC refers to two documents, which provide no support for the EC view that its measures are consistent with its obligations, nor indicate any particular "practice" on the part of the United States regarding monitors. Likewise, the EC's description of where other ITA participants classified FPDs is irrelevant – the EC argument is again premised on its theory that the headnote is "exhausted" by individual tariff lines.

20. As for the negotiating documents the EC has submitted, none is relevant to the interpretative issue presented. For example, the fact that a proposal was made in ITA II for "multimedia monitors" and "video monitors" does not support the conclusion that the products at issue in this dispute (FPDs for computers) were not covered under the original concessions. The rest of the negotiating material referenced simply beg the question of what products were ultimately covered by the concessions. Nor would negotiating history be relevant under VCLT Article 32 unless the EC demonstrates that it is being used to "confirm" an interpretation or when the text as interpreted using VCLT Article 31

leaves the meaning obscure or produces a manifestly absurd or unreasonable result. The EC has failed to demonstrate that either is the case.

21. In addition to its obligation under the headnote to provide duty treatment to flat panel display devices for products falling within the ITA, "wherever...classified", the EC also committed to provide duty-free treatment to goods described by individual tariff lines in its Schedule. In particular, the EC committed to provide duty-free treatment to "input or output units, whether or not containing storage units in the same housing...other...other", contained in HS96 8471 60. As the United States explained in its first submission, the products described above fall within the terms of this concession, based on the ordinary meaning of the text in context and in light of the object and purpose of the GATT 1994. The United States has also pointed to Chapter Note 5(B-C) to Chapter 84 of HS(1996), which provides, among other things, that devices that are either "solely" or "principally" used in an automatic data processing system may be considered a unit for purposes of the heading. The EC now claims that it is entitled to grant duty free treatment only to devices that are "solely" used with computers based on an HS Explanatory Note. In the WCO, HS Explanatory Notes cannot supersede Chapter Notes. Furthermore, the Explanatory Note does not state that the devices described therein are the only devices covered by the subheading – rather, the Explanatory Note pertains to devices that are "solely" used with computers and simply does not address devices that are "principally" used with computers.

VI. MULTIFUNCTIONAL DIGITAL MACHINES

22. While the EC at last concedes that the challenged regulations remain "formally in force" and that the Customs Code Committee opinion has "some interpretative value", as with FPDs, rather than confront the text of its MFM measures, the EC relies on the ECJ's judgment in the *Kip* case to argue that MFMs that can connect to computers and have "an equivalent copying function" (i.e., a copying function that "is not secondary in relation to their ADP functions"), fall within its concession for "photocopiers". As explained in the first submission and will be discussed below, even this interpretation is flawed; yet, that aside, the EC nowhere acknowledges that its measures do not merely treat devices that have "an equivalent copying function" as dutiable. Rather, under the EC measures, any device capable of reproducing more than 12 pages per minute, and any device without a fax feature (regardless of speed) is dutiable.

23. This begs the question of why the copying function on a device that can reproduce more than 12 pages per minute is necessarily "equivalent", as the EC puts it, to the printing function, or why a device that can print and copy but not fax can *never* be considered to have a " primary printing function" (regardless of the number of pages per minute it reproduces). Again, the EC never explains – because it cannot – how the 12 pages per minute output speed indicates the relative importance of the functions a device performs, even if that question were relevant to determining whether the product falls within the terms of the concessions at issue.

24. As the United States has explained, the products in question fall within the concessions for "input or output units" and "facsimile machines". Again, the EC has failed to offer any interpretation of the ordinary meaning of the text of these concessions. Instead, it claims that all the products subject to duty under its measures are photocopiers and provides an interpretation of the concession for "photocopiers" of subheading (HS96) 9009.12.

25. None of the devices in question are "electrostatic photocopying apparatus." MFMs are comprised of a print module (*i.e.*, print controller and print engine), and scanner; in some cases, they also include a modem for facsimile transmission. Printers, scanners, and facsimile machines were all included in the ITA and are entitled to duty-free treatment under the terms of the EC's concessions.

Yet according to the EC, when these technologies are combined in a single unit, that device becomes an "indirect process photocopier", not covered by its concessions. Beyond the fact that the EC has failed to demonstrate that the products subject to duty under its measures do not meet the terms of the concession for " input or output units" , this position does not accord with the ordinary meaning of the description associated with subheading 9009.12. An "indirect process photocopier" as that term is used in heading 9009 (and as it is used by technical experts) is a device that uses light to produce a copy, exposing an optical image on a photosensitive surface. An MFM does not use light to produce a copy, but rather to collect digital data into an electronic file that can then be printed, transmitted via fax or through a network, or stored for later use. Thus, even the various dictionary definitions the EC offers of photocopying do not accurately describe the MFM process – paper copies are not produced through the "electrical or chemical action of light," or "formed by the action of light," or "created on a sensitized surface...by the action of radiant energy." Rather, light is used in the creation of a digital file, which may then be stored, printed, or transmitted. The process for printing/producing "copies" of this digital file is in fact no different than that involved when a user presses the command to "print" on his or her computer and requests one or more "copies" of the original. Finally, what the EC claims to be the "commercial and common usage" of the term "photocopying", based on various sales brochures and newspaper articles, has no bearing on the meaning of the term in the EC's schedule of concessions.

26. Nor do the devices incorporate an "optical system" as that term is used in the subheading. Consistent with the text of heading 9009, the Explanatory Note to heading 9009 notes that a photocopier "incorporates an optical system (comprising mainly a light source, a condenser, lenses, mirrors, prisms, or an array of optical fibers) which projects the optical image of an original document on to a light sensitive surface, and components for developing and printing of image." Contrary to what the EC claims, a scanner is not a system of "lamps, lenses, and mirrors" – as the EC's own exhibit states, "the core component of the scanner is the CCD array...CCD is a collection of tiny light sensitive diodes, which convert photons (light) into electrons (electrical charge)." A photocopier, on the other hand, uses an optical image formed by a lens or mirror system from reflected, refracted, or diffracted light waves.

27. The EC argument appears to be based not on the physical characteristics of the devices, but rather the assumption that the "function" of making copies is "of equivalent or higher importance" than, for example, the printing or other functions performed by the machine. The EC offers no evidence that the devices are in fact predominantly used to make copies, nor that their physical characteristics are such to support this conclusion. As noted, the devices reproduce originals using a scanner and printer – rather than "secondary," the scanner and print module are the *primary* components that comprise the machine. This begs the question of how the EC distinguishes, for example, between the "copy function," the "scan" function, and the "print function", *when all are performed using the same components*.

28. Finally, as noted, the term "indirect process" is only relevant if it can be established that the product in question meets the terms of the heading. As noted in response to panel questions, even from a customs classification perspective, the EC's attempt to distinguish between inkjet MFMs and laserjet MFMs based on the print engine ignores the terms of the heading at the four-digit level, contrary to GIR 1. Furthermore, the EC analysis does not accord with GIR 3(b), which provides that composite goods which cannot be classified under GIR 3(a) "shall be classified as if they consisted of the material or component which gives them their essential character." Rather than focus on the physical *component* that gives the device its "essential character," the EC attempts to divine the "function" of the device – thus ignoring that the main components of the MFM are the *print* module, and that the "function" of copying is performed by these elements operating in conjunction with a scanner. Classification under GIR 3(b) cannot focus on the MFM's "principal function", but rather

depends on the "component" which imparts the MFM's "essential character". Contrary to this rule, the EC's analysis focuses on the type of print technology of the print engine in making its distinction at the 6-digit level for its views of heading 9009 but ignores the essential role that the print module component imparts to the complete device.

29. As with the other products, the EC again relies on various ancillary documents in an attempt to support its position, including the "practice" of the United States and the EC with respect to classification, and material it claims is "negotiating history". First, with respect to the supposed "practice" of the United States and the EC, the EC has not demonstrated that there exists a "common, concordant, and consistent practice" such that the material would be relevant as "subsequent practice" for purposes of Vienna Convention Article 31. Indeed, the EC mischaracterizes both US classification decisions and its own position in asserting that both parties considered MFMs to be photocopiers during the ITA negotiations. While the EC claims that its authorities "have consistently taken the view that digital copying is a form of photocopying within the meaning of HS96 9009," the evidence before the Panel in fact shows that EC customs authorities issued decisions classifying MFMs in heading 8471 60 during the ITA negotiations. As for the United States, the rulings submitted by the EC in virtually all cases make no mention of 9009 and classify MFMs in 8471 60 (the EC claim to a "practice" is based solely on the reference to note 3 in those decisions as a legal basis for the action). Furthermore, nothing in this material suggests that either the EC or the United States believed or had a practice at the time of the negotiations indicating that any device without a facsimile function is a "photocopier" or that based on pages per minute (much less 12 pages per minute) one could deem all MFMs with a fax function as "photocopiers."

30. Second, the EC offers a number of documents it characterizes as "negotiating history" – as noted, none of these documents shed light on what was ultimately agreed upon by the parties. The EC claim that the United States initially opposed including heading 9009 simply begs the question of whether digital copiers were in fact considered included in that heading (indeed in the document the EC references, the term "digital photocopying" nowhere appears). Other evidence suggests that at the conclusion of the ITA, participants (including the United States) agreed to include digital copiers, in exchange for inclusion of digital cameras. More fundamentally, the EC has failed to show that (1) the material is relevant to "confirm" a meaning provided through application of VCLT Article 31, or that VCLT Article 31 leaves the meaning obscure or manifestly absurd or unreasonable; or (2) the material qualifies as "preparatory work" within the meaning of VCLT Article 32.

VII. EC'S FAILURE TO TIMELY PUBLISH STB CNEN

31. The EC argues that the measure was not in fact effective until it was "adopted" upon signature by the Vice-President of the Commission, and that it was published "promptly" after it was signed. However, this characterization of the facts is inconsistent with ample evidence to the contrary: the statements of the Customs Code Committee Chairman as well as BTI issued by member States after the vote both support the conclusion that the measure was *in effect* following the vote of the Customs Code Committee. Furthermore, while the EC points to additional work the Commission planned with respect to *other* aspects of its classification practice regarding set top boxes in an attempt to argue that the measure was not in effect, this is irrelevant to the question at hand: the facts demonstrate that the EC position on set top boxes with a record or reproducing function and set top boxes with certain types of modems (including IP-streaming boxes) was established definitively upon the vote of the Committee. Indeed, the EC offers no evidence to indicate that any member States were *not* following the CNEN amendments after the Committee vote and prior to publication – the only BTI before the Panel suggest that member States relied on the CNEN in their classification decisions once the Committee voted, and viewed it as a final decision.

32. The EC appears to be taking the position that an additional ministerial step in its process allows it to delay publishing a measure, even when the Commission is expressly encouraging member States to apply the measure and it is in fact being applied by member States. The consequences of the EC argument are significant, as they suggest that, simply by introducing an additional ministerial step in the process of "adoption" of a measure, a Member can avoid publishing a measure until long after it has come into effect. Furthermore, nothing in the text of Article X:1 suggests that that a measure that is in effect and being applied by member States would, on that basis, be disqualified from constituting an "administrative ruling[] of general application."

33. The EC also acted inconsistently with GATT 1994 Article X:2. The CNEN is a measure of "general application" and "effect[s] an advance in a rate of duty," as the United States explained in its first submission. In response, in addition to claiming that the measure was not in effect until it was officially published, the EC argues that the measure was not being enforced (notwithstanding four BTI on the record citing to the measure as a basis for the classification of the goods in question) and did not "effect...an advance in a rate of duty or other charge on imports under an established and uniform practice." In support of the latter assertion, the EC points to the four BTI the United States submitted that were issued before the CNEN amendments were voted upon. These BTI provide no support for the argument the EC is advancing – they say nothing about whether the measure was effecting an advance in a rate of duty *under* an established and uniform practice. Again, all the BTI on the record that were issued after the vote provide for classification in the dutiable heading, consistent with the requirements contained in the CNEN. Nor can the EC be suggesting that a CNEN, once in effect, does not effect an advance in a rate of duty...under an established and uniform practice; indeed, the EC has relied on CNEN in previous disputes to argue that it administers its customs regime uniformly.

ANNEX A-5

EXECUTIVE SUMMARY OF THE ORAL STATEMENT BY THE UNITED STATES AT THE SECOND SUBSTANTIVE MEETING

1. At the center of this dispute lie certain tariff concessions made by the EC and its member States in their Schedules of Concessions to the GATT 1994 (the "EC Schedules") with respect to three ITA products: set top boxes which have a communication function, flat panel display devices, and multifunctional digital machines. The question before this Panel is whether the EC and member State measures – specifically, those identified by the complainants in their panel request and subject to the Panel's terms of reference – result in tariff treatment that is inconsistent with those concessions and Article II:1(a) and (b) of the GATT 1994.

2. In its submissions to date, the United States has explained each of the measures identified in the panel request and provided evidence of how they operate. The United States has quoted language from the measures at issue – language which the EC itself has characterized as "categorical" – that directs customs authorities to impose duties on any product that has one or more of the particular arbitrary characteristics outlined in the measures. The United States has submitted BTI, which support the conclusion that *in every case*, when a product has the particular arbitrary characteristics outlined in the measures, EC customs authorities apply duties to it. The EC's protestations to the contrary, the United States has also explained in detail the concessions at issue, and how the measures result in the imposition of duties on products that are entitled to duty-free treatment under the terms of concessions in the EC Schedules. As explained in the US submissions, these concessions include the headnote in the EC Schedules, providing for duty-free treatment of products "wherever...classified," as well as descriptions associated with individual tariff lines bound at zero duty. Using the principles of treaty interpretation reflected in the Vienna Convention, the United States has explained how the products in question fall within the ordinary meaning of the terms of the concessions when read in context and in the light of the object and purpose of the GATT 1994. Those products are therefore entitled to duty free treatment. Yet they are denied duty free treatment as a result of the measures. Consequently, the measures are inconsistent with GATT 1994 Article II:1(a) and (b) and the EC Schedules of Concessions.

3. Beyond claiming confusion about the claims and measures at issue, the EC's response continues to be premised on four key propositions: first, that the complainants' claims and the measures at issue are not clear, principally because they have failed to define in sufficient detail the "products at issue" in the dispute; second, that its measures mean something other than what they say; third, that the concessions complainants have identified have no meaning or should otherwise be ignored in favor of concessions on entirely different products; and fourth, that the headnote, and thus the commitment to provide duty free treatment to Attachment B products "wherever...classified", is meaningless. Each of these propositions is wrong as a matter of fact or law or both. When they are rejected, there is nothing left to the EC's defense.

4. The EC's professed confusion about the core elements in the case – elements articulated by three different WTO Members and endorsed by a number of third parties – strains credibility. At heart, the EC position appears to be premised on its incorrect view that, in addition to demonstrating that its measures result in the breach of specific concessions, the complainants must provide a detailed definition of a specific "product category" in order to prevail, and that only by showing that EC customs authorities improperly impose duties on *all* products in this category can complainants demonstrate that the EC is in breach of its obligations. As the United States explained in its second written submission, this argument is without basis. It turns the test for demonstrating an "as such"

breach on its head, and appears to be nothing more than an attempt to introduce an additional legal hurdle to establishing a breach of Article II – one already discredited by the Appellate Body in *EC– Computer Equipment*. The fact that the EC in that dispute was raising an argument in relation to Article 6.2 does not support the conclusion that the Appellate Body's reasoning is inapplicable in this case.

5. Second, the EC utterly ignores the text of its own measures. The EC focuses instead on statements contained in two court decisions, vague generalities regarding its approach to classification, and equally vague assertions regarding the legal effect of the measures in question. For example, with respect to MFMs, not once in its entire rebuttal submission does the EC refer to the 12 page per minute criterion contained in the text of the EC Combined Nomenclature for subheading 8443 31 – the measure that is the subject of the terms of reference of this Panel and that EC customs authorities use to disqualify products from duty-free treatment. Its response instead centers around a so-called "case-by-case" analysis or a standard described by the ECJ in 2009 in the *Kip* case – a case that did not itself address the measures before this Panel, articulating a standard that is nowhere evidenced in those measures, in an opinion by an EC court evaluating particular EC actions in light of the EC classification laws before it, not the EC's WTO tariff obligations. The EC does not even attempt to reconcile the measure as it exists – the CN – and the observations of the court in *Kip*. In response to a direct question from the Panel, it fails even to offer an explanation of why the 12 page per minute criterion was selected. As explained in the US submissions, the EC's argument regarding FPDs, relying on the court opinion in *Kamino*, is equally at odds with its own measures and divorced from reality.

6. Regarding the theory that the FPD and MFM measures are "effectively inapplicable" due to court opinions, as noted above, the United States has provided evidence showing that the court opinions, while providing some useful illustrations of the flaws in the EC's logic, do not themselves nullify the measures. The measures *remain in effect*. The EC's repeated assurances that it may at some future date repeal the measures simply serves as further evidence of that reality. Likewise, as for the EC's theory that some of the measures are "effectively inapplicable" due to changes in the EC's domestic nomenclature in 2007, while the EC claims that it would be "difficult" to apply some of the measures due to renumbering and other changes, the United States has presented BTI indicating that member States have *in fact* continued to apply them notwithstanding those changes. The EC has offered little or no response, stating rather incongruously that the BTI "refer" to the regulations as "authority" but do not "apply" them. As for the EC's claim that the CNENs are not binding, it acknowledges that they are "important tools for the interpretation of the CN" and that "customs authorities naturally have to" consult them, and again offers no credible explanation in response to the evidence before the Panel concerning their legal effect, including BTI demonstrating that member States have in fact referred to CNENs as a legal "classification justification" for decisions to classify products in dutiable headings, and the EC's own reliance on CNENs for compliance with DSB recommendations and rulings in a prior dispute.

7. Finally, while the EC at times suggests that there exists some purported flexibility in the measures themselves, it has offered *no evidence* indicating that the measures do anything other than what they say: direct EC customs authorities, in what the EC itself describes as "categorical" language, to impose duties on products with the specified technical characteristics. The EC has submitted no evidence thus far showing that *any* customs authority in the EC has treated as duty-free *any* product with the characteristics specified in its measures. The United States, on the other hand, has provided ample evidence demonstrating that they in fact operate exactly as written, and deny products duty-free treatment merely because they have certain arbitrary attributes. In this regard, the United States has quoted language from the measures and submitted an assortment of BTI, in response to which the EC has identified no language in the measures that would permit the opposite

conclusion, nor any BTI classifying products with the specified attributes in a duty free tariff line. Thus, all of its theories and rhetoric notwithstanding, the measures are in effect and result in the application of duties to products that should be duty free.

8. Third, the EC ignores the concessions the complainants argue it has breached, in favor of other concessions for products not subject to this dispute, an assortment of completely irrelevant documents it claims inform the "surrounding circumstances" of its concessions, and what it claims to be the classification "practice" of WTO Members. In the process, it advances a range of arguments that simply do not accord with basic principles of treaty interpretation reflected in the Vienna Convention.

9. Regarding the headnote, the EC ignores the commitment set forth in the headnote to its Schedule – a key innovation of the ITA – to provide duty-free treatment to the descriptive list of products specified in Attachment B of the ITA "wherever...classified." The EC persists in its second submission to take the view that the headnote is "exhausted," and thus has no meaning, despite the fact that, as noted, its interpretation is flatly inconsistent with basic principles of treaty interpretation.

10. In addition, it now claims that there is some difference in the argument advanced by the complainants with respect to the structure of the concession in the headnote. To be clear, with regard to the headnote, the United States is in agreement with the other complainants – all agree that the headnote is a separate concession from the individual tariff line provisions in the EC Schedules, all agree that the HS is not relevant context for interpreting the Attachment B product descriptions referenced in the headnote, all agree that the table does not limit the scope of Attachment B descriptions to particular enumerated subheadings but rather is illustrative, and all agree that there is no difference even in the product descriptions for the products at issue in this dispute in Attachment B proper and those transposed into the table in the EC Schedules. Even the EC appears to agree with this last point. Furthermore, the United States shares the other complainants' view that the EC position – that the headnote is "exhausted" – is untenable, as it is contrary to the principle that entire provisions of agreements should not be rendered inutile.

11. The United States in its submissions has explained why the EC's interpretation of the headnote cannot be accepted. In response, the EC simply again recites its legal theory of "exhaustion," without explaining why it is appropriate to read the headnote out of its Schedule – and instead, remarkably, argues that the tariff subheadings next to the product definitions in the table under the headnote "cannot be read out from" its Schedule. Of course, this is not what the complainants do – as each has explained, the subheadings in the EC's Schedules indicate where the EC classified the products in question at the time the ITA was concluded, and are useful *illustrations* of the types of products covered by the product definitions. Indeed, with respect to STBs, the United States has pointed out that one subheading in the EC's Schedules associated with the Attachment B description of STBs shows that the EC itself considered STBs with tuners among the products covered by the Attachment B description. Plainly, in the view of the United States, the table has meaning – it simply does not have the meaning that the EC advances.

I. SET TOP BOXES WHICH HAVE A COMMUNICATION FUNCTION

12. As noted previously, a discussion of products is relevant in two respects for purposes of this proceeding: the products that are subject to duties under the measures, and whether at least some of those products are entitled to duty-free treatment under the concessions. If some products subject to duties under the measures are entitled to duty free treatment under the concessions, those measures must be found inconsistent with Article II of the GATT 1994. The United States has amply explained the products subject to duties under the measures and why they are entitled to duty-free treatment

under the concessions. As the Appellate Body concluded in *EC – Computer Equipment*, there exists no obligation to provide a detailed definition of a "product category" in order to prevail under Article II.

13. On the effect of the CNEN, as noted previously, the United States has submitted extensive evidence demonstrating the legal effect of CNENs, including that with respect to STBs, to which the EC has provided no convincing response to date. Nothing in the EC's statement responds to those points; instead, the EC has simply persisted in making the same arguments it advanced in its previous submissions. The EC in its second submission cites to an ECJ opinion simply stating that if the content of a CNEN is not consistent with the CN "it could not be taken into consideration." Based on this opinion, the EC argues that CNEN do not have "mandatory power". Of course, the mere possibility that a measure in effect today *could* hypothetically be found inconsistent with a Member's domestic law in the future does not bar it from now being challenged "as such". This argument equally begs the question of whether the STB CNEN is *in fact* inconsistent with the CN such that it could not be taken into consideration; the EC has nowhere even argued that this is so. By contrast, the evidence offered by the United States is clear regarding the effect of the CNEN: that it results in the imposition of duties on STBs which have a communication function merely because they have a particular type of modem or incorporate a device performing a recording or reproducing function.

14. Throughout its submissions, the EC persists in arguing that the phrase "which have" in the STB concession *limits* the concession to STBs which have *only* a communication function; and thus, that STBs that serve any purpose other than "communication" are excluded. As we have previously explained, the word "only" does not appear in the relevant text. As the United States has also noted, this position can be reconciled neither with the terms of the concession nor with the EC's own actions in 2000, when it modified its Schedule. The EC in its second submission offers a new interpretation of the modification it made in 2000 (one which, on careful review of the EC implementing measure, the modification, and the Schedule, does not appear to be correct), but, moreover, which again cannot be reconciled with its argument that there is a substantive difference between "which have" and "with".

15. In its second submission, the EC concedes that it added the line covering STBs "with" a communication function to the list of lines associated with the STB description in Attachment B. If STBs "with" a communication function were something different than STBs "which have" a communication function, why would the EC have used "with" in its *own* description of a product that it *concedes* it associated with the Attachment B description? The EC offers no explanation. There appears to be one point on which the United States and the EC can now agree: the Attachment B description of STBs from the ITA was not modified as a result of the EC's change to its Schedule. This fact, however suggests, not that these products are excluded from the Attachment B concession, but rather that the EC *recognized* that the products it described as "set top boxes with a communication function" in 2000 were covered by the Attachment B description as agreed upon in 1997 – that "set top boxes with a communication function" were among the STBs referenced in the ITA description of "set top boxes which have a communication function." Furthermore, it shows that STBs with a tuner – i.e., STBs with a function of receiving television signals – were included in the EC's own understanding of the Attachment B concession. Again, as the United States has explained in previous submissions, the EC position that "which have" means "which have *only*" cannot be reconciled with the terms of its concessions, nor with its own actions in 2000. The EC argument boils down to this: a product it concedes is a "set top box" and which it concedes has a "communication function" is nonetheless not covered by its concession. This position cannot be sustained.

16. In its second submission, the EC changes course, offering a number of arguments regarding the term "modem" which contradict the position it set forth in its own measure, and are particularly

revealing of the fundamental flaws in its position. First, it may be recalled that, in its measure, the EC describes modems as follows: "[m]odems modulate and demodulate outgoing as well as incoming data signals...enabl[ing] bidirectional communication for the purposes of gaining access to the Internet." The measure then asserts that ISDN, WLAN and Ethernet modems are not modems because they "do not modulate and demodulate signals." The United States showed in its answers to the Panel's questions that this statement is simply incorrect.

17. Remarkably, the EC in its second submission changes its tune – apparently realizing the fallacy in its measure, it *does not dispute* that the devices in fact modulate and demodulate signals. Rather, it introduces an entirely new requirement for a device to be considered a modem: the device must not only modulate and demodulate signals, but must do so from *analogue* to *digital*, and not only allow a computer to gain access to the Internet, but allow access through a *telephone* line. The EC position is simply at odds with the meaning of the term "modem". It is at odds even with the definition the EC *itself* used in its own measure. And it creates an utterly arbitrary dividing line that even the EC's own measure does not support – cable modems, for example, do not communicate through a telephone line, yet the EC considers cable modems to be "modems". If as the EC has argued this morning, modems must convert analog to digital and must use telephone lines, then why does the EC measure consider cable modems to be modems? The EC offers no response.

18. With respect to ISDN modems, the EC describes six documents from the Internet that it claims support its view that ISDN modems are not "modems". Only two of the documents even arguably address the question of whether ISDN modems are "modems" – the remainder simply describe how ISDN modems work. As for the two, one does not explain why an ISDN modem is not "technically" a modem – the United States by contrast has submitted sources stating that ISDN modems *are* "technically" modems, and further explaining, based on standards from the IEEE, how they modulate and demodulate signals. The other source is quoted out of context – in fact, the author earlier offers a definition of modulation that is identical to that provided by the United States. Furthermore, the source was identified by the EC through a search of GoogleBooks; another search of GoogleBooks reveals that it selectively cited to this source and omitted a number of sources confirming that ISDN modems are modems.

19. The EC then points to a document ostensibly prepared by Japan during the ITA negotiations containing *one product example* of an STB – to argue that the word "modem" must instead be used "in the same sense as used by that document." Yet the document does not even contain a definition of the term modem. The EC's argument simply comes down to this: rather than assume that negotiators used the term "modem" properly, the EC asks this Panel to *assume* that the negotiators used it improperly. This position simply strains credulity. Even the EC uses a technical definition of "modem" in its measure that encompasses all of the devices at issue.

20. Thus, with respect to STBs, the conclusion is clear: for the devices subject to duty because they have a hard disk, the EC concedes that they are "set top boxes" and "have a communication function" and has otherwise failed to show that there are limits to the concession that would exclude such devices from its terms. On devices subject to duty because they have certain modems, the EC has simply reversed course in the face of facts that it cannot dispute, but its new position still does not address, let alone overcome, the complainants' argumentation.

21. On the Article X claim, the EC continues to rely on the notion that a measure cannot be in effect merely because the EC has not taken a ministerial step. We have responded to this point in our second submission. Evidence shows that member States relied on the measure to classify products and were encouraged to do so by the Customs Code Committee before that step was taken. Thus the EC's position is simply contradicted by the facts.

II. FLAT PANEL DISPLAY DEVICES

22. First, the EC continues to protest that it does not understand the "scope" of the US claim, because it believes the United States has not provided a detailed definition of the "product." Again, the United States has been clear: under the measures, customs authorities in the EC and its member States impose duties on any FPD with DVI and any FPD capable of receiving signals from a device other than a computer. As a result, the EC and its member States have breached their obligations to provide duty free treatment to flat panel display devices for products falling within the ITA, wherever classified (as contained in the headnote), as well as their obligation to provide duty-free treatment to "input or output units" of ADP machines. The question is not whether a particular product is within the so-called "scope of the claim" – the question is whether the EC *measures* result in the imposition of duties on products that are entitled to duty free treatment under its *concessions.* The United States has explained in detail how they do so in its submissions. With respect to the purported obligation to first define the product, the Appellate Body in *EC – Computer Equipment* rejected the same argument the EC now advances, and it should again be rejected by this Panel.

23. Regarding the measures, the EC in its second submission again claims that, notwithstanding what the measures say, they do not require its customs authorities to impose duties on all products with DVI or all products capable of receiving signals from a device other than a computer. Again, the EC relies on *Kamino* to argue that its measures have changed, now citing to portions of the *Kamino* opinion in which the court critiques the Commission's arguments that devices capable of connecting to something other than a computer cannot be classified in subheading 8471 60 and that "the number and type of sockets with which monitors are equipped cannot, alone, constitute decisive criteria" for the classification of monitors. Notably, many of the arguments the court criticizes are among those the EC has continued to advance in this proceeding, including the EC's reliance on the HS Explanatory Notes to defend its measures. Nothing in the quoted portions of the opinion, however, indicate that, as a consequence of the issuance of the opinion, the HS2007 CNEN (in whole or in part) is no longer in effect in the EC. As the United States has repeatedly explained, while *Kamino* illustrates a number of the flaws in the EC's reasoning, the court did not address the measures at issue in this dispute (its reference to the ENs relates to the *2004* version of the ENs), nor did it modify those measures, nothing in the record supports the conclusion that it did, and the EC's own account of its process for "reviewing" the measures demonstrates that they remain in effect.

24. The EC also now appears to rely on the "mutatis mutandis" reference in the CNEN to subheading 8528 51 00, to suggest that the criteria identified by complainants may not in fact be incorporated into the CNEN for that subheading. Specifically, the EC points to the fact that when the CNEN was placed in the HS2007 nomenclature, the detailed criteria were set out in subheading 8528 41 00, and rather than repeat those criteria verbatim in subheading 8528 51 00, the CNEN for subheading 8528 51 00 indicates that the criteria apply "mutatis mutandis". Based on this, the EC suggests that perhaps the criteria complained of do not apply to imports of flat panel display devices but only to CRT monitors. Of course, the EC does not go so far as to assert that the DVI criterion or the criterion regarding connectability are not in fact reflected in the CNEN for subheading 8528 51 00; it merely states that "it is necessary to distinguish between the technical criteria that are relevant only in relation to CRT technology."

25. In fact, the BTI on the record demonstrate that member States have in fact applied both the DVI and the connectability criteria in classifying goods under 8528 51 00 (and the EC in another dispute has referred to the CNEN as ensuring uniform classification of LCD monitors). The record does not support any conclusion other than that "mutatis mutandis" simply means that technically inapplicable language such as the criteria specifically identified as describing monitors "of the CRT type" would not be reflected in the CNEN for purposes of subheading 8528 51 00.

26. Finally, with respect to the FPD regulations, the EC simply repeats its argument that the regulations have "effectively lost their applicability" as a result of the implementation of HS2007, simply due to changes in the nomenclature. It offers no response to the evidence provided by the United States, including evidence showing that regulations using pre-HS2007 nomenclature have been relied upon by EC customs authorities in decisions issued since HS2007 was adopted. It is also somewhat remarkable that the EC insists that *regulations* using pre-HS2007 nomenclature have no effect today, even as it persists in arguing that *court opinions* using pre-HS2007 nomenclature and interpreting pre-HS2007 measures, such as *Kamino*, have profound effects on measures drafted in HS2007 nomenclature.

27. Regarding the concessions, in its second submission the EC again advances an interpretation that does not correspond to the text. In this case, the EC attempts to use "context," to read language into the flat panel display device commitment that it does not contain. Not only does the EC claim that language in the CRT monitor provision regarding the exclusion of televisions must be read into the FPD provision, it also asserts that this language must be read to "necessarily" exclude video monitors (even though even the CRT provision does not refer to video monitors). Quite simply, a proper interpretation of the CRT provision as "context" to interpret the FPD concession supports the opposite conclusion: had the negotiators intended the language in the CRT provision to apply to all provisions of Attachment B, they would not have placed it in the CRT provision only, and had they intended to include "video monitors" in that exclusion, they would have done so expressly.

III. MULTIFUNCTION DIGITAL MACHINES

28. First, as noted earlier, the EC's second submission is strikingly bereft of any discussion of its measures, in particular the CN provisions that result in the imposition of duties on any indirect process MFM capable of reproducing more than 12 pages per minute. As the United States has explained, these measures are in effect. As a result of the measures, the EC imposes duties on any indirect process MFM capable of reproducing more than 12 pages per minute, and any MFM without a facsimile feature, regardless of the number of pages per minute it can reproduce. In so doing it subjects to duties certain "input or output units" and "facsimile machines." The United States has explained why the devices in question fall within the concessions under subheading 8471 60 or 8517 21. The only response the EC offers is that, to fall within 8471 60, the devices must be "solely or principally" used in an ADP system, as provided in note 5 to Chapter 84. Contrary to what the EC suggests, the United States has discussed note 5 in its submissions and has provided evidence showing that the printer function is the most significant function. Rather than contend with this evidence, the EC instead claims that it is entitled to impose duties on MFMs because they are "photocopiers." As the United States has explained, MFMs operate through a scanner and print module (print engine and print controller), and in some cases, incorporate a modem allowing them to transmit facsimiles. They are not "photocopiers". Moreover, *nowhere* has the EC explained why the mere fact that a device is capable of reproducing more than 12 pages per minute means that it is *always* a "photocopier" and *never* an "input or output unit" or "facsimile machine." Likewise, nowhere has the EC explained why the mere fact that a device that connects to a computer or network but lacks a facsimile feature is always a "photocopier" and never an "input or output unit." Yet this is precisely what the EC measures provide.

29. With regard to the EC's argument that the devices in question are in fact "photocopiers" classifiable in HS96 subheading 9009 12, the United States notes with interest the EC's newfound desire to focus first on the text of HS heading 9009 in conducting its analysis rather than subheading 9009 12. As the Panel may recall, this is precisely the approach the United States used to demonstrate that the EC's position cannot be sustained. As the United States also explained in its second submission, the EC's argument in fact is not supported by the terms of the heading. An MFM is not

an "indirect process photocopier." It does not use light to produce a copy, but rather to collect digital data. It does not incorporate "an optical system" – rather it consists of a scanner and print module.

30. The EC does not in its second submission respond to most of the arguments the United States has made to date on MFMs, including: (1) that the number of pages per minute that a device produces has *absolutely no bearing* on the ordinary meaning of "input or output unit," nor any significance from a practical standpoint, and that most MFMs currently sold which connect to computers are capable of producing copies at a rate of more than 12 pages per minute; (2) that the printer unit is by far the largest component of the MFM, is able to operate independently from the scanner or fax unit, and represents the largest portion of the cost of manufacturing a typical MFM; and that typical MFM users print far more often than they make digital copies; and (3) that heading 8471 expressly covers combined devices, and therefore simply combining a print module and scanner – two devices covered by heading 8471 – provides no basis to exclude the end product – an MFM – from that heading. (The EC does respond to the purported US argument that CCD is not a "light sensitive surface"; however, the United States never in fact made that argument.)

31. The EC argues, for example, that "all the evidence made available to the Panel by the parties and third parties points to the conclusion that prior to the conclusion of the ITA, all WTO members, and not just the European Communities, classified digital copiers under HS96 9009." If one were to read the EC's statements that follow, one might believe that some Members were in fact classifying all *MFMs* in heading 9009 during the ITA negotiations. Yet a more careful look at the material cited in fact reveals that this characterization of Members' positions is, at best, profoundly misleading.

32. First, the EC asserts that Chinese Taipei, along with Singapore, has "recognized explicitly that, prior to the conclusion of the ITA, it classified all digital copiers as photocopying apparatus under HS96 9009." The EC cites for this conclusion a response to a question from the EC regarding the classification of what the EC described as "*single-function* digital copiers" – *i.e.*, devices that *are not* MFMs, the product at issue in this dispute. In fact, with respect to MFMs, Chinese Taipei states that it classified the devices on a "case by case basis" and Singapore states that it classified devices based on the physical component which imparted the device its essential character. Thus these answers do not support the conclusion that there exists a "practice" with respect to classification of MFMs, nor do the materials cited otherwise support the conclusion that the EC measure is consistent with its obligations. Certainly nothing in the materials indicates a "practice" akin to what the EC measure provides – imposing duties on *any* indirect process MFM capable of reproducing more than 12 pages per minute, or *any* indirect process MFM without a facsimile function, as its measure provides.

33. The second item the EC cites to is the supposed classification practice of the United States. However, the EC's evidence that the United States had a "practice" of treating MFMs as photocopiers under heading 9009 is an assortment of classification opinions issued by the United States that *do not* classify products in heading 9009 *or even refer* to heading 9009. The EC in fact points to nothing more than two opinions predating the ITA negotiations – while ignoring the large number of opinions before the Panel in which US Customs and Border Protection (CBP) treated MFMs as "input or output units" of subheading 8471 60.

34. Finally, the third item that the EC attempts to rely on is the *absence* of classification practice, in particular that of Japan and certain third parties. Regarding Japan, the EC again refers to a proposal Japan made during the ITA II negotiations – as the United States explained in its second submission, it was recognized that a number of products proposed for inclusion in ITA II may already have been covered by the ITA. Thus a negotiating proposal says little about what was covered by the concessions at issue in this dispute, and certainly does not indicate a "common, concordant, and

consistent" practice even on the part of Japan, the Member putting forward the proposal. Likewise, the absence of evidence regarding classification by third parties or other WTO Members cannot support the conclusion that there exists a "common, concordant, and consistent" practice on the part of other WTO Members. Even with respect to the EC's "practice", the evidence demonstrates inconsistencies. In sum, the EC fails to demonstrate that there exists a "practice" among WTO Members, much less one that supports its interpretation of the concession.

ANNEX B

SUBMISSIONS OF JAPAN

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ANNEX B-1

**EXECUTIVE SUMMARY OF THE
FIRST WRITTEN SUBMISSION BY JAPAN**

I. INTRODUCTION

1. Japan's first written submission in *EC – Tariff Treatment of Certain Information Technology Products* sets forth the legal arguments challenging European Community ("EC") tariffs with regard to three categories of information technology products – multifunctional digital machines ("MFMs") with and without digital connectivity, flat panel display devices for automatic data processing machines, and set top boxes ("STBs") with a communication function. Specifically, Japan argues that any assessment of duties against these products would be inconsistent with EC obligations under its schedule of tariff concessions, and would thus be inconsistent with Articles II:1(a) and II:1(b) of GATT 1994.

2. For each of these three products, Japan presents its arguments on the meaning of the language in the relevant tariff concessions. Japan ascertains the meaning of this language – both the ordinary meaning of the language of specific concessions, and the meaning of that language in the context of the other language in the EC's schedule of tariff concessions. Japan believes the language of the relevant tariff concession leaves no doubt that these products should be duty free. To find otherwise would ignore the language of the concession, and would unjustifiably undermine the important trade liberalization represented by the Ministerial Declaration on Trade in Information Technology ("ITA") signed in 1996.

II. EC MEASURES CONCERNING MULTIFUNCTIONAL DIGITAL MACHINES ARE INCONSISTENT WITH EC OBLIGATIONS UNDER ARTICLES II:1(A) AND II:1(B) OF THE GATT 1994

3. The first category of products, MFMs, fall into two distinct groupings, with different tariff concessions relevant to each. MFMs are digital devices that generally incorporate an input unit (a scanner unit to convert information into digital input for the device) and an output unit (a printer unit that allows the digital output from the device to be printed). Japan uses the term "MFMs" to refer to machines that, in addition to printing, may be used for scanning, digital copying, or facsimile transmission. Some MFMs have the ability to connect with a computer or computer network. The other MFMs do not have this computer connectivity, operate primarily in connection with a telephone line, and are generally known commercially as facsimile machines.

A. MFMs WITH DIGITAL CONNECTIVITY MUST BE ACCORDED DUTY-FREE STATUS

4. MFMs are digital devices that generally incorporate both an input unit and an output unit. Once a document has been converted into digital information, that information can be stored, manipulated on the computer, transmitted over phone lines, or sent over the Internet. MFMs with digital connectivity are subject to tariff concessions that the EC made under heading 84.71 and subheading 8471.60, which are listed in Attachment A to the ITA. The EC bound the duty rate for those products under heading 84.71 and subheading 8471.60 at zero. However, the EC has been imposing duties on these products.

5. Japan believes the ordinary meaning of the language of EC concessions confirms that MFMs with digital connectivity must belong in heading 84.71 and therefore must be accorded duty-free status. The failure to do so is inconsistent with Articles II:1(a) and II:1(b) of the GATT 1994 as less

favorable than the treatment accorded to MFMs with digital connectivity under Schedule LXXX of EC tariff concessions.

6. The ordinary meaning of "units" in heading 84.71 and "output units" in subheading 8471.60 confirms that MFMs with digital connectivity belong in heading 84.71. Whether the Panel considers the ordinary sense or the technology sense of these words, both point unambiguously to the conclusion that MFMs that can print digital output from a computer must fall under heading 84.71. This printing function of MFMs confirms that MFMs are "output units – printers" within the ordinary meaning of these terms.

7. Conversely, the ordinary meaning of "photocopying" in heading 90.09 equally confirms that MFMs cannot fall under this heading. "Photocopying" represents a fundamentally different technology. Unlike MFMs, which are based on digital technology and which can thus connect to and interact with computers, photocopiers are based on optical technology. A photocopier makes copies based on light reflected from an original document. A photocopier is not a digital device and cannot connect to a computer. Photocopiers fall under Chapter 90 for optical products because they are a fundamentally different technology. The fact that MFMs cannot fall under the ordinary meaning of heading 90.09 reinforces the conclusion that MFMs in fact belong under heading 84.71.

8. These arguments about the ordinary meaning of key terms are confirmed by the factual context of MFMs and photocopiers. Unlike photocopiers, MFMs do not need an original document to make a copy. MFMs can receive digital data from a computer or other sources, and printout that data, with or without an original. Unlike photocopiers, the operation of MFMs is not limited by the persistence of the image. MFMs can save the digital data and use it now or use it later, while photocopiers can only function as long as the light is reflecting off the original document. Unlike photocopiers, MFMs can share the data creating an image. MFMs can easily share data with the computer or send it over networks, while photocopiers can use the reflected light to make copies. Finally unlike photocopiers, MFMs can manipulate the digital data that creates the printout. MFMs operate based on digital data, and therefore have all of the flexibility that digital data provides. These technological differences highlight the tremendous differences between "output units" and "photocopiers."

9. Beyond the ordinary meaning "output units" and "photocopying", the broader context in which these terms appear reinforces the conclusion that MFMs with digital connectivity must fall within heading 84.71. The phrase "output units" in subheading 8471.60 falls among other subheadings that cover all types of computers, and all types of computer "units" – whether separately or in various combinations. When the various subheadings of heading 84.71 are read as a whole, it is hard to image a broader description of products based on digital technology and working with computers than the description of each subheadings of heading 84.71.

10. Conversely, the context of heading 90.09 equally confirms that this heading could not possibly apply to a digital product like an MFM with computer connectivity. The other headings of chapter 90 all describe optical products, which explains why "photocopying" – based on optical technology – falls in chapter 90. Photocopiers cannot connect to computers, are not based on digital technology, and therefore cannot possibly cover MFMs that do connect to computers are based on digital technology.

11. Japan believes that ordinary meaning of the terms "output units" and "photocopying" read in context can resolve this dispute by itself, but interpretative materials from the Harmonized System also confirm this interpretation. Note 5 to Chapter 84 defines a broad scope for devices that are "units" as "printers" that output computer data. Particularly, Note 5(D) specifically addresses certain

types of computer "units" and confirms that "printers" (a specifically enumerated type of "output unit" in the EC schedule of concessions) must be classified in heading 84.71 as long as those "printers" are connectable to a computer and can accept digital data.

12. Similarly, the Harmonized System materials concerning heading 90.09 confirm what the ordinary meaning of "photocopying" would suggest – that photocopiers are technologically different than computer "output units." The Harmonized System Explanatory Notes for heading 90.09 confirm that "indirect process" electrostatic photocopying involves projecting an optical image onto a photosensitive drum or plate as an intermediary, and then making photocopies onto plain paper from the photosensitive drum. This commentary confirms that "indirect process" had a very specific and narrow meaning when it was used in the EC Schedule, and in no way could be construed to apply to MFMs that are based on digital, not optical technologies.

13. Finally, the object and purpose of the EC concessions would be best served by a confirmation of the duty-free treatment of MFMs as computer "output units". The WTO Agreement seeks to reduce tariffs and barriers to trade, an object and purpose which the ITA embraced and furthered by eliminating tariffs on information technology products. The concessions on heading 84.71 covered all computer "units" and used that term broadly and inclusively. Nothing in the ordinary meaning or the context of the language in heading 84.71 suggests that the term computer "units" should be read narrowly as only applying to certain products or certain generations of computer "units". In sharp contrast, the language in heading 90.09 refers to a very specific non-digital technology that was not part of the concessions in the ITA. It would be inconsistent with the object and purpose of the WTO Agreement to allow the narrow scope defined by the language of heading 90.09 to expand in such a way as to exclude from duty free treatment products such as MFMs that fall squarely within the scope of the broad language of the original concessions on heading 84.71.

B. MFMs WITH FACSIMILE CAPABILITY BUT WITHOUT DIGITAL CONNECTIVITY MUST SIMILARLY BE ACCORDED DUTY-FREE STATUS

14. MFMs with facsimile capability but without digital connectivity are subject to tariff concessions that the EC made under heading 85.17 and subheading 8517.21, which are listed in Attachment A to the ITA. The EC bound the duty rate for those products under heading 85.17 and subheading 8517.21 at zero. However, the EC has been imposing duties on these products.

15. Japan believes the ordinary meaning of the language of EC concessions confirms that MFMs with facsimile capability, but without digital connectivity, must belong in heading 85.17 and therefore must be accorded duty-free status. The failure to do so is inconsistent with Articles II:1(a) and II:1(b) of the GATT 1994 as less favorable than the treatment accorded to such MFMs under Schedule LXXX of EC tariff concessions.

16. The ordinary meaning of "facsimile machines" in subheading 8517.21 confirms that MFMs with facsimile capability, but without digital connectivity, belong in heading 85.17. Whether the Panel considers the technology sense or the ordinary sense of these words, both point unambiguously to the conclusion that MFMs that send and receive facsimiles (but do not have computer connectivity that would place them in heading 84.71) must fall under heading 85.17.

17. Conversely, the ordinary meaning of "photocopying" in heading 90.09 equally confirms that MFMs – with or without digital connectivity – cannot fall under this heading. "Photocopying" represents a fundamentally different technology. Unlike MFMs, which are based on digital technology and which use digital technology to send and receive messages over the telephone lines, photocopiers operates based on optical technology. The fact that MFMs cannot fall under the

ordinary meaning of heading 90.09 reinforces the conclusion that MFMs with facsimile capability, but without digital connectivity, in fact belong under heading 85.17. These arguments about the ordinary meaning of key terms are confirmed by the very different underlying technologies of MFMs and photocopiers.

18. Japan believes that the ordinary meaning of the terms "facsimile machines" and "photocopying" read in context can alone resolve this dispute, but that interpretative materials from the Harmonized System confirm this interpretation. In particular, Harmonized System Explanatory Notes ("HSEN") to Chapter 85 provides useful interpretative guidance. This HSEN explains the scope of "facsimile machines," and confirms its focus on its sending and receiving messages over telephone lines using digital technology. This HSEN reinforces the distinction between the digital technology for all MFMs, and the optical technology for photocopiers.

19. Finally, the object and purpose of the EC concessions would be best served by confirming the duty-free treatment of these MFMs as "facsimile machines". The WTO Agreement seeks to reduce tariffs and barriers to trade, an object and purpose that the ITA embraced and furthered by eliminating tariffs on information technology products. The concessions on heading 85.17 covered all "facsimile machines" and used that term broadly and inclusively. Nothing in the ordinary meaning or the context of the language in heading 85.17 or subheading 8517.21 suggests that the term "facsimile machines" should be read narrowly as only applying to certain products or certain generations of "facsimile machines". In sharp contrast, the language in heading 90.09 refers to a very specific non-digital technology that was not part of the coverage of the ITA. It would be inconsistent with the object and purpose of the WTO Agreement to allow the narrow scope of the language of heading 90.09 to expand in such a way as to exclude from duty free treatment products such as MFMs that fall squarely within the scope of the broad language of the original concessions on heading 85.17.

III. EC MEASURES CONCERNING FLAT PANEL DISPLAY DEVICES "FOR" AUTOMATIC DATA PROCESSING MACHINES ARE INCONSISTENT WITH THE EC'S OBLIGATIONS UNDER ARTICLE II:1(A) AND II:1(B) OF GATT 1994

20. This dispute also covers "flat panel display devices," including the liquid crystal display ("LCD") type commonly referred to as "LCD monitors". Flat panel display devices, including LCD monitors, for automatic data processing ("ADP") machines are listed in Attachment B to the ITA, which incorporates them in EC's Schedule LXXX and makes them entitled to duty-free treatment. In the alternative, flat panel display devices for ADP machines are subject to tariff concessions that the EC made on those products under heading 84.71 and subheading 8471.60, which are listed in Attachment A to the ITA. The EC bound the duty rate for those products under heading 84.71 and subheading 8471.60 at zero. However, the EC has been imposing duties on these products. It should be noted that while Japan's submission focuses on LCD monitors with a "digital visual interface" or DVI, the scope of this dispute comprises flat panel display devices "for" ADP machines, the most common type of which are LCD monitors with DVI.

21. As with the MFMs discussed earlier, Japan believes this dispute is about the meaning of specific language in EC tariff concessions. Japan believes the ordinary meaning of the language of EC concessions confirms that LCD monitors with DVI must be accorded duty-free status. The failure to do so is inconsistent with Articles II:1(a) and II:1(b) of the GATT 1994 as less favorable than the treatment to be accorded to LCD monitors with DVI pursuant to Schedule LXXX of EC tariff concessions.

22. The EC incorporated a headnote referencing the list of specific products in Attachment B to the ITA, as part of its Schedule LXXX. One of these products is "flat panel display devices

(including LCD…) for products falling within this agreement…". An LCD monitor with DVI is a display device "for" an ADP machine, and ADP machines are indisputably products falling within the ITA. Therefore, LCD monitors with DVI are explicitly covered by the concessions of Schedule LXXX and entitled to duty-free treatment.

23. The history of the LCD monitors used in computers provides facts that confirm this ordinary meaning that LCD monitors with DVI are "for" computers. LCD monitors were being used for computers long before the ITA, and the DVI technology simply made the connection between LCD monitors and computers more direct – allowing a digital-to-digital transfer of signals, without any need to go through any conversion from an analogue signal. Many LCD monitors are "for" a computer, and an LCD monitor with DVI is undeniably "for" a computer.

24. The ordinary meaning of this phrase – LCD monitors "for" computers – is reinforced by the context in which this phrase was used. Attachment B also discusses projection-type flat panel displays. The sole requirement to projection-type flat panel displays to be duty free is that such devices "can" display digital information from a computer, and that in no way precludes multiple uses for these devices. The context provided by this other display device confirms that it is only necessary for LCD monitors "for" computers to be capable of receiving a digital signal from a computer to be eligible for duty-free treatment. Had any other limitations been contemplated, Attachment B would not have used the broad term "for" and the language on LCD monitors would have included some limitation. It does not.

25. Further contextual understanding can be seen in the treatment of network equipment in Attachment B. This provision specifically requires that such equipment be "dedicated for use solely or principally" with computers. This provision shows that where the parties sought to limit the use of the equipment to that dedicated to computers, they knew how to do so; the fact that they used the simple word "for" in the flat panel devices provision indicates that they did not intend such a limitation.

26. In the alternative, Attachment A to the ITA provides an independent legal basis to treat LCD monitors with DVI as duty-free. Attachment A is a list of HS headings and subheadings covered by the concessions of Schedule LXXX. Included in this list are heading 84.71 and subheading 8471.60. The ordinary meaning of the terms of heading 84.71 and subheading 8471.60 requires the classification of LCD monitors with DVI under these categories, resulting in their duty-free treatment under Schedule LXXX.

27. The context of the terms in heading 84.71 and subheading 8471.60 supports this conclusion. The parties sought to provide for broad inclusion of products used in connection with ADP machines. Nothing in this context imposes any limitation of the concessions to output devices that are used exclusively as outputs of ADP machines.

28. The Notes to Chapter 84, and particularly Note 5 to Chapter 84, provide helpful information for understanding the language of heading 84.71. Note 5(C) to Chapter 84 states that "separately presented units of an automatic data processing machine are to be classified in heading 84.71". This broad and inclusive provision requires LCD monitors with DVI, as "units of" an ADP machine, to be classified in heading 84.71.

29. In addition, Note 5(B) to Chapter 84 says that for purposes of heading 84.71, a unit is to be regarded as part of an ADP system if it is "solely or principally" used in connection with an ADP

system.[1] The ordinary meaning of the term "principally" is that the monitors may have uses other than output devices of ADP machines. The very language of the statements made by the EC in its regulations - in particular Council Regulation (EC) No 493/2005 of 16 March 2005 – concedes that LCD monitors with DVI are "mainly" used in connection with ADP machines. Hence, the basis of the EC's classification of LCD monitors as outside heading 84.71 is self-contradictory and wrong.

30. The object and purpose of the EC concessions would be best served by confirming the duty-free treatment of LCD monitors with DVI. The WTO Agreement seeks to reduce tariffs and barriers to trade, an object and purpose which the ITA embraced and furthered by eliminating tariffs on information technology products. The concessions for those products specifically listed in Attachment B and for those products listed in Attachment A covered by heading 84.71 on all computer "units" were broad and inclusive. Nothing in the ordinary meaning or the context of this language suggests that it should be construed narrowly as only applying to LCD monitors used only for computers, and excluding other LCD monitors. It would be inconsistent with the object and purpose of the WTO Agreement to allow the EC to graft this limitation onto tariff concessions that have no such limitation.

31. Since the EC's measures provide for the classification of LCD monitors with DVI under 84.71 only if they receive signals solely from an ADP machine and cannot receive signals from any other source, these measures are inconsistent with the concessions set forth in Schedule LXXX which is an integral part of the GATT 1994, and which incorporated Attachment B and Attachment A to the ITA.

IV. EC MEASURES CONCERNING SET TOP BOXES WITH A COMMUNICATION FUNCTION ARE INCONSISTENT WITH EC OBLIGATIONS UNDER ARTICLES II:1(A) AND II:1(B) OF THE GATT 1994

32. STB is an electronic apparatus that connects to a communication channel, such as a phone, ISDN (integrated services digital network) or cable television line, and produces output on a conventional television screen. STBs with a communication function are listed in Attachment B to the ITA, which incorporates them in EC's Schedule LXXX and makes them entitled to duty-free treatment. In the alternative, those STBs are subject to tariff concessions that the EC made on those products under subheading 8517.50, 8517.80 and 8525.20, which are listed in Attachment A to the ITA. The EC bound the duty rate for those products under above-mentioned subheadings at zero. However, the EC has been imposing duties on these products.

33. Japan believes that the language in the EC tariff concession is dispositive to this dispute. Japan believes that this language requires that all STBs which have a communication function be granted duty-free treatment, regardless of where the STBs are classified under the tariff nomenclature.

34. The ordinary meaning of the phrase "set top boxes which have a communication function" confirms this interpretation. The meaning of this language is broad, covering those STBs whose purpose or intended role is the transmission or exchange of information, without any limitation on the type of information exchanged. This language certainly includes STBs with modems for gaining access to the Internet, which the EC concedes in the Explanatory Notes to the Combined Nomenclature ("CNEN") as "set top boxes". The language also includes other methods of receiving signals, and nothing in the language supports the EC's reading that an STB with a communication

[1] Note 5(B) was reconfigured in 2007, with the "solely or principally" language becoming a part of Note 5(C). The language concerning "separately presented units" remained in the new Note 5(C). To avoid confusion, we refer to the subsections of Note 5 as they existed at the time the ITA was negotiated and the concessions at issue were made. This means that we will refer to the "solely or principally" rule as being part of note 5(B).

function may not be equipped with a hard disk or other "recording or reproducing" apparatus. The EC measure is contradictory and illogically ignores the ordinary meaning of the language of the EC concession.

35. This ordinary meaning is reinforced by the specific headnote that confirms any product listed in Attachment B must be granted duty free treatment regardless of where the product is classified under the tariff nomenclature.

36. Beyond the meaning of "set top boxes which have a communication function", the broader context of the phrase confirms that the EC Concessions includes all STBs with a communication function. An examination of other devices covered in Attachment B shows that the drafters provided clear statements where they intended to limit the functions of an apparatus; no such limitations exist with regard to STBs. The separate treatment provided for in headings for products able to perform different functions, indicates that where no such differentiated treatment exists, such as here, devices able to perform more than one function should not be treated differently.

37. Finally, the object and purpose of the EC Concessions are best served by continued duty-free treatment of STBs with a communications function. In addition to furthering the reduction of tariffs and expansion of trade, the ITA aimed to encourage technological development. It would be inconsistent with this objective to reduce tariffs on a product, only to permit the reimposition of those tariffs simply because of an evolution in that product.

ANNEX B-2

EXECUTIVE SUMMARY OF THE ORAL STATEMENT BY JAPAN AT THE FIRST SUBSTANTIVE MEETING

I. INTRODUCTION

1. Before we launch into the details of the arguments in this dispute, Japan would like to make a few general observations. First, this dispute is fundamentally about the meaning of the specific language in the EC schedule of tariff concessions. The EC's arguments in this dispute will try to shift the focus away from the language itself, and direct our attention to interpretative tools rather remote from the language.

2. Second, as provided by the Appellate Body in *EC – Computer Equipment*, the scope of tariff concessions should not be determined in light of "legitimate expectations". The language must govern. The EC's first written submission, however, rests rather heavily on its "expectations" at the time of the concessions, by referring to the products at issue as "new products" and "multifunctional products."

3. Finally, the expectations of the opportunity for future negotiations do not change the meaning of the tariff concessions at issue. When reviewing the EC arguments in this case, Japan has been struck by how little attention the EC paid to the language of the concessions themselves, and how much discussion the EC devoted to the mechanisms for future negotiations.

4. Japan presents its arguments on the meaning of the language in the relevant tariff concessions. Japan believes the language of the relevant tariff concessions leaves no doubt that these products should be duty-free.

II. EC MEASURES CONCERNING MULTIFUNCTIONAL DIGITAL MACHINES ARE INCONSISTENT WITH EC OBLIGATIONS UNDER ARTICLE II:1(A) AND II:1(B) OF GATT 1994

5. Multifunctional digital machines – so-called "MFMs" – fall into two distinct groupings, with different tariff concessions relevant to each. MFMs are digital devices that generally incorporate an "input unit" and an "output unit".

6. Commercial MFMs fall into two groups. Some MFMs have the ability to connect with a computer or computer network. Other MFMs do not have this computer connectivity, and instead operate primarily in connection with a telephone line, and are generally known commercially as facsimile machines. Because these products are covered by different tariff concession, we discuss each separately.

A. MFMs WITH DIGITAL CONNECTIVITY MUST BE ACCORDED DUTY-FREE STATUS

7. Japan believes the ordinary meaning of the language of the EC concessions on heading 84.71 confirms that MFMs with digital connectivity fall within the scope of the tariff concessions and therefore must be accorded duty-free status.

1. Meaning of "Units" and "Photocopying"

8. The ordinary meaning of "units" in heading 84.71 and "output units" in subheading 8471.60 confirms that MFMs with digital connectivity belong in heading 84.71. Whether the Panel considers the ordinary sense or the technology sense of these words, both point unambiguously to the conclusion that MFMs that can print digital output from a computer must fall under heading 84.71. This predominant printing function of MFMs confirms that MFMs are "output units – printers" within the ordinary meaning of these terms.

9. The term "photocopying" in heading 90.09, as properly viewed as context for heading 84.71, confirms that digital copiers are not covered under heading 90.09, and therefore only heading 84.71 covers MFMs. Photocopiers fall under Chapter 90, which is for optical products, because "photocopying" represents a fundamentally different technology from MFMs. Unlike MFMs with digital connectivity, which are based on digital technology and which can thus connect to and interact with computers, photocopiers are based on analogue or optical technology. A photocopier makes copies based on light reflected from an original document.

10. We urge the Panel to stop and reflect on the language at issue. The EC largely refuses to discuss the ordinary meaning of the key phrase "output units" in subheading 8471.60. Instead the EC jumps to the word "photocopying" in heading 90.09 and argues this term must include so-called digital copying. However, "photocopying" has a much more specific and narrow meaning.

11. Finally, these arguments about the ordinary meaning of key terms are confirmed by the factual context of MFMs and photocopiers. Unlike photocopiers, MFMs operate based on digital data, and therefore have all of the flexibility that digital data provide. MFMs can receive digital data from computer or other sources, print digital data even without an original document, save digital data and use it now or later without limitation of persistence of the image, share digital data with computers or sending it over networks and manipulate digital data that create printout. The technological differences highlight the tremendous distinctions between "output units" and "photocopiers," and help confirm the ordinary meaning of these terms.

12. As stated by the Appellate Body in *EC – Chicken Cuts*, "in characterizing a product for purposes of tariff classification, it is necessary to look exclusively at the "objective characteristics" of the product in question when presented at the border." Instead of doing so, the EC's argument appears to use its own arbitrary criteria for characterizing the product.

2. The terms of the EC Schedule as further context

13. The above interpretation of the ordinary meaning of heading 84.71 is supported by that of other terms in the EC Schedules as context. The EC believes that MFMs fall within the scope of the following language of subheading 9009.12: "Electrostatic photocopying apparatus … operating by reproducing the original image via an intermediate onto the copy (indirect process)." However, the phrase "via an intermediate onto the copy (indirect process)" in subheading 9009.12 refers to a very specific technology and a very specific type of device. The text of subheading 9009.12 refers to operations that reproduce the original image via an intermediate onto the copy. The terms "image" and "copy" are both in a singular form, indicating that photocopying apparatus should reproduce a single copy from a single original image. In contrast, digital copying machines can reproduce many copies from a single set of digital data scanned and stored in memory from an original document.

14. Further, the phrase refers to a single "intermediate" – an intermediate – not an unlimited series of devices operating in conjunction to create or transfer digital data. This use of "an intermediate"

makes no sense when discussing a digital MFM, since there is no single "intermediate," or for that matter no intermediate or intermediates at all.

15. The key phrase also refers to a specific "indirect process". This phrase does not cover a wide range of multiple processes that each may collectively operate "indirectly." This "indirect process" cannot go beyond the scope of a "photocopying" process described as "operating by reproducing the original image via an intermediate onto the copy". Therefore "indirect process" does relate to photocopying, but not to digital copying. The issue here is the "indirect process electrostatic photocopying", which involves projecting a single optical image onto a photosensitive drum or plate as a single intermediate, and then making a single photocopy onto plain paper from the photosensitive drum.

16. Nor is Japan's interpretation of the ordinary meaning of "indirect process electrostatic photocopying" particularly novel or controversial. Indeed, the EC itself used precisely the same interpretation in October 1995 to conclude that digital copiers were not indirect process photocopiers within the meaning of subheading 9009.12.

17. Beyond the ordinary meaning of the phrases "output units" and "photocopying," the context in which these terms appear reinforces the conclusion that MFMs with digital connectivity must fall within heading 84.71. The phrase "output units" in subheading 8471.60 falls among other subheadings of heading 84.71 that cover all types of computers, and more importantly all types of computer "units" – whether separately or in various combinations.

3. HS and its rules

18. In light of the clarity of the language in the concessions themselves, the analysis of the HS and its related rules is of little practical value; indeed, such an analysis simply confirms the ordinary meaning of the language in the concessions. As an initial matter, we must emphasize that the decision by the European Court of Justice in the *Kip* case, while useful in a number of respects in highlighting flaws in the EC's position, is merely the EC's interpretation of the HS under its domestic law within its jurisdiction. This decision in no way binds this panel. That being said, the EC's discussion of the *Kip* case leaves out two very important points. First, the EC ignores that the commentary by the ECJ that "those machines are likely to be of a kind used principally in an automatic data-processing system," recognizing the key importance of this digital interface and computer connectivity in assessing these products. Second, the ECJ properly noted that the MFMs at issue "comprise, in a single housing, a laser printer module and a scanner module." The EC in its first written submission, however, arbitrarily divides the printer module into a print engine and print controller. This bifurcation ignores the reality that a print engine without a print controller cannot function.

19. The EC's argument that the tariff concession on heading 84.71 excludes MFMs with digital connectivity rests largely on its arguments about Note 5(B). Yet, these arguments fail to pay sufficient attention to Note 5(D). As stated in Japan's first written submission, with respect to "printers", it is Note 5(D), rather than Note 5(B), that is relevant.

20. Similarly the HS Explanatory Note – HSEN – concerning heading 90.09 confirm what the ordinary meaning of "photocopying" would suggest – that photocopiers are technologically different from computer "output units." The HSEN for heading 90.09 confirms that "indirect process" electrostatic photocopying involves projecting an optical image onto a photosensitive drum or plate as an intermediate, and then making a photocopy onto plain paper from the photosensitive drum.

21. The EC also argues that General Interpretative Rule 3(c) governs in this case based upon the ECJ's determination in the *Kip* case. However, before reaching GIR 3(c), GIR 3(b) must be considered. For purposes of the analysis under GIR 3(b), MFMs with digital connectivity are considered to be composed of the two key components – a printer module and a scanner module – and it is the printer module that gives MFMs their essential character because of the predominant printing function of MFMs. Moreover, both of the two key components – a printer module and a scanner module – belong to the same heading (i.e., 84.71). Therefore, GIR 3(c) and heading 90.09 are not applicable to this analysis.

4. Object and purpose

22. Finally, the object and purpose of the EC concessions would be best served by a confirmation of the duty-free treatment to the MFMs as computer "output units". The WTO Agreement seeks to reduce tariffs and barriers to trade and it would be inconsistent to allow the narrow scope defined by the language of heading 90.09 to expand in such a way as to exclude products such as MFMs that fall squarely within the scope of the broad language of the original concessions on heading 84.71 from duty-free treatment.

23. The EC argues that Japan has focused on the object and purpose of the ITA, not the WTO Agreements. In fact, Japan's first written submission explained how the object and purpose of the WTO Agreements and GATT 1994 apply here.

B. MFMS WITH FACSIMILE CAPABILITY BUT WITHOUT DIGITAL CONNECTIVITY MUST SIMILARLY BE ACCORDED DUTY-FREE STATUS

24. Japan believes the ordinary meaning, both in the technology sense and in the ordinary sense, of the language of EC concessions confirms that MFMs with facsimile capability, but without digital connectivity, must belong in heading 85.17 and therefore must be accorded duty-free status.

25. Conversely, the ordinary meaning of "photocopying" in heading 90.09 equally confirms that MFMs – with or without digital connectivity – cannot fall under this heading. "Photocopying" represents a fundamentally different technology from MFMs. These arguments about the ordinary meaning of key terms are confirmed by the very different underlying technologies of MFMs and photocopiers.

26. The EC argument on these products is basically that digital copying is a form of photocopying, and so heading 90.09 can apply. For the reasons discussed earlier, this EC argument has no foundation.

III. EC MEASURES CONCERNING FLAT PANEL DISPLAY DEVICES "FOR" AUTOMATIC DATA PROCESSING MACHINES ARE INCONSISTENT WITH THE EC'S OBLIGATIONS UNDER ARTICLE II:1(A) AND II:1(B) OF GATT 1994

27. Japan would like to begin its statement on flat-panel display devices – FPD devices – by refocusing the discussion on the issue before the Panel. As is the case for MFMs, the issue in this dispute is interpreting the language of the EC's relevant tariff concession, i.e., whether the concession grants duty free-treatment to the FPD devices at issue, rather than a classification question of whether the FPD devices at issue are "computer monitors" or rather are television or video monitors.

28. When the ITA was signed in 1996, the signatory countries pledged to provide duty-free treatment to a wide range of products related to information technology. These commitments were

embodied in two separate Attachments, which the EC explicitly incorporated as a part of the EC's Schedule of Concessions, and the contents of both attachments are equal obligations to provide duty-free treatment of the EC under GATT 1994 and the WTO Agreements. In this case, the FPD devices at issue are clearly covered by both Attachment A and Attachment B. The EC has claimed in this case that the product covered by the complaining parties in this case is not clear. But the product is the same in all complaining parties' submissions: FPD devices, including LCD monitors, "for" automatic data processing – ADP – machines and other ITA products. Such devices are included in the description in Attachment B of the EC's concessions, "flat panel display devices… for products falling within [the ITA]". Any flat-panel device with an interface permitting it to receive signals from a computer, and capable of operating with a computer, is within this description. The products that Japan describes most frequently in its request are LCD monitors with a DVI. It is the DVI that permits the display device to receive and display signals from an ADP machine, or computer. The DVI therefore makes the display device an FPD "for" a computer, provided the device is capable of operating with a computer.

29. Counter to the concessions in its schedules, the EC's regulations have denied duty-free treatment for some FPD devices and "suspended" duties for others. But the suspension is temporary and must be explicitly renewed by the EC; moreover, the suspension can be withdrawn at any time. The uncertainty of the situation is itself a burden on commerce, and is inconsistent with the EC's obligation to provide unfettered duty-free treatment for these products.

30. The EC claims that its obligations in its Schedule of Concessions to provide duty-free treatment do not extend to FPD devices capable of operating with an ADP machine so long as they can display signals from sources other than computers, because such FPD devices did not exist at the time the concessions were made. However, the EC has been able to point to nothing in the language of the concessions themselves, as expressed in either Attachment A or Attachment B, which would limit the concessions to products in existence at the time the concessions were made.

31. The EC then goes on to say that such FPD devices at issue in this dispute constitute an entirely "new product, …the multifunctional LCD monitor." However, the relevant question is whether the EC's relevant tariff concession grants duty-free treatment to such FPD devices, and the panel's examination must be conducted objectively in light of the text and context of the tariff concession. As stated above, this textual approach means that a Member's own perception on whether a product is "new" is irrelevant in interpreting the term of the tariff concession. Considering the existence of various FPD devices, Japan considers that at the time the concessions were negotiated, it was widely foreseen and indeed expected that FPD devices for ADP machine could be able to receive a signal from other devices.

32. The ordinary meaning of the language used in both Attachment B and Attachment A, as incorporated in the EC's Schedule, is broad enough to encompass any FPD devices capable of operating with a computer, even if they have the ability to display signals from products other than computers. With respect to Attachment B, there is nothing in this language that says that the FPD devices must be "exclusively" or "solely" for the computer.

33. The EC attempts to graft a restrictive clause onto the language of the Attachment B commitment by referring to restrictive language in Attachment B relating to cathode-ray tube (CRT) "monitors". But a CRT monitor is a different product from FPD devices; the former is an analogue device using CRT technology while the latter is a digital device with a thinner profile. If the language on CRT monitors demonstrates anything, it demonstrates that when the drafters of the language in Attachment B wanted to restrict a product under the agreement to products used exclusively with a computer, they were fully aware how to do so. Japan also would like to point out that the note on

"monitors" excludes only "televisions". The EC's assertion that the note also excludes "video monitors" is without foundation.

34. The ordinary meaning of the language in Attachment A, as incorporated into the EC Schedule, is also broad and encompassing like the language in Attachment B. Attachment A provides, in subheading 8471.60, for duty free treatment for "input or output units" of a computer. There is no doubt that FPD devices that have a digital-video interface that permits them to display signals from a computer are "output units" of a computer.

35. The EC cites, as part of its "context" for Attachment B, one part of the HSEN that it claims requires that FPD devices under heading 84.71 be exclusively used with computers. But the EC itself admits that the HSEN themselves are of limited value, and that if the HSEN contradicts the language of an HS heading or Chapter Note, the heading or Chapter Note prevails. But it is not at all clear that the HSEN cited by the EC restricts the meaning of heading 84.71 in the way the EC claims. The HSEN does not exclude all non-computer display functions from display units that otherwise display computer signals.

36. The EC also looks to Note 5 of Chapter 84 of HS96 to support its positions. That Note has two paragraphs, (B) and (C), which relate to FPD devices. The EC does not directly address paragraph (C), which applies to "separately presented units" although that paragraph on its face requires that FPD devices that are output units "of" computers should be classified under heading 84.71, and hence free of duty.

37. Instead, the EC looks to Note 5 (B), which applies to units that are imported as parts of a "system". Even that paragraph, however, only requires units to be "solely or principally" used for computers in paragraph (B)(a). Here, the EC acknowledges, in light of the ECJ's decision in the *Kamino* case, that its measures are inconsistent with the language of Attachment A incorporated in its Schedule of Concessions and agrees to "review" the regulations further. This Panel must make clear that the EC's measures are inconsistent with the EC's obligations under its Schedule of Concessions and recommend the EC to bring its measures into compliance with those obligations.

38. Japan's reading of the language of the concessions is, moreover, consistent with the object and purpose of the WTO Agreements and the GATT 1994.

IV. EC MEASURES CONCERNING SET TOP BOXES WITH A COMMUNICATION FUNCTION ARE INCONSISTENT WITH EC OBLIGATIONS UNDER ARTICLE II:1(A) AND II:1(B) OF GATT 1994

39. Please allow us to reiterate that the language in the EC tariff concessions is dispositive to this dispute. This language requires that all STBs which have a communication function be granted duty-free treatment, wherever classified. The broad ordinary meanings of the phrase "set top boxes which have a communication function" confirm this interpretation.

40. The context of the phrase confirms that the EC's concessions include all STBs with a communication function. An examination of other devices covered in Attachment B, as incorporated in the EC Schedule, shows that the drafters provided clear statements where they intended to limit the functions of an apparatus; no such limitations exist with regard to STBs.

41. Finally, the object and purpose of the WTO Agreements are best served by continued duty-free treatment of STBs with a communications function.

ANNEX B-3

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION BY JAPAN

I. FOR ALL OF THE PRODUCTS AT ISSUE, THE PANEL SHOULD BEAR IN MIND KEY INTERPRETATIVE PRINCIPLES

A. THE CENTRAL IMPORTANCE OF THE LANGUAGE OF THE CONCESSION, INTERPRETED IN ACCORDANCE WITH THE *VIENNA CONVENTION*

1. Japan firmly believes that recognizing this dispute as a question of the proper scope of tariff concessions – and framing the analysis in that way – is very important. The key distinction is recognizing the central role of the language of the concession itself.

2. The question for the Panel's consideration remains whether the products at issue fall within the scope of the relevant EC Schedule of Concessions. The Panel must examine the language of the concession and decide on the meaning of that language, considering the ordinary meaning read in context and in light of the object and purpose of the treaty in accordance with the Vienna Convention of the Laws of Treaties (hereinafter *"Vienna Convention"*). In course of this examination, first, the focus must be on the language, and the product at issue must be tested against that language. Second, the focus must be on the language used in the concession itself. Third, the focus must be on the meaning of the language in both its ordinary sense from standard usage and ordinary dictionaries, but also its technology sense from usage in a technology context and from technology dictionaries. Fourth, context matters a great deal, but all context is not equal: for example, HS rule that speaks directly to the meaning of language used in a heading would have more interpretative weight, however, the HS rule that does not so would have less interpretative weight. Finally, the object and purpose of the *WTO Agreements* and the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") reinforces Japan's interpretation based on the ordinary meaning of the language of the concession.

B. THE HS HAS INTERPRETATIVE RELEVANCE, BUT ONLY TO THE EXTENT IT HELPS CLARIFY THE MEANING OF THE TEXT OF THE CONCESSIONS MADE PURSUANT TO ATTACHMENT A

3. The HS has interpretative relevance in this dispute. The interpretative relevance, however, will vary depending on the particular item from the HS being considered, and for what purpose it is being considered. First, HS materials that speak directly to the meaning of the language of a concession – HS section and chapter notes addressing the language of the concessions as well as HSENs addressing the language – are highly relevant. That being said, such HS materials, no matter how direct, cannot override the text of the language in the concession itself.

4. Second, HS materials that do not speak directly to the meaning of the language in a specific heading, or even a range of headings, but only provide guidance for how to pick between two competing headings, have much less relevance. Third, the relevance of the HS materials extends only to concessions that relied upon the HS framework; accordingly, the HS does not provide any context for the language made pursuant to Attachment B in this dispute.

C. THE ITA HAS INTERPRETATIVE RELEVANCE, BUT ONLY TO THE EXTENT IT HELPS CLARIFY THE MEANING OF THE TEXT OF THE CONCESSIONS AT ISSUE

5. The EC has tried to argue that the tariff concessions negotiated through the ITA must be narrow, and the parties must have intended to add new products later. Yet, the ITA is not treaty text for the purpose of interpreting the EC concessions and although it could be relevant as context under the *Vienna Convention*, such context is only relevant to the extent it helps interpret the language of the concessions at issue.

6. The EC argues that the Panel must consider the products at issue with reference to paragraph 3 of the ITA Annex, which expresses the expectation for future negotiations. Japan believes that paragraph 3 is largely irrelevant to the present dispute. Paragraph 3 of the ITA simply states the obvious thing that parties to the ITA recognized in general terms that they might have future negotiations.

D. THE EXPECTATIONS OF THE PARTIES ARE IRRELEVANT TO INTERPRETING THE PROPER SCOPE OF THE TARIFF CONCESSIONS AT ISSUE

7. The EC's expectations at the time of the concessions serve no interpretive purpose. First, the Appellate Body has made clear that subjective expectations are irrelevant to interpreting the meaning of a tariff concession, and that what matters is the language of the concession and the objective characteristics of the product at issue.[1] Second, the EC repeatedly turns improved versions of existing products into "new" and "unforeseen" products, when in fact the products, properly understood, were neither new nor unforeseen.

E. THE LANGUAGE OF A CONCESSION WILL OFTEN COVER A PRODUCT REGARDLESS OF THE TECHNOLOGICAL DEVELOPMENTS THAT MAY OCCUR REGARDING THAT PRODUCT

8. The EC devoted considerable attention to explain the technological development of the products at issue, a point that has little relevance to the actual dispute. The objective characteristics of the products, not their evolution over time, thus remain the key considerations.

9. The EC argues that certain products may cross into two headings, or may even "cease to exist" and may be replaced by a new product. But the EC makes two legal errors. First, the EC assumes that the language of the concession no longer applies when the product evolves. The language of concessions will often have been drafted specifically to avoid reference to specific technologies or specific objective characteristics that might change over time. Second, whether a product "ceases to exist" depends as much on the language of the concession.

F. NEGOTIATING HISTORY AND THE CLASSIFICATION PRACTICE OF CERTAIN MEMBERS HAVE LITTLE INTERPRETATIVE RELEVANCE IN THIS DISPUTE

10. Japan believes that the Panel should give little if any weight to extraneous information provided by the EC not relevant to interpretation of the concessions at issue. First, the EC attempts to direct the Panel's attention away from the actual language of the text of the EC's Schedule, and instead towards the negotiating history of the ITA. Only the language actually included in the final text matters, not materials regarding the complex and uncertain path to create the final text. Even less relevant is the classification practice of certain WTO members. These materials do not reflect in any way on the agreement made by the WTO Members. Such classification practices do not rise to the

[1] Appellate Body Report, *EC – Computer Equipment*, para. 80.

level of "subsequent practice" under Article 31.3 (b) of the *Vienna Convention* because too few countries are involved and that practice is not consistent.

II. THE EC MEASURES CONCERNING MULTIFUNCTIONAL DIGITAL MACHINES ARE INCONSISTENT WITH EC OBLIGATIONS UNDER ARTICLES II:1(A) AND II:1(B) OF THE GATT 1994

A. THE PRODUCTS AND MEASURES AT ISSUE

11. At the outset, we note that the EC has not raised any objections to our arguments about the definition of the products at issue with respect to MFMs. We also note there is no major dispute among the parties on the measures and tariff concessions at issue. The EC has argued that only the current version of the CCT is at issue in this dispute. Yet, these prior measures still have effect and unless and until these measures are formally withdrawn, Japan considers them still to be in effect for purposes of this WTO dispute. Even their repeal will not alone cure the WTO inconsistency of imposing duties on MFMs that should be duty free.

B. THE EC LARGELY IGNORES THE ORDINARY MEANING OF THE LANGUAGE OF THE CONCESSIONS AT ISSUE IN THIS DISPUTE, THE LANGUAGE OF HEADING 84.71

12. The EC tries to avoid discussing the language of the concessions at issue, and never really explains why MFMs that connect to ADPs do not fall under heading 84.71. We note the EC has provided no examination at all of the ordinary meaning of the key concession at issue here – the concession on heading 84.71. The ordinary meaning of the language in heading 84.71 covers MFMs with digital connectivity. As Japan has explained at length, MFMs with digital connectivity fall squarely within the ordinary meaning of a "unit" of a computer, as an "input or output unit". Whether one considers the ordinary sense of these words or the technological sense of these words, they both point to the same ordinary meaning. This language captures devices such as MFMs that operate in an integrated manner with computers, using digital technology to "input" information as well as to "output" information. The EC never really challenges this argument because it cannot.

13. The printing and other functions of MFMs confirm that they are "output units" of an ADP. These objective characteristics of the MFMs allow one to conclude that MFMs are properly considered to be "output units" under subheading 8471.60 and more specifically "printers" under subheading 8471.60.40. The objective physical characteristics demonstrate that MFMs are first and foremost "printers" that may have other functions. But these other functions do not change the basic physical characteristics that make such devices "printers". The historical development of MFMs further confirms that they are "output units" of ADPs, and were well known at the time of the concessions of heading 84.71.

C. THE CONTEXT PROVIDED BY HEADING 90.09 CONFIRMS THAT DIGITAL COPYING IS NOT A FORM OF PHOTOCOPYING, AND THEREFORE CONTRARY TO THE EC ARGUMENTS MFMS CANNOT FALL WITHIN THE SCOPE OF HEADING 90.09.

14. The claim in this dispute is that the concession on heading 84.71 covers MFMs. The EC tries to rebut this claim by shifting the focus to heading 90.09, and tries to turn this dispute into a classification question, which it is not. Nothing in the language or context of heading 90.09 or subheading 9009.12 supports the conclusion that MFMs can possibly fall within their scopes.

15. The EC has misinterpreted the term "photocopying" in heading 90.09. The use of light in a digital copier does not make that device into a "photocopying apparatus". The EC largely ignores the

critical role of the digital file in an MFM, which is dramatically different than that of the reflected light used in an analogue photocopier. This distinction changes the objective characteristics and operations of the device. The EC's contextual distinctions are similarly flawed, as it confuses the difference between having an optical system and using the optical system to make the copy. In MFMs, the optical system is used to scan and convert the document into digital data, which can be stored and manipulated. In photocopiers, the optical system creates an image with no purpose other than produce a photocopy. If the photocopy is not created, the light image simply disappears.

16. The EC has also misinterpreted the detailed language in subheading 9009.12 and does not pay sufficient attention to the precise meaning of the structure or language of this heading. In addition to the fact that heading 90.09 does not cover MFMs as discussed above, the language of subheading 9009.11 and subheading 9009.12 both exclude MFMs. MFMs do not reproduce the optical image of an original document directly onto the paper, as required by subheading 9009.11. Nor do MFMs reproduce the optical image onto the paper in the specific manner described in subheading 9009.12, namely the "one image" to make "one copy" correspondence that characterizes photocopying technology. The EC further misinterprets as overly-broad the phrase "indirect process" in subheading 9009.12. This phrase refers to a specific technology well known in 1996 that describes analogue photocopying, not the broader concept of indirect process.

17. The HSEN for heading 90.09 confirms the ordinary meaning of "photocopying" and "indirect process" as excluding MFMs with digital connectivity. The HSEN that describes analogue photocopying technology was not changed in 1996 – even though digital copying technology was then well developed. "Photocopying" as defined by the HSEN does not include digital copying; a CCD array does not constitute a "light sensitive surface." This phrase refers to a single surface that can receive the optical image of an original document, as distinguished from the numerous diodes that convert photons of light into electrical impulses in a CCD array.

D. THE OTHER INTERPRETATIVE MATERIALS PRESENTED BY THE EC EITHER ARE IRRELEVANT WITH OR SUPPORT JAPAN'S INTERPRETATION

18. The EC offers a number of other arguments for interpreting the language of heading 90.09. The classification practice of a handful of member countries has little interpretative relevance under the *Vienna Convention*, and certainly the EC's own practice – which is what is being challenged in this dispute as WTO inconsistent – has no relevance. The Appellate Body has made clear that subsequent practice only has interpretive weight when it is the consistent practice of many countries.[2] Too few countries are involved and the present practice is too inconsistent to satisfy this standard.

19. The WCO political votes on classification also have no interpretative relevance under the *Vienna Convention*, but the detailed factual and legal discussion provided by the WCO Secretariat as background for those debates and votes provides a neutral perspective that a panel may find useful and persuasive, much as a panel may find the reasoning of any earlier panel persuasive.

20. The negotiating history of the ITA also has very little, if any, interpretative weight here. The conditions for invoking Article 32 of the *Vienna Convention* have not been met here. Even if it were considered, the negotiation history provides little support for the EC interpretations in this dispute.

21. The EC arguments about the HS07 nomenclature actually support Japan's position. Subsequent events, such as the changes in the EC Schedule to reflect the changes as part of the HS07 amendments, cannot change the scope of the concession, but may only be used to supplement one's

[2] Appellate Body Report, *EC – Chicken Cuts*, para. 276.

understanding of the meaning of the language used in the original concessions. The way in which the HSEN 07 distinguishes "photocopying" and "digital copying" is completely consistent with Japan's interpretation of these two phrases, as it simply reinforces and makes explicit the distinction. Further, the EC's emphasis on the new phrase "for each copy" misses the mark, because this new language in the HSEN simply reflects a concept already inherent in the language used in subheading 9009.12 of the HS06 nomenclature.

E. EVEN IF HEADING 90.09 WERE TO COVER DIGITAL COPYING, MFMS WITH COMPUTER CONNECTIVITY WOULD STILL FALL WITHIN HEADING 84.71

22. Even if the Panel were to assume hypothetically that heading 90.09 can include the digital copying function of MFMs, that does not end the analysis. MFMs are much more than digital copiers. The MFMs at issue in this dispute connect either to computers, computer networks, or telephone networks, and are not stand alone devices. Properly understood, these MFMs fall under heading 84.71 (or perhaps heading 85.17) even if the digital copying function alone might fall under heading 90.09.

23. The EC effort to elevate the primacy of the digital copying function and to downplay the more fundamental features of MFMs with digital connectivity represents fundamentally flawed treaty interpretation for several reasons. Japan and the other complaining parties have provided the ordinary meaning of "units thereof" in heading 84.71 and "input or output units" in subheading 8471.60. The EC has ignored the ordinary meaning of these key terms. The ordinary meaning of this language covers MFMs with digital connectivity, but is in no way limited to specific technologies.

24. In interpreting the ordinary meaning of this language under the above stated assumption, the HS can provide an interpretative guidance. The Appellate Body has used the HS materials holistically, drawing upon them and giving them weight based on their connection to the interpretative guidance at hand.[3]

25. Note 5(D) of Chapter 84 strongly supports treating MFMs with digital connectivity as "output units" and "printers" under subheading 8471.60. An MFM is fundamentally a "printer," and the meaning of "printer" is not limited to single function printers. When thinking about the nature of a multifunctional device, it is entirely proper to think of that device as being the machine that performs the principal function of the device. This perspective fundamentally contradicts the EC interpretation that a "printer" can only be a single function printer.

26. The MFMs are essentially a printer because, as Japan has demonstrated at length, MFMs at issue: (1) are designed and built around a printer unit that allows the outputting of information from the computer; (2) have a printer unit that is the largest and most important component; (3) have a printer unit that can operate independently of any other devices on the MFM; and (4) have a printer unit that represents the largest portion of the cost. Under these facts and circumstances – completely unaddressed by the EC argument – the MFM is essentially a "printer".

27. Note 5(B) to Chapter 84 does not change and in fact supports this interpretation. Even if Note 5(B)(a) applies (and we believe that under Note 5(D) it does not apply), MFMs with digital connectivity are in fact "of a kind solely or principally used" with computers. The intrinsic qualities of MFMs are basically those of a printer, and the existence of an incidental copying function does not change this reality. Moreover, empirical evidence confirms that the printing function (and particularly

[3] Appellate Body Report, *EC – Chicken Cuts*, paras. 219-229.

the printing and scanning function together) vastly exceeds the digital copying function of such devices.

28. GIR 3(b) in fact supports this interpretation, and renders GIR 3(c) unnecessary and irrelevant. The "essential character" of the MFM is that of a printer, and the two key components of MFMs – printer module and scanner module – both fall under the "input or output units" of heading 84.71. It make no logical sense to argue that an incidental feature of combining printing and scanning – the additional ability to make digital copies – somehow trumps the "essential character" of printing and somehow gives the MFM a new essential character.

29. Nothing in the ECJ decision in *Kip* changes this analysis. A decision under EC domestic law, *Kip* is of very limited relevance anyway. That limited relevance is to confirm that current EC practice is deeply flawed, and impermissibly ignores heading 84.71, and to confirm that most MFMs in fact probably fall within the rule of Note 5(B) as "of a kind solely or principally used" with computers, as specified in Note 5(B)(a).

F. MFMs WITH FACSIMILE FUNCTION BUT WITHOUT DIGITAL CONNECTIVITY ARE ALSO ENTITLED TO DUTY-FREE TREATMENT UNDER APPLICABLE EC CONCESSIONS.

30. This dispute involves two categories of MFMs – those that are input/output units of computers covered by the EC concession on subheading 8471.60 and those that are facsimile machines covered by the EC concession on subheading 8517.21. The key difference is the connectivity to a computer. As a practical matter, a multifunctional device is either a printer or a facsimile machine.

31. As with MFMs with digital connectivity, the EC never really addresses the language of the key concession at issue, the concession on heading 85.17. Rather than address the language and its ordinary meaning, the EC simply jumps ahead to assume that both heading 85.17 and heading 90.09 are equally applicable, and therefore GIR 3(c) must apply.

32. Yet the premise of this argument – that heading 90.09 applies at all – is flawed. The earlier arguments that MFMs based on digital technology cannot fall under heading 90.09 apply equally to both MFMs with digital connectivity and those with a facsimile function. All MFMs – whether connectable to a computer or not – use digital technology to scan documents and use digital technology whether printing computer output or printing out an incoming facsimile. None of these MFMs use the "one original-one copy" technology that characterizes analogue photocopying.

III. THE EC MEASURES CONCERNING FLAT PANEL DISPLAY DEVICES "FOR" ITA PRODUCTS ARE INCONSISTENT WITH EC'S OBLIGATIONS UNDER ARTICLES II:1(A) AND II:1(B) OF THE GATT 1994.

A. THE PRODUCTS AND MEASURES AT ISSUE.

33. The EC has argued that the complaining parties have not sufficiently made a *prima facie* case. Yet in doing so, the EC is trying to limit this dispute improperly to a case-by-case assessment of specific models and import transactions, when the dispute is really about EC measures that treat many flat panel display ("FPD") devices as dutiable products that should be duty-free under the applicable EC concessions.

34. The Appellate Body stated quite clearly that "Article 6.2 does *not* explicitly require that the products to which the 'specific measures at issue' apply be identified."[4] Rather, it is sufficient to define the type of products that fall within the language of the concession. Contrary to the EC argument, Japan has in fact specifically defined the product at issue: "flat panel display devices" capable of operating with a computer or some other non-computer ITA products.

35. Contrary to the EC argument, Japan has identified the features that necessarily lead to a WTO inconsistency. Japan has made clear the scope of the concessions. Indeed, the scope of the concessions on FPD devices made pursuant to Attachment A and Attachment B can be defined based on the language of those concessions. The concession pursuant to Attachment A covers those FPD devices that qualify as "output units" of computers. The concession pursuant to Attachment B covers those FPD devices that are capable of operating with any ITA product, which includes those capable of operating with a computer. Japan has also made clear the scope of the FPD devices improperly subject to duties based on the EC measures at issue. Having described the scope of the duty-free concessions, and having shown that many FPD devices that are in fact properly within the scope of the concessions but are being systematically excluded from duty-free treatment, Japan has made out a *prima facie* case for its "as such" claim in this dispute.

36. The EC erroneously argues that the current suspension of duties eliminates the inconsistency between its measures and the concessions under the WTO. The EC's suspension of duties is temporary and conditional; in contrast, the EC's concessions on FPD devices are neither temporary nor conditional. The violation of Article II of the GATT 1994 thus remains and has not been eliminated.

B. RELATIONSHIP OF THE CONCESSIONS PURSUANT TO ATTACHMENT A AND ATTACHMENT B.

37. Obligations in tariff concessions made pursuant to the description of products in Attachment A and those made pursuant to the description of products listed in and for Attachment B are legally independent of each other, and both must be respected.

C. CONTRARY TO THE EC ARGUMENT, THE CONCESSIONS PURSUANT TO ATTACHMENT B COVER FLAT PANEL DISPLAY DEVICES "FOR" PRODUCTS COVERED BY THE ITA, INCLUDING FLAT PANEL DISPLAY DEVICES CAPABLE OF OPERATING WITH A COMPUTER, REGARDLESS OF WHETHER THEY CAN RECEIVE A SIGNAL FROM OTHER DEVICES.

38. The EC tries to narrow the scope of its concession pursuant to Attachment B and argues that the limitations that applied to CRT monitors must now apply to FPD devices. Yet the EC cannot reconcile this argument with the ordinary meaning of the text of the concession. The key term is "for," and when a FPD device will be deemed to be for a computer or other ITA products, it should be subject to a duty-free treatment. The EC's interpretation of "for" to mean "only for" or "mainly for" gives the word a restrictive meaning that has no basis in the ordinary meaning of the term.

39. Nor does the EC contextual argument help. The EC draws the incorrect conclusion from the concession on CRT monitors, which highlights the absence of the very carve-out[5] the EC wishes to read into the concession on FPD devices made pursuant to Attachment B. Similarly, the limitation to

[4] Appellate Body Report, *EC – Computer Equipment*, para. 67.

[5] At its heart the EC argument is that because the concession on CRT monitors carved out those devices that could receive a signal from other non-ITA products (such as TVs), and because FPD devices have now largely replaced CRT monitors, then the limitations that applied to CRT monitors must now apply to FPD devices. See, para. 144 of Japan second written submision.

devices "solely or principally" for a certain use in the concession on "network equipment" pursuant to Attachment B, and the use of the word "can" on "[p]rojection type flat panel display devices" reinforces Japan's interpretation of "for" as meaning any device capable of operating with a computer or other ITA product. Having made these carve-outs and limitations for other products, the absence of any such carve out for FPD devices speaks to the importance about the ordinary meaning of that language in context.

40. Furthermore, the HS materials do not affect this analysis because the HS does not apply to concessions made pursuant to Attachment B.

41. The other EC arguments do not save its flawed interpretation of the concessions. The *Kamino* decision just underscores the legal errors of the current EC measures. Moreover, the EC arguments on object and purpose of the *WTO Agreements* and GATT 1994 highly serve to the extreme unpredictability of the EC approach. Rather than focus on the meaning of the language, which is stable over time, the EC tries to shift the focus to the changing products and technologies. This unpredictability in the EC approach is utterly at odds with the object and purpose of the *WTO Agreements* and GATT 1994.

D. THE CONCESSIONS PURSUANT TO ATTACHMENT A ALSO COVER FLAT PANEL DISPLAY DEVICES CAPABLE OF OPERATING WITH A COMPUTER EVEN IF THEY CAN RECEIVE SIGNALS FROM OTHER DEVICES.

42. The language of the concession pursuant to Attachment A defines a scope, and does not include the limiting language the EC tries to graft onto this scope. The concession provides duty-free treatment under heading 84.71 for units "of" ADP machines ("thereof"). As Japan has noted throughout its submissions in this case, there is no language of limitation in either heading 84.71 or subheading 8471.60 on the use of the term "thereof". At a minimum, a unit that is principally used with an ADP machine is a unit "of" an ADP machine, even if it has alternative uses.

43. Japan believes that the ordinary meaning of the language of heading 84.71 encompasses FPD devices that interface with an ADP machine. Heading 84.71 covers "units" for computers, and subheading 8471.60 specifically covers both "input or output units". These terms have ordinary meaning that must be considered in both the dictionary sense of these words and the technology sense of these words. The EC therefore cannot explain why a device that is principally used with a computer but also has additional capabilities is not a "unit" of an ADP machine within the ordinary meaning of the language in heading 84.71.

44. Furthermore, there is no doubt that in the holistic interpretation of the ordinary meaning of the words of a concession, context always needs to be examined. Although the EC provided extensive citation and recitation of HS materials, the EC overlooks the binding chapter and section notes, and instead focuses on the non-binding HSEN. The problem with this approach is that the EC's reliance on the part of the HSEN in question contradicts the binding Note 5 to Chapter 84, and therefore must be rejected.

45. Japan submits that Note 5(C), which relates to FPD devices, applies because it discusses "separately presented units of an automatic data processing machine." This paragraph provides the broadest possible reading of heading 84.71, as it includes any unit "of" an ADP machine. Note 5(B) also provides important contextual guidance here for interpretation of the concessions pursuant to Attachment A. Note 5(B) only requires units to be of a kind "solely or principally" used for computers in paragraph (B)(a). Although the HSEN cannot override the HS note, the EC relies so heavily on one limited portion of the HSEN that it appears to interpret the HSEN to prevail over the

text of this binding chapter note. Indeed, this contradiction lead the ECJ in the *Kamino* case to conclude that the EC measures, responsible for classifying FPD devices under subheading 8471.60 only if they receive signals exclusively from computers, are "in most cases too rigid…."[6]

46. The EC also urges resort to GIR 3(c), observing that in most cases it is impossible to identify the principal function of a given monitor. But GIR 3 does not apply at all if the interpretative question can be resolved by reference to the language of the heading, read in context. The EC's resort to GIR 3 reflects its refusal to consider the ordinary meaning of the language in the heading.

47. The EC's arguments about object and purpose of the *WTO Agreements* and GATT 1994, the classification practices of other countries, and the negotiating history of the ITA should be rejected for the reasons already discussed above.

IV. THE EC MEASURES CONCERNING SET-TOP BOXES WITH A COMMUNICATION FUNCTION ARE INCONSISTENT WITH EC OBLIGATIONS UNDER ARTICLE II:1(A) AND II:1(B) OF THE GATT 1994

A. THE PRODUCTS AND MEASURES AT ISSUE

48. The EC seems to believe that identification of a specific category of STBs that has a communication function or even the specific models of STBs that have a communication function would be necessary. The EC simply mischaracterizes Japan's claim; this claim is not about the tariff treatment of a specific model of STBs, but about a number of criteria used by the EC to determine the tariff treatment of a category of products, namely STBs which have a communication function.

49. The EC claims that the Complainants "fail to explain what constitutes the EC concession [with respect to set-top boxes] and where it is provided for." The EC's claim is hardly understandable given that Japan has clearly stated that the concession is included in the EC Schedule itself and not in the ITA.

50. The EC further claims that the Complainants refer to the "headnote" but do not explain "what the headnote means for the rest of the EC Schedule, including the codes that were notified to WTO." The "headnote" is central in the EC Schedule because it is through the headnote that the EC committed to grant duty-free treatment to all products described in or for Attachment B to the ITA, wherever the product is classified.

51. Again, Japan would like to emphasize that it is irrelevant that in some instances application of the challenged measures may lead to a WTO consistent outcome. Indeed, to succeed in an "as such" claim, it is sufficient to demonstrate that *any aspect* of the criteria set out in the measures that are being challenged will necessarily lead to a violation of the EC's obligations under its Schedule and consequently, Article II of the GATT 1994.

52. The EC claims that "it does not exclude any STBs from duty-free treatment due to the presence of a hard disk or other apparatus." But as stated in the CNEN, the mere presence of a hard disk or DVD drive in a STB which has a communication function leads to the exclusion of that STB from duty-free treatment.

[6] EC first written submission, para. 167.

B. CONTRARY TO THE EC ARGUMENT, THE CONCESSIONS PURSUANT TO ATTACHMENT B COVER SET TOP BOXES WHICH HAVE A COMMUNICATION FUNCTION.

53. The concession concerning STBs that have a communication function has been made by the EC in its Schedule. The ordinary meaning of the terms of the concession does not imply any exclusion from the scope of the concession on STBs which have a communication function merely because the STBs at issue have a recording or reproducing function.

54. According to the EC, the product covered by the concession cannot assume the existence of additional features and technical elements. Yet, as long as the product meets the description of a "set top box which has a communication function," it must receive duty-free treatment, regardless of any additional feature or functionalities it may also have.

55. The EC attempts to draw conclusions from the fact that no CN code was provided under headings 85.21 and 85.28, which has an equivalent effect to submitting the tariff lines which define the scope of the commitments. If CN codes were intended to define the scope of the concession, however, it would have been unnecessary to include the headnote that explicitly provides for duty-free treatment wherever the product is classified.

ANNEX B-4

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT BY JAPAN AT THE SECOND SUBSTANTIVE MEETING

I. MULTI-FUNCTIONAL DIGITAL MACHINES

1. MFMs with digital connectivity to computers fall squarely within the scope of the terms "units thereof" in heading 84.71, and particularly the terms "output units" in subheading 8471.60 and "printers" in subheading 8471.60.40. This interpretation results from reading these terms in their context, including the language of heading 90.09 and subheading 9009.12, which indicates that MFMs do not "photocopy" within the meaning of heading 90.09.

2. We would like to make a few broader observations about the EC arguments on MFMs. First, the EC arguments largely ignore one of the defining objective characteristics of the MFMs with digital connectivity – their capacity to operate with computers, a capacity that rests on the fact that MFMs use digital technology enabling them to input and output digital data. Unlike the analogue photocopiers covered by heading 90.09, MFMs are very much digital devices. This important difference is why the language of heading 84.71 speaks of "units thereof," with the "thereof" linking the device back to the computer.

3. Indeed, the EC argument in the alternative that MFMs would fall under subheading 8472.90 if they are somehow not "photocopying apparatus" just highlights the myopia of the EC argument. MFMs without computer connectivity and without any facsimile function fall outside heading 84.71 and into heading 84.72 because such MFMs are <u>not</u> capable of operating with computers. This alternative EC argument disregards the capacity of the MFMs at issue to operate with computers, the common and critical characteristic of the products falling within heading 84.71.

4. Second, the EC arguments largely ignore all of the other objective characteristics of the MFMs and instead focus on the single function of "copying". In doing so, the EC improperly shifts the focus from the intrinsic physical characteristics of the device – the printer unit and the scanner unit – and instead focuses on one of the ways in which the device operates. The Appellate Body has stressed the importance of the "objective characteristics" of the item subject to a tariff concession. Copying is not an intrinsic physical <u>characteristic</u> of MFMs – it is an additional and incidental function that results from the combined operation of the true intrinsic physical characteristics of the MFM, the printer unit and the scanner unit.

5. Third, the EC talks about making its determinations on a case-by-case basis, but the EC measures do not make case-by-case determinations. Subheading 8443.31.10 preserves duty-free treatment only for those MFMs with a facsimile function and an output speed of 12 pages per minute or less. This use of the 12 page per minute output rule to determine that most if not all MFMs are in fact subject to duties demonstrates the extent to which the EC is not truly interested in making case-by-case determinations.

A. MEANING OF "PHOTOCOPYING" – MFMS ARE NOT "PHOTOCOPYING APPARATUS"

1. Heading 90.09

6. The EC defense has been and continues to be basically that MFMs are in fact "photocopying apparatus," and thus are properly subject to duties under HS96 heading 90.09. The EC improperly stretches the term "photocopying" to cover two very distinct technologies: analogue photocopying and digital copying. Even if the function of these two technologies is the same – to make copies – the objective characteristics of the devices relying on these two technologies are very different, and these differences relate specifically to the language of subheading 9009.12. A device based on analogue photocopying technology does not create digital files, and cannot possibly be an input or output unit of a computer. These technical details – these objective characteristics of the devices – are very much relevant in light of the language of the tariff concession on subheading 9009.12.

7. Consider a few examples of these technical details. An analogue photocopier must make its copy immediately from the original paper document, or not at all. In contrast, an MFM creates a digital file from the original paper document, which can be used now, or can be stored for printing out later. Moreover, the reflected light in an analogue photocopier has one use – to make that photocopy at that moment, while the digital file created in an MFM, in contrast, has myriad uses.

8. The copying technology is fundamentally different, even if the devices use a similar print technology. The EC acknowledges that photocopying is the instant reproduction of an original image. The digital copy is not necessarily instant and the image reproduced by digital copying is not the "original" image. Because a digital copy is produced from a digital file, and not just a reflection of the original image itself as in photocopying, the original image is artificially changed or reconstituted in order to make it clearer and sharper before being printed. Since an image produced onto a copy paper has been artificially changed and reconstituted before the printing process, it is therefore no longer identical to that of the original paper document.

9. The EC argues that the existence of stand-alone digital copiers supports its argument that MFMs are really photocopiers. Contrary to the EC's argument, the device in Exhibit EC-64 appears to be a "black and white laser printer" – a device with computer connectivity and without a scanner – and not a stand alone digital copier. But more fundamentally, stand-alone digital copiers in fact highlight the importance for proper tariff classification of the digital connectivity, a key objective characteristic of the MFMs at issue here. A printer unit combined with digital connectivity becomes a "printer," which is capable of operating with a computer, and which is covered by heading 84.71 as an "output unit". A scanner unit combined with digital connectivity becomes a "scanner," which is also capable of operating with a computer, and which is also covered by heading 84.71 as an "input unit". It is the digital connectivity that makes these items input and output "units" of a computer. A combination of such stand-alone devices – the printer unit without digital connectivity and the scanner unit without digital connectivity – can make them digital copiers, and they cannot fall under heading 84.71. But this dispute is not about stand-alone digital copiers, devices that would fall under subheading 8472.90 if they do not have any facsimile capability. Such devices have very different objective characteristics than the MFMs with digital connectivity at issue.

10. The EC has explicitly confirmed that "digital copiers incorporate <u>not just one</u>, but <u>two</u> different optical systems," in paragraph 114 of its oral statement. This characterization contradicts the language of heading 90.09, which says "photocopy apparatus incorporating an optical system." This difference in the number of "optical system(s)" between "photocopying apparatus" and digital copiers produces another technological difference in their objective characteristics, which necessarily excludes digital copiers from the scope of heading 90.09.

2. Subheading 9009.12

11. The language of subheading 9009.12 provides important context for the term "photocopying apparatus" in heading 90.09. In the course of interpreting the language of a tariff concession under the Vienna Convention, the language of the headings and subheadings must read holistically.

12. First, consider the structure of heading 90.09 and how subheading 9009.12 fits within that heading. Heading 90.09 has three categories at the five digit level, only one of which could possibly cover the MFMs at issue in this dispute: Five-digit subheading 9009.1, which covers "electrostatic photocopying apparatus". The EC has stressed the electrostatic printing technology of MFMs, and notes that "other photocopying apparatus" is also subject to a concession guaranteeing duty-free treatment. The more detailed languages of subheadings 9009.11 and 9009.12 refer to specific technologies – "direct process" and "indirect process" respectively – and thus serve to describe exhaustively rather than illustratively the scope of "electrostatic photocopying apparatus". The exhaustive nature of these subheadings also makes clear that subheading 9009.12 has no role as a "catch-all" category that captures any "photocopying apparatus" using an "electrostatic" mechanism, other than a "direct process" one. Since MFMs do not meet either of these definitions set forth in these subheadings, "photocopying" as used in heading 90.09 cannot cover MFMs.

13. Now let us turn to the language of the EC tariff concession on subheading 9009.12 read in the context of the rest of heading 90.09. Japan's argument is not only that the terms "image" and "copy" have been used in the singular form, but rather that the apparatus covered by subheading 9009.12 in fact can operate only by reproducing a single image onto a single copy each time, no matter how many copies of a document are produced. However, digital copiers produce multiple copies from a single original image. In this connection, it should be noted that in the EC's current national tariff schedule of HS 2007 CN 8443.31.91 also uses singular and plural forms precisely to match the technology being described: "[m]achine performing a copying function by scanning the original and printing the *copies* by means of an electrostatic print engine."

14. Japan has also noted the meaning of the term "intermediate," and the relationship of this term to the underlying technology used in analogue photocopying. The EC is trying to read the term "intermediate" too broadly: the "electrostatic drum" in an MFM may be an intermediate, but it is not "the" intermediate in the sense of subheading 9009.12. According to the language of subheading 9009.12, indirect electrostatic photocopying machines must have a single intermediate. The EC erroneously cites to the adjectival form of "intermediate," which does not apply here. The noun form of this term refers to "an intermediate person or thing" – in other words, a singular intermediate. On the contrary, the digital copying process does not have a single "intermediate" and instead requires multiple devices, such as the CCD image sensor in the scanning engine and the laser beam in the printing engine, both of which do not exist in the analogue photocopiers.

15. The EC arguments try to exploit the fact that MFM printing technology uses an electrostatic print engine. The EC argument, however, treats the use of electrostatic print engine as sufficient for copying devices to be "photocopying apparatus". The EC conveniently disregards the text of the tariff concession on subheading 9009.12, which explicitly recognizes only one "intermediate" in the process.

16. Moreover, the EC argument confuses the distinction between how the image is being "copied" and how it is being printed. As stated before (in paragraph 8), digital copying does not reproduce the original image onto the copy, and is therefore not consistent with the language of subheading 9009.12. There is no process to reconstitute and improve the original image as part of the "indirect process electrostatic photocopying," which confirms that digital copying involves different objective

characteristics from "photocopying". Lastly, the EC accuses Japan of reading words into subheading 9009.12, but it is the EC that mistakenly reads this language in isolation. One must read "photocopying" in heading 90.09 and "indirect process" in subheading 9009.12 together holistically, not in isolation.

3. HSEN

17. The Harmonized System Explanatory Note ("HSEN") for heading 90.09 confirms that "photocopying" does not include digital copying. The HSEN is relevant for understanding the ordinary meaning of the language used in heading 90.09 and subheading 9009.12. First, the EC apparently has no response to our argument that since the language of this HSEN was originally drafted, it had not been changed until the HS 2007 text newly created subheading 8443.31 on MFMs at issue and abolished the entire heading 90.09.

18. Second, the HSEN confirms Japan's reading of "reproducing" in the sense of "projecting" the original image, and Japan's reading of "an intermediate" as meaning the photosensitive "drum (or plate)". The language of this HSEN does not contradict the language of subheading 9009.12 and can be used as important contextual guidance for what the language of subheading 9009.12 means. Third, the HSEN quite specifically explains that "the optical image is projected onto a drum (or plate.)" Thus the HSEN gives very specific contextual guidance for exactly what "via an intermediate" in subheading 9009.12 really means. This meaning is completely consistent with Japan's interpretation of subheading 9009.12.

4. Classification Practice

19. As confirmed by Appellate Body in *EC – Chicken Cuts*, subsequent practice should be examined based only on the consistent practice of a wide range of WTO Members. The EC only addresses the "practice" of a handful of countries, only shows that supposed practice over a narrow period of time, and admits the "practice" has not been consistent.

20. Indeed, the EC has drawn an erroneous inference concerning Japan's classification practice from Japan's informal proposal to the ITA Committee for the ITA II negotiation in 1997. This proposal was submitted not to clarify Japan's duty treatment of MFMs, but particularly to address the EC's imposition of duties on MFMs. Thus, it is not at all suggestive of any inference regarding the customs practice on MFMs at that time. Also, the EC has seriously mischaracterized US classification practice. Indeed, even the EC's own practice has been inconsistent, as illustrated by the EC BTI's issued in 1996 that classified MFMs under heading 84.71. Such classification "practices" cannot be given any interpretative significance under the *Vienna Convention*. We also note that the EC cites a Japanese negotiating proposal on ITA II in 1997 as somehow being relevant here. As a legal matter, this proposal has no significance for the interpretation of the treaty at issue in accordance with the *Vienna Convention*.

5. Conclusions about "photocopying"

21. Japan believes its arguments stand on their own merit, and should convince the panel. But Japan also believes the panel can and should consider the neutral discussion of these issues by the WCO Secretariat. First, we recognize the WCO Secretariat materials are not binding, but the argument and logic are quite persuasive and can be considered. Second, the EC criticism is largely that the WCO Secretariat adopted too static a view of the language of the HSEN for heading 90.09 and thus did not allow for subsequent technological developments, which is a rather ironic argument given the EC position on other products that have undergone technological development. Third, the

EC criticism is largely that the WCO Secretariat put too much emphasis on the HSEN for heading 90.09 and not enough on the language of heading 90.09 itself. Yet as we have shown above, from the viewpoint of tariff concessions, the language of heading 90.09 and subheading 9009.12 are in fact consistent with and supported by the HSEN for heading 90.09.

B. MEANING OF "OUTPUT UNIT" – MFMS ARE "OUTPUT UNITS"

22. Having clarified the limited meaning of the term "photocopying," this discussion brings us back to the key issue for this dispute – the scope of the concession the EC granted on products within the scope of heading 84.71. The starting point must therefore be the language of the concession at issue. Other treaty text – in other words, the language of other concessions – must also be considered as context. Contrary to the EC argument, Japan does not deny that HS interpretative materials are context under the *Vienna Convention* for purposes of interpreting this concession. Chapter Notes, as part of the overall context, can inform an interpretation based on the ordinary meaning of the concession. But Chapter Notes cannot require any interpretation that disregards the text of the concession itself.

23. Contrary to the EC focus on Note 5(B) in isolation, Japan considers all of Note 5 in its interpretation. In particular, Note 5(D) makes clear that the rule of Note 5(B)(a) – on which the EC relies so heavily – simply does not apply to those "output units" that are "printers" within the meaning of CN 8471.60.40 in the EC's Schedule.

24. The EC insists that MFMs cannot be "printers" because MFMs are multifunctional. Here, we simply note that the EC has largely ignored the factual arguments Japan has presented that MFMs have the objective characteristics that make them essentially a "printer" with some additional features. The EC has also ignored the contextual guidance provided by Note 3 to Section XVI that confirms a multifunctional machine should be treated as a "machine which performs the principal function" – which, for MFMs, is being used as a "printer."

25. The EC asserts the Complainants have provided no evidence on the principal function of MFMs. At the outset, we note that whether a product falls within the scope of a tariff concession is determined by the objective characteristics of the product. Further, Japan has provided evidence demonstrating that the EC argument fails on two different levels. First, if the printing unit is the central component of an MFM and if printing is the principal function, then the MFMs can and should be deemed to be "printers". Second, even if MFMs are not "printers," they do in fact meet the rule of Note 5(B)(a). The principal use is as a "printer," which is an "output unit" for use with a computer. Another very common use of MFMs is as a scanner, which is an "input unit" also for use with a computer. MFMs with digital connectivity are thus in fact for use "solely or principally" in a computer system, and thus meet the requirement of Note 5(B)(a). In the end, however, the Panel should keep in mind that Note 5 to Chapter 84 is not treaty text.

26. Ignoring all of these arguments, the EC simply stresses the copying function of MFMs. The tariff concession focuses on the objective characteristics of the device. The fact that the printer unit and scanner unit can also be used together to provide an additional and incidental function of digital copying does not change the objective characteristics of the MFM.

C. MFMS WITH FACSIMILE FUNCTION BUT WITHOUT DIGITAL CONNECTIVITY

27. For MFMs with facsimile function but without digital connectivity, the printer unit and the scanner unit are both essential for the device to operate as a facsimile machine. The fact that the

printer unit and scanner unit can also be used together to create the additional and incidental function of digital copying does not change the objective characteristics of the MFM as a facsimile machine.

28. The EC relies heavily on classification practice, but ignores the implications of the inconsistent practice within a country such as the United States. Such inconsistent practice by a handful of WTO Members hardly provides strong support for the EC position. Further, the EC argument about the need to use Note 3 to Section XVI to pick between subheading 8517.21 and subheading 8472.90 reflects a continuing misunderstanding about the objective characteristics of these MFMs that are the subject of the relevant concessions. For an MFM that cannot connect to a computer but that does have a facsimile function, the printer unit and the scanner unit become key components that are essential for the device to operate as a facsimile machine.

29. Besides, the EC overlooks the fact that subheading 8472.90 is a residual line for general office machines, compared to subheading 8517.21 which is specific line for facsimile machines. MFMs with facsimile function but without digital connectivity have the specific characteristic as a facsimile machine.

II. FLAT PANEL DISPLAYS

A. THE RELATIONSHIP BETWEEN THE TWO CONCESSIONS AT ISSUE

30. Unlike MFMs, which are subject only to the concession pursuant to Attachment A, FPDs are subject to two distinct concessions – those pursuant to Attachment A and also those pursuant to Attachment B. The concession pursuant to Attachment A applies to those products that fall within specific HS codes. The concession pursuant to Attachment B serves the very different function of capturing products that could not be completely described by existing HS codes, and therefore required a narrative explanation to ensure that the full scope of the product would be covered by the duty-free concession. Each concession must be considered.

31. The concession pursuant to Attachment A covers only FPDs that are "output units" of computers. The notion of an "output unit" being "of" a computer in the language of heading 84.71 and subheading 8471.60 must be considered against the context of Note 5(B) to Chapter 84, which explains that a "unit" is part of a computer system if that unit is "solely or principally" used in a computer system.

32. The concession pursuant to Attachment B covers FPDs "for" computers or "for" other ITA products. Unlike the concession pursuant to Attachment A, the concession expressly includes FPDs for products other than computers and includes any FPD that is "for" a computer or some other ITA products. This term "for" is to be read outside the context of Note 5(B) because Note 5 relates only to the language of heading 84.71 and does not relate to the narrative descriptions provided in those concession pursuant to Attachment B. This difference reinforces the need to interpret the term "for" as it is, particularly since the "sole or principal" use test set forth in Note 5(B) does not apply. Japan has argued that the term "for" in the Attachment B concession read in its proper context means "capable of operating with." Other concessions that do have other criteria or limitations underscore the absence of any other criteria or limitation in the concession on FPDs pursuant to Attachment B.

33. Complainants are not trying to read the illustrative CN headings out of the EC concession – they are included as part of a proper holistic interpretation of treaty text. Complainants simply reject the EC argument that these CN headings somehow narrow or exhaust the narrative description provided in the EC concessions.

34. The EC's argument about the scope of the "safety net" concession tries improperly to introduce some external concept to limit the scope of the concession pursuant to Attachment B. The phrase in the headnote to the concession pursuant to Attachment B in the EC's Schedule –"to the extent not specifically provided for in this Schedule" – indicates that the scope of the concessions pursuant to Attachment B covers the products specified by the narrative description, even if those products are not specified as duty-free items anywhere else in the whole EC's Schedule.

B. PRIMA FACIE CASE

35. The EC insistence that the claims are somehow still vague flows from their erroneous view that complainants must identify all models of the products that are improperly subject to duties. We need not do so. Once we have established that some products are necessarily subject to duties improperly, we have made out our case. The complainants have two separate claims for FPDs – a claim based on the concession pursuant to the Attachment A on subheading 8471.60, and a separate claim based on the concession pursuant to Attachment B for "flat panel display devices".

C. PRODUCTS AT ISSUE

36. The EC protests that it does not know what products are subject to this dispute. Japan and the other complainants have been quite clear on this point from the beginning of this dispute, and the panel need only confirm that the EC has improperly imposed duties on some FPDs that are in fact within the scope of the duty-free concessions.

37. The EC also protests that products classifiable under some other heading might fall within this definition. But how products may be "classified" under HS rules does not determine the issue in a dispute over tariff concessions. By design, the concession pursuant to Attachment B includes certain FPDs that do not fall within the concession pursuant to Attachment A. This overlap does not render the concession pursuant to Attachment A irrelevant, since heading 84.71 covers a wide variety of "output units," and not just FPDs.

38. The EC seems to argue Japan's view of the scope of concessions pursuant to Attachment B is too broad and includes non-ITA products. But this argument exaggerates Japan's view. The concept of "capable of operating with a computer" means more than whether the device can merely receive signals from computers. This phrase means that the FPDs "for" personal computers, for example, must be designed to be used with computers, thereby providing an acceptable level of operational quality. Even with a DVI connector installed, FPD monitors that can receive and display television signals are not necessarily going to be "for" a computer. Further, it might be less likely that FPD monitors with a HDMI connector would be capable of operating with a computer or other ITA products, because the HDMI connector is designed primarily for audio-visual data. Nevertheless, the type of connector is not decisive; it is the capabilities of the device that determines whether a particular FPD monitor falls within the scope of the concession or not.

39. The EC is classifying as dutiable products that in fact fall within the scope of the concessions pursuant to Attachment B, simply because the EC thinks these products should be classified in some other headings. The EC measures in dispute deem the capability of receiving data from any source other than computers to be sufficient to establish that FPDs are dutiable products not covered by the EC concessions. The EC ignores other factors that might demonstrate that the FPDs at issue are in fact fully capable of operating with a computer, and thus entitled to duty-free treatment, and instead subjects the FPDs at issue to duties.

40. If the EC changes its current WTO inconsistent criteria, and introduces new criteria, those new criteria may be addressed in compliance panels. In the meantime, the Panel can and should decide the obvious WTO inconsistencies at issue.

D. MEASURES AT ISSUE

41. The EC measures act as if there were only the concessions pursuant to Attachment A, and then read that single concession more narrowly than it should be read. The EC takes the language from Note 5(B) (a) to Chapter 84 regarding a FPD at issue as a "unit" of a computer if it is "solely or principally" used in a computer system and then strips away the word "principally" without any proper legal basis. Therefore, the EC measure is inconsistent with concessions covered by either Attachment A or Attachment B.

42. The EC measures also allow other features to trump the ability of FPDs to be operating with a computer. A product that would otherwise be duty-free somehow loses its duty-free status if it adds some additional capability. But that is not how the wording of the concessions works. If the FPD is capable of operating with a computer (or some other ITA product), it is covered either by Attachment A or Attachment B, or perhaps both.

1. The current CN

43. Let us consider each of the EC measures in turn. Read in isolation, the current CN2009 seems to reflect the concession pursuant to Attachment A since there is no duty on CN 8528.51.00 for monitors other than cathode-ray tube monitors, of a kind solely or principally used in an automatic data processing system of heading 84.71. But as the EC itself acknowledges, the CNEN to CN 8528.51.00 narrows the scope of this tariff line in a way that is inconsistent with the concession pursuant to Attachment A.

44. Moreover with regard to the FPDs at issue, the current CN does not reflect the concession pursuant to Attachment B, which includes products beyond those used "solely or principally" in a computer system. This is particularly the case when the current CN is read together with the CNEN and the EC Regulations. The EC stresses "foreseeability" and states that it did not foresee this outcome. However, the legal issue here is the scope of the concession as it is written. The EC measure does not even try to identify or delineate which FPDs are "for" ITA products, other than FPDs that are "solely or principally" used in a computer system. Once Japan has explained clearly that some FPD monitors capable of operating with a computer or other ITA products are covered by any dutiable CN, then Japan has established its *prima facie* case.

2. CNEN (*Kamino case*)

45. Let us now turn to the CNEN that provides concrete rules for interpretation of the CN at issue here. The EC tries to defend this highly problematic measure, the CNEN, by arguing "this criterion under the CNEN cannot today be considered as any more probative than others set out in the applicable Explanatory Notes."[1] The EC apparently believes the decision by the ECJ in *Kamino* somehow saves its measure. We strongly disagree. First, we note that the *Kamino* case, a judgment delivered after the establishment of this Panel, does not have any direct relevance for this case. Second, Japan is not aware of any change in EC practice after *Kamino*, nor has the EC provided documentation of any change in its practice.

[1] EC second written submission, para. 60.

3. Classification Regulations

46. The EC tries to defend these measures by saying they are under review. Yet these regulations remain in effect until they are formally repealed. This Panel can and should find them to be WTO inconsistent.

III. SET TOP BOXES

47. Regardless of how large the capacity of such a storage device installed in STBs might be, such storage capacity is fully covered by the "communication function" of the device. Consider, for example, the e-mail box. The e-mail account needs a significant storage capacity for effective functioning. This significant storage function is thus needed for the communication purpose of the STB, because a recipient would fail to receive e-mails without this storage function in the e-mail system. Japan is aware that the storage capacity enables such STBs to store recorded video. Yet as the EC concedes, the devices are still STBs which have a communication function. These devices are entitled to duty-free treatment wherever classified.

ANNEX C

SUBMISSIONS OF CHINESE TAIPEI

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ANNEX C-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION BY CHINESE TAIPEI

I. INTRODUCTION

1. The *Ministerial Declaration on Trade in Information Technology Products* ("ITA", Information Technology Agreement) was signed during the WTO Ministerial Conference held in Singapore on 13 December 1996. Participants to the ITA agreed to bind and eliminate customs duties and other duties and charges of any kind within the meaning of Article II:1(b) of the GATT 1994 with respect to the products listed in the Attachments to the ITA.

2. As a participant in the ITA, the European Communities ("EC") modified its Schedule in order to undertake its commitments under the ITA. Specifically, the EC bound and eliminated all customs duties and other duties and charges on products listed in Attachment A and Attachment B to the ITA, including, *inter alia*, flat panel displays ("FPDs"), set-top boxes ("STBs") with a communication function, and certain "input or output units" of "automatic data processing machines" and "facsimile machines" ("MFMs").

3. However, as a result of certain EC measures challenged in this dispute, the EC and its member States apply customs duties on the aforementioned products, specifically, a 14% duty on FPDs, 13.9% and 14% duties on STBs and a 6% duty on MFMs. The EC and its member States therefore accord to the commerce of those products from *inter alia* the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu ("TPKM") treatment less favourable than that provided for in the EC Schedule. These customs duties are in excess of those set forth and provided in the EC Schedule and subject to terms, conditions and qualifications not set forth in the EC Schedule. The EC therefore violates Articles II:1(a) and II:1(b) of the GATT 1994.

4. In addition, by failing to publish certain classification measures with respect to STBs promptly and by applying duties prior to their publication, the EC and its member States acted inconsistently with their obligations under Articles X:1 and X:2 of the GATT 1994.

II. FACTUAL BACKGROUND

A. THE PRODUCTS AT ISSUE

5. FPDs are display devices capable of receiving signals from automatic data-processing ("ADP") machines only or from both ADP machines and other sources. They normally have a variety of connectors from the traditional VGA connector to Digital Video Interface ("DVI"), among other connectors. The common element to all FPDs concerned is that they can only be used with ADP machines, or with ADP machines and other apparatus.

6. STBs with a communication function are devices that enable a television set to receive and decode digital television ("DTV") signals. They include the capability to connect to the Internet through a modem. Sometimes they also include a hard disk drive (HDD) to record television programmes and to perform other ancillary applications enabled by the DTV provider.

7. MFMs are machines capable of performing two or more of the following functions: printing, scanning, copying and faxing. They can be further divided into two main categories of products. The first category includes MFMs that are connectable to an ADP machine or to a computer network. The

second category includes MFMs that cannot connect to an ADP machine but that operate in connection with a phone line. None of the MFMs at issue include a function using traditional photocopying technology.

B. THE MEASURES AT ISSUE

1. FPDs

8. The EC published Commission Regulation (EC) No. 634/2005 on 26 April 2005 and Commission Regulation (EC) No. 2171/2005 on 29 December 2005. Pursuant to these Regulations, a monitor of the liquid crystal display (LCD) type with a DVI among other connectors was classified under 8528.21.90 and subject to 14% duty. Classification as an output unit of an ADP machine in heading 8471 is excluded because such monitor is not of the kind solely or principally used in an ADP machine system in view of its capabilities to display signals from sources other than an ADP machine, such as a closed circuit television system, a DVD player or a camcorder.

9. On 30 May 2008, the EC published a consolidated version of the Explanatory Notes to the Combined Nomenclature (CNEN), 2008/C 133/01, which confirms that any FPD which is not *exclusively* used with ADP machines or systems will be excluded from the classification subject to zero tariff treatment.

10. On 31 October 2008, the EC published Commission Regulation (EC) No. 1031/2008 amending Council Regulation (EEC) No. 2658/87 and establishing the 2009 CN through which FPDs for use solely or principally with ADP machines are classified under heading 8528. However, the applicable zero tariff was still reserved for FPDs solely or principally used with ADP systems pursuant to the above classification measures.

11. TPKM notes that, through Council Regulation (EC) No. 493/2005 on 16 March 2005, and Council Regulation (EC) No. 301/2007 on 22 March 2007, the EC suspends duties on certain LCD FPDs. The latter expired on 31 December 2008 although the EC Commission has introduced a proposal to expand and prolong the duty suspension.

2. STBs

12. In 2006, the EC Commission proposed a draft CNEN to clarify the type of STBs covered by CN subheading 8528.12.91 as STBs with a communication function, and the classification of STBs with HDD. The text of the CNEN was partly adopted by the Customs Code Committee during its meeting of October 2006. However, the vote on the draft CNEN concerning STBs with a HDD was not adopted until the meeting of April 2007.

13. Although the CNEN were adopted in October 2006 and April 2007, they were only published in the Official Journal of the European Union on 7 May 2008. However, they were already applied by EC member States before its publication.

14. As a result of the CNEN, STBs with a HDD are classified as video recorders under CN 8521.90.00 and are subject to a 13.9% customs duty rate. In addition, STBs that include devices that allow access to the Internet, such as ISDN- WLAN- or Ethernet devices, are excluded from duty-free tariff treatment and classified under CN subheading 8528.71.19 subject to a 14% customs duty on the ground that such devices are not considered to be "modems".

3. MFMs

15. On 9 March 1999, the EC published Commission Regulation (EC) No. 517/1999 which classifies certain MFMs with the functions of scanning, printing, faxing and photocopying under CN 9009.12.00 subject to a 6% customs duty. The reason is that none of the above functions are considered to give the product its essential character.

16. On 9 March 2006, the EC published Commission Regulation (EC) No. 400/2006 which classifies certain MFMs with the functions of scanning, printing and copying under CN 9009.12.00 subject to 6% customs duty. The reason is that none of the above functions are considered to give the product its essential character.

17. The Customs Code Committee held its 360th meeting in 2005. The Report of this meeting states that "The Committee agreed that if a multifunctional device (fax, printer, scanner, copier) has the capability of photocopying in black and white 12 or more pages per minute (A4 format) this indicates that the product is classifiable in heading 9009 as a photocopying apparatus."

18. On 31 October 2008, the EC published Commission Regulation (EC) No. 1031/2008 which provides that MFMs performing a fax function and capable of coping 12 or less monochrome pages per minute are subject to 0% customs duty. However, MFMs which do not incorporate a fax function or which incorporate a fax function but are capable of copying more than 12 monochrome pages per minute are subject to 6% customs duty.

III. ARGUMENTS

A. BY IMPOSING CUSTOMS DUTIES ON CERTAIN FPDS, THE EC IS VIOLATING ARTICLES II:1(A) AND ARTICLES II:1(B) OF THE GATT 1994

1. The EC Schedule incorporates Attachment B to the ITA which obliges the EC to grant duty-free treatment to FPDs for products falling within the ITA

19. According to the EC Schedule, a product covered by the description "flat panel display devices (including LCD, Electro Luminescence, Plasma, Vacuum-Fluorescence and other technologies) for products falling within this agreement, and parts thereof" must be granted duty-free treatment, wherever this product is classified. Therefore, the question in this dispute is to determine the scope of the concession granted with respect to "flat panel display devices". In particular, the Panel must decide whether the EC is entitled to exclude from the scope of the relevant concession any FPDs which can receive signals from an ADP machine and from other sources due to the presence of a DVI, or any other connector. Those questions will be examined below in the light of Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("Vienna Convention").

(a) Ordinary meaning

20. The ordinary meaning of "flat panel display devices" indicates that they are thin screen devices to visualize data or signals. They have a variety of applications including reproduction of signals from ADP machines. However, they can also visualize data from other sources. It follows from the ordinary meaning that a flat panel display device is *not* limited to receiving signals from an ADP machine only.

(b) Context

21. The concession contained in the EC Schedule refers to "flat panel display devices (including LCD, Electro Luminescence, Plasma, Vacuum-Fluorescence and other technologies) *for products falling within this agreement*, and parts thereof" (emphasis added). It is clear that the concession only requires that flat panel display devices be "for" products falling within the ITA. It is therefore sufficient if the flat panel display device is inter alia used with products falling within the ITA and therefore at least with ADP machines. As a result, FPDs are covered by that concession even though they may be able to be connected to apparatus other than ADP machines.

22. Second, the EC Schedule grants duty-free treatment to a number of products even though they may be able to be connected to apparatus other than ADP machines. For instance, a concession is granted to "projection type flat panel display units used with automatic data processing machines which can display digital information generated by the central processing unit". It is sufficient that the flat panel display can display information from an ADP machine. There is no reason to apply a more restrictive interpretation to the FPDs at issue which also concern flat panel display technologies.

23. Finally, in connection with the concession of "flat panel display devices", the EC listed in its modified Schedule 14 CN subheadings under which those devices could be classified. Having analysed the 14 tariff subheadings, TPKM considers that they do not support the proposition that FPDs are excluded from those concessions if they are able to be connected to apparatus other than ADP machines.

(c) Object and purpose

24. TPKM submits that any interpretation that excludes from the broad EC concession any FPDs which are capable of receiving signals not only from ADP machines but also from other sources is contrary to the object and purpose of the GATT 1994 and the ITA.

(d) Other Considerations

25. In practice, the EC classified FPDs capable of receiving signals both from an ADP machine and other sources under heading 8471 or other headings subject to 0% customs duty. Such consistent classification under zero tariff headings was maintained until 2004 when the EC started to reclassify under dutiable headings first plasma FPDs and then LCD FPDs.

2. The EC Schedule incorporates Attachment A to the ITA which obliges the EC to grant duty-free treatment to "output units" including certain FPDs

26. TPKM submits, independently from the concession made with respect to "flat panel display devices" in the EC Schedule, that the concession made with respect to subheading 8471.60 ("input or output units, whether or not containing storage units in the same housing") also covers certain FPDs capable of receiving signals both from an ADP machine and other sources.

(a) Ordinary meaning

27. The ordinary meaning of the term "output units" demonstrates that this term is very broad and covers any element or item capable of delivering information from the computer. It follows from the ordinary meaning that a FPD which can receive signals both from an ADP machine and from other sources shall fall within the scope of "output units". The ordinary meaning of "output unit" does not

support the proposition that a FPD covered by subheading 8471.60 must be capable of receiving signals *only* from a computer system.

(b) Context

28. The EC in its Schedule defines subheading 8471.60 as "input or output units, whether or not containing storage units in the same housing". Reading subheading 8471.60 in conjunction with heading 8471, the term "whether or not containing storage units in the same housing" does not suggest that a FPD capable of receiving signals both from an ADP machine and other sources would be excluded from the definition of this subheading.

29. The structure of heading 8471 contained in the EC Schedule also confirms the broad scope of this heading. It clearly covers all types of data processing technologies. In addition, nothing in the description of the subheadings under heading 8471 suggests that only products capable of working exclusively with an ADP machine may be classified under heading 8471. Therefore, TPKM submits that FPDs capable of receiving signals both from an ADP machine and other sources are covered by subheading 8471.60.

(c) The Harmonized System

30. Note 5 (B) to Chapter 84 lays down the requirements to qualify as a unit of an ADP machine. Among others, Note 5 (B) requires that such unit must be of a kind *solely or principally* used in an automatic data-processing system. It is therefore sufficient that a FPD is *principally* used with an ADP machine to be classified under heading 8471, regardless of whether it is also capable of receiving signals from other sources.

31. Further, Note 5(C) to Chapter 84 confirms a classification under heading 8471even when the units of the ADP machine are presented separately. This Chapter Note does not require exclusive use with an ADP machine.

(d) Other Considerations

32. Under the HS 2007, FPDs previously classified under HS subheading 8471.60 are classified under new HS subheading 8528.51 (CN subheading 8528.51.00) which has the following wording: "of a kind *solely or principally* used in an automatic data-processing system of heading 8471" (emphasis added). The HS 2007 has clearly rejected any requirement for exclusive use by inserting the "sole or principal" criteria in the wording of the subheading 8528.51 itself.

3. As such, the measures at issue violate Articles II:1(a) and II:1(b) of the GATT 1994

33. Through the challenged measures as described above, the EC and its member States are imposing customs duties on certain FPDs, which is inconsistent with their obligations under Articles II:1(a) and II:1(b) of the GATT 1994.

34. TPKM notes that the EC suspends duties on certain FPDs through the aforementioned Council Regulations. TPKM is of the view that the EC would still violate Articles II:1(a) and (b) of the GATT 1994 regardless of the duty suspension. The violation would exist because the benefit of the zero tariff is made dependent on a number of conditions and terms not set forth in the EC Schedule.

35. First, duty suspensions may be terminated unilaterally as soon as the EC considers that the conditions for their continuation are no longer fulfilled. Second, given the fact that the aforementioned Council Regulations only grant a duty suspension on some types of FPDs, there are various types of FPDs that fall outside the scope of the duty suspension at issue and remain subject to the 14 % customs duty.

B. BY IMPOSING CUSTOMS DUTIES ON CERTAIN STBS WITH A COMMUNICATION FUNCTION, THE EC IS VIOLATING ARTICLES II:1(A) AND II:1(B) OF THE GATT 1994

1. The EC Schedule incorporates Attachment B to the ITA which obliges the EC to grant duty-free treatment to STBs with a communication function

36. According to the EC Schedule, a product covered by the description "STBs which have a communication function" must be granted duty-free treatment, wherever this product is classified. Therefore, the question in this dispute is to determine the scope of the concession granted with respect to STBs. In particular, the Panel must decide whether the EC is entitled to exclude from the scope of the relevant concession any STBs with a HDD or STBs that include devices, such as ISDN- WLAN- or Ethernet modems, allowing access to the Internet on the ground that such devices are not "modems". Those questions will be examined below in the light of Articles 31 and 32 of the Vienna Convention.

(a) Ordinary meaning

37. As set forth in the EC Schedule, the product covered by the concession at stake is defined as "Set top boxes which have a communication function: a microprocessor-based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange". TPKM will review first the text of the concession as defined before the colon, and then that as defined after the colon.

(i) "Set-top boxes which have a communication function"

38. The ordinary meaning of the text of the concession is clear. It covers STBs with any type of communication function. The concession does not require that the STBs should have only a communication function. Therefore, it is sufficient if the STB has a communication function, although it may have additional functions, such as a video recording function.

(ii) "a microprocessor-based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange"

39. Examining the terms after the colon, TPKM has not found any ground that may justify excluding from the scope of the concession at stake STBs which *in addition to* the communication function, are able to perform a recording or reproducing function. Moreover, the analysis of the term "modem" has shown that this term has a very broad scope.

(b) Context

40. It is recalled that the EC in its Schedule cited the following 3 subheadings next to STBs in the second list: 8517.50.90, 8517.80.90 and 8525.20.99. In addition, 8528.12.91 was also mentioned as of 2000. Having analysed the terms of these CN subheadings, TPKM notes that these terms do not support that STBs that perform functions in addition to the communication function cannot be treated

as falling under the coverage of the concession at stake. Similarly, they do not require that the STBs include specific types of modems in order to fall under one of these CN subheadings.

(c) Object and purpose

41. TPKM submits that any interpretation which would exclude from the EC concession any STBs with other functions in addition to the communication function or STBs that do not incorporate the type of modems that are listed in the CNEN at issue is contrary to the object and purpose of the GATT 1994 and the ITA.

(d) Other Considerations

42. In practice, the treatment to be given to certain STBs which have a communication function was first discussed in 2005 and that a first decision regarding these matters was not taken until October 2006. Between year 2000 and 2006, exporters were benefiting from duty-free treatment, as forseen under the EC Schedule.

2. As such, the measures at issue violate Articles II:1(a) and II:1(b) of the GATT 1994

43. Through the challenged measures which are described above, the EC and its member States are imposing customs duties on certain STBs with a communication function, which is inconsistent with their obligations under Articles II:1(a) and II:1(b) of the GATT 1994.

C. BY NOT PUBLISHING THE AMENDED EXPLANATORY NOTES RELATED TO THE TARIFFICATION OF CERTAIN STBS FOR MORE THAN ONE YEAR, THE EC IS VIOLATING ARTICLE X:1 OF THE GATT 1994

44. Article X:1 of the GATT 1994 provides that "Laws, regulations, judicial decisions and administrative rulings of general application, …, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them".

45. In the present case, the fact that the CNEN at issue was adopted in October 2006 and April 2007 but not published until May 2008 is clearly inconsistent with the requirement of "prompt" publication included in Article X:1 of the GATT 1994.

D. BY APPLYING DUTIES ON CERTAIN STBS PRIOR TO THE OFFICIAL PUBLICATION OF THE MEASURES IMPOSING THE DUTIES, THE EC IS VIOLATING ARTICLE X:2 OF THE GATT 1994

46. Article X:2 of the GATT 1994 provides that "No measure of general application…, shall be enforced before such measure has been officially published."

47. Some EC member States applied the CNEN on STBs before it was officially published. As a result, customs duties were applied before publication of the CNEN. Therefore, the EC and its member States acted inconsistently with its obligations under Article X:2 of the GATT 1994.

E. BY IMPOSING CUSTOMS DUTIES ON CERTAIN MFMS, THE EC IS VIOLATING ARTICLES II:1(A) AND II:1(B) OF THE GATT 1994

1. The EC Schedule incorporates Attachment A to the ITA which obliges the EC to grant duty-free treatment to "input or output units" and to "facsimile machines"

48. The EC committed itself by accepting the ITA to eliminate all customs duties applicable to "input or output units" of ADP machines of HS subheading 8471.60 and facsimile machines of HS subheading 8517.21. The Panel must decide whether the EC is entitled to exclude from the scope of the relevant concession all MFMs connectable to an ADP machine or network and without a facsimile function; and those MFMs connectable to an ADP machine or network and including a facsimile function, when they are capable of copying more than 12 monochrome pages per minute. The Panel must also determine if certain MFMs which cannot connect to an ADP machine but operate in connection with a telephone network can be excluded from the concession. Those questions will be examined below in the light of Articles 31 and 32 of the Vienna Convention.

(a) Ordinary Meaning

(i) "Input or output units" and "Printers"

49. The terms "input units" and "output units" within the meaning of HS subheading 8471.60 are very broadly defined. Indeed, "output units" refer to any apparatus or thing which receives data or information from ADP machines and "input units" cover any apparatus or thing which provides data or information to ADP machines. Thus, the MFMs capable of connecting an ADP machine constitute "input units" and "output units" within the meaning of HS subheading 8471.60.

50. Among the concessions made with respect to "input or output units" of ADP machines, one relates to "printers" (CN subheading 8471.60.40). The term "printer" refers to an output device which produces a printed record of data, text, etc. TPKM notes that the term "printer" in no way requires the information or data that are printed to come exclusively from an ADP machine. It also never refers to a maximum or minimum number of pages that could be produced in order to be regarded or considered as a "printer". TPKM therefore submits that the MFMs connectable to an ADP machine fall under that concession, i.e. that they are not only "input or output units" of ADP machines, but more specifically "printers".

(ii) Facsimile machines

51. The term "facsimile machines" refers to apparatus which reproduce graphic matter by scanning an original and which then transmit the scanned data by means of signals sent over a telephone network. TPKM submits that MFMs at issue that cannot be connected to computers but operate in connection with a telephone network to transmit data are clearly covered by the category of "facsimile machines".

(iii) Photocopier/photocopying process

52. The EC through the measures at issue consistently considers the MFM at issue as photocopying apparatus. However, the photocopying process refers to a process whereby a copy is being produced by the action of light on a photo-sensitive surface. There is a direct link between the action of light and the copy being produced. The term "photocopy" thus does not cover the reproduction of originals by printing or transmitting a previously scanned data file as it is done by MFMs.

(b) Context

53. As stated above, the structure of HS heading 8471 clearly confirms the broad scope of heading 8471 as covering all types of data processing technologies. Similarly, the structure of heading 8517 also supports its broad scope. In particular, this heading includes a residual subheading, i.e., "other apparatus" (subheading 8517.80) that confirms the intent of that heading to cover all "electrical apparatus for line telephony or line telegraphy". On the contrary, the wording of heading 9009, unlike headings 8471 and 8517, includes a very limited category of apparatus. It only covers photo-copying apparatus and thermo-copying apparatus as well as their parts and accessories. Unlike headings 8471 and 8517, heading 9009 does not include a residual subheading.

54. Next, it is clear from the wording of Chapters 84 and 85 that they intend to cover a broad range of apparatus. Chapter 84 covers machinery and mechanical appliances and parts thereof while Chapter 85 covers electrical machinery and equipment and parts thereof. In contrast, Chapter 90 covers very specific instruments or apparatus which are exhaustively listed, namely optical, photographic, cinematographic, measuring, checking, precision, medical or surgical instruments or apparatus. Chapter 90 should therefore be restrictively interpreted, unlike Chapters 84 and 85.

55. Finally, TPKM refers to headings 8525 and 9006 of the EC Schedule which both include cameras in order to illustrate the distinction which is being made in the EC Schedule between digital and non-digital products. In the EC Schedule, digital cameras are classified in HS subheading 8525.40, and more precisely, under CN subheading 8525.40.11 as "still image video cameras – digital" while photographic cameras are classified in HS heading 9006. This distinction is important and supports the interpretation that "photocopying apparatus" which are included in Chapter 90 do not cover digital copying.

(c) The Harmonized System

56. As indicated above, pursuant to Note 5 (B) to Chapter 84, a "unit" of an ADP machine must be of a kind solely or principally used in ADP systems. Most of the functions of the MFMs at issue, i.e., printing and scanning, are designed to be used in connection with an ADP machine and are therefore functions of an apparatus principally used with an ADP machine.

57. TPKM notes that such principal use is actually not even required for the MFMs at issue. Note 5(D) to Chapter 84 clarifies that a printer remains covered by HS heading 8471 even if it is not used exclusively or even principally with an ADP system. Therefore, to the extent that the MFMs at issue are printers, they do not need to be used solely or principally with an ADP system in order to fall within HS heading 8471.

58. Finally, the HSEN to heading 9009 confirms that the term "photocopying" does not include the conversion of an image into digital data by a scanner and the printing of that data by the printer.

(d) Object and Purpose

59. TPKM submits that any interpretation which excludes from the EC concession MFMs which do not incorporate a fax function or which incorporate a fax function but are capable of copying more than 12 monochrome pages per minute is contrary to the object and purpose of the GATT 1994 and the ITA. The exclusion of certain MFMs with a facsimile function and which cannot connect to an ADP machine or computer network is also contrary to the object and purpose of the GATT 1994 and the ITA.

(e) Other Considerations

(i) Certain BTIs with respect to MFMs

60. In practice, the classification of MFMs capable of connecting to ADP machines under headings 8517 or 8471 is confirmed by various BTIs. The multifunctional nature of the device did not in any case justify the classification as copier unless the device could not be connected to an ADP machine or network and it did not have a fax connection.

(ii) Certain HS documents

61. Under the HS 2007, the scope of HS heading 8443 has been broadened in order to cover MFMs previously covered by HS headings 8471 and 8517. Heading 8443 now includes all printers, facsimile machines, photocopiers and digital copiers as well as MFMs. Both the structure of HS heading 8443 and the HSEN to this heading confirm the differences between digital copying and photocopying.

62. Furthermore, new Chapter Note 5(D) to Chapter 84 under HS 2007 states that heading 8471 does not cover "printers, copying machines, facsimile machines, whether or not combined" when presented separately. By finding it necessary to expressly exclude MFMs from the scope of heading 8471, this Note acknowledges that such MFMs were properly classified in heading 8471 under the HS 96.

2. As, such, the measures at issue violate Articles II:1(a) and II:1(b) of the GATT 1994

63. Through the challenged measures as described above, the EC and its member States are imposing customs duties on certain MFMs, which is inconsistent with their obligations under Articles II:1(a) and II:1(b) of the GATT 1994.

IV. CONCLUSIONS

64. For all the above reasons, TPKM requests that the Panel find that:

(a) the EC's measures concerning flat panel displays are inconsistent with the EC's obligations under Articles II:1(a) and II:1(b) of the GATT 1994;

(b) the EC's measures concerning set-top boxes with a communication function are inconsistent with the EC's obligations under Articles II:1(a) and II:1(b) of the GATT 1994;

(c) the EC's measures concerning set-top boxes with a communication function are inconsistent with Articles X:1 and X:2 of the GATT 1994;

(d) the EC's measures concerning "input or output units" and facsimile machines are inconsistent with Articles II:1(a) and II:1(b) of the GATT 1994.

ANNEX C-2

EXECUTIVE SUMMARY OF THE ORAL STATEMENT BY CHINESE TAIPEI AT THE FIRST SUBSTANTIVE MEETING

1. For the first time in the history of its WTO membership, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu ("TPKM") has seen itself obliged to lodge a WTO complaint. It has taken this unprecedented step because of the importance of the trade flows concerned as well as the manifest nature of the violations committed by the EC.

2. As coordinated among complainants, TPKM in this opening statement will concentrate on one of these products, namely, FPD devices. As for MFMs and STBs, TPKM supports what has been said by the United States and Japan in their opening statements.

I. PRELIMINARY REMARKS

3. On its face, this case is quite simple. The question before this Panel is whether the EC is entitled to exclude FPD devices from the scope of the concession merely because they are capable of receiving and reproducing signals from both ADP machines and other sources (some of these FPD devices can even only reproduce signals from an ADP machine). Indeed, under the contested measures, the mere capability of an FPD device being connected to an apparatus other than an ADP machine will lead to the automatic exclusion of that FPD device from the scope of the concession covering FPD devices for use with ITA products.

4. The ECJ, the highest Court in the EC, in *Kamino* has held that the words "solely or principally" which determine whether a product can be considered to fall under HS subheading 8471.60 cannot be read as requiring the exclusive use with an ADP machine. The ECJ in *Kamino* therefore confirms that the EC has no legal basis to exclude FPD devices from classification under HS subheading 8471.60 simply because such apparatus may also be able to connect to a device other than an ADP machine, for instance, simply because the FPD device has a DVI connector.

5. The EC in its submission made some preliminary comments contending that TPKM failed to make a prima facie case with respect to FPD devices. None of these comments are correct.

6. First, the EC seems to argue that it is unaware of which product TPKM is precisely complaining about the treatment. As stated in its submission, TPKM's complaint relates to the treatment given by the EC to all FPD devices which are capable of receiving and reproducing signals from ADP machines only, and from both ADP machines and other apparatus. The FPD devices at issue may use various technologies, such as LCD, plasma, OLED, etc, other than CRT technology.

7. Secondly, TPKM has never alleged that the EC obligations flow directly from the ITA. It is clear from its submission that TPKM considers that the EC has violated its WTO obligations by according treatment to the products at issue which is less favourable than that provided for in its Schedule.

8. Thirdly, the fact that the EC has temporarily suspended its customs duties on part of the products concerned by this dispute does not remove its Article II GATT 1994 violation. Indeed, such suspension is temporary, and conditional upon a number of terms and conditions not included in the EC Schedule. The EC has failed even to respond to this argument.

9. Finally, the EC argues that FPD devices which are capable of receiving signals from ADP machines and other sources are not automatically excluded from the zero tariff treatment. The EC therefore proposes that TPKM's claim cannot extend to challenging the measures of the EC as such. However, in order to substantiate an "as such" claim, it is not necessary for the complainants to demonstrate that the measure at issue "always" leads to a violation of the WTO covered agreements. It is sufficient to demonstrate that at least in some respects the measure at issue will necessarily lead to such violation.

II. ARGUMENTS

10. The concession in the EC Schedule covering FPD devices is twofold. The first part of the concession is based on Attachment A to the ITA and provides for a zero tariff for a number of HS subheadings under which FPD devices could be classified, in particular, input or output units of ADP machines of subheading 8471.60.

11. The EC also incorporated the products listed in Attachment B to the ITA into its Schedule, including, among others, FPD devices. For FPD devices covered by Attachment B and incorporated in the EC Schedule, TPKM submits that the Panel's interpretation in this dispute should begin with the terms of the headnote contained in the EC Schedule. This is because, in the headnote, the EC made the commitment that with respect to any product described in Attachment B, to the extent not specifically provided for in the Schedule, the customs duties on such product shall be bound and eliminated, wherever the product is classified.

12. The meaning of the words "wherever the product is classified" is both crucial and self-explanatory. Regardless of the specific heading or subheading under which a particular product falls in the EC Schedule, any product meeting the description of FPD devices contained in the EC Schedule must be granted duty-free treatment, "wherever the product is classified".

13. There is therefore no doubt that the 14 CN subheadings next to the description of FPD devices in the headnote in the EC Schedule are only illustrative, rather than exhaustive. The EC's argument that its obligations with respect to FPD devices under Attachment B are only limited to those HS codes is incorrect. Furthermore, in doing so, the EC fails to give proper meaning to the words "*wherever the product is classified*".

A. ATTACHMENT B

14. It follows from the ordinary meaning that an FPD device is not limited to receiving signals from an ADP machine only. The rest of the language in the concession as well as the context supports this conclusion.

15. The product at issue is described as "*for* products falling within this agreement", it is clear that the concession requires that FPD devices be "for" products falling within the ITA. The ordinary meaning of "for", as found in dictionaries, is extremely wide and covers many different possible situations. In light of this, TPKM concludes that FPD devices "for products falling within this agreement" should be interpreted as covering FPD devices which are capable of operating with or being incorporated in ITA products even though other uses may be possible.

16. This conclusion is further supported by other concessions contained in the EC Schedule. For instance, both the concession with respect to "projection type flat panel display units" and the 14 subheadings next to the description of FPD devices confirm that FPD devices are not excluded from

those concessions on the mere ground that they are able to be connected to apparatus other than ADP machines.

17. As required by the Panel and Appellate Body in previous disputes, the concessions at issue must be interpreted in the light of the object and purpose of the WTO Agreement and GATT 1994, which is, among other things, to further the expansion of trade in goods and the substantial reduction of tariffs.

18. In this regard, TPKM submits that any interpretation that excludes from the EC concession FPD devices which are capable of receiving signals from both ADP machines and other sources, for instance because the FPD devices have a DVI connector, is contrary to the objective of expanding world trade in IT products as shed light upon not only by the ITA, but also by the WTO Agreement and the GATT 1994.

19. Finally, the EC tries to construct an argument by relying on the negotiating history of the ITA. However, in the present case, references made by the EC to the alleged negotiating history are partial and unconvincing. TPKM does not see how those references can be used to clarify the scope of the concessions at issue.

B. ATTACHMENT A

20. TPKM notes that the EC has not addressed its argument on Attachment A in its first written submission.

21. TPKM submits, independently from the concession made with respect to "flat panel display devices" in the EC Schedule, that the concession made with respect to subheading 8471.60 also covers FPD devices capable of receiving signals both from an ADP machine and other sources.

22. The ordinary meaning of the term "output units" in subheading 8471.60 demonstrates that this term is very broad and does not support the proposition that an FPD device covered by subheading 8471.60 must be capable of receiving signals only from a computer system.

23. This conclusion is supported by the HS 1996. Note 5 (B) to Chapter 84 of this HS lays down the requirements to qualify as a unit of an ADP machine. Among others, Note 5 (B) requires that such unit must be of a kind solely or principally used in an ADP system. It is therefore sufficient that an FPD device is principally used with an ADP machine to be classified under heading 8471, regardless of whether it is also capable of receiving signals from other sources. Under the EC measures, however, any device capable of receiving signals from other sources (as well as some that cannot) is subject to duties.

III. CONCLUSION

24. In conclusion, TPKM considers that there can be no legal justification for the EC not to grant duty-free treatment to FPD devices which are capable of receiving signals from an ADP machine only or from both ADP machines and other apparatus. TPKM therefore maintains that, as such, the measures at issue violate Articles II:1(a) and II:1(b) of the GATT 1994.

ANNEX C-3

CLOSING ORAL STATEMENT BY CHINESE TAIPEI AT THE FIRST SUBSTANTIVE MEETING

Mr. Chairman, distinguished Members of the Panel.

1. During the past three days, it has been obvious that the EC has failed to address the claims and arguments put forward by the co-complainants in this dispute.

2. The EC has continuously attempted to reframe the dispute as a dispute over the customs classification of products. It is not. The matter before this panel is to which extent the EC's contested measures necessarily result in violation of Article II of the GATT 1994. The difference is fundamental. If the issue was one of classification, the exercise would be to properly apply the relevant rules of classification. However, as this dispute concerns the question whether the tariff treatment resulting from the EC measures is consistent with the EC Schedule, it is necessary to examine the EC's concessions in accordance with the Vienna Convention on the Law of Treaties 1969. It is striking that while the complainants have analysed each of the concessions concerned starting from the ordinary meaning of the terms used, the EC simply fails to do so.

3. We would like to submit – once again – that the HS is clearly not relevant at all for the interpretation of those concessions that have been made by the EC pursuant to Attachment B to the ITA. Actually, these concessions have been defined not by the HS but by product descriptions phrased in commercial terms. And the EC Schedule provides that such products shall benefit from duty-free treatment "wherever [they] are classified".

4. We note that the EC has kept alleging that it does not know what it is accused of; claiming a lack of clarity as regards both the identification of the products and measures at issue. Yet, as underlined by the Appellate Body in *EC – Chicken Cuts*, "the identification of the products at issue must flow from the specific measures identified in the panel request.…In other words, it is the measure at issue that generally will define the product at issue."[1]

5. The co-complainants have clearly identified the contested measures in our panel request.

6. We would like to use one of the measures at issue, the CNEN, to demonstrate how products at issue are defined by the measures with respect to FPD devices. According to the EC Schedule, all FPD devices for ADP machines shall enjoy duty-free treatment. However, the CNEN excludes from duty-free treatment all FPD devices which are capable of receiving signals from apparatus other than an ADP machine or which can be connected to a video source other than an ADP machine or even simply because they have a DVI interface.

I. FPDS

7. We would like to add a few more words on the issue of FPD devices, more precisely, on the EC Schedule concerning "flat panel display devices."

8. The EC argued that the CN codes listed next to the Attachment B product description are exhaustive and define the full scope of the Attachment B concessions. This interpretation is simply

[1] Appellate Body Report, *EC-Chicken Cuts*, para. 167.

not acceptable as it reduces to inutility the headnote that provides expressly duty-free treatment for this concession wherever the product is classified.

II. MFMS

9. We agree with the closing statements made by the co-complainants on MFMs. I would, however, like to add the following comments.

10. Contrary to the EC submission and as already mentioned above, the question to be resolved is not one of classification. However, TPKM notes that insofar as classification rules are relevant as context, the EC errs in its presentation of the applicable classification rules, in some cases, even in flagrant contradiction with the rulings of the ECJ.

11. In the case of MFMs with ADP connectivity and with a facsimile function, the EC classifies them under Heading 9009.12 whenever the copying speed exceeds 12 ppm. Manifestly, the EC has provided no justification why an MFM with a copying speed which exceeds 12 ppm is automatically a photocopier.

12. Unfortunately, the EC has completely failed to address the above issues in either its First Written Submission or at the first substantive meeting.

III. STBS

13. TPKM also agrees and fully supports the closing remarks made by its co-complainants with regard to STBs. TPKM would only like to add the following comment.

14. The EC argued that STBs must be reviewed on a "case-by-case basis". However, the EC does not carry out such case-by-case analysis. For instance, any STB with a hard disk is excluded from the duty-free treatment and this is regardless of the capacity of the hard disk. The submission from the EC that some STBs with a hard disk are subject to duty free treatment is clearly not in conformity with the measures at issue adopted by the EC itself.

Mr. Chairman, distinguished Members of the Panel, TPKM thanks you for your attention.

ANNEX C-4

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION BY CHINESE TAIPEI

I. HORIZONTAL ISSUES

A. THE ITA

1. The ITA is part of the "context" within the meaning of Article 31.2 (b) of the *Vienna Convention* for the purposes of interpreting the EC Schedule. Indeed, the ITA is an "instrument which was made by one or more parties in connection with the conclusion of the treaty" and has been "accepted" by all WTO Members as an instrument related to the Schedule of Concessions. Moreover, the ITA is also relevant to determine the object and purpose of the treaty for the purposes of this dispute.

2. The EC agrees with the above but claims that complainants have arbitrarily selected some parts of the ITA, taken them in isolation and "imported" them into the interpretative exercise concerning the EC Schedule.

3. The EC's claim is erroneous. The analysis of the ITA as a whole clearly supports the overarching importance for the interpretation that the ITA's purpose is to achieve maximum freedom for world trade in IT products. It is the EC's overemphasis on point 3 of the Annex to the ITA concerning future negotiations that constitutes in fact a selective reading of the ITA.

4. Furthermore, the documents submitted by the EC as constituting the negotiations of the ITA do not qualify either as "preparatory work" or as any other forms of "supplementary means of interpretation" within the meaning of Article 32 of the *Vienna Convention*.

5. Indeed, these documents are informal documents exchanged among some of the participants to the ITA that have not been published or made available to all the parties. TPKM did not and does not have access to all the documents submitted by the EC as being part of the "negotiating history" and therefore requests the Panel to refrain from using them to determine the interpretation of the EC's concessions.

6. In any case, recourse to supplementary means of interpretation is only possible when "interpretation in the light of Article 31 leaves the meaning of a treaty provision ambiguous or obscure, or, in order to confirm the meaning resulting from the application of the interpretation methods listed in Article 31." This is not the case here. The meaning of the concession as established pursuant to Article 31 of the *Vienna Convention* is very clear, as it was detailed in TPKM's first written submission and second written submission.

B. THE PRESENT DISPUTE IS ABOUT TARIFF TREATMENT AND NOT ABOUT CUSTOMS CLASSIFICATION

7. That the present dispute deals with tariff treatment and not with customs classification has important practical effects.

8. First, it means that rules of classification, in particular the HS, are not central to this dispute and can at the most be relevant as part of the context only. Being part of the context, the HS is merely one element among others and is neither decisive nor dispositive of the interpretative exercise.

Moreover, it implies that the Panel should refrain from applying these rules automatically, for instance, GIR3(c).

9. Second, it means that rules of customs classification do not have equal relevance when interpreting the concessions. Their relevance varies depending on the concession concerned. In that respect, the HS is not relevant for the interpretation of the concessions made by the EC pursuant to Attachment B to the ITA, given that such concessions are based on product descriptions and not on HS headings.

C. REQUIREMENTS TO SUCCEED WITH AN "AS SUCH" CLAIM

10. First, when making an "as such" claim, the complaining party does not have to bring evidence concerning *the application* of the measures being challenged, as underlined by the Appellate Body in *US – Carbon Steel*. The evidence will in the first place take the form of the relevant legislation. It may, but need not, be supported by evidence of the application of such legislation.

11. Second, in order to succeed with an "as such" claim, it is not necessary to demonstrate that the measures at issue will lead *in all cases* or *always* to a WTO inconsistent result. As underlined by the Panel in *China – Auto Parts*, it is sufficient that a specific *aspect* or an *element* of the criteria set out in the measures at issue necessarily leads to a violation of the WTO Agreements.

D. ALL MEASURES BEING CHALLENGED ARE IN FORCE AND RELEVANT

12. First, with respect to certain measures challenged, the EC is claiming that they have lost their relevance since the CN codes indicated in these measures have changed with the entry into force of the CN 2007.

13. This is not correct. Each of these measures is valid and has legal effect, and will only disappear from the EC legal order when they are expressly revoked by the EC Commission or expressly annulled by the ECJ. This is supported by the way in which the EC has dealt with modifications resulted from past changes to the HS or the CN, for instance, the Commission Regulation (EC) No. 705/2205 that has expressly amended and repealed certain regulations on the classification of goods in the CN. Furthermore, this is consistent with the principle of legal certainty as acknowledged by the EC itself.

14. Second, the EC seems to have argued that measures which are incompatible with the interpretation by the ECJ in the *Kamino* and *Kip* cases have become invalid. However, in these cases, the ECJ has not annulled any measure and such measures are thus, as a matter of law, still in force and applicable. The measures will only disappear from the EC legal system when they are expressly revoked by the EC Commission or expressly annulled by the ECJ. There is no such thing as implied annulment or annulment by analogy under EC Community law.

15. Third, TPKM would like to clarify that, contrary to what the EC claims, CNEN are legally binding. The statement of the ECJ that "CNEN do not have legally binding force" refers to the fact that they cannot alter the scope of the CN but certainly not that customs authorities are free to disregard them. This is supported by the following facts: first, BTIs cease to be valid where they are no longer compatible with the interpretation of the CN by reason of an amendment to the CNEN (Article 12(5) of the CCC); second, the Chairman of the Nomenclature Committee stated that "as soon as an opinion has been voted, member States can issue BTIs for the products concerned, even before the measure has been adopted by the Commission and published in the Official Journal"; third, if member States do not follow CNEN and collect less customs duties as a result, the EC Commission

is entitled to claim the difference in the member States' budget and retains the option of instituting proceedings against that member State for infringement of Article 10 of the EC Treaty. As underlined by the EC in *EC – Selected Customs Matters*, CNEN are part of the "tools for ensuring a uniform classification practice within the EC". Finally, it must be emphasized that the fact that CNEN cannot contradict the wording of the CN does not mean that, as the EC appears to claim, customs authorities would be free to disregard a CNEN at its own initiative when they consider that it contradicts the wording of the heading. A national authority will not disregard a CNEN, though contrary to the wording of a heading, until it has been amended by the EC Commission.

16. Furthermore, TPKM would like to underline that, in light of the clarifications made by the Appellate Body in *US – Corrosion-Resistant Steel*, CNEN necessarily constitute "measures" that can be challenged "as such".

E. INTERPRETATIVE ISSUES CONCERNING THE CONCESSIONS INCLUDED IN THE EC SCHEDULE

17. First, through the headnote included in its Schedule, the EC committed to grant duty-free treatment to all products described in or for Attachment B, wherever they are classified. The various CN codes identified by the EC at the time of implementing the ITA merely indicate where the EC thought the products concerned were falling in the CN. However, they do not "exhaust" the definitions included in the EC Schedule. The EC's interpretation is contradicted by the text of the headnote, reducing it to inutility and further contradicted by the text of the ITA.

18. Second, technological development does not have an impact on tariff treatment. It is TPKM's view that, while concessions are made at one point in time, they are not restricted, as the EC appears to submit it, to the products existing at that time. What is relevant is to determine whether a product, on the basis of its objective characteristics, falls within the scope of the concessions interpreted on the basis of its ordinary meaning, context and object and purpose. As long as the product at issue meets the description of the product covered by the concession, it does not matter whether this product is technologically more advanced than the products existing at the time the concession was made. That product must receive the treatment offered by the concession. This is consistent with the position expressed by the panel in the GATT dispute concerning "Greek Increase in Bound Duty."

II. BY IMPOSING CUSTOMS DUTIES ON CERTAIN FLAT PANEL DISPLAY DEVICES, THE EC VIOLATES ARTICLES II:1(A) AND II:1(B) OF THE GATT 1994

A. GENERAL ISSUES

1. The product at issue has been defined in a sufficiently precise manner

19. The EC complains about the alleged lack of precise definition of the products at issue. In addition to the fact that TPKM has provided a precise definition of the product at issue, TPKM would like to underline that the Appellate Body clarified in *EC – Chicken Cuts* that it is the measure at issue that will generally define the product at issue. In this dispute, the complainants have clearly identified the contested measures that accordingly have defined the products at issue.

20. The EC's confusion seems to flow from a wrong understanding of the claims being made in this dispute. The products at issue are not limited to those mentioned as examples such as LCD monitors with DVI. The products at issue are those defined by the measures at issue and the claims are being made with respect to certain aspects of the measures that necessarily lead to a WTO inconsistent outcome.

2. The obligations in the EC Schedule have been precisely identified

21. The EC's claim about TPKM's failure to identify the concession concerned and where it is provided for is incorrect. TPKM's first written submission has clearly identified the precise content of the concession. Moreover, contrary to the EC's claim, TPKM has also made clear that the CN codes indicated by the EC are illustrative only. They may be used as "context" but in no way determine the scope of the concession that is based on the product description. Finally, TPKM disagrees with the EC's arguments that when the EC concession is in its Schedule and identified with a given HS/CN code, some differences in its interpretation may be allowed. This position amounts to stating that WTO Members have agreed that there could be difference between WTO Members in the scope of concessions which are identically worded, depending on the codes listed alongside the product description. This is contrary to the wording of the ITA and the EC's concession.

3. The EC has misrepresented the complainants' claim

22. The EC has misrepresented the complainants' claim. TPKM has not submitted that the presence of a DVI connector determines whether an LCD monitor must benefit from duty-free treatment. On the contrary, TPKM has argued that the presence of a DVI cannot automatically exclude any FPD device from duty-free treatment. This is actually the effect of the measures at issue.

23. The EC argues that it is incorrect to claim that the EC will impose duties based on the mere fact that the FPD device "might" be used with something other than an ADP machine or the fact that it is merely capable of being connected to a non-ADP machine. The EC refers to item 1 in Regulation (EC) No. 2171/2005 to support its argument. However, item 1 in the said Regulation is not subject to this dispute. Furthermore, the product described in item 1 can only be used together with an ADP machine. It is not able to reproduce correctly signals received from any external source other than an ADP machine.

4. The FPD devices at issue are neither multifunctional LCD monitors nor new products

24. TPKM's complaint is not limited to "multifunctional monitors" but covers all FPD devices which can receive and reproduce signals from an ADP machine and this is so regardless of whether the FPD device can also receive and reproduce signals from other sources.

25. The fact that a product with additional or enhanced features that did not exist at the time the concession was made does not make that product a "new" product, and is not a reason to exclude that product from the scope of the concession.

5. The measures at issue

26. There are five measures at issue. It should be noted that (i) Council Regulation (EC) No. 179/2009 referred to by the EC as replacing Council Regulation (EC) No. 493/2005 merely establishes a new duty suspension which remains at the discretion of the EC and is limited in time; (ii) Commission Regulations (EC) No. 634/2005 and No. 2171/2005 have not lost their relevance as claimed by the EC since they have not been repealed or amended by any other regulation or annulled by the ECJ; (iii) the EC's statement that Council Regulation (EC) No. 2658/87 as last amended applies a zero duty to monitors of the "kind solely or principally used in an automatic data processing system of heading 8471" fails to take into account that FPD devices are subject to a zero percent duty regardless of the sole or principal use with an ADP machine pursuant to the EC concession based on Attachment B of the ITA; and (iv) CNEN are in fact legally binding.

B. INTERPRETATION OF THE CONCESSIONS

1. Ordinary meaning

(a) EC concession for "input or output units" of ADP machines

27. TPKM has made a *prima facie* case that the products at issue meet the ordinary meaning of the concession concerning heading 8471.60 with respect to input or output units of ADP machines. It is thus up to the EC to demonstrate that the products at issue do not fall within that concession as it claims. However, the EC has simply failed to demonstrate this.

28. The EC is also wrong when saying that the products at issue could also fall within subheading 8528.21/22 or subheading 8528.12/13. An FPD for use solely or principally with an ADP machine undoubtedly falls under CN code 8471.60.90 as an output unit of an ADP machine. This is confirmed by Chapter Note 5(B).

(b) Concession made with respect to "flat panel display devices"

29. Contrary to the EC that failed to review any definition of the words of the concession, TPKM has carefully reviewed the ordinary meaning of the concession, and in particular of the term "flat panel display devices… for products falling within this agreement." There is nothing in the ordinary meaning of these terms that would imply a limitation such as receiving signals from ADP machines only.

30. Contrary to the EC's suggestion, the use of technical dictionaries from this decade does not necessarily invalidate its relevance. Indeed, the descriptions of "display" and "panel display" in both editions of 1993 and 2003 of the *McGraw-Hill Dictionary of Scientific and Technical Terms* are exactly identical.

2. Context

(a) Tariff headings indicated in the EC Schedule regarding its concession on "flat panel display devices"

31. The CN codes identified by the EC next to the product description of "flat panel display devices for products falling within this agreement" may be analyzed as part of the "context." Contrary to the EC's approach that focuses on a single CN code among the 14 identified in the list, a proper analysis should examine all 14 CN codes. By focusing on one CN code, the EC has conveniently avoided examining the reference to subheading 8531.20 where certain FPD devices can also be classified.

32. The EC submits that the definition of "monitors" in another product description is "by far the most important contextual relevance" and seeks to strengthen its position by referring to the fact that the definition of "monitors" expressly states that "the agreement does not, therefore, cover televisions." However, this statement is tied to the CRT monitor only and cannot be read into other concessions concerning, in particular, "flat panel display devices."

33. Regarding the "exclusion of video monitors and televisions," whether a device on which one can watch television or video is covered by a particular concession depends on the terms of that concession. If a device is a "flat panel display device for products falling within the ITA," it is covered irrespective of whether or not it incorporates a TV tuner. There is simply no basis to read

additional limitations into the concession for flat panel display devices that do not exist in the text of that concession, and doing so would be utterly contrary to the principles of treaty interpretation reflected in the *Vienna Convention.*

(b) Schedules of other ITA participants

34. As part of the "context," the EC also refers to the Schedules of other participants. However, it is not the tariff classification of the FPD devices under the subheadings identified in the list that is relevant but the duty treatment. Moreover, the EC ignores that heading 8531 is also identified by a large number of participants and that subheading covers FPD devices, whether or not they can be connected to a source other than an ADP machine.

3. The Harmonized System

35. The EC elaborated on the HS at length and concluded that the HSEN to headings 8471 and 8528 require both the exclusive use with an ADP machine and the sole presence of connectors characteristic of data-processing systems to classify FPD devices under heading 8471. The EC alleges that these were precisely the requirements that the EC used to classify FPD devices under heading 8471. TPKM would like to make the following comments regarding the EC's analysis of the HS in this regard.

36. First, the HS may be used as "context" only for the analysis of the EC concessions made by the EC pursuant to Attachment A to the ITA. Indeed, for the concession made with respect to "flat panel display devices for products falling within this agreement" pursuant to Attachment B to the ITA, the duty-free treatment must apply regardless of whether the flat panel display devices are solely or principally for use with an ADP machine and regardless of their "principal function."

37. Second, even if the HS1996 were to have any relevance as context for the analysis of the EC concession for FPD devices, the HSEN are not part of the HS1996. They must be ignored and cannot be given any interpretative value where they are in direct conflict with binding HS section or chapter notes or with the wording of the HS headings.

38. Third, even if the tariff classification of FPD devices had any relevance for the current dispute, the EC is incorrectly applying GIR 3(c). Indeed, the application of this GIR does not lead classification of FPD devices under heading 8528 as the EC claims but under heading 8531. The EC has conveniently ignored that Heading 8531 is also applicable and if classification had to take place under the last heading in numerical order, heading 8531 would apply.

4. The *Kamino* case

39. The *Kamino* judgment indirectly clarifies that the EC has violated its concession covering input or output units of subheading 8471.60. Indeed, it confirms that the EC incorrectly excludes FPD devices from the scope of subheading 8471.60 on the sole ground that they can be connected to a source other than an ADP machine, or due to the presence of a particular type of connector. It is therefore surprising that the EC still tries to support its positions with this ruling. The conclusions drawn by the EC from the *Kamino* case are incorrect.

40. It is not necessary for the EC to explain how it will proceed to classify FPD devices following *Kamino*. Since FPD devices must be subject to duty-free treatment wherever they are classified, such classification exercise is not relevant. Moreover, if the EC intends to implement the *Kamino* judgment on the basis of the criteria in the HSEN, it is likely to continue infringing the obligations undertaken

in its Schedule with respect to FPD devices. Finally, for "multifunctional monitors," the EC's position that, it is impossible to determine the principal use or function and GIR3(c) is to be applied in all cases, will similarly lead to a violation of the EC obligations under its Schedule. In any case, the EC's position ignores that it should lead to a classification under heading 8531 or 9013 which are duty-free.

5. Object and purpose

41. TPKM's arguments focus on the object and purpose of the GATT 1994. First, concessions should be interpreted "so as to further the general objective of the expansion of trade in goods and the substantial reduction of tariffs" even if "such an interpretation is limited by the condition that arrangements entered into by Members be reciprocal and mutually advantageous." That the concessions are to be interpreted so as to further the general objective of the expansion of trade is supported by the object and purpose of the ITA itself. Second, concessions should be interpreted so as to promote the objective of security and predictability. In that respect, the EC's interpretation that results in excluding products from the scope of the concession because they would be "new" runs against the objectives of security and predictability. Likewise, the argument that the EC's duty suspension, which is temporary and uncertain, could "save" the measures at issue from violating Article II of the GATT also contradicts the objects of security and predictability.

6. Supplementary means of interpretation

(a) The classification practice of ITA participants is irrelevant

42. The "classification" practice of the other ITA participants regarding "flat panel display devices for products falling within this agreement" is irrelevant since the concession has been made "wherever the product is classified."

(b) The negotiating history is irrelevant

43. The documents submitted by the EC as being the "negotiations" do not constitute "supplementary means" of interpretation and can therefore not be used in the framework of this dispute. In addition, recourse to Article 32 of the Vienna Convention is not necessary in this dispute since the scope of the concession is clear pursuant to the sole use of the interpretative tools of Article 31 of the Vienna Convention.

C. THE EC'S MEASURES VIOLATE ARTICLE II:1(A) AND II:1(B) OF THE GATT 1994

44. Through the measures at issue, the EC is imposing customs duties on certain FPDs instead of providing duty-free treatment as required by the concessions made by the EC with respect to "flat panel display devices for products falling within the ITA" and with respect to HS heading 8471.60 "input or output units" of ADP machines. Thereby, the EC violates Article II:1(a) and II:1(b) of the GATT 1994.

45. Although the EC has been providing duty suspension for certain FPD devices, it does not "save" the measures at issue from being inconsistent with Article II:1(a) and II:1(b) of the GATT 1994, as the EC submits it.

46. First, duty suspension is temporary. Whether a duty suspension will be renewed depends on a number of factors including economic factors. The EC thus necessarily violates Article II:1(b) of the GATT 1994 since it makes the benefit of a zero customs duty dependent on a number of terms and conditions not set forth in its Schedule.

47. Second, not all FPD devices that should have received duty-free treatment benefit from the duty suspension. Under Regulation (EC) No. 179/2009, the duty suspension is not applicable to colour monitors having a screen size of more than 22 inches or an aspect ratio different from 1:1, 4:3, 5:4 or 16:10.

48. Finally, Regulation (EC) No. 179/2009 that provides for a duty suspension on certain FPD devices until 31 December 2010 was published on 7 March 2009 and entered into force on that date. Since the previous duty suspension expired on 31 December 2008, it means that between 1 January 2009 and 6 March 2009, there was no duty suspension in force until the new Regulation was published and provided for its retroactive application as of 1 January 2009. This system therefore creates considerable uncertainty for traders.

III. BY IMPOSING CUSTOMS DUTIES ON CERTAIN SET-TOP BOXES WHICH HAVE A COMMUNICATION FUNCTION, THE EC VIOLATES ARTICLE II:1(A) AND II:1(B) OF THE GATT 1994

A. GENERAL ISSUES

1. The obligations in the EC Schedule have been well identified

49. Contrary to the EC's claim, TPKM has clearly identified the EC concession at stake and noted that such concession is included in the EC Schedule itself and not in the ITA. Furthermore, the headnote is central since it expressly provides that duty-free treatment is to be granted to all products described in Attachment B wherever the product is classified. The codes that the EC notified to the WTO in accordance with paragraph 2 of the Annex to the ITA only indicate where in the CN the EC considered the product was classified at that time. These codes thus in no way limit the scope of the concession made with respect to a specific product description.

2. Identification of the product at issue and "as such" claims

50. The EC argues that the complainants failed to describe the products at issue. However, let along that TPKM has clearly identified the products at issue, the EC has missed the point. The claim is not about tariff treatment of a specific model of STBs but about several criteria used by the EC to determine the tariff treatment of a category of products, namely STBs which have a communication function. TPKM has underlined that several aspects of the measures at issue are inconsistent with the EC's obligations under the WTO. In other words, the EC excludes the following STBs which have a communication function from duty-free treatment through the measures at issue: (i) STBs which incorporate a device performing a recording or reproducing function (for example, a hard disk or DVD drive); (ii) STBs incorporating a device "performing a similar function to that of a modem but which do not modulate or demodulate signals" such as "ISDN-, WLAN- or Ethernet devices"; (iii) STBs that do not have a "built-in modem" but an external modem; and (iv) STBs which do not incorporate a video tuner.

51. Furthermore, TPKM would like to emphasize that it is irrelevant whether in some cases the application of the measures may lead to a WTO consistent outcome. Indeed, in order to succeed with an "as such" claim, it is sufficient to demonstrate that any aspect of the criteria set out in the measures challenged will necessarily lead to a violation of the EC's obligations under its Schedule, and consequently Article II of the GATT 1994.

B. INTERPRETATION OF THE CONCESSION

1. Ordinary meaning

(a) STBs incorporating a hard disk or DVD recorder

52. The analysis of the ordinary meaning of the terms of the concession demonstrates that it covers STBs which have a communication function even if they have additional functions. Actually, the EC also acknowledged this when stating that the product covered by the concession "cannot *endlessly* assume other features or technical elements." The EC thereby recognizes that the coverage of the concession permits products with additional features or functionalities. As long as the product meets the description of a "set top box which has a communication function," it must receive duty-free treatment, regardless of any additional feature or functionalities it may have.

53. The EC seems to be aware of the weakness of its position and tries to strengthen it by developing a rather farfetched theory about the meaning of the words "which have" instead of "with." However, if the drafters of the ITA intended to limit the functions of the product covered by the concession to communication functions only, they would have added the word "solely" or the equivalent in the text of that concession rather than using the word "which" instead of "with." It is a well-established principle of treaty interpretation that the interpreters cannot read into the text words that are not there.

(b) Set top boxes and modems

54. In accordance with the definition of "modem" as included in the relevant dictionaries, the Ethernet, ISDN and WLAN modems all modulate and demodulate. They connect a set top box to a communication line and convert signals produced by one type of device to a form compatible with another. Devices that operate through an Ethernet or network connection, a WLAN connection or an ISDN modem are modems. STBs equipped with such modems therefore fall within the scope of the concession concerning "set top boxes which have a communication function."

2. Surrounding circumstances

55. In an attempt to strengthen its position, the EC has imported the analysis of "the set top boxes available on the market in 1996" and "the descriptions used during the negotiations" as "surrounding circumstances" into its analysis of the ordinary meaning of its concession concerning "set top boxes which have a communication function." However, these elements could at most be examined as "supplementary means" of interpretation within the meaning of Article 32 of the Vienna Convention. It is actually very doubtful whether these elements qualify as "supplementary means of interpretation."

3. Context

(a) Tariff lines

56. The CN codes notified by the EC to the WTO do not determine the scope of the concessions. They are merely indications of where in the CN the EC viewed the STBs which have a communication function were included at that time.

(b) Schedules of other ITA participants

57. The table showing the codes notified by the ITA participants as to where they classify STBs which have a communication function is irrelevant in determining the scope of the EC concession. It merely supports the view that when the ITA negotiations concluded, there were no universally agreed classification headings for STBs which have a communication function. That is precisely the reason why the commitment has been made with respect to a product description wherever classified and regardless of its classification by individual participants.

C. THE EC'S MEASURES AT ISSUE VIOLATE ARTICLE II:1(A) AND II:1(B) OF THE GATT 1994

58. The EC repeatedly claims that "it does not exclude any STBs from duty-free treatment due to the presence of a hard disk or other apparatus." Yet, the EC has not provided any evidence of instances where an STB with a hard disk has been accorded duty-free treatment by the EC. In other words, as expressly stated in the CNEN, the mere presence of a hard disk or DVD drive in an STB which has a communication function leads to the exclusion of that STB from duty-free treatment. By doing so, the EC violates its obligations under Article II:1(a) and II:1(b) of the GATT 1994.

IV. BY NOT PUBLISHING THE AMENDED EN RELATED TO THE TARIFFS OF CERTAIN STBS FOR MORE THAN ONE YEAR AND BY APPLYING CUSTOMS DUTIES ON CERTAIN STBS PRIOR TO THE OFFICIAL PUBLICATION OF THE MEASURES, THE EC VIOLATES ARTICLE X:1 AND X:2 OF THE GATT 1994

A. ARTICLE X:1 OF THE GATT 1994

59. Contrary to the EC's claim, the CNEN constitute "laws, regulations, judicial decision or administrative rulings of general application" and therefore fall within the scope of Article X:1 of the GATT 1994. Indeed, CNEN are legally binding. In any case, Article X:1 of the GATT 1994 has a broad scope that would cover CNEN even if the CNEN were not found to be legally binding.

60. Article X:1 of the GATT does not refer to acts that have been "adopted" but acts that are "made effective". From the moment the measure, i.e., the CNEN, was voted upon by the Customs Code Committee in April 2007, it began to be applied by the customs authorities of the member States. It was then that CNEN were "made effective." It was also then that the EC should have promptly published the CNEN accordingly. The fact that the CNEN was made effective since the vote of the Customs Code Committee in April 2007 but not published until May 2008 is clearly inconsistent with the requirement of prompt publication as provided in Article X:1 of the GATT 1994.

B. ARTICLE X:2 OF THE GATT 1994

61. The EC first tried to confuse the panel by reframing the dispute as one concerning not the CNEN but "the votes and discussions in the CCCE." However, TPKM's claim is about the CNEN that have been "enforced" but not yet published. Thus, the measure within the meaning of Article X:2 of the GATT is the CNEN as voted upon by the Customs Code Committee. The fact that the CNEN concerned have not been "adopted" is not relevant for the purposes of this provision as long as they have been "enforced."

62. Contrary to the EC's claim, CNEN constitute "measures" within the meaning of Article X:2 as they constitute "acts setting forth rules or norms that are intended to have general and prospective application." CNEN constitute "measures" even if they have not been "formally" adopted.

63. The EC simply ignores the evidence brought by TPKM and the United States which shows that customs authorities started applying the CNEN that had been voted upon by the Customs Code Committee but not yet officially published. The sole defence of the EC is that the reference to the not-yet published CNEN in the BTIs is "for information" only since the "member States base their classification decisions on CN and the interpretative rules thereto." However, the EC's argument amounts to deprive CNEN of any existence. The EC appears to argue that CNEN do not constitute "measures." Nonetheless, as TPKM noted above, the issue is not to determine what the exact status of the CNEN is within the EC legal system. The fact that customs authorities of the member States have relied on CNEN either to issue BTIs or to take other customs decisions shows that the CNEN had been enforced and affected traders.

V. BY IMPOSING CUSTOMS DUTIES ON CERTAIN MULTIFUNCTIONAL MACHINES, THE EC VIOLATES ARTICLE II:1(A) AND II:1(B) OF THE GATT 1994

A. GENERAL ISSUES

1. The products at issue

64. The EC has had no difficulties in identifying the products at issue as comprising the so-called "ADP MFMs" and "NON-ADP MFMs," even though the EC has made a number of statements about the product at issue that are factually incorrect.

2. The measures at issue

65. Contrary to what the EC claims, with the exception of the CCCE statement, the measures at issue are all still valid and continue to form part of the EC legal system.

3. The issue

66. The EC erroneously presents the issue as being one about customs classification while it is a tariff treatment dispute. It is sufficient for the complainants to demonstrate that the EC measures necessarily result in certain MFMs being subject to customs duties when they are actually entitled to a zero tariff under the applicable concessions. The Panel will thus first have to determine whether the MFMs at issue are properly covered by the concessions contained in HS subheading 8471.60 or 8517.21. TPKM notes that the EC failed to examine anywhere the ordinary meaning of the wording of the concessions covering subheadings 8471.60 or 8517.21. Instead, the EC embarked immediately on a classification exercise, applying the rules of the HS in order to demonstrate that the MFMs are correctly classified under heading 9009 instead of under heading 8471 or 8517. TPKM submits that in doing so the EC skipped the most important step in the interpretative exercise, i.e., to analyze, in the light of the principles set out in the *Vienna Convention*, the ordinary meaning of the wording of the concessions covering subheading 8471.60 and subheading 8517.21 and whether such wording covers the MFMs at issue.

B. ADP MFMS

67. The EC has not examined the wording or even the scope of the concessions under Subheading 8471.60 for "printers" (CN code 8471 60 40) and "others" (CN code 8471 60 90) or for "facsimile machines" (CN code 8517 21 00) but immediately argues that digital copying is a form of photocopying. According to the EC, "*unless it can be shown that the copying function was 'secondary,*'" ADP MFMs would fall outside the concession for subheading 8471.60. "*If the copying*

function was equivalent," they would fall under subheading 9009 12 pursuant to GIR 3. The EC refers to the judgment of the ECJ in *Kip*. However, it is puzzling how the EC can base its entire defence on a ruling from its own highest court, which actually concluded that the automatic exclusion of MFMs with a copying function from the scope of subheading 8471 and their classification under heading 9009 violates EC customs law.

68. First, an ADP MFM will fall under subheading 8471.60 provided it is "of a kind solely or principally used in an ADP system." Given that ADP MFMs are by definition connectable to an ADP system and consist of a scanner module and a printing module, it is clear that as a general rule such apparatus will be of a kind solely or principally used in an ADP system and would therefore generally fall under heading 8471.

69. Second, in the rare cases where the copying function is equivalent to the printing and the scanning functions, classification cannot take place on the basis of Note 5(B) to Chapter 84. It is necessary to examine whether the ADP MFM cannot be classified on the basis of GIR 3(b) which classifies products on the basis of the component which confers the essential character to the product. Since printer, scanner and computer modules are clearly classifiable under heading 8471, it is manifest that the exercise will necessarily result in a classification under heading 8471 unless the value and role of the various components would be so similar that no component can be identified conferring the essential character to the apparatus. Needless to say, given the preponderance of the printer module consisting of the print engine and the print controller in the overall value and functioning of an ADP MFM, it will only be in very rare cases that the printer module will not confer the essential character to the MFM.

1. Digital copying is not a form of photocopying

70. The EC has avoided analyzing the wording of the concession covering subheading 8471 and has focused instead on the concession covering heading 9009. This approach presupposes that digital copying is actually a form of photocopying.

71. TPKM submits that such reasoning is not supported by the facts: (i) analogue photocopying and digital copying are different even if light is used in both processes; (ii) although both systems use an "indirect process," in the case of digital copying, it is the printing process that is "indirect," not a "photocopying process." To qualify as an indirect photocopying process, it is necessary that the original image is projected on the light sensitive surface of the drum and that afterwards the projected original image is transferred from the drum to the paper. That is not the case with digital copying; (iii) the indiscriminate use in commercial literature of the terms "copier" and "photocopier" is not an acceptable interpretative tool under Article 31 or 32 of the *Vienna Convention*; (iv) the EC ignores that analogue photocopier and digital copier are fundamentally different technologies; (v) the reference to Regulation (EC) No. 1165/95 and the *Rank Xerox* ruling is not convincing as the apparatus concerned by these measures cannot connect to an ADP machine or to a network; and (vi) in Council Regulation (EC) No. 2380/95 of 2 October 1995 that imposed a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, the EC distinguished "digital copying" from "photocopying" as being two completely different processes.

72. As for the alleged US practice of classifying stand alone digital copiers under heading 9009, TPKM fails to see how this can support the EC position. TPKM considers that the HS2007 and its negotiating history are equally of minimal relevance in this dispute.

2. ADP MFMs fall within the scope of the concession for subheading 8471.60

73. The main argument submitted by the EC to justify the exclusion of ADP MFMs from the concession covering subheading 8471.60 relies on Note 5 to Chapter 84. The EC claims that the requirement of sole or principal use in Note 5(B) is not met and that Note 5(D) is not applicable since the MFM are not "printers". However, the following should be noted. First, ADP MFMs fulfill the requirements in Note 5(B)(a) since they are of a kind principally used in an ADP system. The fact that the MFMs may operate independently from an ADP system as a stand alone digital copier does not invalidate its principal use with ADP machines. Second, Note 5(D) confirms that ADP MFMs fall under the scope of the concession for "output units" and "printers" under subheading 8471.60. Such would be the case regardless of whether the sole or principal use test is met. The meaning of "printer" is not limited to single function machines only. Third, the broad scope of the concession for 8471.60 actually confirms that the MFMs at issue are included within the scope of the concession.

C. NON-ADP MFMS

74. The EC claims that these MFMs correctly fall under the scope of the concession in subheading 9009.12 since their copying functionality is similar to that of stand alone digital copiers, and their copying function also qualifies as photocopying.

75. However, the EC's claim is without merit for the following reasons: (i) "photocopying" is different from "digital copying"; (ii) correct application of GIR 3(b) would actually result in a classification under another heading different from 9009; (iii) it is incorrect that the criterion of pages-per-minute copying speed was already used in Commission Regulations (EC) No. 2184/97 and No. 517/99; and (iv) the duty-free treatment granted to some non-ADP MFMs with a copying speed not exceeding 12 pages per minute (8443 31 10) is simply a fulfillment of the EC's obligation. It is the EC that has arbitrarily excluded from the duty-free treatment those MFMs with a facsimile function and a copying speed exceeding 12 pages per minute.

VI. CONCLUSIONS

76. For all the reasons set forth in its First Written Submission and for all the reasons set forth above in this Submission, TPKM respectfully requests the Panel to find that:

(a) the EC's measures concerning flat panel display devices are inconsistent with the EC's obligations under Articles II:1(a) and II:1(b) of the GATT 1994;

(b) the EC's measures concerning set-top boxes which have a communication function are inconsistent with the EC's obligations under Articles II:1(a) and II:1(b) of the GATT 1994;

(c) the EC's measures concerning set-top boxes which have a communication function are inconsistent with Articles X:1 and X:2 of the GATT 1994;

(d) the EC's measures concerning multifunctional machines are inconsistent with the EC's obligations under Article II:1(a) and II:1(b) of the GATT 1994

77. Accordingly, TPKM respectfully requests that the Panel recommend, pursuant to Article 19.1 of the DSU, that the EC and its member States bring the measures into conformity with the covered agreements.

ANNEX C-5

EXECUTIVE SUMMARY OF THE ORAL STATEMENT BY CHINESE TAIPEI AT THE SECOND SUBSTANTIVE MEETING

1. Mr. Chairman, distinguished members of the Panel, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu ("TPKM") would like to thank you and the Secretariat for your hard works that have already been done and for your ongoing efforts in connection with this dispute.

2. TPKM is pleased to have this opportunity today to address some new arguments developed by the EC in its second written submission. In this oral statement, TPKM will first address the issues with respect to the tariff treatment accorded by the EC to Flat Panel Display devices (FPD devices). TPKM will then address the main concerns raised by the EC's arguments with respect to Set-top Boxes (STBs) and Multifunctional Machines (MFMs).

3. At the outset, we would like to respectfully remind the Panel that the crux of this dispute is about tariff treatment rather than customs classification or something else. The core question awaiting the Panel is whether the EC's measures at issue in regard to three ITA products have resulted in tariff treatment that is inconsistent with its Schedule of Concessions and Articles II:1(a) and II:1(b) of the GATT 1994. By applying the principles of treaty interpretation as reflected in the Vienna Convention, TPKM has demonstrated how the three products at issue fall within the ordinary meaning of the terms of the EC's concessions when read in context and in the light of the object and purpose of the GATT 1994. TPKM has shown, and will show the Panel again that, because of the EC's measures at issue, those products have been denied duty-free treatment that they are entitled to.

I. FLAT PANEL DISPLAY DEVICES

4. On the FPD issues, it is striking how the EC has tried to distract the Panel's attention from the core issues involved throughout this dispute. Instead of addressing the core issues, the EC has chosen to mount its defense almost exclusively based on procedural arguments. In particular, the EC has continuously claimed that the complainants have failed to make a prima facie case because they have failed to identify with sufficient precision the products at issue, the concessions at issue and now, in its second written submission, also the claims at issue and the scope of those claims.

5. In this oral statement, TPKM would like to systematically address the arguments put forward by the EC and demonstrate why they are without merit.

A. THE CLAIMS AT ISSUE HAVE BEEN PRECISELY IDENTIFIED BY THE COMPLAINANTS

6. It has always been clear since the very beginning of this dispute that all the complainants have made two different claims with respect to FPD devices. Both claims relate to a breach of Article II:1(a) and II:1(b) of the GATT 1994 but concern the EC's two different concessions that were made in its Schedule in order to implement the ITA. The first one is the concession made by the EC pursuant to Attachment B to the ITA with respect to "flat panel display devices for products falling within the ITA." The second one is the concession made by the EC pursuant to Attachment A to the ITA with respect to "input or output units" of ADP machines under the heading 8471.60.

7. The EC appears to be surprised by the fact that the two concessions have different scopes. However, this is how the EC Schedule is structured, and this structure reflects the two different commitments undertaken by the EC pursuant to Attachment A and Attachment B to the ITA. We

have already highlighted that each concession has a different scope in separate sections of our First Written Submission and, in particular, in the analysis of the scope of each of the concessions.[1]

8. The concession concerning heading 8471.60 that covers "input or output units" of ADP machines must be read in its context and in particular in accordance with Note 5(B) to Chapter 84 which prescribes that "input or output units" must be "of a kind solely or principally used in an [ADP] system." However, there is no such limitation as "sole or principal use" in the concession concerning "flat panel display devices for products falling within the ITA." In fact, this latter concession, as properly interpreted on the basis of its ordinary meaning, in its context, and in light of the object and purpose of the GATT 1994, does not contain any limitation that the FPD devices, in order to be covered, must be for use "principally" or "solely" with ADP machines.

9. The fact that both concessions have different scopes is another reason why both claims must be examined in turn by the panel in this dispute and make its rulings accordingly. Indeed, for example, an FPD device that falls under one of the measures at issue may not be covered by the concession concerning "input or output unit" of ADP machines but nonetheless be covered by the concession concerning "flat panel display devices for products falling within this Agreement."

10. In the following paragraphs, we will analyze in more detail the scope of each concession made by the EC with respect to FPD devices.

11. The first concession has been made by the EC pursuant to Attachment B with respect to "flat panel display devices for products falling within the ITA." This concession has been granted "wherever the product is classified." Thus, it is totally irrelevant how the EC or other participants classify FPD devices for products falling within the ITA. To the extent that they are "for products falling within this Agreement," they are entitled to duty-free treatment. For an FPD device to qualify as one that is "for products falling within the ITA," it must be capable of operating with an ADP machine. "Capable of operating" does not mean, however, "simply connected". The FPD devices must be capable of receiving and properly reproducing signals received from an ADP machine in order to fall within that concession.

12. The EC claims that the conclusion of the complainants that it impermissibly subjects to duties any flat panel display device that is capable of operating with a device other than an ADP machine is contradicted by the express exclusion of "televisions" from the concession concerning CRT "monitors."[2] According to the EC, televisions are excluded from the scope of the whole agreement.

13. However, the exclusion of "televisions" is found only in the concession concerning CRT "monitors" and that exclusion cannot be imported into the concession of "flat panel display devices." The fact that there is no express exclusion in the concession concerning "flat panel display devices" must actually mean something. As the Appellate Body underlined in *Japan – Alcoholic Beverages*, "omission must have some meaning."[3] In *EC – Bed Linen*,[4] the Appellate Body considered that the presence of exclusion in the chapeau to Article 2.2.2 of the Anti-Dumping Agreement led it to believe that where there is no such express exclusion elsewhere in the same Article, no such exclusion should be implied. Similarly, the absence of an express exclusion in the concession concerning "flat panel display devices" while an express exclusion is provided in the concession concerning CRT "monitors" means that in the first concession, no such exclusion should be implied. If the authors wanted to

[1] See TPKM first written submission, paras. 216 – 306 and paras. 307 – 348.
[2] EC second written submission, para. 30.
[3] Appellate Body Report, *Japan – Alcoholic Beverages*, p. 19.
[4] Appellate Body Report, *EC – Bed Linen*, para. 83.

apply such exclusion to FPD devices, they would have expressly included it in that product description.

14. Furthermore, it should be emphasized that the description in the list of products under the concession for "computers" expressly mentions that those products cover ADP machines irrespective of "whether or not they are able to receive and process with the assistance of central processing unit telephony signals, television signals, or other analogue or digitally processed audio or video signals." Thus, the fact that an apparatus can receive and process television signals is not in itself a criterion that would exclude it from the scope of the concessions made pursuant to the ITA.

15. The EC has repeatedly questioned whether, in the complainants' view, flat panel televisions are covered by the concessions. First, TPKM believes that in order to answer this question, the EC will need to first clarify what it considers to be a "television". Indeed, what really matters is the criterion that the FPD devices are "for" products falling within the ITA and thus including FPD devices for ADP machines. To the extent that the FPD devices can receive and reproduce signals from an ADP machine properly, they are covered by the EC's concessions.

16. The second concession has been made by the EC with respect to HS heading 8471.60 as "input or output units" of ADP machines. The ordinary meaning of "input or output units" of ADP machines does not support the proposition that an FPD covered by subheading 8471.60 must be capable of receiving signals "only from" a computer system in order to be covered. In accordance with the existing jurisprudence of the Appellate Body, it appears that the Harmonized System may be relevant as part of the context to interpret the concession. Note 5(B) to Chapter 84, which is an integral part of the HS, refers to input or output units that are "of a kind solely or principally used in an ADP system." In light of the foregoing, it is clear that FPD devices cannot be excluded from the scope of the concession concerning "input or output units" of ADP machines on the sole ground that the FPD devices can also reproduce signals from a source other than an ADP machine. Note 5(B) to Chapter 84 does not require "exclusive" use. A principal use in an ADP system is sufficient for an FPD device to be classified under Heading 8471. However, by requiring that the FPD devices must be for "sole" use with ADP machines to receive duty-free treatment, the measures at issue violate the EC's concessions with respect to "input or output units" of ADP machines.

17. The EC has attempted to rely on the Explanatory Notes ("EN") to the HS to Chapter 84, in particular Point I(D), to justify the criteria used in the measures challenged in this dispute.[5] The HSEN provides that "separately presented units" falling under heading 8471 differ from video monitors and television receivers under heading 8528 in different ways. Such differences include the notion that "they are capable of accepting a signal *only* from the central processing unit of an ADP machine," the notion that they "are not able to reproduce a colour image from a composite video signal," and so on. According to the EC, it has simply been applying the criteria contained in the HSEN to distinguish between display units of ADP machines and video monitors.

18. However, the EN of the HS do not form part of the HS and therefore cannot be part of the "context" for the purpose of determining the scope of the concession concerning subheading 8471.60. Moreover, to the extent that the EN contradict the wording of the HS itself, including its section and chapter notes, they must be disregarded. In the present dispute, by referring to ADP monitors as "accepting a signal ***only*** from an ADP machine," the EN manifestly contradicts the wording of Note 5(B) to Chapter 84 that refers to input or output units "of a kind *principally or solely* for use in an ADP system" and therefore must be ignored.

[5] EC first written submission, paras. 156 – 159.

19. Finally, TPKM would like to address the remark of the EC that the wide scope of the concession concerning flat panel display devices for *products falling within the ITA* "leads to a situation where it is entirely unclear how the challenged measures come within the scope of each of the two claims."[6]

20. TPKM does not understand the EC's assertion of the alleged lack of clarity. There are five measures at issue which have been precisely identified in the Panel Request and in the first written submission.[7] All these measures are in breach of the EC's concessions made pursuant to Attachment A and Attachment B to the ITA with respect to FPD devices.

B. THE PRODUCTS AT ISSUE AS DEFINED BY THE MEASURES AT ISSUE HAVE BEEN CLEARLY IDENTIFIED

21. Now we would like to turn to the issue of the "products". The EC has continuously claimed that there is a lack of precision in the definition of the products at issue. However, the products at issue are those subject to duties under the measures at issue. They have been clearly identified by TPKM as "any flat panel display device capable of receiving and reproducing signals from ADP machines only or from ADP machines and other apparatus."[8] The products at issue are therefore not limited to, as the EC claims, the "LCD monitors with DVI."[9] This point had also been precisely made in TPKM's First Written Submission when it was clarifying that "the FPDs most affected by the EC measures are LCD displays with a DVI connector" "although not limited to such types of FPDs."[10]

22. Claims are made not with respect to products but with respect to specific measures. We have repeatedly and clearly identified the measures at issue with precision. The Panel's task is to determine whether or not the measures at issue are inconsistent with Article II:1(a) and II:1(b) of the GATT 1994. The Panel has to assess whether by excluding from duty-free treatment flat panel display devices on the basis of a number of criteria the EC has breached the concessions it has made pursuant to the ITA. The focus for the Panel is the criteria as listed in the measures at issue that are used by the EC to determine the classification and, as a result, the duty treatment, for FPD devices.

23. The EN to CN code 8528.59.90 specifies, by reference to the EN to CN code 8528.41.00, a list of characteristics that, if present, would exclude the FPD device from the scope of the duty-free CN code. The presence of a DVI is just one of the criteria listed there. There are other criteria such as the "connection to a video source," the presence of an "HDMI connector," and so forth. To the extent that these criteria lead to the exclusion from duty-free treatment of FPD devices that are for products falling within the ITA, they are inconsistent with the concessions made by the EC.

24. The EC has tried to create confusion by stating that the products at issue must somehow be different depending on the claim concerned. Indeed, the EC is asking what products come within the scope of each claim.[11] In fact, the products at issue are the products falling within the measures at issue. However, since both concessions have a different scope whereby the scope of the concession concerning "flat panel display devices for products falling within the ITA" is wider than the more limited scope of the concession covering subheading 8471.60, the finding of inconsistency may be different with respect to each concession. In other words, the mere fact that an FPD does not fall

[6] EC second written submission, para. 31.
[7] TPKM first written submission, paras .66 – 89.
[8] TPKM oral statement at the first substantive meeting of the Panel, para. 13.
[9] EC second written submission, para. 35.
[10] TPKM first written submission, para. 12.
[11] EC second written submission, para. 33 *et seq*.

within the scope of the concession covering input or output units of ADP machines of subheading 8471.60, does not mean that it is also excluded from the concession relating to "flat panel display devices for products falling within the ITA."

C. THE MEASURES AT ISSUE HAVE BEEN CLEARLY IDENTIFIED

25. Among the five measures at issue, there is in the first place the Combined Nomenclature. It is correct that, at the first glance, the CN2009 seems to respect the concession made by the EC with regard to Attachment A's "input or output unit" of ADP machines given that there is a specific heading, namely CN code 8528.51.00 that covers "other monitors – of a kind solely or principally used in automatic data processing system of heading 8471."

26. However, if read in combination with the CNEN, it leads to an interpretation of the CN2009 that would exclude FPD devices of a kind principally used in ADP systems under heading 8471 from duty-free treatment. Such exclusion would be so simply because the CNEN requires exclusive use in an ADP system and the absence of a DVI connector. This is inconsistent with the concessions made by the EC pursuant to Attachment A to the ITA.

27. Furthermore, FPD devices which are of a kind principally used in ADP systems are clearly also "flat panel display devices for products falling within the ITA." Since the duty-free treatment shall be granted to such FPD devices "wherever they are classified," it is irrelevant where such products are classified in the CN.

28. As far as the CNEN are concerned, the EN to codes 8528.51.00, 8528.59.10 and 8528.59.90 require the Panel's attention as well as the EN to codes 8528.41.00 and from 8528.49.35 to 8528.49.99. The EN to code 8528.51.00 that covers monitors provides that "the explanatory notes to subheading 8528.41.00 apply *mutatis mutandis*." The EC is now claiming that the word "mutatis mutandis" "do not incorporate all of the CNEN to heading 8528.41.00 into the CNEN to heading 8528.51.00."[12] However, except the paragraph that expressly refers to the specific characteristics of monitors of the CRT type, the rest of the CNEN are directly applicable to the flat monitors, in particular, the list of the criteria that exclude monitors from the scope of the headings with duty-free treatment.

29. Again, the EC is trying to create confusion by alleging that it is not clear whether the CNEN fall within the scope of the claim made pursuant to Attachment B. There is no ambiguity on this issue: the criteria listed in the CNEN must be reviewed by the Panel with respect to both concessions.

30. Finally, there are two Classification Regulations of the EC that are being challenged. Again, the WTO consistency of these regulations has been challenged with respect to both concessions.

D. THE *KAMINO* JUDGMENT DOES NOT REMOVE WTO INCONSISTENCY OF THE EC'S MEASURES

31. TPKM has referred to and continues to refer to *Kamino* only to show how the highest court in the EC, the ECJ, has interpreted the CN with regard to flat monitors and how the ECJ came to the conclusion that monitors cannot be excluded from the scope of CN code 8471.60.90 solely because they are capable of displaying signals coming both from an ADP machine and from other sources or solely because they are equipped with certain types of connectors such as a DVI connector.

[12] EC second written submission, para. 51.

32. The findings in *Kamino* may be informative since the judgment underlines that some aspects of the measures being challenged in the present dispute are contradictory to the CN. In other words, the judgment in *Kamino* confirms that, even if only from an EC classification perspective, the EC incorrectly excludes FPD devices from the scope of subheading 8471.60 solely because they can be connected to a source other than an ADP machine or due to the presence of a particular type of connector.

1. The *Kamino* judgment has not modified the measures at issue and has not removed the WTO inconsistency of the EC measures

33. The *Kamino* judgment has neither modified nor annulled the measures at issue. Those measures at issue were all published after the facts concerned in the *Kamino* dispute, and thus were not reviewed by the court in that case. Therefore, the *Kamino* judgment has not removed the WTO inconsistency of the EC measures. At most, the *Kamino* judgment has made it clear that the EC measures requiring exclusive use in an ADP system before an FPD can be classified under subheading 8471.60 are legally wrong under EC customs law. By logical reasoning, the EC's measures requiring exclusive use of the FPD devices in ADP systems have resulted in an illegal exclusion of these FPD devices from the scope of the concession under subheading 8471.60. *Kamino* has not resulted in any automatic substitution of the illegal EC measures with new WTO-consistent measures.

34. The ECJ has only dealt with the interpretation of the CN that existed in 2004. It has not ruled on the validity of any of the Classification Regulations. For such regulations to disappear from the EC legal order, they must either be amended or repealed by the EC Commission or expressly annulled by the ECJ. Under the current circumstances, these Classification Regulations are still valid and legally applicable despite the judgment of the ECJ in *Kamino*.

35. The same holds true for the CNEN which was not examined by the ECJ in *Kamino* and therefore remains in existence. As acknowledged by the EC itself, the CNEN must be amended or repealed following *Kamino*.[13]

36. Unlike what the EC seems to want others to believe, *Kamino* has not solved the issues before this Panel. It is also clear from the EC member States' repeated requests for guidance addressed directly to the EC Commission. Recent meetings of the EC's Customs Code Committee confirmed that member States are still waiting for common guidance on correct interpretation and application of the principles contained in *Kamino*. [14] The EC itself also acknowledged this when stating that "in order to ensure legal certainty, the EC has already initiated a review process for identifying whether some adjustments to the notes may be needed."[15] While what the EC will do remains uncertain, one thing is for sure, i.e., the Kamino has not saved the EC from breaching its concessions and relevant WTO obligations.

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[13] EC first written submission, para. 168.

[14] *See* Exhibit TPKM-88. In the Customs Code Committee's meeting of 22 to 29 April 2009, the following was reported with respect to the ruling in *Kamino*: "some Member States asked for guidance on the correct interpretation and application of the principles established by the ruling. They further asked whether issuance of BTI and replies to requests for reimbursement should be suspended awaiting the above clarification. The Chair explained that the Commission services are currently reflecting on the way to implement the Court judgment and that a debate is expected to take place at the next Committee meeting." Interestingly, no debate took place on which amendment to the CNEN would be necessary at the subsequent meeting of the Customs Code Committee, contrary to what was announced in the minutes quoted above.

[15] EC first written submission, para. 168.

2. The criteria to be used in the alleged case-by-case analysis of the EC would not necessarily remove the WTO inconsistency

37. The EC claims that, following *Kamino*, "to decide whether a given monitor is or is not used 'principally' in an ADP system requires inherently a case-by-case analysis."[16] Even if this were the case, the so-called "case-by-case analysis" is currently being made on the basis of the criteria contained in the HSEN, the CNEN and in the Classification Regulations. This practice has not changed even after the *Kamino* judgment. The EC has also failed to bring evidence of BTIs or customs decisions issued after *Kamino* that can demonstrate the application of duty-free treatment to, e.g., FPD devices equipped with a DVI.

38. Even if the EC modifies the CNEN and the classification regulations in order to implement *Kamino*, it remains uncertain how it will apply its "case-by–case" analysis." *Kamino* provides certain criteria to be used in such a case-by-case analysis in its paragraphs 59 and 60. In case the EC would use these criteria[17] and would require these criteria to be met cumulatively, a case-by-case analysis is unlikely to remove the WTO violation. Indeed, such an approach would again lead to the exclusion from duty-free treatment of FPD devices that are covered by the concessions of the EC as examined above.

II. SET-TOP BOXES WHICH HAVE A COMMUNICATION FUNCTION

39. Now we would like to turn to issues with respect to Set-top boxes. According to the EC, in order to succeed with an "as such" claim, it is necessary to demonstrate that the measures in question result in the imposition of duties with respect to a given product model or a certain category of products.[18] Under the EC's theory,[19] complainants must identify the product category by identifying the "totality of the objective characteristics" of those products[20] somehow similarly to a product description included in a classification regulation.

40. The EC simply missed the point. The measure at issue, i.e., the CNEN, contains certain criteria that, if present in a STB, would automatically exclude an STB covered by the EC's concession from the scope of duty-free treatment. To the extent that complainants have demonstrated that the application of these criteria necessarily leads to a WTO-inconsistent outcome, they have succeeded with their "as such" claims. As the complainants have successfully demonstrated that STBs which have a communication function would be automatically excluded from the scope of duty-free heading because they include, *inter alia*, a hard disk or DVD drive is inconsistent with the EC Schedule, they have made their case.

41. Once again, in its second written submission, the EC claims that in any case CNEN are not binding and that the criteria used in the CNEN do not have the mandatory power that the complainants ascribed to them.[21] This is not correct. Has the EC given any example in which

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[16] EC first written submission, para. 166.

[17] *See* EC first written submission, para 166. The EC may use these criteria in order to consider as decisive "the objective technical characteristics as laid down in the Explanatory Notes relating to heading 8471 of the HS, in particular in points 1 to 5 of Part One Chapter I(D)." The criteria contained in the HSEN to heading 8471 stipulate for instance that an ADP monitor may not incorporate an audio circuit. *See* Exhibit TPKM-89.

[18] EC second written submission, para. 66.

[19] See EC second written submission, para. 68, for an example, according to the EC's theory, it is not sufficient to describe a category of products such as STBs with a hard disk or DVD drive.

[20] EC second written submission, para. 67.

[21] EC second written submission, para. 69.

customs authorities have given duty-free treatment to an STB which has a hard disk? No! Indeed, customs authorities have consistently classified STBs in accordance with the mandatory criteria contained in the CNEN since the vote of the Customs Code Committee on this issue.

42. As to the interpretation of the concession, the only textual argument the EC continues to assert relates to the use of the words "which have" in the concession. According to the EC, the phrase "which have" differs from the term "with" and means "which only have." However, "which have" and "with" do not have the different meanings the EC ascribes to them. TPKM does not understand why the words "which have" should somehow be interpreted as "which *only* have."

43. Furthermore, the EC also used the same word "with" when modifying its own Schedule in 2000. The EC added in the list of codes indicated next to the product description concerning STBs which have a communication function, a CN code that covers "[a]pparatus with a microprocessor-based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange, capable of receiving television signals ('set-top boxes *with* communication function')."[22] If there were a difference between the terms "which have" and "with", why would the EC have used the word "with" in its CN code 8528.12.91? This simply shows that there is no difference of meaning as alleged by the EC between the two terms.

44. The EC defends itself by arguing that the wording "set top boxes with a communication function" does not form part of its Schedule. Allegedly, only the code itself would be part of the Schedule. This argument is unacceptable. As a general rule, when a concession is defined in a Schedule by reference to a specific CN code, the description attached to this code also forms part of the concession. In the present dispute, however, where concessions have been granted pursuant to Attachment B, TPKM considers the concession as being defined by the product description alone.

45. The EC's arguments are self-contradictory. Indeed, by stating that "the notification neither introduced a separate narrative description into its Schedule nor modified the existing narrative description,"[23] the EC simply admits that the concession is determined by the product description and not by the codes listed next to it.

46. Furthermore, the EC notes that the CN codes indicated next to the product description constitute "context" for the interpretation of the narrative description. As previously noted, TPKM agrees with this view to a certain degree, but does not agree that this context can be used to "exhaust" the narrative description.

47. On the basis of the principles of treaty interpretation as reflected in the Vienna Convention, it is necessary to interpret the concession on the basis of its ordinary meaning in the light of its context and of the object and purpose of the treaty. The ordinary meaning of the concession, namely "set top boxes which have a communication function," is clear and does not exclude from its scope set top boxes because they have an additional function such as a recording or a reproducing function or because they are equipped with certain types of modems. The analysis of the context, in particular of the CN codes indicated by the EC next to the product description, confirms this conclusion.[24]

48. In its analysis of the CN codes as "context," the EC merely notes that three CN codes have been initially notified by the EC: 8517.50.90, 8517.80.90 and 8525.20.99 and that no codes under heading 8521 or 8528 were notified. The EC appears to argue that STBs which have a recording or

[22] CN code 8528.12.91.
[23] EC second written submission, para. 80.
[24] EC first written submission, paras. 239 – 241.

reproducing function must necessarily be classified under heading 8521 or 8528. Therefore, the EC further argues that since these headings were not indicated among the codes listed next to the product description, the EC did not intend such products to be covered by the concession.

49. With respect to the EC's arguments, TPKM would like to provide the Panel with the following observations. First, the EC's argument suggests that the concession is limited to the codes, when in fact it covers products "wherever classified." Even as a matter of classification, it fails to take into account that heading 8525, which is one of the codes listed, covers transmission apparatus "whether or not incorporating reception apparatus or sound recording or reproducing apparatus." Second, the EC intentionally ignored in its analysis the fourth CN code notified by the EC to the WTO in 2000, namely CN code 8528.12.91, and which is one of the codes listed next to the product description. Third, these codes do not contain any wording which would support the EC's position that STBs including certain types of modems would be excluded from the scope of the concession. Thus, a careful analysis of the CN codes, as requested by the EC itself, actually supports the complainants' view in this case.

III. CLAIMS RELATING TO ARTICLE X OF THE GATT 1994

50. Finally, TPKM would like to add a few words on the EC's defense regarding its Article X claims.

51. The entire EC's defense consists of arguments that the CNEN do not constitute "measures" either under EC law or under WTO law because they have not *officially* been adopted by the EC Commission. However, even if the CNEN has not been formally adopted within the EC legal system, this is not relevant for WTO dispute purposes. As the Appellate Body noted in *US – OCTG* regarding the status of the Special Policy Bulletin (SPB), the fact "that the SPB is not a legal instrument under US law" "is not relevant to the question before us."[25] "The issue is not whether the SPB is a legal instrument within the domestic legal system of the US, but rather, whether the SPB is a measure that may be challenged within the WTO."[26] As the Appellate Body emphasized in that case, if it provides administrative guidance and creates expectations among the public and among private actors, it constitutes a "measure". This is also the case of CNEN which have been voted upon by the Customs Code Committee even if they have not yet been formally adopted by the EC Commission. To the extent that they already have been enforced before being published officially, this is inconsistent with Article X:2 of the GATT.

IV. THE EC CONTINUES TO IGNORE THE WORDING OF THE CONCESSION COVERING MULTIFUNCTIONAL MACHINES

52. In its second written submission, the EC once again erroneously approached the question of whether the tariff treatment applied to MFMs is consistent with the concession covering HS subheading 8471.60 as a classification dispute. The EC started by saying that ADP MFMs are "*prima facie* classifiable under both HS96 9009 12 and HS96 8471 60" (emphasis added). Therefore, the EC further argued that it is necessary "to determine, on a case-by-case basis and having regard to the applicable HS rules addressing specifically this type of situation (i.e., GIR 3) whether each kind of ADP MFMs is covered by the concession for HS 9009 12 or by the concession for HS96 8471 60."[27]

[25] Appellate Body Report, *US – OCTG*, para. 187
[26] *Id.*
[27] EC second written submission, para. 101.

The EC asserted that "in accordance with GIR 1, the classification analysis must begin by looking at the terms of the HS96 heading 9009"[28] and blames the complainants for having failed to do so.

53. The EC – once again – disregards the nature of the current dispute. This is not a classification exercise. The issue is not to determine whether ADP MFMs are properly classified in Heading 8471 or 9009. The issue is whether the tariff treatment currently applied is consistent with the concession made by the EC, in particular with respect to the concession covering HS subheading 8471 60. The EC continues to avoid the meaning of the wording of the concession covering subheading 8471 60. Instead, the EC began its analysis with the wording of subheading 9009 12, which it considers as an equally relevant classification option.

54. In order to justify that Heading 9009 is an option, the EC needs to demonstrate that digital copiers are in fact "photocopying apparatus". TPKM has already developed several arguments proving the contrary and will not repeat them here. TPKM will limit its comments to the following issues raised by the EC.

55. The EC argues that the technical differences between digital copiers and traditional photocopiers are not relevant and that the issue "is not whether both types of photocopier operate in identical fashion."[29] TPKM strongly disagrees with this view. TPKM believes that, in view of the clear wording of the subheading, the technical differences are relevant and important to determine the scope of the concession concerning photocopiers under subheading 9009.12. The analysis of the ordinary meaning of the words of that concession clearly excludes from its scope digital copiers. This is further supported by the HSEN which the EC tries to put aside by claiming that there are "non-binding" and "obsolete."[30] It is strange that the EC claims the HSEN are "obsolete" while part of it has been included in the revised EN to the HS2007 that clearly distinguishes between "photocopiers" and "digital copiers." Should WCO Members have considered digital copiers as being equal to photocopiers, why didn't they use the word "digital photocopiers"?

56. Finally, TPKM would like to address the EC's remarks on how the complainants classify MFMs. TPKM would like to respectfully remind the Panel that it is irrelevant to this dispute how TPKM or other Members classify certain products that deserve duty-free treatment. In any event, TPKM has granted duty-free treatment to ADP MFMs wherever they are classified.

57. Last but not the least, TPKM would like to respond to what the EC asserted this morning that we made an alleged "new claim" with respect to MFMs. That was simply not true. Contrary to the EC's assertion, TPKM did not raise a new claim in relation to the products allegedly covered by CN code 8443.32.91, and TPKM did not ask the Panel to rule with respect to this specific CN code or make specific findings with respect to products classified thereunder. The EC's assertion was unfortunately a misleading statement.

58. TPKM's and the other complainants' claim regarding MFMs was set out in the panel request. This request covers the treatment given to MFMs under the EC measures as defined in the panel request. The CCT (Council Regulation (EEC) No. 2658/87, as amended) is one of the measures listed in the panel request. MFMs are defined in footnote 15 of the request which provides:

> "machines which perform two or more of the functions of printing, copying, or facsimile transmission, capable of connecting to an automatic data processing

[28] EC second written submission, para. 104 (emphasis added).
[29] EC second written submission, para. 107.
[30] EC second written submission, para. 116.

> machine or to a network (including devices commercially known as MFPs (multifunctional printers), other 'input or output units' of 'automatic data processing machines' and 'facsimile machines')."[31]

59. The products described by CN code 8443.32.91 are described in identical terms as those described in CN code 8443.31.91, namely, *"[m]achines performing a copying function by scanning the original and printing the copies by means of an electrostatic print engine*" and they are equally "*capable of connecting to an automatic data-processing machine or to a network.*"

60. Products of CN code 8443 31.91 and 8443.32.91, on the basis of their product description, would therefore appear to have identical physical characteristics: a scanner, a printing module and computer connectivity.

61. The description in CN code 8443.32.91 covers, in TPKM's view, input units for an automatic data processing machine, such as scanners, which also have a copying function. Since other "input units of automatic data processing machines" are specifically mentioned in the panel request, TPKM considers that products of CN code 8443.32.91 are clearly included in the scope of the claim. They are multifunctional input units for an ADP machine and are different from the so-called stand-alone digital copiers of CN code 8443.39.10 which have no computer connectivity. They also do not have a facsimile function.

62. We take note that the EC considers that no products meeting this description actually exist and would therefore invite the EC to clarify why this tariff line was included in the CCT and which products it intends to cover. Manifestly, there would be no need for ADP connectivity if this heading would only relate to single function digital copiers.

V. CONCLUSIONS

63. In conclusion, throughout this dispute, the EC appears to have tried to evading from engaging the main issues raised by the complainants, i.e., a proper analysis of the scope of each concession concerned on the basis of the principles of treaty interpretation as reflected in the Vienna Convention. As far as FPDs and STBs are concerned, the EC has focused instead on developing procedural arguments alleging confusions about the claims, the concessions, and so on. With respect to MFMs, the EC has attempted to deviate from the core issues by addressing the complainants' claim as a pure classification exercise. TPKM is confident that the Panel will ignore these procedural tactics and confirm that the EC's measures at issue are inconsistent with its Schedule of Concessions and Articles II:1(a), II:1(b) as well as Article X of the GATT 1994, and recommend that the EC and its member States bring their measures into conformity.

64. Mr. Chairman, distinguished members of the Panel, TPKM would like to thank you and the Secretariat again and would be pleased to answer your questions.

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[31] Request for the Establishment of a Panel, *EC and Its Member States – Tariff Treatment of Certain Information Technology Products*, WT/DS375/8, WT/DS376/8 and WT/DS377/6.

ANNEX D

SUBMISSIONS OF THE EUROPEAN COMMUNITIES

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ANNEX D–1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION BY THE EUROPEAN COMMUNITIES

I. INTRODUCTION

1. The present dispute is mainly about whether certain products are within the scope of the tariff concessions made by the European Communities pursuant to the ITA, as the complainants have alleged, or rather within the scope of other concessions included in the EC Schedule, which do not provide for duty free treatment.

2. It is regrettable, however, that the complainants have deemed it necessary to call into question the good faith of the European Communities by suggesting that the European Communities is seeking to undermine the ITA and to evade the tariff concessions which it has made pursuant to that agreement. Contrary to what the complainants may want to imply, the ITA is not "their project". It was, in fact, the European Communities which played a seminal role in developing the idea of an agreement on liberalization of trade in IT products. What resulted from the negotiations was a landmark agreement, but also a balanced compromise.

II. THE INFORMATION TECHNOLOGY AGREEMENT ("ITA")

3. Regrettably, the complainants never explain what the ITA is really about, and focus instead on a few selected provisions or excerpts thereof. The ITA consists of three parts: (i) the Ministerial Declaration, (ii) the Annex to it and (iii) Attachments A and B to the Annex. To capture the object and purpose of the ITA, all these parts have to be interpreted in such a way that all of them are given meaning and none of them is rendered ineffective. The complainants seem to forget that the certification of schedules by WTO members has completed the process envisioned in the ITA for its implementation. With the certification, the ITA obligations were transformed into binding Schedules. This approach of the complainants raises questions about the solidity of the assumptions that the complainants advance as legal bases for their claims against the EC.

4. The negotiating history illustrates well that the scope of the product coverage is one of the central issues of the ITA and that the ITA as a whole is about the *product coverage* and *ways* in which that product coverage *can (or cannot) be expanded* to benefit from liberalized market access.

III. THE CLAIM ON "FLAT PANEL DISPLAY DEVICES" (FPD) UNDER ARTICLE II OF THE GATT 1994

A. PRELIMINARY REMARKS

5. To the extent the European Communities is able to understand the claim relating to Flat Panel Display Devices, the complainants criticise two criteria the EC is allegedly incorrectly applying under the measures with the result that the EC is in breach of Article II of the GATT 1994: (1) the existence of a DVI connector and (2) the question whether a monitor is able to display signals only from an automatic data-processing machine.

6. Furthermore and to the extent the European Communities is able to understand the claim, the complainants are invoking at least two terms or positions in the EC Schedule that, according to them, cover the products at issue in this dispute.

7. The main focus is on the term "flat panel display devices (including LCD, Electro Luminescence, Plasma, Vacuum-Fluorescence and other technologies) for products falling within this agreement, and parts thereof" that is the result of the EC incorporating Attachment B of the ITA into its Schedule. This is not a term used by the Harmonised System. It is a specific term pursuant to the ITA.

8. "Alternatively" (Japan) or "independently" (TPKM) or "in addition" (US), the complainants invoke the tariff term "input or output units, whether or not containing storage units in the same housing – other – other" in tariff line 8471 60 90 (HS 96). This is clearly a secondary line of argument.

9. However, the complainants are not very clear on how they see the interplay between these allegedly separate commitments in the EC Schedule and/or in the ITA as allegedly incorporated into the EC Schedule. However, there is no dispute between the Parties that a monitor capable of displaying signals only from an automatic data-processing machine cannot be subject to duties despite the complainants insisting that such monitors are within the scope of the dispute.

B. LACK OF A PRIMA FACIE CASE

10. The European Communities is of the view that the complainants have failed to make a *prima facie* case in respect of the measures concerning "Flat Panel Display Devices" for at least four different reasons, namely they have

- failed to identify the product or products at issue in sufficient detail for the European Communities to defend itself and for the Panel to rule on the dispute in the absence of rebuttal;

- failed to identify with the necessary clarity the obligation the European Communities is allegedly in breach;

- failed to demonstrate that the European Communities would be applying ordinary customs duties in excess of those set forth in the EC Schedule because the European Communities does not apply duties on products the European Communities assumes could fall within the scope of the dispute;

- only identified certain specific elements in the disputed EC measures that could not, even if all the arguments of the complainants would be accepted, necessarily lead to a violation of Article II of the GATT 1994.

11. In any event, the case the complainants have brought cannot extend to challenging the EC measures *as such*.

C. THE MEASURES AT ISSUE AND THEIR INTERPRETATION BY THE EUROPEAN COURT OF JUSTICE

12. In the Panel request, the complainants have identified five different measures as "measures at issue":

13. Regulation 493/2005 suspending the application of duties on certain video monitors expired on 31 December 2008. It has been replaced by Council regulation 179/2009. In accordance with its Article 2, regulation 179/2009 applies from 1 January 2009. It suspends the application of customs

duties on certain flat panel video monitors. The product scope is wider than its predecessor regulation 493/2005 cited by the complainants in their panel request.

14. Regulations 634/2005 and 2171/2005 provided *inter alia* for the classification of certain LCD monitors within the CN codes 8471 60 80 and 8528 21 90 as the CN codes existed at the time in the light of HS 2002. The codes as they existed at the time no longer exist. As a result, the above mentioned classification regulations have effectively lost their relevance and the European Communities is in the process of repealing or replacing them as appropriate for reasons of legal certainty. However, the LCD monitors in the annexes are the only products the complainants have identified with sufficient clarity.

15. Council regulation 2658/87 as amended provides for the current version of the CCT. Monitors "of a kind solely or principally used in an automatic data-processing system of heading 8471" are free of duty. Other monitors and televisions carry a duty ranging from 2 to 14% *ad valorem*. However, as described above, the application on duties on most video monitors has been suspended.

16. Finally, the complainants have identified also Explanatory Notes to the Combined Nomenclature of the European Communities, 2008/C 133/01 (30 May 2008), "alone or in combination with Council Regulation (EEC) No. 2658/87 of 23 July 1987". It should, however, be underlined that Explanatory Notes are not legally binding in the EC legal order. Explanatory Notes are not "like a regulation" as the complainants' describe them. To the extent there is a conflict between the wording of the headings and the Explanatory Notes, the latter will be inapplicable.

17. On 19 February 2009 the European Court of Justice (ECJ) gave its judgment in case C-376/07 *Kamino.* As a matter of current EC law as interpreted by the ECJ, the classification of monitors using LCD technology as units of the kind used "principally" in an automatic data-processing system is *not* precluded on the sole ground that they are capable of displaying signals coming both from an automatic data-processing machine and from other sources as claimed by the complainants.

18. In fact it never was precluded as rigidly as the complainants assert in view of item 1 of regulation 2171/2005. However, any possible ambiguity that there was in this respect has now been clarified by the ECJ through the interpretation provided by the Court. It is also noteworthy that in order to reach its conclusion the ECJ essentially had to consider that there is a textual conflict between the HS2002 Explanatory Notes to heading 8471 and the HS2002 Note 5(B)(a) to chapter 84. The ECJ resolved this textual conflict on the basis of the hierarchy of Notes in the CN and the HS.

19. Neither is the fact that an LCD monitor is fitted with a DVI connector alone decisive on the tariff classification under EC law as claimed by the complainants although the ECJ uphold the relevance of the criterion. To decide whether a given monitor is or is not used "principally" in an automatic data-processing system requires inherently *a case-by-case analysis.*

D. CONCLUSIONS

20. In its first written submission the EC demonstrates that video monitors and televisions were explicitly excluded from the scope of the ITA and the concessions made pursuant thereto. The complainants fail to recognise that this follows from the narrative product definitions in Attachment B to the ITA.

21. Furthermore, as becomes clear when the claims are examined in the context of the Harmonized System, the European Communities has simply been applying the criteria contained

therein to distinguish between display units of ADP machines and video monitors. At the time relevant to the case, the language of the Explanatory Note to heading 8471 with regard to "separately presented units" such as "display units of automatic data-processing machines" stated that display units of ADP machines were "capable of accepting a signal *only* from the central processing unit of an automatic data-processing machine and [were] therefore not able to reproduce a colour image from a composite video signal whose waveform conforms to a broadcast standard (NTSC, SECAM, PAL, D-MAC etc.)". Such display units were equally "fitted with connectors characteristic of data-processing systems (e.g. RS-232C interface, DIN or SUB-D connectors)". These are precisely the two criteria the complainants claim the European Communities should *not* have applied.

22. Finally, even if one were to ignore the language of the HS96 Explanatory Notes to heading 8471, it would in most cases be necessary to have recourse to the application of GIR 3(c) because in most individual cases it is impossible to identify the *principal* function of a given monitor. As a result, the relevant monitor would be classified in one of the subheadings in heading 8528 because that "occurs last in numerical order among those which equally merit consideration". Indeed, as the European Communities demonstrates this is precisely how the United States classifies such monitors.

23. The European Communities considers that in respect of the claim on "flat panel display devices"

(a) The complainants' have failed to present a prima facie case

(b) To the extent the Panel considers the complainants have presented a prima facie case, the claim does not extend to an "as such" claim, and in any event,

(c) The European Communities is not in breach of its obligations under Article II:1(a) and II:1(b) of the GATT 1994.

IV. THE CLAIM ON SET TOP BOXES WHICH HAVE A COMMUNICATION FUNCTION (STBC) UNDER ARTICLE II GATT 1994

A. PRELIMINARY REMARKS

24. The complainants have failed to explain and establish what constitutes the EC concession. The EC addresses the claim in the way put forward by the complainants, namely as that resting solely on the narrative description of the product at issue in the EC Schedule and/or ITA. That does not mean, however, that the EC necessarily agrees with the proposition that the EC tariff concession is set forth both in the EC Schedule and the ITA and that it is affected by the "headnote" in the way the complainants assert.

25. Neither the ITA nor the EC Schedule refers to a product referred to by the complainants as a "set top box *with* a communication function". The EC's commitment is made with respect to "[S]et top boxes *which have* a communication function". An analysis of a commitment in light of the Vienna Convention must, *at a minimum*, be based on a full, correct and unaltered text of that commitment.

26. The product descriptions provided by the complainants are inaccurate, irrelevant and misleading. By joining and combining descriptive elements from various sources and, importantly, time periods, the complainants avoided addressing any differences between the product existing at the time of the conclusion of the ITA (and when the EC made its bindings) and the product of today

which is under dispute. A product which had certain features and characteristics at the time of the conclusion of the ITA is not the product the treatment of which is complained about by the complainants.

B. THE NARRATIVE DESCRIPTION IN THE EC SCHEDULE

27. The narrative description of the product at issue is part of an international agreement (namely, the GATT 1994). In addition, the narrative description itself stems from an international agreement, the ITA. Hence, the EC interprets this term in accordance with the rules of interpretation under international law, *i.e.*, in accordance with the ordinary meaning interpreted in light of the surrounding circumstances, taking due account of the context and subsequent developments, including subsequent practice. This interpretation makes clear that the narrative description refers to a *certain specific category of set top boxes* and not all or any products called or referred to as "set top boxes" fulfilling certain minimum requirements. The narrative description covered only certain category of set top boxes, while other set top boxes (certain technologies) were not covered by the narrative description.

C. THE MEASURE(S) AT ISSUE RESPECT THE EC COMMITMENT

28. The complainants argue that the narrative description means that any STB, as long as it contains three "attributes" (namely, (1) it is a microprocessor-based device, (2) incorporating a modem for gaining access to the Internet and (3) having a function of interactive information exchange) is an STBC as defined in the EC Schedule and the ITA. It does not matter whether the product at issue has any other functions or incorporates any other devices "*in addition to*" the three "attributes". In other words, despite calling the narrative description a "definition", the complainants essentially view the narrative description of the STBCs as setting forth *minimal requirements*: once present, an apparatus qualifies for a duty free treatment, regardless of what else the apparatus contains. A set top box which performs 1% communication function and 99% other functions, or 1% of which is constituted by the above three "attributes" and 99% by other technical elements (a hard disk, a DVD recorder, etc.), is in the view of the complainants a set top box covered by the ITA and the EC commitment.

29. Such an interpretation would mean that one does not consider the objective characteristics of a product, *i.e.*, the technological elements present in the set top box. To the contrary, anything can be put into a set top box and, as long as it fits inside together with the above three elements, it is supposed to be, in the view of the complainants, a set top box covered by the EC Schedule. This is clearly wrong.

30. Moreover, products which the complainants want to have covered by the definition of "set top boxes which have a communication function" are no longer even considered as set top boxes: their main features and functionality make them a completely different product – a "digital video recorder" (DVR) or "personal video recorder" (PVR).

31. The ISDN/W-LAN/Ethernet devices are not "modems". Hence, set top boxes with these devices are not granted ITA treatment because they do not fulfil the narrative description and not because the EC would deny that they allow a connection to the Internet. Similarly, set top boxes which perform the function of a reception apparatus for television but which do not incorporate a video tuner (such as "IP-streaming boxes") do not incorporate a modem but connect to the Internet through, for example, an Ethernet interface.

32. The complainants also misunderstand the EC classification. It is through the CN codes that the EC implements its obligations flowing from its Schedule, including those taken pursuant to the

ITA. If the complainants consider that the EC misclassifies, they have to yet make their case. If they decide to do so, and considering that the EC classifies on the basis of objective characteristics of the products, they cannot merely point to one technical element out of many in a product – they have to make their case with respect to the totality of the objective characteristics of a given existing product, and not merely to an abstract category of products delineated by certain minimal attributes.

D. CONCLUSIONS

33. In its first written submission, the EC demonstrates, first, that the narrative description of the product at issue in the EC Schedule and the ITA does not support the claim made by the complainants. To the extent that narrative description constitutes the EC concession, that concession is not open-ended. The *Greece – Phonograph Records* case supports, rather than contradicts, the EC position.

34. Second, the EC's customs classification, through which the EC implements the ITA, is, in accordance with the guidance provided by the ECJ, WCO and the Appellate Body, based on objective characteristics of a product at the time of importation. This approach to classification does not mean that one selects a single characteristic and ignores all the other. To the contrary, the EC considers the totality of the characteristics to make a classification decision. The complainants are therefore wrong in arguing that the EC excludes certain STBs from the ITA treatment "merely due to the presence of a hard disk". It is rather because those products, based on a consideration of all their characteristics, perform other functions than that covered by the ITA description and the EC Schedule, that the EC classifies them in a certain way.

35. Third, by interpreting the narrative description as setting forth minimum requirements, the complainants avoided presenting any evidence showing that in any given case, the EC incorrectly considered the totality of the product as a whole and that it incorrectly concluded that it was not entitled to ITA treatment. Nonetheless, since the narrative description is about a certain type of products and not about minimum requirements, the complainants have yet to show that in any given case the EC acted inconsistently with its obligations. This is a highly significant observation, because it pertains both to the complainants' failure to identify conclusively the products at issue as well as to their lack of showing that the EC violates Articles II:1(a) and (b) GATT 1994 "as such and as applied".

V. THE CLAIM ON SET TOP BOXES WHICH HAVE A COMMUNICATION FUNCTION (STBC) UNDER ARTICLE X GATT 1994

A. ARTICLE X:1 GATT 1994

36. The US based its claim on the following premise: the CN EN at issue "were approved by the … Customs Code Committee … in October 2006 and May 2007, respectively. Yet the EC failed to publish amendments in its official journal until May 2008, over a year after the amendments had been approved." TPKM advances a similar claim, albeit arguing that the CN EN were adopted in April 2007.

37. The premise of the complainants is factually and legally wrong. First, it is incorrect to say that the CN EN were published over a year after their adoption. The Customs Code Committee does not "adopt" or "approve" anything in the management procedure. The complainants acknowledge this, in fact, in the initial parts of their submissions in which they describe the functioning of the EC customs law. By arguing something different in the sections dealing with their claim, they are contradicting themselves.

38. Second, what happened was that various parts of the interrelated text of the CN EN were revised several times following their first discussion in the Committee in May 2006 and, during the process of redrafting and revision, voted upon several times by the Committee (October 2006, April 2007 and February 2008). In this way, the draft developed into a coherent text reflecting the discussion. Once all the parts of the draft measure voted upon, the Commission services proposed the text to the Commission for adoption. The CN EN were adopted at the end of April 2008. Thereafter, the CN EN were promptly published on 7 May 2008.

B. ARTICLE X:2 GATT 1994

39. In reality, the complainants argue that the CN EN violated Article X:2 GATT 1994 because they were *enforced before their adoption* (and subsequent publication). The legal status and effect of draft CN EN, which were merely voted upon, cannot exceed that of *adopted* and *published* CN EN. Therefore, without considering any further arguments by the complainants, one can already conclude that the complainants are wrong.

40. It appears that the complainants are rather trying to convince the Panel that it is the votes and discussions in the Committee made in the context of the management procedure which constitute a measure in the sense of Article X:2 GATT 1994. This line of thought cannot be followed, however. Neither the misinterpreted statement presented as evidence, nor any of the BTIs provided by the complainants support the complainants' argument.

VI. CLAIM CONCERNING CERTAIN "MULTIFUNCTIONAL MACHINES" (MFMS) UNDER ARTICLE II OF THE GATT 1994

A. BACKGROUND

1. The products at issue

41. This claim concerns the tariff treatment accorded by the EC to imports of certain MFMs. Specifically, according to the complainants, the products at issue comprise: (a) MFMs which are connectable, either directly or indirectly, to an ADP machine (ADP MFMs); and, (b) MFMs which are not connectable to an ADP machine and use a phone line to perform a facsimile transmission function (non-ADP MFMs).

42. MFMs are not a "technological advanced version of printers". They are the result of a process of technological convergence, whereby devices with different functions (photocopying, printing and facsimile) have been merged into one in order to perform these various functions.

43. Many MFMs manufacturers produce stand-alone photocopiers and have developed MFMs from a photocopier basis. Producers such as Ricoh, Canon and Kyocera market their MFMs as "copier-based" or "copycentric". The essential component of MFMs is the print engine. However, a print engine is different from a printer. In an MFM the print engine is used not only for printing data from an ADP machine, but also for copying and for printing incoming faxes. If it is true that a print engine is a necessary component of all printers, it is also true that a print engine is equally a necessary component of all stand-alone copiers and fax machines.

2. The measures at issue

44. In the joint Panel Request, the complainants identified four measures as arguably been inconsistent with the EC obligations under the GATT 1994, namely, (a) Council Regulation (EEC)

No. 2658/87 of 23 July 1987, (b) Commission Regulation (EC) No. 517/1999, (c) Commission Regulation (EC) No. 400/2006, and (d) Statement of the Customs Code Committee, Tariff and Statistical Nomenclature Section, contained in the Report of Conclusions of its 360th meeting. In Commission Regulations 517/1999 and 400/2006, as well as in the CCCE statement, MFMs were classified under CN 9009 12 00. Yet, CN 9009 12 00 was removed from the CCT, effective 1 January 2007, as part of the implementation of the HS 2007. Hence, the EC considers that the only measure at issue in the present dispute is the current version of the CCT.

45. The EC also understands that the complainants' contention in this dispute is limited to the current CN 8443 31 91 ("machine performing a copying function by scanning the original and printing the copies by means of an electrostatic print engine"), as it is the only tariff line in subheading 8443 31 that provides a tariff rate of 6%, compared to the rest of the tariff lines of the said subheading, which provide for duty-free treatment.

3. Relevant Tariff Concessions

46. The complainants claim that the tariff treatment given to imports of MFMs under current CN 8443 31 91 (tariff rate of 6%) is less favourable than that recorded in the EC Schedule under the concessions for the various codes of subheading 8471 60 and for CN 8517 21 00, which provide for duty-free treatment. The EC, on the other hand, considers that, as a general rule, MFMs fall within the concession for CN 9009 12 00, which provides for a bound tariff rate of 6%.

4. The Issue

47. In essence, the matter to be resolved in this dispute is whether the MFMs currently covered by CN 8443 31 91 fall within the concessions made in the EC Schedule for the various codes of subheading HS 8741 60 and for CN 8517 21 00 or, rather, within the concession for CN 9009 12 00.

B. ADP MFMs

1. Digital copying is a form of photocopying

48. The complainants argue that "digital copying" is not a form of "photocopying", so that ADP MFMs cannot be classified under subheading 9009 12. However, digital copying is but a technological development of photocopying. There is nothing in subheading 9009 12 that may lead to the conclusion that this position excludes digital copying.

49. According to the ordinary meaning of "photocopying apparatus", the term "photo" means light. Light is, indeed, the defining feature that distinguishes photocopiers, both digital and analogue, from other types of copying machines. Moreover, the only difference between analogue and digital photocopiers is that the latter utilizes an additional intermediate step, *i.e.* the digitalization of the image before reconstituting it on an electrostatic drum. This difference, however, does not bring digital photocopiers outside subheading 9009 12, because this position also encompasses photocopying by means of indirect processes.

50. The context provided by other positions of the EC Schedule and the HS96 also shed light on the correct classification of MFMs. The complainants argue that digital photocopiers must not be classified under subheading 9009 12 because they do not use "optical technology", omitting that digital photocopiers use an optical system consisting of lamps, lenses and mirrors.

51. The EC has consistently classified digital copiers under subheading 9009 12. And so did the US until 2002. As noted by the complainants, even the WCO struggled with the classification of the MFMs at issue under the HS 96, to the extent that no decision could be reached.

2. ADP MFMs fall outside the concession for subheading 8471 60, unless it can be shown that their copying function is secondary

52. Note 5(B) to Chapter 84, which forms integral part of the HS, establishes three criteria that, altogether, must be met in order for a product to fall under subheading 8471 60. There is no dispute that letters (b) and (c) of that note are fulfilled by the MFMs in question. However, letter (a) will be met depending on the specific nature and relative importance of the functions performed by each particular kind of MFM. As recognized by the complainants, digital copying works independently from an ADP. Hence, to the extent an MFM is used for copying, it cannot be regarded as being "used in an automatic data processing system". As concluded by the ECJ in the *Kip* case, pursuant to Note 5(B)(a), ADP MFMs may not be classified directly under subheading 8471 60 unless the copying function is "secondary" in relation to the ADP functions.

53. The determination of whether the copying function is "secondary" must be assessed on a case-by-case basis in accordance with the "objective characteristics" of each kind of MFM. The application of letter (a) of Note 5(B) is not excluded by Note 5(D) to Chapter 84 because MFMs are not mere printers.

54. The negotiating history of the ITA also shows that the drafters never intended to cover the ADP MFMs at issue, even though they were already in the market in 1996. Neither "Landscape 1" of 12 March 1996, nor "Landscape 2" of 28 of March 1996 made any reference to MFMs at all.

3. ADP MFMs with equivalent copying function fall within the scope of concessions for CN 9009 12 pursuant to GIR 3

55. When the copying function of the ADP MFMs at issue is not "secondary" in relation to their ADP functions, they are prima facie classifiable under subheadings 8471 60 and 9009 12. It becomes necessary therefore to classify them in accordance with GIR 3. GIR 3(a) cannot be applied pursuant to its second sentence. GIR 3(b) cannot be applied either, because the ADP MFMs at issue cannot be classified after the component which arguably confers them their "essential character", i.e. the print engine. Indeed, that component may be classifiable under different positions depending on whether it is intended for use with a printer, a copier or a fax machine. Since neither GIR 3(a) nor GIR 3(b) can be applied, it becomes necessary to resort to GIR 3(c). As subheading 9009 12 occurs last in the HS, the ADP MFMs at issue must be classified under that position.

C. NON-ADP MFMS

56. The complainants claim that non ADP MFMs that have a facsimile transmission function fall always under the concession for CN 8517 21, and must be granted duty-free treatment. This assertion overlooks another of the functions of the non-ADP MFMs at issue, namely, photocopying. Although the complainants point out that in the commercial jargon these machines are usually called "facsimile machines", this is not always the case. But even if so, as the Appellate Body has reiterated, the subjective characterization of a product by its manufacturer is not dispositive for its classification.

57. Given the fact that the non-ADP MFMs at issue perform both facsimile and photocopying functions, and consequently, are *prima facie* classifiable under both subheadings 8517 21 and 9009 12, it is, again, necessary to resort to GIR 3. For the aforementioned reasons, neither GIR 3(a)

nor GIR 3(b) are applicable. Therefore, the non-ADP MFMs at issue must be classified in accordance with GIR 3(c). As subheading 9009 12 comes last in the HS, the non-ADP MFMs at issue must be classified under that position.

VII. CONCLUSION

58. In the light of the foregoing considerations, the European Communities respectfully requests the Panel to reject the claims made by the complainants.

ANNEX D–2

EXECUTIVE SUMMARY OF THE ORAL STATEMENT BY THE EUROPEAN COMMUNITITES AT THE FIRST SUBSTANTIVE MEETING

I. INTRODUCTION

1. This dispute is not about the EC's support for the ITA. The EC is fully committed to the success of the ITA and the liberalisation which the ITA has brought about.

2. Nor is this dispute about the good faith of the EC in implementing the ITA. As shown by the EC, the complainants' insidious and unsupported allegations of "methodical reclassification" are groundless.

3. Lastly, this dispute is not about "protectionism" on the part of the EC. In fact, the EC has no significant domestic production of any of the products at issue.

4. Instead, the present dispute raises a limited number of issues concerning just a few of the many products covered by the ITA. In essence, this dispute is about whether the products at issue fall within the scope of certain tariff concessions made by the EC pursuant to the ITA, as the complainants have alleged, or rather within the scope of other concessions included in the EC's Schedule, which do not provide for duty free treatment.

5. The EC considers that the complainants' claims stem from a misinterpretation of the relevant terms of the EC's Schedule. Unlike the complainants, however, the EC does not claim that the interpretation of those terms is straightforward. The fact that similar issues have been the subject of lengthy discussions within the World Customs Organization and the ITA Committee and have prompted litigation before several national courts, including the European Court of Justice, as well as the complainants' own shifting classification practices, all attest to the difficulties involved.

6. Those difficulties arise, to a large extent, from the fact that the three categories of products at issue in this dispute are "multifunctional", i.e. they can perform more than one function. As a result, they may be prima facie classifiable within more than one of the different concessions included in the EC's Schedule. The EC considers that, in deciding into which of those concessions the products at issue are to be classified, it is essential to take into account all the functions of those products, as well as their relative importance. In so far as the concessions at issue refer to the 1996 version of the Harmonised System (HS96), this analysis must be performed within the framework provided by the notes and interpretative rules stipulated in the HS96 in order to deal specifically with this type of situation.

7. The complainants' position, on the other hand, is guided by the notion that any multifunctional product which happens to have among its functions one covered by an ITA concession must always be classified according to that function, irrespective of that function's relative importance when compared to other functions not covered by the ITA. In essence, the complainants' view is that an ITA concession always trumps a non-ITA concession. The complainants seek to justify this over-extensive reading of the scope of the ITA by arguing that it is necessary in order to further the "object and purpose" of the ITA.

8. The EC cannot agree with the complainants' approach. In the first place, because it is incompatible with the basic rules of treaty interpretation, as well as with the specific rules for the interpretation of the HS96. Furthermore, the EC is concerned about the systemic implications of

upholding the complainants' simplistic way of reasoning; as would be the complainants themselves if only they could look beyond their immediate trade interests in this dispute. Unfortunately, however, the complainants are seeking to achieve very short term trade gains at the expense of the indispensable legal certainty and predictability of tariff concessions. It is obvious, however, that, without the latter, all Members will become reluctant to pursue the ITA liberalization process. Thus, far from furthering the ITA's "object and purpose", the complainants' short-sighted claims may well have the opposite effect.

II. THE CLAIM CONCERNING "FLAT PANEL DISPLAY DEVICES" (FPD) UNDER ARTICLE II OF THE GATT 1994

9. The complainants have made an "as such" claim against the measures of the EC in respect of *some* Flat Panel Display Devices under Article II of the GATT 1994. As the Appellate Body has held,

> " 'as such' challenges against a Member's measures in WTO dispute settlement proceedings are serious challenges. … We would therefore urge complaining parties to be *especially diligent* in setting out "as such" claims in their panel requests as clearly as possible."

10. If the Panel request already has to be presented especially diligently when the measures of a WTO member are challenged "as such", this must apply *a fortiori* to the first written submission when those claims are presented in detail. In the context of a claim alleging the breach of Article II of the GATT, the first written submission must necessarily be clear on the specific product that is the subject of the claim and the precise concession the respondent is alleged to have breached.

11. As regards the first omission, the EC has some sympathy for the apparent underlying reasons for the failure to identify the products with sufficient detail. Indeed, the exceptionally wide variety of different kinds of modern "monitors" and "displays", the different functions they can perform in connection with different devices and the various technical specifications that are legally relevant for tariff classification and for the purposes of classifying a given monitor within the EC's Schedule, make the task difficult. This task is not rendered any easier by the extraordinary speed in technological development and the convergence of the IT and the multimedia consumer electronics industries, even when one is to consider only a handful of specific monitors. Indeed, as China has correctly put it in its third party submission, the real cause of the present dispute is "the rapid development of IT technology".

12. However, if the ambitions are set as high as the complainants seem to have done without simultaneously at least identifying specific product categories, the task of setting out the claims with particular diligence becomes practically impossible without compromising the rights of defence. It is simply not good enough to state that the case includes "*certain"* or "*some"* monitors with certain attributes while also stating that it is not limited to those. *A fortiori*, it is far from sufficient if the product is not defined in any relevant detail, as is the case with the first written submission of the United States.

13. Of course, if the complainants in truth are claiming that all flat panel monitors are subject to the relevant commitments and zero duty, the task of defining the products at issue becomes easy. However, that is not what the Panel request states although the first written submissions do not fall far short of claiming so. To complicate things further, the claims differ even between the complainants.

14. The EC has far less sympathy for the second omission, namely the failure to identify in sufficient detail the relevant concession that it has allegedly breached. This is purely a legal question. The complainants ought to have identified in their first written submissions precisely where the relevant concession is. Remarkably, the complainants have failed to do so, at least when it comes to the product definitions in Attachment B to the ITA.

15. Having said that the EC would like to anticipate some arguments in order to avoid any misunderstandings: the EC is not trying to ignore the so called "headnote" in the Schedule. On the contrary, the EC readily accepts that it is part of the EC Schedule. However, the EC does not understand what the "headnote" and the "wherever classified" language can add to the commitments the EC has made by indicating specific headings next to the product definitions relevant to this case. All these headings carry a zero duty in the EC Schedule that follows the HS96 nomenclature. In other words, the commitments are in fact made twice and the EC believes that they exhaust the "headnote". This is precisely the same technique the United States and TPKM have used in their own Schedules and these Schedules have all been approved by consensus.

16. It is the complainants, not the EC, who wish to argue text out of the EC Schedule when they ignore the headings next to the product definitions. Just as the "headnote" is part of the EC Schedule, so are the headings next to the product definitions. Indeed, if the specific headings were not there, Attachment B to the ITA could simply have been incorporated into the Schedules of the ITA parties by mere reference or by merely copying the product definitions. Clearly this is not what was intended if one reads the text of the ITA objectively and in accordance with the customary rules on Treaty interpretation.

17. Now, let us assume for the sake of the argument that the "wherever classified" language in the "headnote" is a kind of "safety net" whereby there could, at least in principle, be other products that fulfil a given product definition and, thus, fall within headings other than those identified next to the product definitions. Leaving aside the legal and practical uncertainties that such an approach would entail, the EC could even agree with such an interpretation. However, a claim that essentially states that the EC ought to have identified another heading next to the product definition seems untenable in the light of the fact that the Schedule has been approved and certified by consensus and represents a common agreement between all WTO members. In any event and, at the very least, such a claim must be subject to a strict burden of proof showing that headings are missing from the list.

18. The EC understands that the complainants claim that all or at least the great majority of "flat panel display devices" are entitled to duty free treatment under at least two concessions in the EC schedule namely under heading 8471 60 90 "input or output units" for an automatic data processing machine and under a given narrative product definition in the EC Schedule relating to "flat panel display devices" that implements Attachment B of the ITA, although, at times, it seems that the complainants claim that the actual commitment is in the ITA itself. In any event, the legal arguments are made only in relation to multifunctional monitors that use LCD technology even if the claims are not apparently limited to such monitors.

19. The EC fully agrees that a genuine ADP monitor is entitled to zero duties treatment and therefore does not understand why the claim also covers monitors that can only be used with ADP machines. However, the real problem is that the radical changes in monitor technology over the past decade or so have made it extremely difficult to distinguish between computer monitors and video monitors including television sets. The latter are explicitly excluded from the scope of the commitments made pursuant to the ITA. Indeed, quite remarkably the complainants are completely silent in their submissions about the fact that Attachment B contains a definition of "monitors" that explicitly excludes video monitors and televisions from the scope of the obligations. Furthermore, the

complainants also fail to recognise that the two criteria the EC is allegedly incorrectly using in tariff classification are explicitly provided by the HS96 Explanatory Notes.

20. Even if one were to ignore the language of the HS96 Explanatory Notes to Heading 8471, the technological circumstances of today are very different from the circumstances that surrounded the ITA negotiations. Back in 1996 the technology used made it easier to distinguish between computer monitors and video monitors. Today these two product categories have, to a large extent, been merged into one where the same monitor can be connected to a number of different devices. The monitors are genuinely multifunctional. Of course some individual products or models are marketed in a way that the video or gaming functionalities are emphasised while in relation to others the data processing functionalities are underlined. Whether a product brochure uses a picture with a person working on a computer or watching a football match, the monitors can in most cases be used for both purposes. Therefore, when classifying the product for tariff purposes it becomes very important to look at the technical details of each individual product on a case-by-case basis. In many cases it will be impossible to identify the principal function of a monitor and therefore the General Interpretative Rule ("GIR") 3 c) of the Harmonised System will need to be applied. Indeed, this is precisely how the United States has tackled the problem as demonstrated in the EC's first written submission.

21. The European Court of Justice also upheld the necessity of a case by case analysis in its recent judgment in the so called *Kamino* case to which reference has been made in the written submissions of the EC and TPKM. That judgment represents the state of EC law today.

22. The EC is not guilty of reclassifications of modern LCD monitors motivated by bad faith as alleged by the complainants. There is a genuine problem of tariff classification that has emerged due to technological developments. The serious difficulties the complainants have faced in framing their case are themselves testimony to this problem. The complainants will no doubt attempt to use this hearing and the subsequent stages of the procedure for the purpose of trying to define their case better. The EC trusts that the Panel will carefully guard and protect the basic due process rules inherent in the DSU. Indeed, an objective assessment of the case under Article 11 of the DSU requires the Panel to examine whether the complainants have identified clearly and specifically the products that are the subject of the claim and the precise commitment the EC is alleged to have breached. The EC respectfully submits that this is not the case and requests that the complainants' claims must be rejected.

III. THE CLAIM CONCERNING SET TOP BOXES WHICH HAVE A COMMUNICATION FUNCTION (STBC) UNDER ARTICLE II OF THE GATT 1994

A. SET TOP BOXES INCORPORATING A HARD DISK

23. The EC does *not* exclude any STBs "from duty-free treatment *due to the presence* of a hard disk or other apparatus". On the contrary, set top boxes can be equipped with a hard disk and still qualify as STBCs with a zero rate of duty. The CN EN, in the pertinent part, explains rather clearly that it is *the recording or reproducing function* of a hard disk (or any other apparatus) in set top boxes which is the criterion at issue. The presence of this function requires that such STB should be classified as a video recorder, unless the totality of technological elements present in the STB were to suggest otherwise.

24. In its first written submission, the EC provided product brochures for one of the products that the complainants are concerned about (Exhibit EC-44). Those brochures confirm that that product is widely known in the market as a "digital video recorder". This is in stark contrast with the STBCs

which either incorporate no hard disk at all or a hard disk of 1, 2 or 5 GB. Such hard disks merely allow the STBCs to perform related functions such as saving of emails with attachments.

25. In the EC's view, this is perhaps the core of the dispute. The complainants try to create the impression that the EC denies duty-free treatment to STBCs equipped with some minor functions added almost as a necessity in the course of the technological developments. That is not correct. The recording functionality "added" to an STBC is far more than a supportive or ancillary one. That functionality is a fully fledged self-standing function that fundamentally and objectively changes the product. To put it briefly: an STBC does not need a hard disk of 160 GB for its functioning – a recorder does.

26. With a hard disk of that size, we should not speak about a hard disk being added to an STBC: rather it is the other way round. It is effectively the communication function which is added to a recorder. Needless to say, neither Attachment A nor Attachment B of the ITA mention video-recorders (or video-recorders with a communication function) as being included in the ITA.

27. As the EC explained in its first submission, and as even one of the third parties also pointed out, there are many varieties of set top boxes, some of which have been undoubtedly excluded from the ITA from the beginning. The consideration of others depends on the understanding and evaluation of all of their technical characteristics, which can only be done on a case-by-case basis. Moreover, let us not forget that the complainants pointed to a hard disk as being one of the decisive technical elements at issue. However, there are set top boxes with a hard disk which in our view fall within the product category of STBCs. Hence, at this moment, it is not clear which individual products or categories of products are at issue. Under the well-established principles of WTO law, confirmed recently by the panel in the *China – Auto Parts* case, complainants' advancing an "as such" claim have to establish that the challenged measures, in their *every* application in relation to a given product model (and, it is to be noted again that it is not the CN EN but rather the CN itself which is applied here) *always* and *necessarily* lead to a violation of the GATT 1994. The EC submits that this has not been shown. Nor have the complainants shown a violation of GATT 1994 in any individual case.

B. SET TOP BOXES USING "CERTAIN TYPES OF MODEMS TO COMMUNICATE"

28. The definition of STBCs included in Attachment B of the ITA was drafted with one particular product type in mind. That product incorporated a modem, i.e., the modem was inside the set top box. The in-built modem has therefore become one of the defining elements of a STBC. The complainants expressly acknowledge this much.

29. It is correct to say that the Ethernet/W-LAN devices, to which the complainants refer as "certain types" of "modems", also allow, like modems, a connection to internet. However, these devices do so by connecting the STB in question *through a cable* (or radio waves in case of W-LAN) to another device, namely an external (self-standing) modem. It is that *external modem* which then, in turn, connects to the Internet. In other words, the modems which are at issue here are not incorporated in the set top boxes: they are *outside*, connected to a set top box *via* cable (or radio waves).

30. Faced with this indisputable fact, the complainants are trying to circumvent the requirement of an incorporated modem by re-interpreting what a modem is. Through a creative new interpretation the complainants attempt to show that a modem which is beyond doubt physically located *outside* an STB is actually incorporated *inside* it, as required by the ITA definition.

31. The Oxford dictionary defines a "modem" quite accurately, namely as *"[A] combined modulator and demodulator, used esp. to connect a computer to a telephone line, for converting digital electrical signals to analogue or audio ones and vice versa"*. Using this definition, the complainants would find it more difficult to prevail in their claim, because the device connecting to the telephone line, i.e., the modem, is simply not incorporated in the set top boxes communicating through Ethernet or W-LAN devices.

32. The dictionary the complainants rely on includes a more vague definition of a modem suggesting that it is "*equipment that connects … to a communication line*". Basing themselves on the assumption that not only a telephone line but anything, even a piece of cable linking an indefinite number of individual devices and transferring information could be a "communication line", the complainants arrive at their objective. To give an example, using this vague definition, one could be connecting to Internet through a modem "incorporated" in his or her set top box even if that modem itself would be located in the neighbours' flat or another house. Needless to say, this is not what the drafters of the ITA intended.

IV. THE CLAIM CONCERNING SET TOP BOXES WHICH HAVE A COMMUNICATION FUNCTION (STBC) UNDER ARTICLE X OF THE GATT 1994

33. Many of the assertions made by the complainants are simply based on a mistaken understanding of the EC customs legal system – a system which has been extensively discussed in the recent *EC – Selected Customs Matters* case, both at the panel and Appellate Body levels. It seems odd, therefore, that the complainants advance before this Panel a factual description of EC customs law which often departs even from the very basic concepts discussed at length already in that case. What is even more puzzling is that the complainants often correctly describe certain aspects of EC customs law in the initial parts of their submissions, only to depart from them later on in their submissions without any explanation.

V. CLAIMS CONCERNING MULTIFUNCTIONAL MACHINES (MFMS) UNDER ARTICLE II OF THE GATT 1994

34. There appears to be agreement among all the parties that the question to be resolved by the Panel is essentially one of classification: whether the MFMs at issue are covered by the EC concessions for HS96 subheadings 8471 60 and 8517 21 or by the EC concession for HS96 subheading 9009 12.

A. ADP CONNECTABLE MFMS

35. The complainants' position is that the EC concession for subheading 8471 60 covers each and every MFM that can be connected to a computer; and this even if the MFM also performs other functions, such as copying, which do not involve the use of a computer.

36. Thus, the complainants' position is that any MFM which can both print and copy must always be treated as if it were a single-function printer. In other words, the complainants' position is that the copying function of an MFM is always irrelevant, irrespective of its relative importance, and must be disregarded for the purposes of classifying that MFM within the EC's Schedule of concessions.

37. In addition to being manifestly unreasonable, the complainants' position disregards the express language of Note 5(B) to Chapter 84 of the HS96. It follows from that note that an "output unit" cannot be classified directly under HS96 heading 8471 unless it is used "solely or principally" with an ADP system.

38. In essence, the EC position is that because of the wide variety of MFMs it is necessary to examine, on a case-by-case basis, the characteristics of each kind of MFM. If it is determined, on the basis of such examination, that for a particular kind of machine the copying function is "secondary" to the printing function, that kind of MFM must be classified under subheading 8471 60 and accorded duty free treatment.

39. On the other hand, where it is determined that the copying and printing functions of a given kind of MFM are of equivalent importance, such a machine must be deemed prima facie classifiable under two different subheadings: 8471 60 and 9009 12. In those cases, it becomes necessary to resort to GIR 3 of the HS96, which specifically addresses the situation where a product is *prima facie* classifiable under two or more positions.

40. As shown by the EC, neither GIR 3(a) nor GIR 3(b) can be applied to the classification of MFMs. Therefore, the MFMs at issue must be classified pursuant to GIR 3(c). The application of that rule leads to the conclusion that, where the copying function is equivalent to the printing function, the MFMs at issue fall under subheading 9009 12. It follows that, in those cases, the EC is not required to grant duty free treatment to the products at issue.

B. NON-ADP MFMS

41. The complainants' position with regard to the second subcategory of MFMs at issue is that any MFM which can be used for faxing and copying must always be treated as a facsimile machine and classified under subheading 8517 21. And this irrespective of the relative importance of each of the two functions. Thus, the complainants again disregard entirely the copying function of the MFMs.

42. In contrast, the EC's view is that a non-connectable MFM which can be used for both copying and faxing is prima facie classifiable under both subheading 8517 21, as a facsimile machine, and subheading 9009 12, as a photocopier. This renders it necessary, once again, to resort to the specific rule laid down in GIR 3 for dealing with this type of situation. As shown by the EC, the application of GIR 3 leads to the conclusion that this subcategory of MFMs falls under subheading 9009 12. Therefore, the EC is not required to grant duty free treatment for imports of this category.

C. PHOTOCOPYING IS A FORM OF DIGITAL COPYING

43. The complainants' position with respect to both subcategories of MFMs is based on the premise that digital copying is not a form of photocopying. As the EC has shown in its first written submission, this premise is mistaken.

44. Digital copying is but the latest technological development in the field of photocopying. There are obvious technological differences between analogue and digital photocopiers. But the terms of subheading 9009 12 are broad enough, when properly interpreted, to encompass both types of photocopying. Indeed, the complainants themselves continued to classify "stand-alone" digital copiers as photocopiers long after the conclusion of the ITA.

45. Furthermore, if "stand-alone" digital copiers could not be considered as photocopiers, they would have to be classified under subheading 8472 90, a residual subheading covering "other", mainly mechanical office machines. In any event, classifying digital copiers under subheading 8472 90, rather than under subheading 9009 12, would not dispose of the issue before the Panel. On that interpretation, the MFMs at issue would be prima facie classifiable under that position, in addition to being *prima facie* classifiable under subheadings 8471 60 and/or 8517 21. Hence, it would

still be necessary to determine which of these positions is the most pertinent, having regard to the relevant notes and interpretative rules of the HS96.

ANNEX D–3

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION BY THE EUROPEAN COMMUNITIES

I. GENERAL ISSUES

A. THE EC CONCESSIONS PURSUANT TO ATTACHMENT B OF THE ITA

1. In its first written submission the European Communities argued that the complainants have failed to identify the relevant obligations in the EC's Schedule pursuant to Attachment B with sufficient clarity. This failure was again emphasised in the EC's first oral statement. Following specific questions from the Panel, the complainants have attempted to identify the relevant concessions with more precision. To a large extent the replies only add to the confusion. The complainants now advance a rather revolutionary view with respect to the legal status of the ITA and they continue to disagree among themselves where precisely the concessions pursuant to Attachment B are in the EC's Schedule.

1. The legal status of the ITA

2. The parties to the dispute have a fundamentally different view of the ITA and its legal status. While the European Communities has considered it to be a fully-fledged international treaty within the meaning of Art. 2(1) VCLT, the complainants consider that the ITA is not a treaty in that sense and regard it as a mere "political declaration".

3. The first question which arises is how to interpret any terms of such a "political declaration", for instance any narrative definitions provided in Attachment B to the Annex of the ITA. In the light of Article 2(1) VCLT, the VCLT interpretative rules are not applicable, which the complainants expressly confirm. Even if they were applicable, however, they would not help much in the interpretative analysis.

4. The first command of the VCLT, namely to interpret the terms according to their ordinary meaning, entirely fails when applied to this "political declaration". This can be well illustrated on the word "agreement". A cursory review of Attachment B reveals that its drafters used at least 5 times the word "agreement". In its ordinary meaning, this word means "a mutual understanding, a covenant, a treaty" and "a legally binding arrangement between two or more parties". The word "agreement" is also used in Art. 2(1) VCLT to describe a basis of a treaty covered by that Convention. Yet, the complainants are of the view that the drafters, when they used the word "agreement", wanted to say "political declaration".

5. This has significant consequences. If the drafters indeed used such an imprecise language with respect to this rather important term, then how can the complainants be sure that the drafters used any other term in the declaration with more precision and accuracy?

6. Furthermore, in the view of at least the Unites States, there are at least two sets of narrative definitions relevant for the interpretation of the EC's Schedule. First, there is the "headnote" which "directs the reader to Attachment B of the ITA". One set of narrative definitions is therefore directly the one set forth in that Attachment. Second, there would also be another, separate set of narrative obligations in the EC's Schedule. This set, "separated by a heavy black line" from the "headnote",

includes both the narrative definitions and the HS/CN codes notified by the European Communities next to the definitions.

7. The first set of narrative definitions, namely the one provided in the Attachment B to the ITA to which the "headnote" points to, cannot be used for a credible and reliable determination of legal rights and obligations if the ITA is just a political declaration. There is no reason to assume that the drafters have been more careful and accurate with respect to some terms of Attachment B when they have been so apparently inaccurate in their use of the term "agreement".

8. Therefore, an interpreter of the EC's Schedule would have to base himself on the second set of the narrative definitions, namely the one "separated by a heavy black line" from the headnote. This set includes, however, the HS/CN codes notified at the same time alongside those narrative definitions. It follows that those codes are much more than mere context, they constitute the actual concession.

9. The complainants simply cannot have it both ways: relegate the ITA to a mere political declaration *and* rely on a specific interpretation of the words in such a political declaration.

2. Where exactly are the relevant Attachment B concessions?

10. There is a difference between the United States on the one hand, and TPKM and Japan on the other hand, on the question what precisely constitutes the EC's concession pursuant to Attachment B of the ITA. Although all of the complainants wish to downplay the legal relevance of the specific headings next to the product definitions in the EC's Schedule pursuant to Attachment A, Section 2 and Attachment B, the precise concession the complainants claim is breached by the European Communities in relation to "flat panel display devices …." and "set-top boxes which have a communication function" is defined differently between the complainants.

11. Apart from there being a difference on what exactly is incorporated into the EC's Schedule, the United States considers that the so called "chart that follows the headnote" is a *separate* provision of the EC's Schedule. On this basis the EC's Schedule would contain two sets of commitments pursuant to Attachment B. Japan and TPKM in turn appear to see the "headnote" and the product definitions together with the headings next to them as part and parcel of the same concession. They emphasise that the headings next to the product definitions are illustrative only.

12. These differences are not just formal. It is fundamentally important to define what the relevant EC's concession is and what in turn provides context for its interpretation. The position of the European Communities is clear: the headings next to the product definitions cannot be read out from the EC's Schedule. They inform of the commitments made by the European Communities pursuant to Attachment B of the ITA.

13. Even if it were to be accepted that there is a "safety net" commitment that could be derived from the "headnote", overwhelming evidence must be required to demonstrate that a Member is in breach of its obligations because there is another product that fulfils a given definition despite not falling within the scope of the headings explicitly identified next to the product definition. The EC's Schedule together with the headings next to the product definitions was agreed by consensus and certified accordingly.

II. CLAIM CONCERNING CERTAIN "FLAT PANEL DISPLAY DEVICES"

A. CONTINUED LACK OF DILIGENCE IN SETTING OUT THE CLAIMS

14. The complainants have to some extent clarified which concessions in the EC's Schedule are subject to this case although the claim based on the concession pursuant to Attachment B suffers from the general shortcomings identified above. However, despite very clear questions from the Panel, the complainants continue to be extremely vague on the products at issue.

15. But there is another lack of precision in setting out the claims, which the European Communities was not able to identify from the first written submissions. Following the oral statements and the complainants' replies to the questions, the European Communities understands that the scope of the two claims the complainants are advancing in relation to flat panel monitors are very different in scope.

B. TWO SEPARATE CLAIMS UNDER TWO SEPARATE COMMITMENTS

16. Following the clarifications from the complainants, the European Communities understands the claim in relation to Attachment B to be as follows: according to the complainants, the European Communities fails to grant duty free treatment to all flat panel display devices that are "for" a computer or other products falling within the ITA. As TPKM put it in their first oral statement, "the real interpretative issue is the meaning of 'for' ". The complainants claim that any flat panel display device that is *merely capable of operating with a computer* is "for" a computer. Nothing more nothing less; no need to consider any other criteria. Thus, if the complainants do not succeed in convincing the Panel on their interpretation of the word "for", the claim falls.

17. The position of the complainants is completely at odds with the ordinary meaning of the word "for" read in its context that manifestly must include the other concessions in the EC Schedule and in particular those made pursuant to Attachment B. Among those definitions is the definition of "monitors" that categorically excludes televisions - including high definition televisions - from the scope of the whole agreement. In the view of the European Communities this exclusion also necessarily covers video monitors and particularly HD ready monitors because they are capable of receiving and processing television signals or other analogue or digitally processed audio or video signals without the assistance of a central processing unit of a computer.

18. However, while the scope of the claim under the concession pursuant to Attachment B becomes otherwise clearer, it manifestly creates confusion from the point of view of the measures challenged. The very wide interpretation of the word "for" and the consequent width of the products at issue the complainants advance under the concession pursuant to Attachment B of the ITA has some very important consequences for this case: it leads to a situation where it is entirely unclear *how the challenged measures come within the scope of each of the two separate claims*. Do the complainants consider that all EC's measures that would be relevant in assessing the duties on all products falling within the scope of the ITA and that follow the HS nomenclature are necessarily in breach of the EC's WTO obligations? Would there be other criteria in HS96 that in the view of the complainants would also lead to WTO violations? What parts of the CN and CNEN are actually within the scope of each of the two claims?

C. FURTHER CONFUSION ON THE PRODUCTS AT ISSUE: CONSEQUENCES OF THE TWO SEPARATE CLAIMS

19. The fact that the two claims the complainants advance in relation to flat panel monitors are different in scope necessarily has the same consequence in relation to the products at issue. Indeed, the claim under heading 8471 60 90 appears to concern monitors that are *solely or principally* for use with an ADP machine whereas the claim under the relevant concession pursuant to Attachment B of the ITA concerns monitors that are *merely capable of operating with a computer*. The European Communities understands that the latter claim is necessarily wider than the former and therefore more monitors are within its scope. However, with the exception of Japan's reply to question 48, the complainants refuse to otherwise clarify the borderlines and the legal criteria for distinguishing different monitors from each other in order to clarify the scope of and, perhaps even more importantly, the relationship between the two claims.

20. Prior to seeing the replies of the complainants to the questions from the Panel, the European Communities had assumed that, in addition to the five specific monitors identified in Commission regulations 634/2005 and 2171/2005, the products at issue were LCD monitors with a DVI interface irrespective of any other technical characteristic (all complainants) and LCD monitors that can display information only from an ADP machine (US and TPKM). Indeed, in the absence of any explanation to the contrary, the European Communities understood that the product scope was the same under the two claims.

21. Now the European Communities understands that *all* flat panel monitors, irrespective of any other technical characteristic, are within the scope of the claim that is based on the EC's commitments pursuant to Attachment B of the ITA. Indeed, not only LCD monitors with a DVI but any flat panel monitors including plasma and other technologies, with e.g. HDMI interface, or other technical characteristic such as a tuner etc. are within the scope of the claim as long as the monitor is merely capable of operating with a computer.

22. The claim under heading 8471 60 90 in turn appears narrower from the point of view of the products at issue. The European Communities understands therefore that the United States is *not* claiming that a modern flat panel television is within the scope of their claim under heading 8471 60 90 while such a product would appear to be within the scope of the claim under the relevant concession pursuant to Attachment B. Curiously both TPKM and Japan refrain from answering question 58 from the point of view of a TV that can connect to a computer and therefore considerable uncertainty remains on the product scope in relation to their claim under heading 8471 60 90.

23. In these circumstances the European Communities is simply not in a position to know what products come within the scope of the claim under heading 8471 60 90. There is a complete confusion. The complainants' replies *inter alia* to questions 3, 23 a), 48, 49, 58, 66 and 67 are simply not internally consistent and do not distinguish between the two separate claims under two separate concessions they appear to invoke. In such circumstances the European Communities is not in a position to provide an effective rebuttal and considers that its due process rights are being compromised.

D. THE MEASURES AT ISSUE: HOW ARE THE MEASURES WITHIN THE SCOPE OF THE TWO SEPARATE CLAIMS?

1. The CN

24. Regulation 2658/87 as last amended by Commission regulation 1031/2008 provides for the CN 2009 currently in force. Under the CN that reflects HS2007 there are a number of headings to which a given flat panel monitor could be classified depending on its objective characteristics. Among these is heading 8528 51 00 (HS2007).

25. Products falling within this heading "…monitors – other monitors -- of a kind solely or principally used in automatic data-processing system of heading 8471" are *duty free*. The same is the case for heading 8528 41 00. In the view of the European Communities, these headings implement in the CN currently in force the relevant obligations pursuant to the ITA.

26. It is not entirely clear to the European Communities what is the basis for considering that the European Communities would be in breach of its obligations under the claim based on heading 8471 60 90 (HS96) because the combined scope of heading 8528 51 00 (HS2007) and 8528 41 00 (HS2007) is at least as wide as heading 8471 60 90 (HS96) despite the clear differences in the wording in the text of the heading. Presumably the alleged violation stems from the alleged interpretative effect of certain criteria in the Explanatory Notes to the CN (CNEN) when the CN is applied in practice.

27. It is equally not entirely clear to the European Communities how the CN is alleged to breach the "safety net" concession pursuant to Attachment B of the ITA. The European Communities understands that the complainants claim that there are monitors that are classified elsewhere in a dutiable heading (such as "video monitors" under headings 8528 59 10 or 8528 59 90 or "televisions" under various eight digit headings under heading 8528 71) but would nevertheless still be entitled to duty free treatment. If the European Communities understands correctly, the claim means that it ought to have foreseen duty free headings also under the relevant CN headings for video monitors and televisions due to the "safety net" concession in the so called "headnote". But on the basis of what criteria should the European Communities have drawn the borderline between e.g. televisions that, in the view of the complainants, fall within the scope of the ITA and those that do not? Mere ability to connect with a computer?

2. The CNEN

28. The complainants also challenge the CNEN. However, it is not clear to the European Communities whether and in what respects the CNEN are challenged under the two claims made by the complainants i.e. under heading 8471 60 90 and the relevant commitment pursuant to Attachment B of the ITA.

29. The CNEN to heading 8528 41 00 provide for a lengthy list of relevant classification criteria. However, the European Communities understands that the CNEN to heading 8528 41 00 are not in themselves challenged under either of the claims. The challenge is only through the *mutatis mutandis* language in the CNEN to heading 8528 51 00.

30. According to the CNEN to heading 8528 41 00, "monitors of this subheading work with the cathode ray tube (CRT) display technology". Thus, in order to apply the CNEN to other technologies *mutatis mutandis*, it is necessary to distinguish between the technical criteria that are relevant only in relation to CRT technology. Contrary to what the complainants appear to argue, the words *mutatis*

mutandis do not incorporate all of the CNEN to heading 8528 41 00 into the CNEN to heading 8528 51 00. This is not a straightforward task although the CNEN do at times distinguish between different technologies.

31. However, to the extent the European Communities understands the claims, the complainants consider that the specific formulation of two criteria in the CNEN to heading 8528 41 00 as allegedly applied *verbatim* under heading 8528 51 00 necessarily leads the European Communities to classify some monitors in a different heading than 8528 51 00, which according to the complainants is necessarily a dutiable heading.

32. The European Communities understands this to be because of the allegedly mandatory language in the CNEN to heading 8528 41 00 that allegedly leaves no discretion to the customs authorities when applying the CN. In this context, it should be recalled that the criteria the complainants are challenging are provided in the Explanatory Notes to HS96.

33. Whether the complainants consider there to be other criteria in the CNEN that lead in their view to a breach of Article II of the GATT 1994 remains unclear. It is not clear whether the CNEN are challenged *in the same way* under both of the claims i.e. under heading 8471 60 90 and the relevant concession pursuant to Attachment B of the ITA. In particular, it is not clear whether the CNEN come at all within the scope of the claim made under the concession pursuant to Attachment B of the ITA.

34. In any event, the European Communities has already demonstrated in its first written submission that the allegedly mandatory language in the CNEN does not preclude the exercise of discretion in relation to a monitor identified with all of its relevant objective characteristics. Indeed, the CNEN are not legally binding despite the complainants' attempt to describe them as such. According to the established case law of the European Court of Justice;

> "the Explanatory Notes drafted by the Commission, in respect of the CN, and those adopted by the WCO, in respect of the HS, are an important aid for interpreting the scope of the various tariff headings but do not have legally binding force …"

35. It is also important to clarify the state of EC law following the judgment of the European Court of Justice in case C-376/07 *Kamino.* Indeed, all complainants refer to the case in their submissions.

36. In *Kamino* the European Court of Justice considered that the CN should be applied on a case-by-case basis taking into account all the relevant objective characteristics of a given monitor. The Court explicitly dealt with the two criteria addressed by the complainants.

37. Even if the view of the complainants on how the European Communities has applied these criteria in concrete cases would be accepted (*quod non*), they can no longer be applied in that way under EC law.

38. In the view of the European Communities there is nothing WTO inconsistent in the interpretation given by the ECJ in C-376/07 *Kamino*. However, the European Communities is in the process of repealing and/or replacing the relevant CNEN for reasons of clarity.

3. The classification regulations

39. Finally, the complainants challenge Commission regulations 634/2005 and 2171/2005 that have applied the CN in relation to certain specific monitors. Again, *it is unclear whether these regulations are challenged in the same way under both of the claims made by the complainants* i.e. heading 8471 60 90 and the relevant concession pursuant to Attachment B of the ITA. The complainants have not developed their argumentation in any relevant detail in respect of these regulations.

III. CLAIMS CONCERNING CERTAIN "SET-TOP BOXES WHICH HAVE A COMMUNICATION FUNCTION"

A. CLAIM ON STBCS UNDER ARTICLE II OF THE GATT 1994

1. The complainants have not established an "as such" violation

40. The complainants argue that the European Communities suggests that to succeed with their "as such" claims, the complainants are "required to demonstrate that the measures in question result in the imposition of duties *on every single model* of FPD, STB, or MFM that crosses the EC border". This is not correct. The European Communities argues that the complainants have to establish in this respect that the challenged measures necessarily result in inconsistency with WTO law when applied to "*a given* product model" or "*a certain* product or category of products" out of possibly many other categories covered by those measures and treated by the European Communities consistently with its obligations.

41. The disagreement between the parties seems to be in the fact that in the EC's view the category of products with respect to which inconsistency has to be shown has to be a *certain*, duly defined category of products. Knowing which products or types of products are at issue allows to examine of the totality of objective characteristics of those products (or, product types) which, in turn, allows to determine whether the challenged measures treat that category of products consistently with WTO law or not.

42. The complainants attempt to escape this issue by delineating the category of products by a single criterion, which they deem arbitrary. Clearly, one can define a product category like this. But, in the EC's view, explained in this and previous submissions, the Panel can hardly rule that the EC's treatment of a category including *all* set top boxes with a hard disk drive or DVD apparatus performing a recording or reproducing function (even if they otherwise fulfil the definition of an STBC) necessarily results in violation of the EC commitments. Such a finding would presuppose, in the EC's view, that one accepts the complainants' dubious theory of minimum requirements. In contrast, if the Panel finds itself convinced by the – so far non-existent – arguments by the complainants that a certain category of set top boxes within that overall category of all set top boxes which incorporate a device performing a recording or reproducing function (and which otherwise fulfil the definition of an STBC) is treated by the European Communities inconsistently with its obligations, the Panel can naturally make a finding in that regard. But then one would have to explain what that category of products is. In this respect, it should not be forgotten that besides the CN Explanatory Note (CN EN), the complainants also challenged the entire Combined Nomenclature, meaning that the combinations of products which are potentially at issue is, without any further specification, indeed truly endless.

2. The complainants incorrectly interpret the narrative description

43. The explanations provided by the European Communities have shown that even if the complainants' approach of focusing solely on the narrative descriptions were a correct way of interpreting the concessions in the EC Schedule, it would still fail to support the complainants' position with respect to "set top boxes which have a communication function".

44. The starting point for an interpretation of the narrative description is a *correct* text of that description. The European Communities is not of the view that one can interpret text "set top boxes which have a communication function" while using the phrase "set top box with a communication function". That does not mean that the complainants cannot interpret the phrase "set top box with a communication function" if they are of the view the relevant concession is in that phrase. But in such a case they must be clear about the fact that they are interpreting a language different from that of the narrative description of STBCs and that that different language is provided in a document distinct from Attachment B of the ITA or the EC Schedule. These differences cannot be ignored: each of these phrases has not only a different text, but also a distinct context, in which it is to be understood. This – and not so much the fact that "which" and "with" may have a different meaning in itself – is the main reason for which the European Communities insists on using a correct text for interpretation.

(a) Document G/MA/TAR/RS/74 and its relationship to the narrative description

45. To be able to asses the legal significance of that communication, one of course has to analyze its text, provided on page 2 of document G/MA/TAR/RS/74.

46. The first four paragraphs at page 2 explain the background of the communication, including the fact that the European Communities created a new tariff line in its nomenclature, 8528 12 91. The table included in the third paragraph explains that that code in the EC's domestic classification covers an "Apparatus with a microprocessor-based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange, capable of receiving televisions signals". As is further apparent from the table, the EC legislator adopting the legislative measure to the EC's Combined Nomenclature called these products "Set-top boxes *with* a communication function".

47. The use of this term – which is *not identical* to the narrative description set forth in the EC Schedule and the ITA – reflects well the fact that the description of the apparatus classifiable in CN 8528 12 91 is *not identical* with the narrative description provided in the ITA and the EC Schedule either (namely, the words "capable of receiving televisions signals" are added in the EC legislation).

48. No matter how interesting it may be to compare the two distinct phrases, however, the practical significance of such a comparison for the present case is rather limited. This is because no particular name or phrase used by the EC legislator for describing and naming a product in the context of adopting EC's own classification measure could be relevant for the interpretation of the scope of a tariff concession formulated at the WTO level (and the EC recalls that the complainants argue that it is narrative description of STBCs included in the ITA and the EC Schedule which constitutes the concession). As the US correctly stated, referring to the panel in *China – Auto Parts* case: "[I]t is well-established that a Member's classification law … cannot add to or diminish its WTO tariff concessions."

49. The term "set-top boxes with a communication function" would naturally be relevant, had the European Communities made it a part of its Schedule. That is not the case, however, as specified in the fifth paragraph of the communication. This reflects two facts. First, it confirms that that in 2000,

just as it had been in 1996 and just as it is now, the European Communities was of the view that the CN codes inscribed in its Schedule next to the Attachment B product description matter. Second, it shows that the notification **neither introduced** a *separate narrative description* into its Schedule **nor modified** the *existing narrative description.* In that respect, the text could not have been clearer.

50. Nonetheless, even if one accepted that through document G/MA/TAR/RS/74 the *narrative description* was somehow modified (with the effect that its scope was enlarged), one still could not argue that such a modification meant that the European Communities recognized that a distinction between "with" and "which have" was without basis, as the complainants argue. And even less so could it be argued that through the 2000 notification the European Communities accepted that the narrative description was one of setting *minimum requirements*.

51. This is not only an issue of substance, it also has its procedural aspects. This is, in particular, because the complainants do not appear to have unified views on this issue. Of course such a split position is very comfortable for the multiple complainants, since no matter where the truth is, at least one of them will be correct in the end and, through the unclear "joint and several" approach all the complainants will eventually subscribe to that correct view. In contrast, the European Communities, acting alone, has to spread its efforts and cover the entire spectrum of the complainants' views. In such a situation, the EC's call for clarity is more than a call of its defence lawyers for an understanding of the complainants' position, it becomes a **due process** issue.

(b) Understanding of terms established from the documents used during the negotiations

52. The European Communities refers to its first written submission, in which it described certain surrounding circumstances established through a number of documents used in the ITA negotiations. In accordance with the guidance provided by the Appellate Body, the European Communities is of the view that a proper analysis of surrounding circumstances is essential for a correct interpretation.

53. The complainants seem to dispose summarily of the EC's arguments in this regard by arguing that "the ITA does not have a formal 'negotiating history' ". Irrespective of whether these documents as a whole constitute part of the ITA's negotiating history or not, they contain many individual statements which, on their own, establish certain circumstances surrounding and shedding light on the use of certain ITA terms by its drafters. What is indisputable is that those statements are *highly relevant* to the present dispute and cannot be ignored.

54. The complainants endeavour to downgrade these statements by pointing to the interpretative hierarchy established in Articles 31 and 32 VCLT (and, even then, they argue that they cannot be considered as a preparatory work). What the complainants ignore, however, is that this hierarchy of interpretative sources has its sense in a situation where different elements of the interpretative analysis (text, context, object and purpose, supplementary means of interpretation) provide different (or even contradictory) meanings. In this case, however, all the interpretative elements point to the same direction, and the application of the hierarchical order of the individual sources thus becomes less relevant for a correct outcome of the interpretative analysis.

(c) Relevance of HS Codes

55. As the European Communities explained in its first written submission, even if the complainants' theory that the EC's (and other ITA parties') concession on STBCs is indeed expressed solely in the narrative description of STBCs were correct, one cannot ignore the relevance of the HS codes notified by the parties next to that narrative description in accordance with paragraph 2 of the Annex to the ITA. At the very minimum, these codes constitute a context for the interpretation of the

narrative description, since they clearly *reflect the understanding* of the product at issue by the party which notified those codes at the time.

56. The European Communities is pleased to see that the complainants agree with that proposition. In addition, however, the complainants make the argument that the HS codes do not restrict the scope of the concession. The complainants point, in this respect, to the headnote, in particular its "wherever … classified" language. This argument may or may not be relevant in the overall discussion between the European Communities and the complainants as to whether the EC concession is set forth in the narrative description and/or the HS/CN codes notified next to it. However, this argument has zero relevance in the context of the theory that it is the narrative description which comprises the EC commitment, which the complainants advance with respect to STBCs. One naturally has first to identify and understand the content of the narrative description, before one is able to say what product is to be granted a duty-free treatment and benefit from the language "whenever … classified".

57. It follows from the above that the Panel should carefully examine the HS codes that the ITA participants notified to WTO with respect to STBCs. These codes are context and shed considerable light on what sort of products the ITA parties (i.e., not only the European Communities) understood to be covered by the narrative description in 1996/1997 (and, yet again, in 1999). It is also the multilateral nature of this evidence which makes clear that it cannot be ignored.

B. CLAIM ON STBCS UNDER ARTICLE X OF THE GATT 1994

58. First, the complainants' key assumption that "the EC did not publish [the CN EN] … for over a year after it was approved, and applied it to collect the WTO-inconsistent duties even before it was published" is simply *factually* incorrect (in addition to their erroneous legal characterization of those mistaken facts).

59. Under EC law, the text of a measure has to be finalized, voted on (in all parts in the final version by the CCCE) and then adopted by the Commission for a CN EN to exist.

60. The Community measure, as the complainants portray it, does not exist in the WTO sense either. The discussions or votings in the CCCE pertaining to a draft measure simply have no legal or other effect alleged by the complainants. The complainants attempt to connect certain events to create a Community measure. Yet, those events are not connectable in the way complainants argue, and what they perceive as a causal link linking certain facts with a supposed Community measure is misunderstanding of the events, as just described. A *Community measure* which the complainants challenge does not exist, as a matter of *fact*.

61. Second, it is also useful to note that the European Communities naturally cannot prevent individual Member States from finding a certain interpretation of the Combined Nomenclature discussed in the CCCE convincing and from deciding, on their own, to follow such an interpretation. However, if an EC Member State indeed decides to change the interpretation of a certain tariff line in such a case (leading to a classification of products different from that followed by that MS previously), this change would be a measure of that individual Member State.

62. If this were indeed the complainants' theory, however, it would raise at least three questions. First, does the evidence provided by the complainants, i.e. the *three* BTIs issued by French customs authorities (all issued on the same day) and the *one* BTI issued by a Czech customs authority, indeed demonstrate the existence of a *change* of classification by the customs authorities of these Member States? Second, even if the Panel agreed that the complainants demonstrated the existence of such

measures, the next question is whether such measures would be properly before the Panel at all. Finally, even if such measures were before the Panel, the third question is whether they would indeed fall, given their nature and functioning, within the ambit of Art. X:1 or X:2 GATT. In the EC's view, the complainants have not established any of the three points raised above.

IV. CLAIM CONCERNING CERTAIN "MULTIFUNCTIONAL MACHINES" (MFMS)

A. ADP MFMs

1. Digital copiers are "photocopying apparatus with an optical system" - MFMs with a digital copying function are *prima facie* classifiable under HS96 subheading 9009 12

(a) HS96 heading 9009

63. The critical issue in deciding whether digital copiers meet the terms of HS96 heading 9009 is whether they are "photocopying apparatus". The dictionary definitions of that term cited by the complainants are equally apt to encompass both analogue and digital photocopiers. They confirm that the defining characteristic of all photocopiers is that they use light in order to produce instant copies of an original document.

(b) HS96 subheading 9009 12

64. Japan has advanced two arguments in order to show that digital photocopiers do not follow the "indirect process" described in subheading 9009 12. Both are clearly without merit. The first and main argument is purely grammatical, namely that subheading HS9009 12 uses the terms "image" and "copy" in the singular form. But no conclusion can be drawn from this. In describing a production process it is common to use the singular form even when such process can be used to produce simultaneously more than one unit of the same product.

65. Japan's second argument is based on what it describes, rather confusingly, as being simultaneously the "specific" and the "ordinary" meaning of the term "intermediate". According to Japan, that term would allude exclusively to an electrostatic drum or plate. But there is no basis for such a narrow reading. The ordinary meaning of "intermediate" is "coming or occurring between two things in time, place, order, character, etc". The "specific" dictionary meaning of "intermediate" cited by Japan does not belong to the field of photocopying, but rather to the printing machinery falling within HS96 8443. Even assuming that the term "intermediate" meant "electrostatic drum", the undisputable fact is that the digital copiers at issue do incorporate an electrostatic drum.

66. Japan is reading into the wording of HS96 9009 12 a requirement which is not there: that the "original image" must be "reflected" or "projected" onto the "intermediate" and that it must be so "directly". Yet what HS 9009 12 actually says is that the "original image" must be "reproduced" (and not "reflected" or "projected") onto the "copy" (and not onto the "intermediate") and that this must be done "via an intermediate". Even if the terms "via an intermediate" had to be read as meaning "via an electrostatic drum", this requirement would be satisfied provided that the image is reproduced onto the copy with the intervention of an electrostatic drum.

(c) The Explanatory Note to HS96 heading 9009

67. As the complainants cannot show that digital copiers fail to meet the terms of either heading 9009 or subheading 9009 12, their claim becomes dependant on a narrow reading of a non-binding and largely obsolete Explanatory Note. If that note does not mention digital copiers it is simply

because it was drafted before digital copiers came into existence. Although the note does not mention expressly digital copiers, it does not exclude them either.

68. In 2002 Japan made a proposal to amend the Explanatory Note to HS96 9009 in order to provide that the image of the document must be projected "directly" onto the light-sensitive surface. This proposal, however, was not accepted.

69. The United States has argued that a CCD is not a "light-sensitive surface" within the meaning of the Explanatory Note. But the Explanatory Note to the HS2007 describes a CCD as a "photosensitive surface" when defining the notion of digital copier.

2. The classification practice of the complainants and of the third parties supports the EC's position

70. The evidence made available to the Panel shows that, prior to the conclusion of the ITA, all WTO members, and not just the European Communities, classified digital copiers under HS96 9009: (1) TPKM has recognised that, both before and after the conclusion of the ITA, it classified all digital copiers as photocopying apparatus under HS96 9009; (2) the United States has recognised that it was not until 2002 that the US customs authorities ruled, for the first time, that digital copiers were not photocopying apparatus covered by HS96 9009; (3) Japan professes not to know now how or where its authorities classified digital copiers prior to the conclusion of the ITA or, indeed, at any point in time prior to the introduction of the HS2007. But in December 1997 Japan made a proposal to the ITA Committee with a view to including HS96 9009 12 within the scope of the ITA, so as to cover digital copiers. This suggests that, at that time, Japan took the view that digital copiers fell within that subheading; (4) Singapore has confirmed that, like TPKM, it classified all digital copiers under HS96 9009 both before and after the conclusion of the ITA; (5) none of the other third parties which have intervened in support of the complainants has alleged, let alone proved, that it classified any digital copiers under any HS96 heading other than 9009, either before or at any time after the conclusion of the ITA.

71. The evidence made available to the Panel also indicates that, at the time of the conclusion of the ITA, none of the complainants or of the third parties was of the view that all ADP MFMs with a digital copying function had to be classified necessarily under HS96 8471: (1) TPKM has recognised that, until the introduction of the HS 2007, it classified ADP MFMs with a copying function under HS96 9009 where, on the basis of a "case-by-case examination", it was determined that no function was more "important" than the copying function; (2) the United States has confirmed that until 2002 ADP MFMs with a copying function were deemed *prima facie* classifiable under both HS96 8471 and HS96 9009 and their classification was determined in accordance with GIR 3(b); (3) Japan says that it ignores how and where its authorities classified ADP MFMs with a copying function either before or after the conclusion of the ITA; (4) until the introduction of the HS2007, in Singapore ADP MFMs were deemed *prima facie* classifiable under both HS96 8471 and HS96 9009. Furthermore, Singapore has admitted that certain ADP MFMs may have to be classified under HS96 9009 pursuant to GIR3; (5) no other third party has provided any evidence showing that it classified all ADP MFMs with a copying function under HS96 8471, either before or after the conclusion of the ITA.

3. ADP MFMs cannot be classified directly under HS96 subheading 8471 60 unless they are used "solely or principally" with a computer

72. The thrust of the complainants' argument is that the ordinary meaning of the terms "output unit" is so unmistakably clear that the Panel can and must conclude, on that basis alone, that all ADP MFMs are covered by the concession for HS96 subheading 8471 60. The complainants' position is

wrong as a matter of law because it disregards Article 31 of the *Vienna Convention*. The context of a treaty provision is not a subsidiary means of interpretation. The HS96 is part of the context for the interpretation of the Members' schedules. Note 5(B) to chapter 84 is an integral part of the HS96 and, therefore, relevant context. Japan has recognised that Note 5 to Chapter 84 "speaks directly to the interpretative question at hand" and "must be given significant interpretative weight." It is, therefore, incomprehensible that, at the same time, Japan continues to argue that the HS is "of minimum practical value" in this dispute.

73. Note 5(B) to Chapter 84 makes it clear that a "unit" may not be classified under subheading 8471 60 unless it is used "solely or principally" with an ADP system. While denying the relevance of that Note, Japan asserts that printing is the "principal" or even the "predominant" function of all ADP MFMs. Nevertheless, Japan provides no evidence or argument in order to support such assertions. Instead, Japan refers to the ECJ's *Kip* judgement as confirming that printing is always the principal function. But the ECJ said nothing of the sort. Japan has quoted the ECJ as saying that ADP-MFMs " … are *likely* to be of a kind used principally in an automatic data-processing system". But the quoted text is just a translation. What the French original version says is that "… lesdits appareils sont *susceptibles* d'appartenir au type utilisé principalement dans un système automatique de traitement de l'information."

74. Japan goes on to argue that Note 5(B)(a) does not apply by virtue of Note 5(D). But it is rather Note 5(D) which is clearly inapplicable in this case, because ADP MFMs are not mere "printers". They are multifunctional machines.

B. NON-ADP MFMS

75. In its oral statement, Japan continues to gloss over the undisputable fact that the Non-ADP MFMs at issue, in addition to having a facsimile capability, also have a copying capability. Japan also contends that digital copiers do not fall within HS 9009. But, even if it were true that digital copiers are not photocopiers, it would not follow that <u>all</u> non-ADP MFMs must be classified under HS96 8517 21. On the assumption that digital copiers are not photocopiers, they would have to be classified under HS96 8472 90. Accordingly, on the same assumption, non-ADP MFMs would fall *prima facie* within both HS96 8517 21 and HS96 8472 90 and their classification would have to be determined, on a case-by-case basis, pursuant to Note 3 to Section XVI of the HS96.

76. Once again, the practice of the complainants and of third parties, as evidenced by their responses to the EC's questions, supports the EC's position: (1) TPKM has recognised that, both prior to the conclusion of the ITA and subsequently until the introduction of the HS2007, it classified non-ADP MFMs under HS 9009 "as long as it was determined that no other function was more important than the copying function"; (2) the United States has openly admitted that <u>not all</u> non-ADP MFMs which can both copy and fax are to be classified under HS96 subheading 8517 21. The United States has further explained that, until 2002, its customs authorities classified non-ADP MFMs on a case-by-case basis pursuant to GIR 3(b). Furthermore, starting in 2002, the US authorities classified in many occasions non-ADP MFMs under HS8472 90, rather than under HS8517 21, pursuant to Note 3 to Section XVI of the HS96, on the grounds that the copying function, and not the fax function, was the more "important"; (3) as usual, Japan pretends not to know how or where non-ADP MFMs were classified by its customs authorities at any point in time prior to the introduction of the HS 2007; (4) Singapore has recognised that the MFMs at issue may have to be classified pursuant to GIR3; (5) no other third party has alleged, let alone proved, that it classified <u>all</u> non-ADP MFMs under HS 8517 21 either prior to the conclusion of the ITA or at any time until the introduction of the HS 2007.

V. SPECIFIC COMMENTS ON THE COMPLAINANTS RESPONSES TO PANEL'S QUESTIONS

77. In this Section the European Communities addresses some specific elements in the replies of the complainants to the first set of questions from the Panel. No additional comments are provided where the EC's responses to the same questions already anticipate the complainants' arguments. In any event, the fact that the European Communities does not comment on all of the responses from the complainants does not necessarily mean that it agrees with their position.

ANNEX D–4

EXECUTIVE SUMMARY OF THE ORAL STATEMENT BY THE EUROPEAN COMMUNITITES AT THE SECOND SUBSTANTIVE MEETING

I. THE CLAIM CONCERNING CERTAIN "FLAT PANEL DISPLAY DEVICES"

A. STILL NO PRIMA FACIE CASE

1. The European Communities has already explained at length in previous submissions why the complainants have failed to present a prima facie case as regards their claim on "certain flat panel display devices". There are many reasons for this but the main new element is that the complainants' respective positions are increasingly diverging.

2. It was clear from the outset that the claims were not the same between all complainants. However, the differences are far more important than what initially seemed. First, the complainants have so far clarified that they are making two separate claims in relation to "certain flat panel display devices". These two claims are based on two separate concessions. However, the concessions are identified differently by different complainants. Second, the European Communities insists that the complainants have failed to identify the products at issue in this dispute in relation to "certain flat panel display devices".

3. The complainants hardly even begin to explain how the measures define the products because they are not even able to be clear which headings in the CN are relevant to their case. The European Communities still does not know whether headings on video monitors and televisions are within the scope of the case.

4. In this respect it is important to recall that in *EC – Computer Equipment* the Appellate Body was interpreting Article 6.2 of the DSU. In the case before us the situation is different. The issue is whether the complainants have made a prima facie case and the consequences that follow from the failure to do so, including on the burden of proof. The European Communities has the right to know with sufficient precision, what types of products the complainants claim should be duty free in order to be able to rebut their arguments. The European Communities has also the right to know precisely which headings of the CN are within the scope of each of the two claims. It is simply not enough to point to the CN generally because it covers all products. And it is certainly not good enough to identify certain CN headings and certain products only to contradict such identification in the next or even in the same submission to the Panel.

5. The complainants insist that they are making two claims that are not identical in scope. They must therefore explain precisely what the difference between the claims is.

6. For instance, Japan identified the CN headings on video monitors and televisions to be relevant for the purposes of the claim on certain flat panel display devices. In its second written submission Japan first considers televisions as "non-ITA products" only to contradict this position later in the same submission. The confusion is complete even without the added issue of how these conflicting positions relate to the two separate claims.

7. In its previous submissions TPKM in turn appeared to consider that televisions are not covered by the ITA because it did not identify the relevant CN headings in its reply to question 66 of the Panel. In its second written submission TPKM first considers that televisions are not covered but insists later that televisions are in fact covered by the ITA concessions. TPKM goes even as far as

calling the most relevant CN heading 8471 60 90 in this case a "residual category covering all input/output units for ADP machines not specifically mentioned in previous CN codes". One is left completely perplexed. If CN heading 8471 60 90 is a "residual category" what does it mean for the second claim based on this heading?

8. For its part the United States appears to concede that televisions are not covered by the ITA concessions. Yet, the US insists that the definition of monitors in Attachment B of the ITA, including the carve-out on televisions, is limited to the CRT technology. This is simply logically inconsistent and confusing. If televisions generally are not covered by the ITA concessions because of the explicit carve-out in the definition of monitors, that definition cannot be limited to monitors and televisions using the CRT technology. It is equally not logically consistent to insist that any monitor that is merely capable of functioning with an ADP machine is covered by the ITA concessions only to concede that televisions generally are not covered by those concessions. Modern flat panel televisions are manifestly capable of functioning with an ADP machine. The United States accuses the European Communities of being illogical. In the light of the US arguments, the European Communities can therefore only assume that the United States uses a fundamentally different standard for what it considers to be logical.

9. Japan on the other hand insists in its second written submission that the case is very simple. According to Japan, one would only need to look at the ordinary meaning, or the "language" of the relevant definition. This definition is apparently so crystal clear that one only needs to read it. Indeed, the case appears to be limited to interpreting the word "for" in this definition as TPKM suggests. Or, as Japan puts it: "FPD devices that are capable of operating with a computer will by definition be "for" the display of data from an ADP machine". Apparently it is just absolutely clear that the word "for" must mean anything that is merely capable of functioning with an ADP machine. Nothing else appears relevant for adjudicating the case because everything else is allegedly just "irrelevant", including the HS, the ITA, the negotiating history, the submissions of ITA parties in the ITA II negotiations etc. Even the size of a monitor is allegedly completely irrelevant.

10. To the extent the European Communities is able to understand the complainants' overly simplistic assertions and arguments, they just do not add up under a serious legal analysis based on customary rules of interpretation of public international law.

B. MANIFESTLY INCORRECT FACTUAL ASSERTIONS

11. The European Communities is increasingly attacked on the basis of manifestly confusing and, at times, simply counterfactual or circular statements. The European Communities already pointed to the evidence submitted by the United States itself according to which the DVI specification "provides a high-speed digital connection for visual data types that is *display technology independent*". Japan changed its position and states that "the mere presence of a DVI connector in a flat panel display monitor does not by itself necessarily mean the FPD will be capable of operating with a computer". The United States boldly states that "virtually no consumer electronics devices are today equipped with DVI". It is hardly surprising that the US does not provide any evidence to support this rather startling assertion. Indeed they cannot because it is simply counterfactual and can be proven to be so in less than 10 seconds. It suffices to do an internet product search. In its second written submission the United States also claims that it has provided an example of a flat panel display device with a DVI interface that according to its operating manual exhibited as Exhibit US-78 allegedly "cannot operate without [a computer]". Again, it is no surprise that the United States does not provide the precise reference to this alleged statement in the operating manual because that statement is *not* in the operating manual. In fact, quite the contrary.

C. MANIFESTLY INCORRECT ASSERTIONS ABOUT EC LAW

12. The complainants go as far as claiming they know EC law better than the European Court of Justice. The complainants are manifestly unable to demonstrate anything in the CN itself that could possibly be incompatible with Article II of the GATT 1994. With regard to the Commission regulations listed in the Panel request, the complainants have not really even tried to argue their case although in their second written submissions some first attempts are made. When examining the regulations, the US remarkably even concedes that the regulations do not provide for a mandatory rule in respect of the DVI interface. In reality one is only left with the CNEN. However, presumably the complainants are not happy with this consequence of the way they are arguing the case because they desperately try to elevate the status of the CNEN to something more than they are within the EC legal order. In doing so, they are forced to blatantly disagree with the European Court of Justice on the interpretation of EC law. In addition they are forced to disagree not only *between* but remarkably *with* themselves.

13. It is crystal clear that under EC law the CNEN are fundamentally different from a regulation. Indeed, the CNEN have even less importance than the Explanatory Notes to the HS, the HSEN. The arguments of the complainants are simply circular. If an instrument is not legally binding, it cannot be mandatory. If an instrument *may* be taken into account by the customs authorities it by definition cannot be mandatory. A sentence or two in a non-binding instrument cannot alter the very nature of the instrument itself even if those sentences were to be written in a way that, if read in isolation and out of context, would give the impression of a mandatory rule.

14. Item 1 of Commission regulation 2171/2005 clearly provides for duty free treatment for an LCD monitor that ***is*** capable of "receiving signals from a source other than an automatic data-processing machine". Indeed, TPKM tries to limit the damage by claiming that "item 1 of Regulation …2171/2005 is not subject to this dispute". The complainants cannot have it both ways: to include within their claim only those parts of the measures they think might support their argument and ignore those that do not.

15. The complainants are even distorting the *Kamino* judgment and the whole system of preliminary rulings under Article 234 of the EC Treaty. Further, in *Kamino,* the Court explicitly dealt with the two relevant elements in the CNEN. First with regard to the first sentence of point 1 of Part One, Chapter I(D), and, second, with regard to the number and type of sockets with which monitors are equipped. It is simply quite remarkable that TPKM explicitly argues that the "the *Kamino* case did not deal expressly with the CNEN" when the contrary is so manifestly the case. It is equally simply unbelievable that TPKM asserts time and time again that EC customs authorities would not apply the CN as interpreted by the highest court in the EC. In fact, TPKM is asking the Panel to decide this case on the manifestly unproven premise that the customs authorities of EC Member States will always deliberately and necessarily violate EC law.

16. The two elements in the CNEN the complainants criticise simply cannot be applied in the way the complainants claim when applying the CN following the judgment of the Court. If they ever were interpreted in such a way in the past, the European Court of Justice is very clear that this was not correct and national courts are obliged to follow the judgment even in relation to past imports if the facts are similar as in *Kamino*. If there ever was a need for a remedy, it has already been provided for in law. What is left is to adjust the CNEN to be in line with the ECJ's interpretation. Although not a legal requirement under EC law, this is essentially a formality in the interest of uniformity, clarity and legal certainty in order to avoid that customs officials could **erroneously** use the CNEN as guidance in the way criticised by the Court.

17. Finally, the European Communities recalls that it has since 2005 suspended the collection of duties on most flat panel monitors including on monitors on which duties would manifestly be due.

II. THE CLAIM CONCERNING CERTAIN STBCS UNDER ARTICLE II OF THE GATT 1994

A. IN SEARCH OF A MISSING CONCESSION

18. The complainants repeatedly say that the narrative description is dispositive of this dispute. It is therefore understandable that they are looking for a *narrative description* meeting their objectives. But what should we understand under a "*description contained in the four individual tariff lines*"? What if the European Communities decided to call one of these subheadings, e.g., the one it notified in 2000, simply "Other"? Would that be a valid narrative description of a commitment to the US? Clearly not. That does not mean that the word "Other", the phrase "Set-top boxes with a communication function" or any other word or phrase used in the descriptions of the subheadings is without any meaning. Such a word or phrase can naturally have a very precise meaning if one considers it together with the HS/CN code next to it. But that requires the employment of customs classification rules. TPKM does not refer to the "*description contained in the four individual tariff lines"* at all.

B. THE REQUIREMENTS OF AN "AS SUCH" CLAIM AND OTHER RED HERRINGS

19. With respect to the complainants' "as such" claims, the European Communities is of the view that to be able to say that a certain product model or a certain category of products is treated by the European Communities inconsistently with its obligations, the complainants have to first explain what that product model or a category of products is. Only if one knows what products or product categories are at issue, one can determine – on the basis of an examination of the totality of the objective characteristics of those products – whether the European Communities treats those products consistently with its obligations or not. The complainants nonetheless suggest that one can make such a determination simply on the basis of (one of) the criteria referred to in the challenged EC measures. This is wrong.

20. First, the challenged CN Explanatory note does not employ the one or more – allegedly arbitrary – criteria in the way the complainants argue it does. Second, even if the challenged Explanatory note were functioning in the way the complainants argue, it would not mean that the criteria which it refers to were arbitrary. Again, these are **classification** criteria (and not tariff treatment criteria). The complainants argue that their case is dependent on the *narrative description*. The HS/CN codes notified next to the narrative description are in their view "*irrelevant*". In such a situation, it is a schizophrenic approach that the complainants still focus on establishing that the **classification** criteria which are set forth in the Explanatory note (or elsewhere) are wrong. Third, the theory of *minimum requirements*, which is at the core of the complainants' claim, deeply flawed.

21. The US said: "*[T]he ITA covers products, not 'functions'* ". There is indeed no basis for arguing that anything, any set-top box which *also* happens to have a communication function, is covered by the ITA simply because it has the communication function. The US has made that quite clear.

C. STBS WHICH INCORPORATE A DEVICE PERFORMING A RECORDING OR REPRODUCING FUNCTION

22. Only apparatus which fulfils the requirements of heading 8521 can be classified in subheading 8521 90 00. This is also specifically recognized in the CN Explanatory note to subheading 8521 90 00 which talks about a rather specific category of products, i.e. a category with specific features, such as the capacity to receive television signals. This description reflects a category of products which are currently present on the market and which primarily serve to record and reproduce movies and other TV programs. Faced with this classification issue, the US makes some rather remarkable statements, which, however, have nothing to do with classification and are, frankly, also at odds with the technological reality.

23. In this respect, the US also takes issue with the product referred to in Exhibit EC-44. In its recent submissions, the US has submitted a couple of new exhibits pertaining to this product. These materials are worth a particularly close look before one takes the information which the US quotes from them for granted. The European Communities does not deny that these products also contain technology allowing for a communication function. But this function is clearly ancillary to its recording function. This product is a digital video recorder.

24. Also in terms of price, the STBC product fits at least twice in the DVR product. One has to ask what inside of the product is so valuable, what do the consumers pay the extra for? It is also important to understand that these issues are not irrelevant for the customs classification of a product either. As the ECJ stated, "the intended use of a product may constitute an objective criterion for classification if it is inherent to the product, and that inherent character must be capable of being assessed on the basis of the product's objective characteristics and properties."

D. SET-TOP BOXES WHICH DO NOT INCORPORATE MODEMS

25. In its second written submission, the US stated that: "[I]ndeed, at the time the ITA was concluded, the term "modem" was understood to apply to a range of modem devices, including digital devices, such as ISDN and LAN modems." In its submissions in the *EC – Computer Equipment* case, which is highly relevant among other things because of its timing, the United States stated that "[T]he principal types of LANs are Ethernet, Token Ring and FDDI" and that "Modems are not LAN equipment".

26. The fact that modems are different from ISDN technology can be also demonstrated on excerpts from a book by Mr. O'Driscoll, to which the complainants themselves refer, as well on the definition of "modem" in the McGraw-Hill Dictionary of Scientific and Technical Terms.

27. By asserting that Ethernet, WLAN and ISDN technologies are modems, it is the complainants, and not the European Communities, who read words into the narrative description that are not there. Given the overall acceptance of what the term "modem" means and meant at the time of conclusion of the ITA, it is highly unreasonable – to say the least – to assume that the drafters of the ITA relied on that word to cover ISDN, Ethernet or WLAN. Given the fundamental differences between the modem and these three technologies, and the fact that the ITA was not meant to be over-inclusive, it also cannot be argued that the term modem can somehow be interpreted in a liberalizing and forward looking way to ultimately include the other three technologies.

III. THE CLAIM ON STBCS UNDER ARTICLE X OF THE GATT 1994

28. First, the complainants continue to portray the functioning of the EC customs system in a misleading way. The principal point which the complainants misunderstand is that ECJ case law and other statements only relate to **CN EN which are existing**, i.e., to Explanatory notes which have been duly adopted and published by the European Communities. They do not and *cannot* relate to mere drafts (even less so to intermediate drafts), discussions, Member States' votes or Customs Code Committee opinions delivered in the management procedure. These events simply do not have any legal effect on the interpretation and application of the CN.

29. Second, as a matter of general principle a preparatory act or a mere draft of a measure which has not yet been adopted cannot be made subject to the requirements of Article X:1 and X:2. As explained, the discussion and vote in the Committee serves merely to fulfil one of the procedural requirements set forth in the so-called "Comitology decision".

30. Further, the question in this case seems to be whether, in this specific case before the Panel, there was anything more than a mere preparatory act, i.e., any further relevant factual circumstances suggesting that there is a measure in the sense of Article X:2 of the GATT 1994. In this respect, the statements by the Chairman of the Customs Code Committee and certain BTIs pointed out by the complainants cannot support their claim.

31. Hence, there is no Community measure in the sense of Art. X:2 before the Panel. The complainants have not brought any claim under Article X:3(a).

IV. THE CLAIM CONCERNING CERTAIN "MULTIFUNCTIONAL MACHINES" (MFMS)

A. PRODUCTS IN DISPUTE

32. In its second written submission TPKM has alleged, for the first time, that its claim also covers "ADP MFMs which perform a scanning and a copying function but not a facsimile function" and which, according to TPKM, would be classifiable under CN 8443 32 91. This additional claim is outside the Panel's terms of reference. The machines described by TPKM are not covered by the definition of 'MFM" made by the complainants in the panel request. Furthermore, while the panel request alludes expressly to the tariff treatment provided under CN 8443 31 91, it makes no reference to CN 8443 32 91.

B. ADP MFMS

1. HS96 heading 9009

33. The complainants argue that digital copiers are not "photocopying" apparatus because they do not use light to produce a copy, but rather to "collect digital data". But this argument is wrong on two accounts.

34. First, because the digital copiers at issue use light for two different purposes. First, a source of light projects the image of the original document onto the photo-sensitive surface of a scanning device, which converts it into electrical signals. Secondly, those signals are used to guide another source of light (a laser beam), which recreates the image onto another photo-sensitive surface (the electrostatic drum).

35. In addition, the complainants' argument assumes that the "collection of digital data" is not part of the copying process and, ultimately, that "digital copying" is not a form of "copying", but just a succession of scanning and printing. This argument is specious. To be sure, digital copying involves the use of the print engine. But it differs from the printing function in that it is performed autonomously from an ADP system. This difference is of crucial importance, because the use of an ADP system is the defining characteristic of all the "output units" falling within HS96 8471 60. That digital copying is a separate and distinct function is confirmed by the existence of single function (stand-alone) digital copiers. In addition, it is beyond doubt that manufacturers and users regard copying as a separate and distinct function from printing and scanning. Furthermore, in many cases the digital copying function is marketed as the "basic" function, with the other functions being offered as mere "options". Indeed, that digital copying is a distinct function has been admitted by the complainants themselves in their own definition of "MFM" included in the panel request.

36. The United States argues that digital copiers are not "photocopying apparatus" because they do not incorporate an "optical system". But digital copiers incorporate not just one, but two different optical systems. Japan does not contest the obvious fact that digital copiers incorporate an optical system. But it argues that it is not used for making copies. Again, however, this argument is premised on the implausible proposition that the collection of digital data is not part of the copying process and that, ultimately, digital copying is not "copying" at all.

2. HS96 subheading 9009 12

37. The complainants also argue that digital copiers are not "photocopying apparatus" because they do not follow the "indirect process" described in HS96 subheading 9009 12. However, in making this argument the complainants are reading into that subheading a series of narrowly defined requirements which, quite simply, are not there. What that subheading actually says is, simply, that the "original image" must be "reproduced" (and not "reflected" or "projected") onto the "copy" (and not onto the "electrostatic drum"); and that this must be done "via an intermediate".

38. Even if the terms "via an intermediate" had to be read, notwithstanding their ordinary meaning, as meaning "via an electrostatic drum", this requirement would be satisfied as long as the image is reproduced onto the copy with the intervention of an electrostatic drum. This is indeed the case of all digital copiers using an electrostatic engine.

3. The Explanatory Note to HS96 heading 9009

39. The complainants have failed to show that digital copiers do not meet the terms of either heading 9009 or subheading 9009 12. As a result, their claim is entirely dependant on the mere fact that digital copiers are not mentioned expressly in a non-binding Explanatory Note to HS96 heading 9009. However, if that Explanatory Note does not mention digital copiers it is simply because it was drafted before digital copiers came into existence. Furthermore, although the Explanatory Note does not mention expressly digital copiers, it does not exclude them either.

4. Notes 5(B) and 5(D) to Chapter 84 of the HS96

40. When an MFM is used for printing data received from an ADP machine, it functions as an "output unit". On the other hand, when an MFM makes copies, it does no use the ADP system at all and, therefore, does not operate as an "output unit". Rather it operates as a "photocopying apparatus". Since the MFMs at issue are caught prima facie by the "ordinary meaning" of two different concessions, each covering a different HS96 subheading, it is crucial to take the context into account. In turn, the most relevant contextual element is Note 5(B) to Chapter 84, because that note is meant to

address specifically the type of situation before the Panel. Indeed, letter (a) of Note 5(B) makes it clear that a "unit" may not be classified under HS96 subheading 8471 60 unless it is used "solely or principally" with an ADP system.

41. Japan argues that Note 5(B)(a) does not apply in this case by virtue of Note 5(D). But it is rather Note 5(D) which is inapplicable. MFMs are not mere "printers". They are multifunctional machines, which have other functions, such as copying or faxing, besides printing. Japan concludes that MFMs must be deemed "printers" for purposes of Note 5(D) because their "principal function" is printing. The EC disagrees. Note 5(D) provides a narrow exception to Note 5(B)(a). As such, it must be interpreted strictly. Any machines not expressly mentioned in Note 5(D) remain subject to the general rule of Note 5(B)(a).

42. The EC agrees that, as the ECJ held in *Kip*, pursuant to Note 5(B)(a) ADP MFMs must be classified directly under HS96 8471 60 and granted duty free treatment, if the copying function, which does not involve the "use of an ADP system", is of secondary importance in relation to other functions, which do involve the "use of an ADP system", such as printing. In order to determine whether the copying function is secondary, it is necessary to conduct a case-by-case examination of the objective characteristics of each model of MFM. In contrast, Japan's position is that it must be assumed *a priori* that printing is always and necessarily the "principal" function of any ADP MFM, irrespective of the specific objective characteristics of each model of ADP MFM. Japan has put forward three types of arguments in support of its position that printing is always the "principal" function. All of them are without merit.

43. The first argument is that what Japan calls the "print unit" or the "print module" is the "most important" component. However, most of the printing components, including in particular the print engine, are themselves multifunctional. Thus, from the mere fact that the printing components are the "most important" it does not follow that the printing function is the most important.

44. Japan's second argument is that the copying function is "incidental" to the other functions. This is, once again, the same implausible argument to the effect that "digital copying" is not really "copying". Furthermore, even if this argument were correct, it would be of no use to Japan in relation to Note 5(B)(a), because it is beyond dispute that digital copying, regardless of whether it is a distinct "function", does not involve "the use of an ADP system". Hence Japan's gymnastics to avoid the application of Note 5(B)(a) and to read a "principal function" test into Note 5(D).

45. Japan's third argument is that there is "empirical evidence" that the printing function is the "most used function". Such evidence consists exclusively of a self-styled "survey" supplied by the United States. But the so-called "survey" is just a power point presentation, without a proper explanation of either the meaning of the terms used or the methodology followed and without any indication of the margin of error. The number of respondents is very small: [just 200]. Besides, we do not know how they were selected, except that [they are all US companies]. In any event, the "survey" does not really support Japan's position.

5. GIR 3(b) of the HS96

46. The architecture and design of the MFMs at issue may vary considerably from one model to another, depending on the manufacturer, the functions of each model and the specific features and capabilities of each function. This makes the casual use of vague terms such as "print unit" or "print module", without any further precision, virtually meaningless.

47. A basic ADP MFM with the functions of copying and printing consists essentially of three types of components: a print engine; a scanner; and various electronic components. The electronic components ensure the interface between the print engine, the scanner and the ADP machine to which the MFM is connected and control the operation of the different functions of the MFM. The electronic components may fall within three subcategories: electronic components used when printing data from the ADP; electronic components used when operating the MFM autonomously from the ADP machine for making copies; and electronic components used for both copying and printing. In practice, the electronic components may appear in very different configurations within the MFM.

48. Japan's position appears to be that, since the print engine cannot operate alone, it must be grouped together with the electronic components used for printing data received from the ADP machine. However, there is no good reason why the print engine should be grouped with those electronic components, rather than with the electronic components used for operating autonomously the MFM in order to make copies. Furthermore, by Japan's own flawed logic, one could as well argue that, since in the MFMs with the functions of printing and copying, neither the scanner nor the print engine can be operated without certain electronic components, all such three components must be grouped together into a single "functional unit". The previous discussion evidences that requiring, as Japan does, that the "component" which confers the "essential character" for the purposes of GIR 3(b) must be, in itself, a "functional unit" capable of "operating alone", leads necessarily to various, and conflicting, possible definitions of that "component" and, ultimately, renders GIR 3(b) impossible to apply. This is so because many of the components of an MFM, including in particular the "print engine", are themselves multifunctional.

6. The classification practice of the parties and third parties

49. Japan is wrong when it says that the EC's own classification practice is irrelevant because that practice is the subject of this dispute. The present dispute is about the tariff treatment currently given by the EC to certain products. It is not about the EC's classification practice prior to the conclusion of the ITA, which is what the EC is invoking. The Appellate Body has made it clear that the classification practice of the importing country may be not only relevant, but indeed "of great importance"..

50. Japan makes much of the fact that MFMs with a digital copying function were already in existence at the time of the conclusion of the ITA. Japan argues that, because such products existed in 1996, the EC must have been aware that they were covered by the concession for HS96 8471 60. But it is obvious that one thing does not follow from the other. Indeed, as shown by the EC, the actual classification practice of the parties and third parties around 1996 contradicts Japan's assumption.

7. The negotiating history

51. The EC finds it truly remarkable that, while denying any interpretative value to negotiating documents signed by a high ranking US official, the United States appears to consider as most authoritative an article co-written by two officials of the OECD in their own personal capacity. The article in question provides a useful overview of the negotiating process. But the authors, not being experts in customs classification, have made mistakes when trying to decipher the complex details of the ITA's product coverage.

52. The United States appears to concede that the EC sought the inclusion of digital copiers in the ITA and that the United States opposed such inclusion. But why would the EC have made any concession to the United States in order to secure duty free treatment for the products at issue in this

dispute and, immediately after having achieved that objective, pretend that, in fact, those products were not covered by the ITA?

8. Non-ADP MFMs

53. In its second written submission Japan has finally acknowledged, for the first time in this dispute, that, in addition to a fax function, these machines have also a copying function. Nevertheless, Japan seeks to play down the importance of the copying function by describing it as merely "incidental". It is, of course, correct that the copying function shares some components with the fax function. But this does not mean that the fax function is always the "essential" function and the copying function purely "incidental". As shown by the EC, the copying performance of some of the machines at issue is similar or higher than that of certain stand-alone digital copiers. Furthermore, in some cases the copying function is marketed as the "basic" function and the fax function as a mere "option" which can be added at a relatively low cost.

54. In response to a question from the EC, the United States has conceded that not all non-ADP MFMs which can both copy and fax are to be classified under HS96 subheading 8517 21. For its part, TPKM has recognised that until the introduction of the HS2007, it classified non-ADP MFMs under HS96 9009 "as long as it was determined that no other function was more important than the copying function". This suggests that the United States and TPKM do not really agree with Japan's inflexible position that all non-ADP MFMs are covered by the concession for HS96 8517 21.

ANNEX E

ARGUMENTS OF THE THIRD PARTIES

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ANNEX E-1

ORAL STATEMENT BY AUSTRALIA AT THE FIRST SUBSTANTIVE MEETING

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 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

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[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*.
[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

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.

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 – Auto Parts* 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

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> 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] Appellate Body reports in *US – Gasoline*, WT/DS2/AB/R, at p. 23 and *EC – Chicken Cuts*, WT/DS269/AB/R, at para. 214.

[8] *EC – Chicken Cuts* para. 199. See also, *China – Auto 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 – Auto Parts* para. 164.

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]

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."

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.

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[10] See *Singapore Ministerial Declaration*, adopted on 13 December 1996, WT/MIN(96)/DEC para. 18.

[11] *EC – Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R and WT/DS68/AB/R, para. 109.

[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] European Communities' first written submission in *EC – IT Products*, WT/DS375, WT/DS376 and WT/DS377, para. 359.

[15] European Communities' first written submission, para. 435.

[16] HS96 GIR 3(b). See European Communities' first written submission at para. 441 states "[s]ince GIR 3(b) cannot be applied, it is necessary to resort to GIR 3(c)."

[17] European Communities' first written submission, para. 100.

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.

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.

[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.

ANNEX E-2

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION BY CHINA

1. The People's Republic of China (hereafter "China") makes this third party submission for the systemic interests in the interpretation of the EC's Schedule of Concessions that implements EC's commitments under the ITA. (the "EC Schedule").

2. In disputes that involve alleged violation of Article II(a) and (b) of GATT 1994, the text to be interpreted is the WTO member's concession schedule. Therefore, China submits that the key issue of the present dispute concerns with the interpretation of the relevant parts of the EC Schedule. Since the EC Schedule is a WTO treaty, its interpretation should follow the well-established methodology provided in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (the "Vienna Convention"). China submits that the elements prescribed in Article 31, i.e. ordinary meaning, context and object and purpose of the text to be interpreted, are of equal interpretational value and none is dispositive in the interpretation.

3. In this submission, China will focus on the FPDs in the dispute. For the FPDs at issue, China first identifies two sources of text to be interpreted in the EC Schedule: (1) tariff heading 8471.60.90 and the corresponding product description and (2) the Headnote Table that includes all products of Attachment B to ITA. ("Headnote Table") Tariff heading 8471.60.90 covers input or output units for ADP machines. By dictionary definition, output units are external devices that deliver information from ADP machines. With respect to the Headnote Table, it covers "flat panel display devices (including LCD, Electro Luminescence, Plasma, Vacuum-Fluorescence and other technologies) for products falling within [ITA] and parts thereof." By dictionary definition, "flat panel display devices" are thin display devices for apparatus, including ADP machines. The term "products falling within [ITA]" excludes FPDs for non-ITA covered products.

4. China further submits that there are two sources relevant for contextual interpretation in the present dispute: (1) HS 1996 and (2) ITA. The relevance of HS as a source of context is confirmed by WTO law. Since the EC Schedule was based on HS 1996, it provides a relevant context for the interpretation. Furthermore, pursuant to Section 2(b) of Article 31 of the Vienna Convention, ITA also serves as the context for the interpretation of the EC Schedule.

5. To be a unit of ADP machines, the unit must be, *inter alia*, solely or principally used in an ADP system according to Note 5(B) to Chapter 84 of HS 1996. Therefore, an output unit of ADP under the heading 8471.60.90 is necessarily used solely or principally with ADP machines. Conversely, an output device is not considered a unit of ADP machine within the meaning of 8471.60.90 if it is not used solely or principally with ADP machines.

6. With regard to ITA, China notices that Attachment B to ITA expressly exempts television, including high definition televisions from its coverage. China also notices that Attachment B states in the relevant part that "[m]achines performing a specific function other than data processing, or incorporating or working in conjunction with an automatic data processing machine, and not otherwise specified under Attachment A or B, are not covered by this agreement." It can be concluded from the contexts that FPDs for non-ITA covered products, such as televisions, are beyond the scope of ITA.

7. Moreover, China observes that ITA features a limited coverage of IT products, with the object and purpose of reflecting a balance reached by the parties to ITA. China recalls that the panel in *EC –*

Chicken Cuts stated that interpretation of the term of a concession should not disrupt the balance negotiated by the parties. Thus China submits that WTO treaties should not be interpreted in a way that disrupts the balance on product coverage.

8. China hopes the viewpoints and various issues raised in this submission may assist the Panel in its decision

ANNEX E-3

ORAL STATEMENT BY CHINA AT THE FIRST SUBSTANTIVE MEETING

9. Mr. Chairman, distinguished members of the Panel, China appreciates this opportunity to present its views over the present dispute. In this statement, I will highlight the main points of China's third party written submission.

10. In this dispute, China believes the key issue is the interpretation of the relevant parts of the EC Schedule. In line with WTO jurisprudence, China follows the methodology established by Articles 31 of the Vienna Convention on the Law of Treaties ("Vienna Convention") for the interpretation of treaty languages and focuses its analysis on the flat panel devices ("FPDs") in question.

11. First, China identifies two sources of text in the EC Schedule for the interpretation of ordinary meaning: (1) tariff heading 8471.60.90 and the corresponding product description, and (2) the Headnote Table that includes all products of Attachment B to the Information Technology Agreement ("ITA").

12. Tariff heading 8471.60.90 covers input or output units for automatic data processing ("ADP") machines. According to dictionary definition, output units are external devices that deliver information from ADP machines.

13. The Headnote Table covers FPDs for products falling within ITA. It can be inferred from the term "products falling within ITA" that FPDs for non-ITA covered products are excluded.

14. Second, China submits that there are two sources of context: (1) HS 1996 and (2) ITA.

15. HS 1996 provides requirements for a device to qualify as a unit of ADP machines within the meaning of heading 8471.60 under HS 1996. According to Note 5(B) to Chapter 84 of HS 1996, a unit must be solely or principally used in an ADP system to be covered by the heading 8471.60.90. In other words, an output device is not considered a unit of ADP machine within the meaning of 8471.60.90 if it is not used solely or principally with ADP machines.

16. With regard to ITA, China notices that Attachment B to ITA expressly excludes television from its coverage. China also notices that Attachment B states in the relevant part that "[m]achines performing a specific function other than data processing, or incorporating or working in conjunction with an automatic data processing machine, and not otherwise specified under Attachment A or B, are not covered by this agreement."

17. It can be concluded from the above two contexts that FPDs for non-ITA covered products, such as FPDs not used solely or principally with ADP machines and FPDs used for televisions, are beyond the scope of ITA.

18. Third, with respect to the element of object and purpose, China recalls that the panel in *EC – Chicken Cuts* stated that interpretation of the term of a concession should not disrupt the balance negotiated by the parties. China observes that ITA features a limited coverage of IT products, reflecting a balance reached by the parties to ITA. Therefore, China submits that no interpretation should disrupt such a balance.

19. Based on the above analysis, China believes that FPDs for non-ITA covered products, such as FPDs not used solely or principally with ADP machines and FPDs used for televisions, are not covered by the EC Schedule.

20. This concludes my presentation. Thank you very much for your attention.

ANNEX E-4

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION BY COSTA RICA

1. Costa Rica is intervening in this case because of its systemic and commercial interest in the proper interpretation of the tariff concessions made by WTO Members pursuant to the Information Technology Agreement (ITA). As a developing country, Costa Rica has greatly benefitted from its participation in the ITA. In 2007, information technology products accounted for approximately 12 per cent of all imports to Costa Rica and for approximately 25 per cent of Costa Rica's total exports. The information technology sector is, thus, of critical importance to Costa Rica's economy.

2. The complainants submit that the products at issue in this dispute (multifunctional machines (MFMs), flat panel display devices (FPDs) and set-top boxes that have a communication function (STBs)) must be accorded duty-free treatment by the EC as provided for in its Schedule of Concessions and pursuant to its obligations undertaken in the ITA. The EC responds that the products at issue fall "within the scope of other concessions included in the EC Schedule, which do not provide for duty free treatment". The interpretative issue for this Panel, therefore, is to determine the proper product scope of the tariff concessions at issue. In Costa Rica's view, the Panel should conduct this analysis by using the principles of treaty interpretation as set out in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* and not by applying rules of customs classification.

3. In Costa Rica's view, the relevant obligation of which the EC is allegedly in breach can be determined through the following order of analysis:

- First, by an examination of the tariff lines of the EC's Schedule to determine whether the product at issue falls within the scope and content of the concession;

- Second, if the product at issue is not accorded duty free treatment in the Schedule ("to the extent not specifically provided for in this Schedule"), then by recourse to the headnote of the EC's Schedule, which provides:

> "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 as 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."

- Third, by determining whether the product at issue is described in or for Attachment B (i.e., those products listed in Attachment A) to the Annex to the ITA.

4. The three complainants and the respondent all acknowledge the relevance of the ITA for the interpretation of the tariff concessions at issue in this dispute. In Costa Rica's view, it would be appropriate to identify the status of the ITA within the analytical framework of the *Vienna Convention on the Law of Treaties*. In Costa Rica's view, the ITA is "context" within the meaning of Article 31(2)(b) of the *Vienna Convention*. The Ministerial Declaration of the ITA reflects the intention of the participants to have a broad interpretation of the product coverage of the ITA.

Paragraph 3 of the Ministerial Declaration states that "Ministers express satisfaction about the broad product range outlined in the Attachments to the Annex to this Declaration." This statement, read in conjunction with the third and fourth recitals in the Preamble, read together with paragraph 3, suggest that although participants were pleased with the broad product coverage of the ITA, they nevertheless wanted to ensure technological development (i.e., such as new products) to achieve maximum "freedom" (i.e., duty-free treatment) for information technology products.

5. The EC states that "the inclusion of a new product must be negotiated; it cannot be assumed to be covered by the concessions just because it happens to also perform similar functions as a product that is covered by the concessions. And this negotiation procedure is precisely what the ITA foresees explicitly." It seems that the EC's position is that any technological change in a covered product gives rise to the requirement to agree by consensus to positively add that "new" product to the coverage of the ITA. This approach is contrary to the aim of the ITA, which notes that although the parties wanted to "encourage technological development", they specifically declared that "each party's trade regime should evolve in a manner that enhances market access opportunities for information technology products". If other WTO Members and the Panel were to adopt the approach suggested by the EC, the number of products that would benefit from duty-free treatment pursuant to ITA obligations would be steadily decreased in the light of the rapid technological developments that occur in the field of information technology.

6. With respect to set-top boxes, the EC submits that the complainants' claims suffer from serious errors because the complainants refer to a "set-top box *with* a communication function", whereas the EC commitment is with respect to "set-top boxes *which have* a communication function" (emphasis added). In the EC's view, based on the dictionary definition and the context of the words, there is a significant difference between the terms "which have" and "with". In Costa Rica's view, there is no support for an interpretation that would give the two phrases significantly different meanings. Costa Rica also notes that the wording in the French and Spanish versions of the ITA, which are both equally authentic, do not correspond exactly to the English phrase "which have".

7. With respect to flat-panel display devices, the issue is whether they fall within the definition of "flat panel display devices (including LCD, Electro Luminescence, Plasma, Vacuum-Fluorescence and other technologies) for products falling within this agreement, and parts thereof" provided in Attachment B of the ITA. The EC argues that a unit must be "solely or principally used in an automatic data-processing system" and therefore must be for *exclusive* use with an ADP machine in order to be classified as a flat-panel display device under 8471. In Costa Rica's view, there is no textual basis to support this interpretation.

8. Costa Rica notes that MFMs are machines that may be used for scanning, digital copying, or facsimile transmission, in addition to printing. The issue is whether a MFM with connectivity to an ADP machine that is capable of scanning, printing and faxing should be classified under 8471 60 as an "input or output unit for automatic data processing machines" or under 9009 12 00 as "photocopying apparatus". As noted by the three complainants, MFMs should be classified under 8471 or 8471 60 as they are not "photocopiers". Photocopying is based on optical technology, whereas the products at issue manipulate the digital data in order to produce the printout. In Costa Rica's view, it is doubtful that the transmission of digital data constitutes a form of photocopying.

9. Costa Rica considers that this case raises important questions with respect to the interpretation of the tariff concessions made by WTO Members pursuant to the ITA. As a developing country with a strong interest in expanding its information technology sector, Costa Rica considers that such tariff concessions must be interpreted, consistently with the *Vienna Convention*, in such a manner as to give

effect to the aim of the ITA that "each party's trade regime should evolve in a manner that enhances market access opportunities."

ANNEX E-5

ORAL STATEMENT BY COSTA RICA AT THE FIRST SUBSTANTIVE MEETING

I. INTRODUCTION

1. Costa Rica appreciates this opportunity to express its views at this meeting of the Panel with the parties and the third parties.

2. As a developing country, Costa Rica has greatly benefited from its participation in the ITA. Costa Rica is intervening in this case because of its systemic and commercial interest in the proper interpretation of the tariff concessions made by WTO Members pursuant to the ITA. This is the first time a panel is required to interpret a Member's tariff concessions pursuant to the ITA and to determine the treatment to be accorded to products falling under the ITA. As noted by Singapore, this case has potentially far-reaching implications for global trade in information technology and technological innovation generally.[1]

3. In its written submission, Costa Rica has put forward its views on the claims of the three complainants and on the defense of the respondent, and will therefore not repeat all its comments at this time. We respectfully request the Panel to be mindful of these comments, in particular with respect to the scope and coverage of the tariff concessions at issue and the categorization of the ITA as context within the meaning of Article 31(2)(b) of the Vienna Convention, in the course of assessing the matter before it.

4. Costa Rica would like to take this opportunity to comment on two substantive issues: (i) whether the procedures provided for in paragraph 3 of the Annex to the ITA must be followed in order for the products at issue to receive duty-free treatment or whether such products are covered by the concessions in the EC Schedule based on the ITA and its Attachments; and (ii) whether additional features or functionalities of a product disqualify that product from receiving duty-free treatment under the EC Schedule based on the ITA and its Attachments.

II. WHETHER THE PROCEDURES PROVIDED FOR IN PARAGRAPH 3 OF THE ANNEX TO THE ITA MUST BE FOLLOWED IN ORDER FOR THE PRODUCTS AT ISSUE TO RECEIVE DUTY-FREE TREATMENT?

5. Turkey states that only those products that are specified in the two attachments of the Annex to the ITA must be accorded duty-free treatment. In its view, the products at issue in this dispute do not fall under the current ITA. Turkey notes that if parties wish to extend the product coverage of the ITA, they have to follow the procedures set forth in paragraph 3 of the Annex to the ITA.[2] Paragraph 3 provides that parties shall meet periodically "to review the product coverage specified in the attachments with the view to agreeing, by consensus, whether in the light of technological developments, experience in applying the tariffs concessions, or changes to the HS nomenclature, the Attachments should be modified to incorporate additional products".

6. The EC has also stated that "the inclusion of a new product must be negotiated; it cannot be assumed to be covered by the concessions just because it happens to also perform similar functions as a product that is covered by the concessions. And this negotiation procedure is precisely what the

[1] Singapore's third party written submission, para. 8.
[2] Turkey's third party written submission, paras. 6 - 8.

ITA foresees explicitly." It appears that the EC's position is that any technological change in a covered product gives rise to the requirement to agree by consensus to positively add that "new" product to the coverage of the ITA. This approach is contrary to the aim of the ITA, which notes that although the parties wanted to "encourage technological development", they specifically declared that "each party's trade regime should evolve in a manner that enhances market access opportunities for information technology products". If other WTO Members and the Panel were to adopt the approach suggested by the EC, the number of products that would benefit from duty-free treatment pursuant to ITA obligations would steadily decrease in the light of the rapid technological developments that occur in the field of information technology. As Singapore notes, the ITA did not envisage continuous negotiations to keep the IT products it covered free from duties as and when a technological development occurred.[3]

7. Thus, mindful of the fact that negotiators were fully aware that there would be rapid technological developments in this sector, Costa Rica considers that it would be more appropriate to interpret the negotiation procedure envisaged in paragraph 3 as referring to the procedures to include brand new products under the coverage of the ITA. Turkey itself notes that the paragraph 3 provides procedures for the incorporation of *additional* products and that, in other words, the Attachments cannot be modified to "exclude" any of the listed products.[4]

8. Costa Rica considers that as long as a product is listed in Attachment A or B to the ITA, it must be given duty-free treatment. To exclude such products from ITA coverage would be contrary to the object and purpose of the ITA which, as noted by the Philippines, is to expand world trade in information technology products to the maximum extent possible.[5] Paragraph 3 thus contemplates procedures by which products may be added to, not excluded from, ITA coverage.

III. WHETHER ADDITIONAL FEATURES OR FUNCTIONALITIES OF A PRODUCT DISQUALIFY THAT PRODUCT FROM RECEIVING DUTY-FREE TREATMENT UNDER THE EC SCHEDULE BASED ON THE ITA?

9. The complainants submit that the products at issue in this dispute (multifunctional machines (MFMs), flat panel display devices (FPDs) and set-top boxes that have a communication function (STBs)) must be accorded duty-free treatment by the EC as provided for in its Schedule of Concessions and pursuant to its obligations undertaken in the ITA. The EC responds that the products at issue fall "within the scope of other concessions included in the EC Schedule, which do not provide for duty free treatment". The interpretative issue for this Panel, therefore, is to determine the proper product scope of the tariff concessions at issue.

10. With respect to flat-panel display devices, the issue is whether they fall within the definition of "flat panel display devices (including LCD, Electro Luminescence, Plasma, Vacuum-Fluorescence and other technologies) for products falling within this agreement, and parts thereof" provided in Attachment B of the ITA. The EC argues that a unit must be "solely or principally used in an automatic data-processing system" and therefore must be for *exclusive* use with an ADP machine in order to be classified as a flat-panel display device under 8471. Turkey further notes that flat panel display devices which incorporate digital visual interface or high-definition multimedia interface are able to be connected to certain consumer electronic products as well information technology products falling within the ITA. Turkey thus concludes that a flat-panel display device which is a dual-use

[3] Singapore's third party written submission, para. 16.
[4] Turkey's third party written submission, para. 12.
[5] Phillipnes' third party written submission, para. 16.

product does not fall under the existing ITA.[6] The task of the Panel is not to determine whether a product is capable of performing various functions, but rather to determine the scope of the tariff concession and whether the product at issue meets the basic criteria to fall under that tariff concession, regardless of whether that product performs additional functions.

11. With respect to set-top boxes, Turkey has stated that "set-top boxes ... having the function of processing and/or recording and transmitting input to televisions, monitors or other similar devices, should be regarded as consumer electronic products." Turkey is thus of the view that the primary purpose of these set-top boxes is to interact with television broadcasts, and their information exchange features are secondary, and therefore, these products do not fall within the scope of the existing ITA.[7] Costa Rica considers that Panel's task is not to determine the primary or secondary function of a product, but rather to determine the scope of the tariff concession and whether the characteristics of the product correspond to the description set out in that tariff concession, regardless of whether that function constitutes the primary or secondary purpose of the product.

12. In summary, in Costa Rica's view, as long as a product meets the minimum requirements to fall within Attachment A or Attachment B to the ITA, it must be given duty-free treatment, even though it may have additional technological features or different functions.

IV. CONCLUSION

13. Mr. Chairman, Members of the Panel, to conclude, Costa Rica wishes to highlight that this case raises important questions with respect to the interpretation of a Member's tariff concessions pursuant to the ITA and the tariff treatment to be accorded to such products. As a developing country with a strong interest in expanding its information technology sector, Costa Rica considers that such tariff concessions must be interpreted, consistently with the *Vienna Convention*, in such a manner as to give effect to the aim of the ITA that "each party's trade regime should evolve in a manner that enhances market access opportunities."

14. The participation in the ITA has brought tremendous economic benefits to Costa Rica and to other developing countries. It is of critical importance to Costa Rica and to other developing countries that the commitments that WTO Members assumed, pursuant to the ITA, are interpreted in a manner that enhances, rather than limits, international trade in the information technology sector.

15. Costa Rica thanks the Panel for the opportunity to present this oral statement.

[6] Turkey's third party written submission, paras. 35 – 37.
[7] Turkey's third party written submission, para. 38 – 39.

ANNEX E-6

ORAL STATEMENT BY HONG KONG, CHINA AT THE FIRST SUBSTANTIVE MEETING

1. Hong Kong, China welcomes the opportunity to participate and present its views as a third party before this Panel.

2. This is the first WTO dispute concerning the Information Technology Agreement (ITA")[1]. Hong Kong, China has a strong systemic interest in the proper interpretation and effective operation of the ITA, of which Hong Kong, China is one of the first 14 signatories. In addition, it has trade interests in some of the information technology products subject to this dispute. We would therefore like to make a brief statement of our views on some of the important issues in this dispute.

3. As provided in its preamble, the ITA aims to achieve **maximum freedom** of world trade in information technology products and to encourage the **continued technological development** of the information technology industry on a world-wide basis. The ITA also stipulates that each participant's trade regime should **evolve** in a manner that **enhances market access opportunities** for information technology products. Hong Kong, China considers that such object and purpose must be taken into account in interpreting the participants' commitments under the ITA, which have been transformed into commitments under the respective schedules of tariff concessions of the participants, as in the case of the European Communities ("EC").

4. Undoubtedly, the ITA has played a vital role in enhancing market access opportunities for information technology products since its implementation in 1997 and has resulted in tremendous expansion of world trade in information technology products. The products covered by the ITA as listed in Attachments A and B are, in our view, very broad, but clear. In particular, Attachment B provides a wide scope of product coverage, namely, "a positive list of specific products covered by the ITA **wherever they are classified** in the Harmonized System". For products covered under the ITA, they should be accorded zero-tariff treatment without any restriction. In other words, the participants' domestic customs classifications or reclassifications of such products should not affect the product coverage under the ITA.

5. Hong Kong, China generally supports the Complainants' arguments and agrees that the information technology products concerned in this dispute, i.e. flat panel displays, set-top boxes which have a communication function and multifunctional digital machines, should all be covered under the ITA and entitled to duty-free treatment, as committed by the EC in its schedule of concessions pursuant to the ITA. In this connection, Hong Kong, China submits that the Panel should determine the scope of the EC's tariff concessions commitments and/or the product coverage under the ITA by applying Articles 31 and 32 of the Vienna Convention on the Law of Treaties. Having regard to the ordinary meaning of the product descriptions in their context and in the light of the object and purpose of the ITA and the schedule of concession of the EC, Hong Kong, China is convinced that the Panel will come to the same conclusion as submitted by the Complainants.

6. Hong Kong, China is unable to accept the EC's argument on "differences between the product existing at the time of the conclusion of the ITA and the product of today which is under dispute," ostensibly for justifying its reclassifications and consequential tariff treatment for information technology products under dispute. The EC further argued that any "new products" that did not exist

[1] The Ministerial Declaration on Trade in Information Technology Products concluded at the Singapore Ministerial Conference on 13 December 1996 is known as the Information Technology Agreement.

at the time of signing the ITA are not covered by the ITA and must be negotiated. Such an argument implies that the ITA is static and merely covers information technology products which existed in 1996. However, information technology products by their nature keep enhancing, developing and evolving, and such continued technological development is indeed encouraged under the ITA. Hong Kong, China considers that the EC's argument ignores the "enhancement", "development" and "evolvement" aspects of the ITA and cannot stand in light of the object and purpose of the ITA. In our view, technology-sophisticated and functions-added information technology products are clearly contemplated and covered under the ITA. A restrictive interpretation as suggested by the EC would result in an absurd situation that while technology develops, the number of products benefiting from the market access opportunities pursuant to the ITA diminishes and is not commensurate with the growth in information technology products. Such an approach will no doubt undermine the benefits accrued to the participants of the ITA and will render the ITA meaningless in the near future. Hong Kong, China therefore submits that the Panel should reject the argument of the EC in this respect.

1. Conclusion

7. In view of the aforesaid, Hong Kong, China respectfully submits that the Panel should uphold the Complainants' claim and find that the measures imposed by the EC on the 3 subject categories of information technology products are inconsistent with its commitments pursuant to the ITA and its obligations under Articles II:1(a) and II:1(b) of the GATT 1994.

8. Mr. Chairman, Hong Kong, China hopes that its views will assist the Panel in its consideration of this dispute. Thank you for your attention, and once again, for the opportunity to appear before this Panel.

ANNEX E-7

ORAL STATEMENT BY INDIA AT THE FIRST SUBSTANTIVE MEETING

1. India welcomes this opportunity to present its views in these proceedings.

2. The present dispute concerns the treatment of three products under ITA having certain features. The complainants viz. the US, Japan and Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu have made detailed submissions as to why these products are required to be given duty-free treatment by the EC in terms of ITA. The EC has furnished exhaustive counter arguments in support of their contention that the products do not merit such treatment in all situations. The EC has also stated that the duty-free treatment cannot be extended to all variants of the products.

3. I am not entering into the details of rival submissions, nor am I going to comment on their respective merits. We are sure the Panel will do that. The facts of the case will have to be analyzed in detail and proper conclusion drawn with a view to ensuring that the rights of ITA Members are not adversely affected as a result of any improper interpretation of the scope of ITA. In this dispute, India has joined as third party because we do have some systemic concerns. We believe this dispute is of importance to other WTO Members as well because of the systemic and commercial interest.

4. We fully recognize the need to support and foster technological innovation and improvement. We also recognize that IT is an area where such innovation is the fastest, and products become obsolete in a short period of time. It is thus a valid objective that all benefits of trade agreements concerning such products are fully available during the life of the products concerned. However, on the other hand, the product coverage envisaged under any trade agreement is an equally important aspect. Therefore while debating the issue of applicability of preferential tariff treatment for IT products, one needs to take on board both these critical issues of fostering technological improvements and sticking to the mandated product coverage.

5. Mr. Chairman, the convergence of information technology and consumer electronics has led to emergence of "new" products. However, in the present dispute, given the intricacies involved and the facts at hand, it is difficult to say whether the three products at issue are actually new products or products that are evolved forms of what was included in the ITA due to improvements in technology. If the products are indeed new, not covered by ITA, their inclusion will have to be negotiated. In fact, the ITA does provide a negotiating procedure to include additional products. Paragraph 3 of the Annex to the 1996 Ministerial Declaration states that "participants shall meet periodically….to review the product coverage specified in the Attachments…..to incorporate additional products." Therefore, to the extent that any ITA participant wants to include additional products under the ITA, the same will have to be done through negotiations.

6. We understand, EC's schedule, like any other WTO Member, is an integral part of the WTO Agreement and, interpretation of this treaty should follow the rules provided in Article 31 and 32 of the Vienna Convention on Law of Treaties as they embody the "customary rules of public international law" within the meaning of Article 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, in determining the precise meaning and scope of the language in the EC's schedule, including individual tariff headings. Article 31 of the Vienna Convention contains the interpretative elements of ordinary meaning, context and object and purpose. However, Article 31 neither directs an interpreter to give more weight to certain element, nor does it impose a hierarchical approach in terms of interpretative value of the elements for the purpose of interpretation.

In our view these interpretative elements are of equal interpretative value and neither element is dispositive.

7. Mr. Chairman, it is true that the Ministerial Declaration talks about trade regimes of participants being evolved "in a manner that enhances market access opportunities for IT products". But then, the duty-free treatment can be accorded only if the products fall within the remit of Annex and the Attachments thereto of the said Declaration. From a perusal of submissions of the complainants, it is seen that their claims for duty-free treatment are basically on the ground that the products at issue are squarely covered by the Attachments A and B of the Annex to the Ministerial Declaration. This is crucial as in the WTO, Members obligation to provide a particular tariff treatment is not open ended but finite. The list of goods as agreed to in the Annex and the Attachments of the ITA in 1996 has to be the basis for determining the tariff treatment due to these products. We, therefore, support the view that classification of a product will have to be decided based upon the objective characteristics and technical parameters.

8. While deliberating on this issue, it is equally important to dwell on the principles enshrined in the Harmonized System (HS) classification. The HS classification is determined according to the terms of the headings and any relative Section or Chapter notes. When this is not possible and the goods are classifiable under two or more headings, the heading which provides the most specific description is preferred to headings providing a more general description. Composite goods made up of different components are classified as if they consist of the material or component which gives them their essential character. When the goods cannot be classified by adopting the above principles, they are classified under the heading which occurs last in numerical order among those which equally merit consideration.

9. Mr. Chairman, We are confident that the Panel will consider all relevant facts and take a view on classification and duty treatment in the light of what is contained in ITA and relevant HS rules.

ANNEX E-8

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION BY KOREA

1. In this submission, Korea wishes to highlight certain legal and interpretive questions for which the Panel could provide an important guidance for future disputes in the ITA covered product. Korea also comments on what it considers to be the appropriate interpretative methodology for this dispute.

2. After conclusion of the ITA, the participating Members in the ITA revised their respective tariff commitments for certain technology products through formal modification of their Schedules of tariff concessions. It is those Schedules of tariff concessions that bind those participating Members. Thus, Korea believes that this dispute is to be resolved by "accurately and correctly" interpreting the commitments made by the EC, as set out in its Schedule of tariff concessions.

3. The EC revised its Schedule in two ways pursuant to the ITA: (a) it modified the tariff commitments made in a number of headings and sub-headings of its Schedule; and, (b) it added to its Schedule a headnote and an ensuing list of products derived from Attachment B to the ITA. In Korea's view, the Panel's interpretative methodology in this dispute should begin with the terms of this headnote and the list of products following that headnote ("the headnote product list").

4. Regardless of the specific heading or sub-heading under which a particular product falls in the EC Schedule, a product included in the headnote product list which is derived from the corresponding ITA list, is entitled to duty-free treatment. Therefore, if a particular product is covered by the headnote product list, it would appear that the EC is required to grant that product duty-free treatment, "wherever the product is classified". In this regard, the list of HS headings attached next to each product cannot reasonably have the meaning that the EC attempts to ascribe to it, because this interpretation would render the phrase "*wherever the product is classified*", a phrase expressly stated in the EC's Schedule, simply ineffective and meaningless.

5. In Korea's view, given the "wherever the product is classified" language, what is controlling in this analysis should be the narrative product description in the headnote product list, that is, the phrase "*wherever* . . . classified". In contrast, by all accounts the HS headings next to the product descriptions appear to be illustrative, rather than exhaustive or controlling. Korea would welcome the Panel's thorough analysis and reliable guidance on the interpretative approach of this treaty language.

6. As to interpreting the product descriptions in the headnote product list, the Panel should apply the general rules of treaty interpretation, as embodied in Articles 31 and 32 of the *Vienna Convention*. In applying these rules, the Panel should examine the ordinary meaning of the terms, read in their context and in light of the object and purpose of those terms, as well as of the treaty as a whole. In examining the ordinary meaning of the terms, particular product descriptions may need to be given a "special meaning", pursuant to Article 31.4 of the *Vienna Convention*, because the terms found in the EC Schedule are overwhelmingly "technical" and appear in a "specialized" sector of goods trade, namely, information technology products.

7. Furthermore, Korea considers that it is not entirely clear what the precise products and product models are at issue in this dispute. In Korea's view, the present dispute does not involve "as applied" measures, where the particular product/product model at issue and the facts surrounding that product would be relatively clear. Rather, this dispute apparently involves "as such" measures regarding the tariff treatment of three broad product categories. Korea recalls that, under well-

established WTO principles, it is for the complainants to make a prima facie case that, in some instances at least, the respondent's "as such" measures necessarily violate the respondent's WTO obligations.

ANNEX E-9

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION BY THE PHILIPPINES

I. INTRODUCTION

1. The Philippines provided the Panel with its views in this dispute, in which the United States, Japan and Chinese Taipei claim that the tariff treatment the EC and its Member States accord to certain information technology products do not reflect the EC commitments to provide duty-free treatment for these products under the WTO Information Technology Agreement.

2. It will be recalled that in 1996, the "Ministerial Declaration on Trade in Information Technology Products" (or the "Information Technology Agreement," or "ITA") was adopted and the signatories committed to grant duty-free treatment to the products covered in that Declaration. Rate reductions were to take effect in equal steps starting no later than 1 July 1997 and ending no later than 1 January 2000.

3. As an ITA participant, the EC modified its Schedule to reflect the commitments made under the ITA. Such modifications became effective on 2 July 1997. Accordingly, the EC and its Member States must apply duty-free treatment on a number of products, including, *inter alia*, flat panel displays ("FPDs"), set-top boxes ("STBs") with a communication function, and certain "input or output units" of "automatic data processing machines" and facsimile machines ("MFMs").

4. However, as a result of certain EC measures, the EC and its member States apply customs duties on the aforementioned products, specifically, a 14% duty on *Flat Panel Displays (FPDs)*, 13.9% and 14% duties on *Set Top Boxes (STBs)*, and a 6% duty on *Multifunctional Machines (MFMs).*

II. PHILIPPINE VIEWS ON THE EC TARIFF TREATMENT OF FLAT PANEL DISPLAYS, SET TOP BOXES, AND MULTIFUNCTIONAL MACHINES

5. The Philippines agrees that pursuant to Article 31(1) of the *Vienna Convention on the Law of Treaties*, a treaty must be interpreted in the light of its object and purpose. Furthermore, as underlined by the panel in *EC – Chicken Cuts (Brazil)*, the relevant aspects of the WTO Agreement and the GATT 1994 provide that concessions made by WTO Members should be interpreted so as to further the general objective of the expansion of trade in goods and the substantial reduction of tariffs.

6. In this respect, it is clear from the Preamble and text of the ITA that the manifest object and purpose of the ITA is to expand world trade in IT products to the maximum extent possible by way of eliminating customs duties as well as any other duties and charges. Interpretations such as the one advocated by the EC do not conform to the ITA's object and purpose. In particular, an interpretation that would result in excluding from the EC concessions certain IT products will be contrary to the objective of substantial reduction of tariffs through reciprocal and mutually advantageous arrangements.

7. Article II:1(a) of the GATT 1994 contains a general prohibition of according treatment less favourable to imports of products from the other contracting parties than that provided for in a WTO Member's schedule. Article II:1(b) prohibits a specific kind of practice that is inconsistent with paragraph (a), that is, the application of ordinary customs duties in excess of those set forth and provided in the schedule.

8. The Philippines submitted that the EC and its Member States accord, through the measures at issue, treatment to the products at issue that is less favourable than that provided for in the EC Schedule. Specifically, the EC currently imposes a 14% duty on *Flat Panel Displays (FPDs)*, 13.9% and 14% duties on *Set Top Boxes (STBs)*, and a 6% duty on *Multifunctional Machines (MFMs)* instead of applying duty-free treatment on the said Information Technology products as provided for in the EC Schedule. For certain FPDs, the EC also makes the granting of a zero tariff upon importation subject to terms, conditions and qualifications not set forth in the EC Schedule. The Philippines submits that there was no justification for the new EC classification and the EC thus violates its obligations under Articles II:1(a) and (b) of the GATT 1994.

9. In addition, with respect to STBs, the Philippines submitted that the EC and its member States acted inconsistently with their obligations under Articles X:1 and X:2 of the GATT 1994 by failing to promptly publish EC classification-related regulations and by applying duties prior to their publication.

III. CONCLUSION

10. The Philippines agrees with the claims of the United States, Japan and Chinese Taipei that the measures of the European Communities and its Member States concerning flat panel displays, set top boxes with a communication function, and multifunctional machines are inconsistent with Articles II:1(a) and II:1(b) of GATT 1994. Furthermore, we agree that the EC measures concerning set top boxes with a communication function are also inconsistent with Articles X:1 and X:2 of GATT 1994.

ANNEX E-10

EXECUTIVE SUMMARY OF THE ORAL STATEMENT BY THE PHILIPPINES AT THE FIRST SUBSTANTIVE MEETING

I. INTRODUCTION

1. The Philippines noted that in view of the enabling nature of information technology, it has rightfully become an important priority for many members of the global trading system. It underscored its strong interest in the correct interpretation and application of the EC's ITA commitments, as it is currently ranked as the 10th largest ITA supplier to the European Union with Total EU imports of ITA products at $223 billion in 2005, and the Philippines accounting for $5.4 billion of that amount. The Philippines fully endorsed the presentations made by the three complaining Members.

II. GENERAL CONSIDERATIONS

2. Noting **Article II:1(a) and II:1(b) of the GATT 1994,** the Philippines submitted that the central element in this dispute is whether the EC has in fact collected duties in excess of those set forth in the EC Schedule, and that the key issue revolves around the misapplication or non-application by the EC of their tariff commitments and concessions as scheduled.

3. As the ***concessions contained in the EC Schedule are integral parts of the WTO Agreement*** pursuant to **GATT 1994 Article II (7),** the Philippines posited that these concessions are part and parcel of the language of the covered agreements whose meaning must abide by the customary rules of treaty interpretation. As established in WTO jurisprudence, ***Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("Vienna Convention")*** codify "customary rules of interpretation of public international law" within the meaning of Article 3.2 of the DSU. These provisions thus comprise the legal framework within which any interpretative exercise of language contained in the WTO covered agreements must take place.

4. The Philippines stated that a key question in this dispute is whether or not the EC measures have resulted in an undue limitation of the scope of their concessions and a derogation of rights of the members affected by such measures. The Panel is, as such, not concerned with the question whether the classification adopted by the EC is correct or not, but rather, what is important is that the tariff which results and is in the end applied because of such classification decision, was in fact the correct and legally binding tariff under the Agreement and the EC Schedule, which was and is an integral part of the Agreement. In this regard, customs classification rules and practice in the domestic setting may certainly be helpful but can never be decisive for the above analysis.

5. The Philippines believed that interpretations such as the one advocated by the EC do not conform to the ordinary meaning of, nor the object and purpose, of their concessions and are not faithful to the Agreement entered into and committed to by the EC.

III. ON FPDS

6. The Philippines posited that the Panel will have to determine the scope of the EC concessions on FPDs, which were in accordance with Attachments A and B of the ITA. The question at issue is whether FPDs with certain other technological features or connectors, such as a DVI that enables the FPD to receive signals both from an ADP machine and from other sources, would preclude them from duty-free treatment as granted by the EC Schedule.

7. The Philippines argued that the EC cannot limit the scope of the FPDs covered by the concession to those that can *only* be used with an ADP machine. As the European Court of Justice held in the *Kamino* case, the EC position on this matter "cannot be accepted" and would be tantamount to altering the EC's own rules on what could qualify as a flat panel display.

8. This view is further confirmed by the language of other concessions made by the EC pursuant to the ITA, and can be demonstrated by the EC's until 2004.

9. The Philippines argued that the principal unanswered question is how and why the EC opted to impose the particularly higher tariff of 14% from the category heading of reception apparatus for television; video monitors from heading 8528.2190 despite no showing of any easily intelligible basis or common reasoning that would lead an ordinary person to consider what is in essence *a flat panel display* to become now ***not*** a *flat panel display* and rather a video monitor.

IV. ON STBS

10. In regard to set-top boxes (STBs) with a communication function, the Philippines argued that in conducting its assessment, the Panel should take into consideration and draw appropriate conclusions from **the head-note in the EC's Schedule**. This head-note is self-explanatory: customs duties on STBs which have a communication function – a product contained in Attachment B to the ITA – must be granted duty-free treatment, wherever such STBs are classified.

11. The Philippines drew attention to the clear and ordinary meaning of the text of the concession. It covers STBs with **any** type of communication function. And the Philippines could not agree with the EC that technology, with its new functionality, has created a fundamentally and objectively changed product.

12. Again an examination of the EC schedule fails to justify in any ordinary meaning or layman approach why a STB with some improved feature suddenly is not a set top box, but is now classifiable as a video tuner or video recorder related item.

13. In addition, and still with respect to STBs, the Philippines also believes that the EC and its Member States acted in a manner that was patently contrary to Articles X:1 and X:2 of GATT 1994, by failing to promptly publish their measures and by implementing the measures before publication. The Philippines urged the Panel not to exercise judicial economy on the claims relating to Article X of GATT 1994 because of the grave systemic and legal implications of the matter.

V. ON MFMS

14. The Philippines submitted that the MFMs at issue fall within the scope of the concessions made by the EC with respect to subheadings HS ***8471.60, 9009.1100*** and ***8517.21.00*** for which the EC committed to grant duty-free treatment. There is no reasonable basis to glean from the schedule how an MFM originally with zero duty became dutiable under ***CN 9009.1200*** or ***8443.3191***, as a result of its having improved in efficiency and productivity.

15. On the second category of MFMs under HS subheading ***8517.21.00*** "facsimile machines," the Philippines submitted that there is a broad meaning to "facsimile machine" as confirmed by the factual context. The term "photocopy" thus does not cover the reproduction of originals by printing or transmitting a previously scanned data file as it is done by MFMs. And the number of pages these 2 separate functions, i.e. facsimile and photocopy, are able to perform are not determinative or definitive, as the main objective in either case is to do as efficiently as possible the task.

ANNEX E-11

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION BY SINGAPORE

I. INTRODUCTION

1. The European Communities (EC) is a participant to the Ministerial Declaration on Trade in Information Technology Products (ITA) and has committed to eliminate customs duties on products covered by the ITA.

2. The EC has however adopted measures with respect to flat panel displays (FPDs), set top boxes which have a communication function (STBCs) and multi-functional machines (MFMs) that deny *at least some* of these products tariff-free treatment, even though the products fall under the coverage of the ITA. These measures are clearly in violation of the EC's commitments under the ITA and the General Agreement on Tariffs and Trade 1994 (GATT 1994).

II. AN ASSESSMENT OF THE EC'S CONTESTED MEASURES

A. HORIZONTAL REMARKS

1. The nature of the dispute

3. This is *not* a case about the classification or tariff treatment of *new* products as such, but how to treat ITA products that have technologically developed. The EC's approach is essentially that whenever a new functionality is added to a product covered by the ITA, the product risks being excluded from the ITA. This approach is overly restrictive and runs counter to the ITA's object and purpose.

2. The nature of the EC's commitments

4. The meaning to be given to the product definitions included in Attachment B cannot be circumscribed by the tariff headings which the EC has added in its Schedule of Concessions. The language of the ITA is clear: Attachment B represents a positive list of specific products to be covered by this agreement wherever they are classified in the Harmonized System (HS).

3. The requirements of an "as such" claim

5. In order to substantiate an "as such" claim, it is *not* necessary to show that the contested measures *always* lead to a violation of the EC's commitments under the ITA. Rather, it is sufficient to show that at least in some respects the contested measures necessarily lead to such a violation.

4. The impact of the EC's duty suspension

6. As regards the suspension of import duties by the EC over some FPDs, this does not regularise a WTO-inconsistent measure. A WTO member is by definition free to lift the suspension of a WTO-inconsistent measure.

B. FPDS

7. The exclusion of any FPD (which would otherwise satisfy the ITA) merely because it has a DVI connection is a violation of the EC's ITA commitments.

1. Attachment A

8. Singapore agrees that FPDs constitute "output units" and notes that some FPDs may also constitute "input units" e.g. touch screen monitors.

9. The ECJ's judgment in *Kamino*, and the Opinion of Advocate General Mengozzi that preceded it, both confirm that EC customs officials apply the "solely or principally threshold" incorrectly towards FPDs fitted with DVI.

2. Attachment B

10. To the extent that an FPD is "for" a product covered by the ITA, such as a computer or an STBC, it is properly covered by Attachment B.

11. In fact, DVI functionality best enables FPDs to display the digital output of computers. FPDs with DVI functionality are thus properly covered by Attachment B.

3. The EC concedes as such violation of FPD-related measures

12. The EC's first written submission effectively concedes that, in the light of the *Kamino* judgment, its Explanatory Notes to the Combined Nomenclature (CNEN) necessarily leads to a violation of the EC's ITA commitments in respect of at least some FPDs. The EC's indication that it may amend the contested CNEN is no defence to an "as such" violation.

C. STBS

13. There is *nothing* in the ITA that precludes an STBC from ITA coverage simply because it has a recording function. The EC's measures do so and are therefore in violation of its ITA commitments.

14. The EC's tariff treatment of STBCs with a recording function is also inconsistent with its own laws. The definition of a "simple set-top box" in EC Regulation 107/2009 (on ecodesign requirements for certain STBs) contemplates that a simple STB can be equipped with recording functions.

15. Further, the European Commission estimates that the most basic forms of STBs will be equipped with hard disks by 2012. By treating STBCs with recording function as falling outside the ITA, the EC would, in effect, render the ITA concessions on STBCs meaningless in a few years.

D. MFMS

16. The EC's measures to exclude from tariff-free treatment, MFMs that are classifiable as either "input or output" units (within sub heading 8471 60) or "facsimile machines" (within sub heading 8517 21) under Attachment A of the ITA, are in violation of its ITA commitments.

1. Computer MFMs

17. MFMs with a digital connection to a computer must be classified within heading 8471 if they satisfy the conditions under Note 5(B) to Chapter 84 of the HS, namely that they: (i) are of a kind "solely or principally" used with a computer; (ii) are connectable to a computer CPU; and (iii) are able to send or receive data in a recognised computer language.

18. The ECJ's judgment in *Kip*, and the opinion by Advocate General Mengozzi that preceded it, indicate that most computer MFMs will be principally used with a computer and should be classified within heading 8471.

19. Even if there has to be recourse to HS General Rule 3, the application of General Rule 3(b) would lead to the majority of computer MFMs being classified as printers as the printing functionality represents that component of computer MFMs that gives them their "essential character".

2. Non-computer MFMs

20. The ordinary meaning, whether as defined by the complainants or the EC, of "facsimile machine" and "photocopying apparatus" do not contemplate output limitations. The 12 page per minute output limitation placed by the EC on non-computer MFMs is arbitrary and does not accord with the ordinary meaning to be given to these terms.

21. Singapore submits that most non-computer MFMs can come under heading 8517, which broadly covers "electrical apparatus for line telephony", and specifically under subheading 8517 21, which covers "facsimile machines", based on the ordinary meaning of the terms of those headings.

22. Even if there has to be recourse to HS General Rule 3, the application of General Rule 3(b) would result in most non-computer MFMs being classified as facsimile machines as the facsimile functionality represents that component of non-computer MFMs which gives them their "essential character".

3. The EC concedes as such violation of MFM-related measures

23. The EC's first written submission concedes that in the light of the criteria enounced by the ECJ in the *Kip* case, there may be computer MFMs in which the copying function must be deemed secondary and which should, therefore, be accorded duty-free treatment. By the EC's own admission, its measures necessarily lead to a violation of the EC's ITA commitments in respect of at least some MFMs. The EC's indication that it is "currently examining this matter with the assistance of the Customs Code Committee" is no defence to an "as such" violation.

III. CONCLUSION ON THE ITA AND ITS OBJECTIVES

24. Singapore submits that the EC's contested measures necessarily lead to duty treatment of FPDs, STBCs and MFMs that is inconsistent with the EC's tariff commitments undertaken pursuant to the ITA and violate WTO law, notably Article II GATT 1994, as such.

25. Singapore notes that this dispute can have far-reaching implications for trade in information technology (IT) products and the IT industry. The ITA aims to encourage innovation and trade in IT products. The interpretation of the ITA that Singapore calls upon the panel to uphold is consistent with its legal text and aspirations.

ANNEX E-12

EXECUTIVE SUMMARY OF THE ORAL STATEMENT BY SINGAPORE AT THE FIRST SUBSTANTIVE MEETING

I. INTRODUCTION

1. Singapore will start with some general points. First, Singapore does not seek an overly broad or inclusive construction of ITA commitments; what it opposes are the EC's overly restrictive interpretations of them. Second, Singapore agrees that any extension of product coverage should be through negotiation but here, we are dealing with products that are and remain covered by the ITA. This case is *not* about *new* products, but about the treatment of products that are *already* included in the ITA but which have developed new functionalities. Third, the products covered pursuant to Attachment B of the ITA cannot be circumscribed or "exhausted" by the tariff headings in the EC's Schedule of Tariff Concessions giving effect to the ITA ("EC Schedule") – the headnote in the Schedule makes it clear that the list and the tariff headings which follow are not exhaustive. Finally, to show that the EC's measures are inconsistent with its commitments, it suffices that the measures necessarily result in the EC imposing duties on at least *some* products which must be given tariff-free treatment; and this is the case for all three products in issue.

II. FLAT PANEL DISPLAYS ("FPDS")

2. Singapore's primary objection is to the EC excluding FPDs from tariff-free treatment so long as they have a DVI feature. FPDs are covered by both Attachment A and Attachment B of the ITA and the EC Schedule.

3. With respect to FPDs covered by HS 8471 60 by virtue of Attachment A, nowhere do the HS notes to that heading state that FPDs with DVIs must be excluded. It would not make sense to so exclude when it is precisely DVI that enables computer data to be better displayed. The inconsistency of the EC's measures is underscored by the ECJ judgment in the *Kamino* case. In light of this case, the EC has effectively conceded in its first written submission that its measures violate its commitments in respect of at least some FPDs. Its attempt to salvage the situation by stating that the presence of a DVI feature is but one of the criteria to be considered ignores the wordings in its measures.

4. The EC's measures on FPDs are also inconsistent with its tariff concessions giving effect to Attachment B, specifically under "flat panel displays … for products falling within this agreement". The EC's attempt to argue that "for" ITA products means "only for" ITA products is to read the limiting word "only" into the ITA when that word is not there. Even if it is assumed that CRT and non-CRT TVs are not covered by the ITA, the EC is not allowed to arbitrarily exclude an FPD simply because it has a DVI feature without looking at the product as a whole to see if it is indeed a TV or an FPD for a computer system.

5. The EC's suspension of its measures does not cure the inconsistency. Tariff-free treatment means no imposition of duties, not the temporary halting of duties. The suspension is also limited to certain FPDs, and tariffs continue to be levied for other FPDs that are entitled to tariff-free treatment.

III. SET TOP BOXES ("STBS")

6. Singapore objects to the EC's measures which treat STBs as "video recording or reproducing apparatus", just because they can perform a recording or reproducing function. This is inconsistent

with the EC's concession giving effect to Attachment B of the ITA to accord tariff-free treatment to: "set top boxes which have a communication function…".

7. First, there is nothing in the text of Attachment B or the EC's Schedule that makes the absence of a recording or reproducing function a condition for tariff-free treatment. Second, the simplistic and sweeping approach taken by the EC to treat an STB as a video recorder by virtue of the added functionality is similar to its approach for FPDs, and is erroneous for the same reasons. Third, the EC's treatment of STBs is inconsistent with its own recent regulation concerning so-called ecodesign requirements for STBs, which recognises that STBs can have recording functions without losing their character as STBs.

IV. MULTI-FUNCTIONAL MACHINES ("MFMS")

8. Singapore's position is that many MFMs would fall under Attachment A of the ITA – under subheadings 8471 60 (for computer MFMs) or 8517 21 (for non-computer MFMs).

9. As regards computer MFMs, Singapore concurs with the approach taken by the ECJ and by the Advocate General of that court in the *Kip* case. First, many MFMs capable of being connected to a computer would be used "solely or principally" with computers and are therefore input or output units. Second, if an MFM is used solely or principally with computers, it must *ipso facto* be classified as an input or output unit under subheading 8471 60. Third, *Kip* does not give rise to any presumption *against* classification of an MFM such that a computer MFM cannot be classified under subheading 8471 60 *unless* it is shown that the copying function is "secondary". It is necessary to make an objective assessment of the characteristics of the product in issue, instead of relying only on the existence of a copying function or copying speed as the criterion. Fourth, even if the copying and computing functions were found to be of equal importance, one cannot jump to GIR 3(c) without first applying GIR 3(b) to determine what the "essential characteristic" of the product is. Fifth, the EC appears to concede in its written submission that in light of *Kip*, its current regime is not fully consistent with its WTO obligations.

10. The same approach should be taken for non-computer MFMs which have a fax function. A proper assessment according to the objective characteristics of the products must be made to determine if they should be regarded as fax machines falling within subheading 8517 21. The machines' copying speed may be one of the relevant factors in making this assessment but it cannot be the *only* or decisive factor. The EC's approach, which is to regard the copying function as primary or equivalent to the fax function, simply on account of their having an electrostatic print engine and a copying speed of more than 12 pages per minute, is wholly arbitrary.

ANNEX E-13

ORAL STATEMENT BY THAILAND AT THE FIRST SUBSTANTIVE MEETING

1. Mr. Chair and Members of the Panel. Thailand appreciates the opportunity to present its views to the Panel today. As a signatory of the Information Technology Agreement ("ITA") and an exporter of the products at issue, Thailand has both a systemic and substantive interest in ensuring that other signatories abide by their ITA tariff commitments. Trade benefits accruing under the ITA play a significant role in Thailand's development: ITA products account for approximately 15 per cent of Thailand's global exports per year, with an annual value of approximately US$28 billion. The EC's interpretation of its ITA commitments, if adopted, would harm producers by limiting trade in information technology products, and we support the arguments made by the United States, Japan, and Chinese Taipei in their respective written submissions. In light of the complainants' comprehensive arguments, we will present just a few points this evening.

2. At the outset, Thailand would like to recall that the ITA is at its core a "tariff-cutting mechanism."[1] This is set out in the ITA preamble, which recognizes as one of its goals "*expanding* the production of and trade in goods."[2] The ITA also specifically provides that any changes in a signatory's treatment of covered products "should evolve in a manner that *enhances* market access opportunities."[3] To this end, Thailand endorses the United States' view that ITA participants "contemplated a positive evolution in market access, not the steady narrowing of duty-free treatment" such as that imposed by the European Communities as a result of the measures at issue in this dispute.[4] We also share the expansive views of the ITA as expressed by Chinese Taipei and Japan.[5]

3. The expansive and trade-liberalizing object and purpose of the ITA should inform the Panel's interpretation of the EC's tariff commitments in this dispute. These commitments are set out in paragraph 2 of the ITA, which requires parties to "bind and eliminate customs duties and other duties and charges of any kind, within the meaning of Article II:1(b) of the GATT 1994" with respect to covered products. In this regard, Thailand supports the complainants' position that the EC is obligated to provide duty-free treatment to STBs, FPDs, and MFMs. The EC's commitments for these products are thus straightforward: the aforementioned products form part of the EC's ITA commitments to provide duty-free treatment under Attachment A, B, or both; the EC modified its Schedule of Concessions by incorporating these ITA commitments; and consequently, these commitments are part of the EC's obligations under Article II:1(a) and (b) of the GATT 1994.[6]

4. That the EC's measures at issue[7] impose import duties on STBs, FPDs, and MFMs, when the EC is bound to provide these products with duty-free treatment, is in Thailand's view clearly inconsistent with the EC's obligations under GATT Article II:1(a), which obligates the EC to provide treatment that is "no less favourable than that provided for in the appropriate part of the appropriate

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[1] WTO ITA: Introduction, http://www.wto.org/english/tratop_e/inftec_e/itaintro_e.htm ("The ITA is solely a tariff cutting mechanism").

[2] ITA preamble, para. 3 (emphasis added).

[3] ITA, Article 1 (emphasis added).

[4] United States' first written submission, 5 March 2009, para. 28.

[5] Chinese Taipei's first written submission, 5 March 2009, para. 27 (stating that the object and purpose of the ITA is to "expand and enhance trade in IT products"), and Japan's first written submission, para. 46 (describing how the ITA seeks to "create and preserve market access for the covered technology products, not to create temporary duty reductions that would disappear over time").

[6] See United States' first written submission, paras. 31-32.

[7] As set out in Chinese Taipei's first written submission,, paras. 66-121.

Schedule." The EC's measures are also inconsistent with its obligation under GATT Article II:1(b), which requires that scheduled products "be exempt from ordinary customs duties in excess of those set forth and provided therein." We note that, like several other Members, Thailand is particularly concerned about the EC's tariff treatment of the products at issue, in the circumstances of this case. In other words, the EC must abide by its tariff commitments and provide duty-free treatment for the products at issue. We hope, like the complainants, that the Panel also reaches this conclusion.

5. On that note, Mr. Chair, we would like to end our statement. Once again, Thailand thanks the Panel for this opportunity to present our views.

ANNEX E-14

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION BY TURKEY

I. INTRODUCTION

1. Turkey believes that the issues subject to complaint by Japan, the United States and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu have to be analyzed with a view to ensure that the rights of the Members of the Ministerial Declaration on Trade in Information Technology Products (hereinafter referred to as "ITA") are not adversely affected.

2. While not taking a final position on the facts of this case, Turkey considers that this dispute is related to the scope of the ITA.

II. INFORMATION TECHNOLOGY AGREEMENT

3. Ministerial Declaration on Trade in Information Technology Products was signed in 13 December 1996 by 14 Members of the World Trade Organization (WTO), including Turkey as a signatory party.

4. In order to expand the product coverage of the ITA, parties have to follow the procedures set forth in the Paragraph 3 of the Annex to the ITA. Paragraph 3 reflects the common understanding of the parties regarding the modification of product coverage of the Agreement.

5. However, Turkey considers that ITA Members have not been able to put into practice the provisions of the Paragraph 3 so far. Hence, there has been no formal modification on any of the Attachments. Turkey is of the opinion that Paragraph 3 (and also Paragraph 5) of the Annex of the ITA can hardly yield satisfactory results unless some amendments are put into effect.

6. On 15 September 2008, the European Communities submitted a document (Document Symbol is G/IT/W/28 and TN/MA/W/107) to the attention of the Committee of Participants on the Expansion of Trade in Information Technology Products and the Negotiating Group on Market Access proposing to negotiate the ITA with the purpose of an update.

7. Turkey considers that re-negotiation of the ITA may well be an avenue to pursue when taking into account the current Doha Round conditions. The need for the revision of the Attached Lists arises, *inter alia*, from the fast evolving nature of information technology products, doubts on the classification of a group of products, and the failure to reflect changes made to HS classification in 2002 and 2007.

III. ASSESSMENTS CONCERNING THE COMPLAINANTS CLAIMS

8. Turkey notes that flat panel display devices which incorporate digital visual interface (DVI) are not only able to produce output from information technology products falling within the ITA, but also from consumer electronics products having DVI or HDMI (High-Definition Multimedia Interface) interfaces.

9. Turkey shares the view that "Televisions and other monitors or display units *able* to receive and process television signals or other analogue or digitally processed audio or video signals *with the assistance of or directly from* another product other than the central processing unit of a computer are

explicitly excluded from the scope of the commitments to eliminate customs duties on certain products."[1] Turkey considers that flat panel display devices which are dual use products do *not* fall under the existing Information Technology Agreement.

10. Since the receiving, watching and recording of television broadcasts are the primary purposes of use for these set top boxes, access to internet and interactive information exchange features must be regarded as secondary and to be of limited use. Turkey is of the view that set top boxes of this kind do *not* fall under the scope of the existing ITA.

IV. CONCLUSIONS

11. Turkey considers that contrary to the claims of the complainants, the products at issue do *not* fall under the current Information Technology Agreement. Any technologically newly developed product which has multi-usage that may partially incorporated by the Attachments of the ITA (mainly Attachment B cannot automatically be considered as covered by the ITA.

12. Turkey requests this Panel to review the claims taking into account observations and comments stated in this submission. On the other hand, the litigation process should not diminish Members' rights beyond obligations undertaken at the time of the signing of the ITA. Turkey reserves its right to make further comments at the third party session of the first substantive meeting with the Panel.

[1] Economic Communities' first written submission, para. 132.

ANNEX E-15

ORAL STATEMENT BY TURKEY AT THE FIRST SUBSTANTIVE MEETING

1. I am glad to present you with the views of Turkey at this stage of the panel proceedings regarding the complaint launched by Chinese Taipei, Japan and the United States of America. I will summarize Turkish position on the subject, to the extent possible, by refraining from repetition of details presented in our written submission.

2. To begin with, I would like to state here that Turkey is a signatory party of the "Ministerial Declaration on Trade in Information Technology Products (ITA)" from the time it was signed in 13 December 1996 by 14 Members of the World Trade Organization (WTO). Turkey still shares the view that information technology makes positive contribution to global economic growth and welfare.

3. Based on the panel establishment requests submitted by the complainants, products subject to complaint in this panel are called Flat Panel Displays (FPDs), Set-Top Boxes (STBs) and Multifunctional Digital Machines (MTMs).

4. Complainants submit that the European Communities imposes customs duties of about 14% on FPDs and STBs, and 6% on MTMs, while the EC is under obligation to grant duty-free tariff rate for these products as required by its schedule of commitments resulting from the ITA.

5. Turkey finds it necessary to point out shortly the following issues relating to the products at issue, so as to underline the fact that tariff commitments under ITA are being applied.

6. Monitors pertaining to goods falling under ITA have been accorded duty free access courtesy of headings 8528.41.00 and 8528.51.00.

7. STBs embedded with the following attributes should be designated as STBs being accorded with the concessions offered by ITA: being microprocessor-based, incorporating a modem for accessing the internet, having a function of interactive information exchange. STBs housing all definitional elements, vividly cited in the agreement, are classified under the heading 8528.71.13, which accords duty free access.

8. MFMs are granted duty free access under the heading 8443.31.10. However, those that are incorporated with copying function as its primary attribute will be dutiable under the heading 8443.31.91.

9. Turkey believes that this dispute has occurred thanks to the rapid development and convergence in "consumer electronics" and "information technology" products. Most consumer electronics products, like televisions, are not covered by the ITA. On the other hand, with the addition of certain features that was not foreseen at the time of signing of the ITA, producers created products that can operate either e.g. as an information technology product or as a TV. Likewise, some STBs and MTMs gained such quality and producers of these devices have sought duty-free access to markets under the ITA.

10. Complainants and some third parties insist that products that can be used as an information technology or as an ordinary electronics device must be granted zero tariff rate. However, they fail to explain how for example an FPD that can also be used as a television fall under ITA. Accepting this logic simply means granting zero tariff for televisions, which are not covered by the ITA.

11. Moreover, the importation of multi-use products with zero tariff rates granted under ITA concesssions may also constitute a form of "circumvention" of customs obligations.

12. Article 3.2 of the DSU provides that "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements." Our view is that, if accepted, complainants' claims will serve to add to the obligations of many signatory parties of the ITA by expanding the product coverage of the Agreement, without resorting to ITA Annex Article 3.

13. In order to find an effective solution to the current disagreement, as stated in our written submission, complaining parties should consider negotiation and update of the ITA product coverage, and parties should devise a feasible mechanism to replace Article 3 of the ITA Annex.

14. Turkey also considers that views expressed by Korea with regard to the legal basis of this dispute are worth mentioning. In its third party written submission, Korea states that the ITA is not among the agreements annexed to the WTO Agreement and is not one of the "covered agreements" within the meaning of Appendix 1 of the DSU.[1] Korea also quotes the following expression from the Panel Report *US – Lead and Bismuth II*: "the Ministerial Declaration is a mere 'Declaration', rather than a 'Decision' of the Ministers. In our view, a Declaration lacks the mandatory authority of a Decision."[2] Korea further argues that "the ITA participants revised their tariff commitments for certain technology products through formal modification of their Schedules of tariff concessions" and that "It is these revised tariff commitments that govern the WTO market access obligations of each ITA participant with respect to the products concerned."[3]

15. With this approach, it occurs that the ITA is not even a Ministerial Decision and thus it is not binding. If this Ministerial Declaration is not binding then the question as to how Signatories are bound with its Annexes or other obligations arises. As a result, Turkey is of the view that the Panel should consider clarifying the legal basis of this dispute taking into consideration Korea's approach.

16. Turkey wishes to thank the Panel for the opportunity to submit its views during this hearing.

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[1] Korea's third party submission, para. 4.
[2] Korea's third party submission, footnote 2.
[3] Korea's third party submission, para. 5.

ANNEX F

JOINT PANEL REQUEST AND MINISTERIAL DECLARATION ON TRADE IN INFORMATION TECHNOLOGY PRODUCTS (WT/MIN(96)/16)

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ANNEX F-1

REQUEST FOR THE ESTABLISHMENT OF A PANEL BY THE UNITED STATES, JAPAN AND CHINESE TAIPEI (WT/DS375/8, WT/DS376/8 AND WT/DS377/6)

WORLD TRADE ORGANIZATION

WT/DS375/8
WT/DS376/8
WT/DS377/6
19 August 2008

(08-3946)

Original: English

EUROPEAN COMMUNITIES AND ITS MEMBER STATES – TARIFF TREATMENT OF CERTAIN INFORMATION TECHNOLOGY PRODUCTS

Request for the Establishment of a Panel by the United States, Japan and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu

The following communication, dated 18 August 2008, from the delegations of the United States, Japan and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu to the Chairman of the Dispute Settlement Body, is circulated pursuant to Articles 4.7 and 6.2 of the DSU.

Pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) and Article XXII:1 of the *General Agreement on Tariffs and Trade 1994* (GATT 1994), the United States, Japan, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu requested consultations with the European Communities (EC) and its member States regarding the tariff treatment the EC and its member States accord to certain information technology products. The United States requested consultations with the EC and its member States on 28 May 2008, and the request was circulated on 2 June 2008 as document WT/DS375/1, G/L/851. Japan requested consultations with the EC and its member States on the same matter on 28 May 2008, and the request was circulated on 2 June 2008 as document WT/DS376/1, G/L/852. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu requested consultations with the EC and its member States on the same matter on 12 June 2008, and the request was circulated on 18 June 2008 as document WT/DS377/1, G/L/853.

The United States and the EC and its member States held consultations on 25-26 June 2008 and 14-15 July 2008 in Geneva. Japan and the EC and its member States held consultations on

26 June 2008 and 16-17 July 2008 in Geneva. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the EC and its member States held consultations on 3 July 2008, 18 July 2008, and 25 July 2008 in Geneva. Those consultations were held with a view to reaching a mutually satisfactory solution. Unfortunately, those consultations failed to find such a solution.

Therefore, the United States, Japan, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, acting jointly and severally, each in the exercise of the rights accruing to it as a member of the WTO, hereby request that a panel be established pursuant to Article 6 of the DSU and Article XXIII of the GATT 1994 regarding the measures specified below and any amendments or extensions thereto as well as any related or implementing measures.

As participants in the *Ministerial Declaration on Trade in Information Technology Products*, or "ITA" (Information Technology Agreement),[1] the EC and its member States modified their Schedules of Concessions to the GATT 1994 (EC Schedules) to reflect the commitments made under the ITA.[2] Such modifications became effective 2 July 1997.[3] Accordingly, the EC and its member States shall grant duty-free treatment for flat panel displays, set-top boxes (STBs) with a communication function, and "input or output units" of "automatic data processing machines" and facsimile machines. However, as a result of the application of certain EC measures, the EC and its member States impose duties on these products.

Flat panel displays

Customs authorities of EC member States impose duties on flat panel displays. The measures at issue through which they do so include:

1. Council Regulation (EC) No. 493/2005 of 16 March 2005;

2. Commission Regulation (EC) No. 634/2005 of 26 April 2005;

3. Commission Regulation (EC) No. 2171/2005 of 23 December 2005;

4. Council Regulation (EEC) No. 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, including all annexes thereto, as amended;[4] and

5. Explanatory Notes to the Combined Nomenclature of the European Communities, 2008/C 133/01 (May 30 2008), alone or in combination with Council Regulation (EEC) No. 2658/87 of 23 July 1987,

as well as any amendments or extensions and any related or implementing measures.[5]

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[1] *Ministerial Declaration on Trade in Information Technology Products*, 13 December 1996 (WT/MIN(96)/16), see also *Implementation of the Ministerial Declaration on Trade in Information Technology Products*, 2 April 1997 (G/L/160).

[2] G/MA/TAR/RS/16 (2 April 1997).

[3] WT/Let/156 (15 August 1997).

[4] Including amendments adopted pursuant to Commission Regulation No. 1214/2007 of 20 September 2007.

[5] Including the actual application by customs authorities of EC member States of a 14% customs duty on imports of certain flat panel displays.

On 2 July 1997, the EC modified Schedule LXXX – European Communities to the *Marrakesh Agreement Establishing the World Trade Organization* (the Marrakesh Agreement). Those concessions include the concession for "[i]nput or output units...Other" as in HS item 8471 60 90. This subcategory carries a zero duty rate. The Schedule also provides in a headnote that "[w]ith respect to any product described in or for Attachment B to the Annex to the Ministerial Declaration on Trade in Information Technology Products, to the extent not specifically provided for in this Schedule, the customs duties on such product, as well as any other duties and charges of any kind … shall be bound and eliminated, as set forth in paragraph 2(a) of the Annex to the Declaration, wherever the product is classified." Attachment B includes "[f]lat panel display devices (including LCD, Electro Luminescence, Plasma, Vacuum-Fluorescence and other technologies) for products falling within this agreement and parts thereof." The bound duty rate for this product, as set forth in HS items 8471 60 90, 8473 30 10, 8473 30 90, 8531 20 30, 8531 20 51, 8531 20 59, 8531 20 80, 8531 80 30, 8531 90 10, 8531 90 30, 9013 80 11, 9013 80 19, 9013 80 30 and 9013 90 10, and as specified in the headnote, is zero.

As a result of these concessions, the EC and its member States are obliged to grant duty-free treatment to flat panel displays. Nevertheless, the EC and its member States impose duties on these products, as explained below.

On 31 March 2005, the EC published Council Regulation (EC) No 493/2005 which provides that certain flat panel displays using LCD technology that are "capable of reproducing video images from a source other than an automatic data-processing machine" are not covered by the ITA or the Communication on its implementation (Council Decision 97/359/EC of 24 March 1997).[6]

On 26 April 2005, the EC published Commission Regulation (EC) No 634/2005, which provides that flat panel displays with certain attributes, including digital visual interface (DVI), would be classified as dutiable.[7]

Also, on 29 December 2005, the EC published Commission Regulation (EC) No 2171/2005, which also provides that flat panel displays with certain attributes, including DVI, would be classified as dutiable.[8]

On 20 September 2007, the EC published Commission Regulation 1214/2007, amending Council Regulation (EEC) No. 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, and establishing Combined Nomenclature (CN) 8528 59 10 and 8528 59 90, which provided a duty rate of 14% on certain flat panel displays.

Furthermore, on 30 May 2008, the EC published an amendment to the Explanatory Notes to the Combined Nomenclature of the European Communities (2008/C 133/01) providing that flat panel displays with certain attributes, such as DVI, would be classified as dutiable.[9]

As a result, customs authorities of EC member States have been applying a 14% duty to certain flat panel displays, instead of providing duty-free treatment as required by the EC Schedules. The United States, Japan, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu

[6] Council Regulation (EC) 493/2005 of 16 March 2005, O.J. L 82 (31 March 2005), pp. 1-2.
[7] Commission Regulation (EC) No 634/2005 of 26 April 2005, O.J. L 106 (27 April 2005), pp. 7-9.
[8] Commission Regulation (EC) No 2171/2005 of 23 December 2005, O.J. L 346 (29 December 2005), pp. 7-9.
[9] Explanatory Notes to the Combined Nomenclature of the European Communities, 2008/C 133/01, O.J. C 133 (30 May 2008), pp. 352-3.

consider that their commerce has been accorded treatment less favourable than that provided in the EC Schedules, and that ordinary customs duties, or other duties and charges, in excess of those set forth in the EC Schedules have been applied to certain flat panel displays, inconsistent with the obligations of the EC and its member States under Articles II:1(a) and II:1(b) of the GATT 1994. While the EC has temporarily suspended the collection of duties on some flat panel displays pursuant to Council Regulation (EC) No 493/2005 of 31 March 2005 and Council Regulation (EC) No 301/2007 of 22 March 2007, it fails to accord tariff treatment that is no less favourable than that provided for in the EC Schedules. The measures at issue nullify or impair, within the meaning of GATT Article XXIII, benefits accruing directly or indirectly to the United States, Japan, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu under the GATT 1994.

STBs with a communication function

Customs authorities of EC member States impose duties on STBs with a communication function. The measures at issue through which they do so include:

1. Council Regulation (EEC) No. 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, including all annexes thereto, as amended;[10] and

2. Explanatory Notes to the Combined Nomenclature of the European Communities, 2008/C 112/03, (7 May 2008), alone or in combination with Council Regulation (EEC) No. 2658/87 of 23 July 1987,[11]

as well as any amendments or extensions and any related or implementing measures.[12]

On 2 July 1997, the EC modified Schedule LXXX – European Communities to the Marrakesh Agreement. The Schedule provides in a headnote that "[w]ith respect to any product described in or for Attachment B to the Annex to the Ministerial Declaration on Trade in Information Technology Products, to the extent not specifically provided for in this Schedule, the customs duties on such product, as well as any other duties and charges of any kind…shall be bound and eliminated, as set forth in paragraph 2(a) of the Annex to the Declaration, wherever the product is classified." Attachment B includes "set-top boxes which have a communication function: a microprocessor-based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange." The bound duty rate for this product, as set forth in HS items 8517 50 90, 8517 80 90, 8525 20 99, and 8528 12 91, and as specified in the headnote, is zero.

As a result of these concessions, the EC and its member States are obliged to grant duty free treatment to STBs with a communication function. Nevertheless, the EC and its member States impose duties on these products, as explained below.

On 7 May 2008, the EC published an amendment to the Explanatory Notes to the EC's CN, which provides that the duty-free heading CN 8528 71 13 ("set-top boxes with a communication function") does not include STBs with modems of certain types (e.g., Ethernet modems) or STBs which incorporate a device performing a recording or reproducing function (e.g., a hard disk or DVD

[10] Including amendments adopted pursuant to Commission Regulation No. 1214/2007 of 20 September 2007.

[11] See also the decisions of the Customs Code Committee discussed on page 5, infra.

[12] Including the actual application by customs authorities of EC member States of customs duties on imports of STBs with a communication function.

drive).[13] Moreover, in the same amendment, the EC added an explanatory note to accompany CN 8521 90 00 indicating that this subheading includes STBs which incorporate a device performing a recording or reproducing function (e.g., a hard disk or DVD drive).[14] The duty rate for CN 8521 90 00 is 13.9%.

As a result, customs authorities of EC member States have been applying duties on STBs with a communication function, instead of providing duty-free treatment as required by the EC Schedules. The United States, Japan, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu consider that their commerce has been accorded treatment less favourable than that provided in the EC Schedules, and that ordinary customs duties, or other duties and charges, in excess of those set forth in the EC Schedules have been applied to STBs with a communication function, inconsistent with the obligations of the EC and its member States under Articles II:1(a) and II:1(b) of the GATT 1994. The measures at issue nullify or impair, within the meaning of GATT Article XXIII, benefits accruing, directly or indirectly, to the United States, Japan, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu under the GATT 1994.

In addition, with respect to STBs with a communication function, the Tariff and Statistical Nomenclature Section of the Customs Code Committee delivered favorable opinions with respect to the proposed amendments to the Explanatory Notes contained in 2008/C 112/03 in October 2006 and May 2007, respectively. It did not publish the amended explanatory notes in the EC Official Journal until 7 May 2008. Furthermore, EC member States were applying duties to STBs using the approach specified in 2008/C 112/03 prior to 7 May 2008. We consider that these actions are inconsistent with the EC's obligations under Articles X:1 and X:2 of the GATT 1994.

MFMs ("multifunctional digital machines")[15]

Customs authorities of EC member States impose duties on MFMs. The measures at issue through which they do so include:

1. Commission Regulation (EC) No. 517/1999 of 9 March 1999;

2. Report of the Conclusions of the 360th meeting of the Customs Code Committee, Tariff and Statistical Nomenclature Section, TAXUD/555/2005-EN (March 2005);

3. Commission Regulation (EC) No. 400/2006 of 8 March 2006; and

4. Council Regulation (EEC) No. 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, including all annexes thereto, as amended,[16]

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[13] Explanatory Notes to the Combined Nomenclature of the European Communities, 2008/C 112/03, O.J. C 112 (7 May 2008), pp. 8-9.

[14] Explanatory Notes to the Combined Nomenclature of the European Communities, 2008/C 112/03, O.J. C 112 (7 May 2008), pp. 8-9.

[15] In this panel request, the United States, Japan and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu use the term "MFMs" to refer to machines which perform two or more of the functions of printing, copying, or facsimile transmission, capable of connecting to an automatic data processing machine or to a network (including devices commercially known as MFPs (multifunctional printers), other "input or output units" of "automatic data processing machines", and facsimile machines).

[16] Including amendments adopted pursuant to Commission Regulation No. 1214/2007 of 20 September 2007.

as well as any amendments or extensions and any related or implementing measures.[17]

On 2 July 1997, the EC modified Schedule LXXX – European Communities to the Marrakesh Agreement, including the concessions for "[f]acsimile machines", as contained in HS 8517 21 00 and "input or output units" of "automatic data processing machines", as in HS category 8471 60. The bound duty rate for both products is zero.

As a result of these concessions, the EC and its member States are obliged to grant duty free treatment to MFMs. Nevertheless, the EC and its member States impose duties on these products, as explained below.

On 9 March 1999, the EC published Commission Regulation (EC) No 517/1999, which provides that certain MFMs would be classified as indirect process electrostatic photocopiers under CN 9009 12 00 with a duty rate of 6%.[18]

In January of 2005, the Customs Code Committee issued a statement providing that "if a multifunctional device has the capability of photocopying in black and white 12 or more pages per minute (A4 format)," it would be classified in heading 9009 as photocopying apparatus.[19] Photocopying apparatus classified in heading 9009 was subject to a 6% duty.

On 9 March 2006, the EC published Commission Regulation (EC) No 400/2006, which provides that certain MFMs would be classified as photocopying apparatus, and would be subject to a 6% duty.[20]

On 31 October 2006, the EC amended Council Regulation (EEC) No. 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, creating CN 8443 31 10 ("[m]achines performing the functions of copying and facsimile transmission, whether or not with a printing function, with a copying speed not exceeding 12 monochrome pages per minute"), CN 8443 31 91 ("[o]ther; [m]achines performing a copying function by scanning the original and printing the copies by means of an electrostatic engine") and CN 8443 31 99 ("[o]ther"). By virtue of these subcategories, MFMs with copying speeds of more than 12 monochrome pages per minute and with an electrostatic engine are classified under CN 8443 31 91. The duty rate for CN 8443 31 91 is 6%.[21]

As a result, customs authorities of EC member States have been applying a 6% duty on imports of certain MFMs, instead of providing duty-free treatment as required by the EC Schedules. The United States, Japan, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu consider that their commerce has been accorded treatment less favourable than that provided in the EC Schedules, and that ordinary customs duties, or other duties and charges, in excess of those set forth in the EC Schedules have been applied to certain "input or output units" of "automatic data processing machines" and facsimile machines, inconsistent with the obligations of the EC and its member States under Articles II:1(a) and II:1(b) of the GATT 1994. The measures at issue nullify or impair, within the meaning of GATT Article XXIII, benefits accruing directly or indirectly to the

[17] Including the actual application by customs authorities of EC member States of a 6% duty on imports of certain MFMs.

[18] Commission Regulation (EC) No 517/1999 of 9 March 1999, O.J. L 61 (10 March 1999), pp. 23-24.

[19] Customs Code Committee, Tariff and Statistical Nomenclature Section, *Report of conclusions of the 360th meeting of the Committee*, TAXUD/555/2005-EN, Annex VII (March 2005).

[20] Commission Regulation (EC) No 400/2006 of 8 March 2006, O.J. L 70 (9 March 2006), pp. 9-11.

[21] Council Regulation (EEC) No. 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, including all annexes thereto, as amended.

United States, Japan, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu under the GATT 1994.

* * * * *

The United States, Japan, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu request, pursuant to Articles 4.7 and 6 of the DSU, that a panel be established with standard terms of reference as set out in Article 7.1 of the DSU, in order to examine the matter described above.

ANNEX F-2

MINISTERIAL DECLARATION ON TRADE IN INFORMATION TECHNOLOGY PRODUCTS (WT/MIN(96)/16)

WORLD TRADE ORGANIZATION

WT/MIN(96)/16
13 December 1996

(96-5438)

MINISTERIAL CONFERENCE
Singapore, 9-13 December 1996

MINISTERIAL DECLARATION ON TRADE IN INFORMATION TECHNOLOGY PRODUCTS

SINGAPORE, 13 DECEMBER 1996

Ministers,

Representing the following Members of the World Trade Organization ("WTO"), and States or separate customs territories in the process of acceding to the WTO, which have agreed in Singapore on the expansion of world trade in information technology products and which account for well over 80 per cent of world trade in these products ("parties"):

Australia
Canada
European Communities
Hong Kong
Iceland
Indonesia
Japan
Korea
Norway
Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu
Singapore
Switzerland[1]
Turkey
United States

Considering the key role of trade in information technology products in the development of information industries and in the dynamic expansion of the world economy,

Recognizing the goals of raising standards of living and expanding the production of and trade in goods;

[1]On behalf of the customs union Switzerland and Liechtenstein.

Desiring to achieve maximum freedom of world trade in information technology products;

Desiring to encourage the continued technological development of the information technology industry on a world-wide basis;

Mindful of the positive contribution information technology makes to global economic growth and welfare;

Having agreed to put into effect the results of these negotiations which involve concessions additional to those included in the Schedules attached to the Marrakesh Protocol to the General Agreement on Tariffs and Trade 1994, and

Recognizing that the results of these negotiations also involve some concessions offered in negotiations leading to the establishment of Schedules annexed to the Marrakesh Protocol,

Declare as follows:

1. Each party's trade regime should evolve in a manner that enhances market access opportunities for information technology products.

2. Pursuant to the modalities set forth in the Annex to this Declaration, each party shall bind and eliminate customs duties and other duties and charges of any kind, within the meaning of Article II:1(b) of the General Agreement on Tariffs and Trade 1994, with respect to the following:

(a) all products classified (or classifiable) with Harmonized System (1996) ("HS") headings listed in Attachment A to the Annex to this Declaration; and

(b) all products specified in Attachment B to the Annex to this Declaration, whether or not they are included in Attachment A;

through equal rate reductions of customs duties beginning in 1997 and concluding in 2000, recognizing that extended staging of reductions and, before implementation, expansion of product coverage may be necessary in limited circumstances.

3. Ministers express satisfaction about the large product coverage outlined in the Attachments to the Annex to this Declaration. They instruct their respective officials to make good faith efforts to finalize plurilateral technical discussions in Geneva on the basis of these modalities, and instruct these officials to complete this work by 31 January 1997, so as to ensure the implementation of this Declaration by the largest number of participants.

4. Ministers invite the Ministers of other Members of the WTO, and States or separate customs territories in the process of acceding to the WTO, to provide similar instructions to their respective officials, so that they may participate in the technical discussions referred to in paragraph 3 above and participate fully in the expansion of world trade in information technology products.

Annex: Modalities and Product Coverage

Attachment A: list of HS headings

Attachment B: list of products

ANNEX

Modalities and Product Coverage

Any Member of the World Trade Organization, or State or separate customs territory in the process of acceding to the WTO, may participate in the expansion of world trade in information technology products in accordance with the following modalities:

1. Each participant shall incorporate the measures described in paragraph 2 of the Declaration into its schedule to the General Agreement on Tariffs and Trade 1994, and, in addition, at either its own tariff line level or the Harmonized System (1996) ("HS") 6-digit level in either its official tariff or any other published versions of the tariff schedule, whichever is ordinarily used by importers and exporters. Each participant that is not a Member of the WTO shall implement these measures on an autonomous basis, pending completion of its WTO accession, and shall incorporate these measures into its WTO market access schedule for goods.

2. To this end, as early as possible and no later than 1 March 1997 each participant shall provide all other participants a document containing (a) the details concerning how the appropriate duty treatment will be provided in its WTO schedule of concessions, and (b) a list of the detailed HS headings involved for products specified in Attachment B. These documents will be reviewed and approved on a consensus basis and this review process shall be completed no later than 1 April 1997. As soon as this review process has been completed for any such document, that document shall be submitted as a modification to the Schedule of the participant concerned, in accordance with the Decision of 26 March 1980 on Procedures for Modification and Rectification of Schedules of Tariff Concessions (BISD 27S/25).

(a) The concessions to be proposed by each participant as modifications to its Schedule shall bind and eliminate all customs duties and other duties and charges of any kind on information technology products as follows:

(i) elimination of such customs duties shall take place through rate reductions in equal steps, except as may be otherwise agreed by the participants. Unless otherwise agreed by the participants, each participant shall bind all tariffs on items listed in the Attachments no later than 1 July 1997, and shall make the first such rate reduction effective no later than 1 July 1997, the second such rate reduction no later than 1 January 1998, and the third such rate reduction no later than 1 January 1999, and the elimination of customs duties shall be completed effective no later than 1 January 2000. The participants agree to encourage autonomous elimination of customs duties prior to these dates. The reduced rate should in each stage be rounded off to the first decimal; and

(ii) elimination of such other duties and charges of any kind, within the meaning of Article II:1(b) of the General Agreement, shall be completed by 1 July 1997, except as may be otherwise specified in the participant's document provided to other participants for review.

(b) The modifications to its Schedule to be proposed by a participant in order to implement its binding and elimination of customs duties on information technology products shall achieve this result:

(i)in the case of the HS headings listed in Attachment A, by creating**,** where appropriate**,** sub-divisions in its Schedule at the national tariff line level; and

(ii)in the case of the products specified in Attachment B, by attaching an annex to its Schedule including all products in Attachment B, which is to specify the detailed HS headings for those products at either the national tariff line level or the HS 6-digit level.

Each participant shall promptly modify its national tariff schedule to reflect the modifications it has proposed, as soon as they have entered into effect.

3. Participants shall meet periodically under the auspices of the Council on Trade in Goods to review the product coverage specified in the Attachments, with a view to agreeing, by consensus, whether in the light of technological developments, experience in applying the tariff concessions, or changes to the HS nomenclature, the Attachments should be modified to incorporate additional products, and to consult on non-tariff barriers to trade in information technology products. Such consultations shall be without prejudice to rights and obligations under the WTO Agreement.

4. Participants shall meet as soon as practicable and in any case no later than 1 April 1997 to review the state of acceptances received and to assess the conclusions to be drawn therefrom. Participants will implement the actions foreseen in the Declaration provided that participants representing approximately 90 per cent of world trade[2] in information technology products have by then notified their acceptance, and provided that the staging has been agreed to the participants' satisfaction. In assessing whether to implement actions foreseen in the Declaration, if the percentage of world trade represented by participants falls somewhat short of 90 per cent of world trade in information technology products, participants may take into account the extent of the participation of States or separate customs territories representing for them the substantial bulk of their own trade in such products. At this meeting the participants will establish whether these criteria have been met.

5. Participants shall meet as often as necessary and no later than 30 September 1997 to consider any divergence among them in classifying information technology products, beginning with the products specified in Attachment B. Participants agree on the common objective of achieving, where appropriate, a common classification for these products within existing HS nomenclature, giving consideration to interpretations and rulings of the Customs Co-operation Council (also known as the World Customs Organization or "WCO"). In any instance in which a divergence in classification remains, participants will consider whether a joint suggestion could be made to the WCO with regard to updating existing HS nomenclature or resolving divergence in interpretation of the HS nomenclature.

6. The participants understand that Article XXIII of the General Agreement will address nullification or impairment of benefits accruing directly or indirectly to a WTO Member participant through the implementation of this Declaration as a result of the application by another WTO Member participant of any measure, whether or not that measure conflicts with the provisions of the General Agreement.

7. Each participant shall afford sympathetic consideration to any request for consultation from any other participant concerning the undertakings set out above. Such consultations shall be without prejudice to rights and obligations under the WTO Agreement.

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[2]This percentage shall be calculated by the WTO Secretariat on the basis of the most recent data available at the time of the meeting.

8. Participants acting under the auspices of the Council for Trade in Goods shall inform other Members of the WTO and States or separate customs territories in the process of acceding to the WTO of these modalities and initiate consultations with a view to facilitate their participation in the expansion of trade in information technology products on the basis of the Declaration.

9. As used in these modalities, the term "participant" shall mean those Members of the WTO, or States or separate customs territories in the process of acceding to the WTO, that provide the document described in paragraph 2 no later than 1 March 1997.

10. This Annex shall be open for acceptance by all Members of the WTO and any State or any separate customs territory in the process of acceding to the WTO. Acceptances shall be notified in writing to the Director-General who shall communicate them to all participants.

There are two attachments to the Annex.
Attachment A lists the HS headings or parts thereof to be covered.
Attachment B lists specific products to be covered by an ITA wherever they are classified in the HS .

Attachment A, Section 1

	HS96		HS description
	3818		**Chemical elements doped for use in electronics, in form of discs, wafers or similar forms; chemical compounds doped for use in electronics**
	8469	**11**	**Word processing machines**
	8470		**Calculating machines and pocket-size data recording, reproducing and displaying machines with a calculating function; accounting machines, postage franking machines, ticket-issuing machines and similar machines, incorporating a calculating devices; cash registers:**
	8470	10	Electronic calculators capable of operating without an external source of electric power and pocket size data recording, reproducing and displaying machines with calculating functions
	8470	21	Other electronic calculating machines incorporating a printing device
	8470	29	Other
	8470	30	Other calculating machines
	8470	40	Accounting machines
	8470	50	Cash registers
	8470	90	Other
	8471		**Automatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included:**
	8471	10	Analogue or hybrid automatic data processing machines
	8471	30	Portable digital automatic data processing machines, weighing no more than 10 kg, consisting of at least a central processing unit, a keyboard and a display
	8471	41	Other digital automatic data processing machines comprising in the same housing at least a central processing unit and an input and output unit, whether or not combined
	8471	49	Other digital automatic data processing machines presented in the form of systems
	8471	50	Digital processing units other than those of subheading 8471 41 and 8471 49, whether or not in the same housing one or two of the following types of units : storage units, input units, output units
	8471	60	Input or output units, whether or not containing storage units in the same housing

	8471	70	Storage units, including central storage units, optical disk storage units, hard disk drives and magnetic tape storage units
	8471	80	Other units of automatic data processing machines
	8471	90	Other
ex	**8472**	**90**	**Automatic teller machines**
	8473	**21**	**Parts and accessories of the machines of heading No 8470 of the electronic calculating machines of subheading 8470 10, 8470 21 and 8470 29**
	8473	**29**	**Parts and accessories of the machines of heading No 8470 other than the electronic calculating machines of subheading 8470 10, 8470 21 and 8470 29**
	8473	**30**	**Parts and accessories of the machines of heading No 8471**
	8473	**50**	**Parts and accessories equally suitable for use with machines of two or more of the headings Nos. 8469 to 8472**
ex	**8504**	**40**	**Static converters for automatic data processing machines and units thereof, and telecommunication apparatus**
ex	**8504**	**50**	**Other inductors for power supplies for automatic data processing machines and units thereof, and telecommunication apparatus**
	8517		**Electrical apparatus for line telephony or line telegraphy, including line telephone sets with cordless handsets and telecommunication apparatus for carrier-current line systems or for digital line systems; videophones:**
	8517	11	Line telephone sets with cordless handsets
	8517	19	Other telephone sets and videophones
	8517	21	Facsimile machines
	8517	22	Teleprinters
	8517	30	Telephonic or telegraphic switching apparatus
	8517	50	Other apparatus, for carrier-current line systems or for digital line systems
	8517	80	Other apparatus including entry-phone systems
	8517	90	Parts of apparatus of heading 8517
ex	**8518**	**10**	**Microphones having a frequency range of 300 Hz to 3,4 KHz with a diameter of not exceeding 10 mm and a height not exceeding 3 mm, for telecommunication use**
ex	**8518**	**30**	**Line telephone handsets**
ex	**8518**	**29**	**Loudspeakers, without housing, having a frequency range of 300 Hz to 3,4 KHz with a diameter of not exceeding 50 mm, for telecommunication use**
	8520	**20**	**Telephone answering machines**
	8523	**11**	**Magnetic tapes of a width not exceeding 4 mm**
	8523	**12**	**Magnetic tapes of a width exceeding 4 mm but not exceeding 6,5 mm**
	8523	**13**	**Magnetic tapes of a width exceeding 6,5 mm**

	8523	**20**	**Magnetic discs**
	8523	**90**	**Other**
	8524	**31**	**Discs for laser reading systems for reproducing phenomena other than sound or image**
ex	**8524**	**39**	**Other : - for reproducing representations of instructions, data, sound, and image, recorded in a machine readable binary form, and capable of being manipulated or providing interactivity to a user, by means of an automatic data processing machine**
	8524	**40**	**Magnetic tapes for reproducing phenomena other than sound or image**
	8524	**91**	**Media for reproducing phenomena other than sound or image**
ex	**8424**	**99**	**Other : - for reproducing representations of instructions, data, sound, and image, recorded in a machine readable binary form, and capable of being manipulated or providing interactivity to a user, by means of an automatic data processing machine**
ex	**8525**	**10**	**Transmission apparatus other than apparatus for radio-broadcasting or television**
	8525	**20**	**Transmission apparatus incorporating reception apparatus**
ex	**8525**	**40**	**Digital still image video cameras**
ex	**8527**	**90**	**Portable receivers for calling, alerting or paging**
ex	**8529**	**10**	**Aerials or antennae of a kind used with apparatus for radio-telephony and radio-telegraphy**
ex	**8529**	**90**	**Parts of: transmission apparatus other than apparatus for radio-broadcasting or television transmission apparatus incorporating reception apparatus digital still image video cameras, portable receivers for calling, alerting or paging**
	8531	**20**	**Indicator panels incorporating liquid crystal devices (LCD) or light emitting diodes (LED)**
ex	**8531**	**90**	**Parts of apparatus of subheading 8531 20**
	8532		**Electrical capacitors, fixed, variable or adjustable (pre-set):**
	8532	10	Fixed capacitors designed for use in 50/60 Hz circuits and having a reactive power handling capacity of not less than 0,5 kvar (power capacitors)
	8532	21	Tantalum fixed capacitors
	8532	22	Aluminium electrolytic fixed capacitors
	8532	23	Ceramic dielectric, single layer fixed capacitors
	8532	24	Ceramic dielectric, multilayer fixed capacitors
	8532	25	Dielectric fixed capacitors of paper or plastics
	8532	29	Other fixed capacitors
	8532	30	Variable or adjustable (pre-set) capacitors

	8532	90	Parts
	8533		**Electrical resistors (including rheostats and potentiometers), other than heating resistors:**
	8533	10	Fixed carbon resistors, composition or film types
	8533	21	Other fixed resistors for a power handling capacity not exceeding 20 W
	8533	29	Other fixed resistors for a power handling capacity of 20 W or more
	8533	31	Wirewound variable resistors, including rheostats and potentiometers, for a power handling capacity not exceeding 20 W
	8533	39	Wirewound variable resistors, including rheostats and potentiometers, for a power handling capacity of 20 W or more
	8533	40	Other variable resistors, including rheostats and potentiometers
	8533	90	Parts
	8534		**Printed circuits**
ex	**8536**	**50**	**Electronic AC switches consisting of optically coupled input and output circuits (Insulated thyristor AC switches)**
ex	**8536**	**50**	**Electronic switches, including temperature protected electronic switches, consisting of a transistor and a logic chip (chip-on-chip technology) for a voltage not exceeding 1000 volts**
ex	**8536**	**50**	**Electromechanical snap-action switches for a current not exceeding 11 amps**
ex	**8536**	**69**	**Plugs and sockets for co-axial cables and printed circuits**
ex	**8536**	**90**	**Connection and contact elements for wires and cables**
	8541		**Diodes, transistors and similar semiconductor devices; photosensitive semiconductor devices, including photovoltaic cells whether or not assembled in modules or made up into panels; light-emitting diodes; mounted piezo-electric crystals:**
	8541	10	Diodes, other than photosensitive or light-emitting diodes
	8541	21	Transistors, other than photosensitive transistors, with a dissipation rate of less than 1 W
	8541	29	Transistors, other than photosensitive transistors, with a dissipation rate of 1 W or more
	8541	30	Thyristors, diacs and triacs, other than photosensitive devices
	8541	40	Photosensitive semiconductor devices, including photovoltaic cells whether or not assembled in modules or made up into panels; light emitting diodes
	8541	50	Other semiconductor devices
	8541	60	Mounted piezo-electric crystals
	8541	90	Parts

	8542		**Electronic integrated circuits and microassemblies**
	8542	12	Cards incorporating an electronic integrated circuit ('smart' cards)
	8542	13	Metal oxide semiconductors (MOS technology)
	8542	14	Circuits obtained by bipolar technology
	8542	19	Other monolithic digital integrated circuits, including circuits obtained by a combination of bipolar and MOS technologies (BIMOS technology)
	8542	30	Other monolithic integrated circuits
	8542	40	Hybrid integrated circuits
	8542	50	Electronic microassemblies
	8542	90	Part
	8543	**81**	**Proximity cards and tags**
ex	**8543**	**89**	**Electrical machines with translation or dictionary functions**
ex	**8544**	**41**	**Other electric conductors, for a voltage not exceeding 80 V, fitted with connectors, of a kind used for telecommunications**
ex	**8544**	**49**	**Other electric conductors, for a voltage not exceeding 80 V, not fitted with connectors, of a kind used for telecommunications**
ex	**8544**	**51**	**Other electric conductors, for a voltage exceeding 80 V but not exceeding 1000 V, fitted with connectors, of a kind used for telecommunications**
	8544	**70**	**Optical fibre cables**
	9009	**11**	**Electrostatic photocopying apparatus, operating by reproducing the original image directly onto the copy (direct process)]**
	9009	**21**	**Other photocopying apparatus, incorporating an optical system**
	9009	**90**	**Parts and accessories**
	9026		**Instruments and apparatus for measuring or checking the flow, level, pressure or other variables of liquids or gases (for example, flow meters, level gauges, manometers, heat meters), excluding instruments and apparatus of heading No 9014, 9015, 9028 or 9032:**
	9026	10	Instruments for measuring or checking the flow or level of liquids
	9026	20	Instruments and apparatus for measuring or checking pressure
	9026	80	Other instruments and apparatus for measuring or checking of heading 9026
	9026	90	Parts and accessories of instruments and apparatus of heading 9026
	9027	**20**	**Chromatographs and electrophoresis instruments**
	9027	**30**	**Spectrometers, spectrophotometers and spectrographs using optical radiations (UV, visible, IR)**

	9027	**50**	**Other instruments and apparatus using optical radiations (UV, visible, IR) of heading No 9027**
	9027	**80**	**Other instruments and apparatus of heading No 9027 (other than those of heading No 9027 10)**
ex	**9027**	**90**	**Parts and accessories of products of heading 9027, other than for gas or smoke analysis apparatus and microtomes**
	9030	**40**	**Instruments and apparatus for measuring and checking, specially designed for telecommunications (for example, cross-talk meters, gain measuring instruments, distorsion factor meters, psophometers)**

Attachment A, Section 2

Semiconductor manufacturing and testing equipment and parts thereof

	HS Code	Description	Comments
ex	7017 10	Quartz reactor tubes and holders designed for insertion into diffusion and oxidation furnaces for production of semiconductor wafers	For Attachment B
ex	8419 89	Chemical vapor deposition apparatus for semiconductor production	For Attachment B
ex	8419 90	Parts of chemical vapor deposition apparatus for semiconductor production	For Attachment B
ex	8421 19	Spin dryers for semiconductor wafer processing	
ex	8421 91	Parts of spin dryers for semiconductor wafer processing	
ex	8424 89	Deflash machines for cleaning and removing contaminants from the metal leads of semiconductor packages prior to the electroplating process	
ex	8424 89	Spraying appliances for etching, stripping or cleaning semiconductor wafers	
ex	8424 90	Parts of spraying appliances for etching, stripping or cleaning semiconductor wafers	
ex	8456 10	Machines for working any material by removal of material, by laser or other light or photo beam in the production of semiconductor wafers	
ex	8456 91	Apparatus for stripping or cleaning semiconductor wafers	For Attachment B
	8456 91	Machines for dry-etching patterns on semiconductor materials	
ex	8456 99	Focused ion beam milling machines to produce or repair masks and reticles for patterns on semiconductor devices	
ex	8456 99	Lasercutters for cutting contacting tracks in semiconductor production by laser beam	For Attachment B
ex	8464 10	Machines for sawing monocrystal semiconductor boules into slices, or wafers into chips	For Attachment B
ex	8464 20	Grinding, polishing and lapping machines for processing of semiconductor wafers	
ex	8464 90	Dicing machines for scribing or scoring	

		semiconductor wafers	
ex	8466 91	Parts for machines for sawing monocrystal semiconductor boules into slices, or wafers into chips	For Attachment B
ex	8466 91	Parts of dicing machines for scribing or scoring semiconductor wafers	For Attachment B
ex	8466 91	Parts of grinding, polishing and lapping machines for processing of semiconductor wafers	
ex	8466 93	Parts of focused ion beam milling machines to produce or repair masks and reticles for patterns on semiconductor devices	
ex	8466 93	Parts of lasercutters for cutting contacting tracks in semiconductor production by laser beam	For Attachment B
ex	8466 93	Parts of machines for working any material by removal of material, by laser or other light or photo beam in the production of semiconductor wafers	
ex	8456 93	Parts of apparatus for stripping or cleaning semiconductor wafers	For Attachment B
ex	8466 93	Parts of machines for dry-etching patterns on semiconductor materials	
ex	8477 10	Encapsulation equipment for assembly of semiconductors	For Attachment B
ex	8477 90	Parts of encapsulation equipment	For Attachment B
ex	8479 50	Automated machines for transport, handling and storage of semiconductor wafers, wafer cassettes, wafer boxes and other material for semiconductor devices	For Attachment B
ex	8479 89	Apparatus for growing or pulling monocrystal semiconductor boules	
ex	8479 89	Apparatus for physical deposition by sputtering on semiconductor wafers	For Attachment B
ex	8479 89	Apparatus for wet etching, developing, stripping or cleaning semiconductor wafers and flat panel displays	For Attachment B
ex	8479 89	Die attach apparatus, tape automated bonders, and wire bonders for assembly of semiconductors	For Attachment B
ex	8479 89	Encapsulation equipment for assembly of semiconductors	For Attachment B

ex	8479 89	Epitaxial deposition machines for semiconductor wafers	
ex	8479 89	Machines for bending, folding and straightening semiconductor leads	For Attachment B
ex	8479 89	Physical deposition apparatus for for semiconductor production	For Attachment B
ex	8479 89	Spinners for coating photographic emulsions on semiconductor wafers	For Attachment B
ex	8479 90	Part of apparatus for physical deposition by sputtering on semiconductor wafers	For Attachment B
ex	8479 90	Parts for die attach apparatus, tape automated bonders, and wire bonders for assembly of semiconductors	For Attachment B
ex	8479 90	Parts for spinners for coating photographic emulsions on semiconductor wafers	For Attachment B
ex	8479 90	Parts of apparatus for growing or pulling monocrystal semiconductor boules	
ex	8479 90	Parts of apparatus for wet etching, developing, stripping or cleaning semiconductor wafers and flat panel displays	For Attachment B
ex	8479 90	Parts of automated machines for transport, handling and storage of semiconductor wafers, wafer cassettes, wafer boxes and other material for semiconductor devices	For Attachment B
ex	8479 90	Parts of encapsulation equipment for assembly of semiconductors	For Attachment B
ex	8479 90	Parts of epitaxial deposition machines for semiconductor wafers	
ex	8479 90	Parts of machines for bending, folding and straightening semiconductor leads	For Attachment B
ex	8479 90	Parts of physical deposition apparatus for for semiconductor production	For Attachment B
ex	8480 71	Injection and compression moulds for the manufacture of semiconductor devices	
ex	8514 10	Resistance heated furnaces and ovens for the manufacture of semiconductor devices on semiconductor wafers	
ex	8514 20	Inductance or dielectric furnaces and ovens for the manufacture of semiconductor devices on semiconductors wafers	
ex	8514 30	Apparatus for rapid heating of semiconductor	For

		wafers	Attachment B
ex	8514 30	Parts of resistance heated furnaces and ovens for the manufacture of semiconductor devices on semiconductor wafers	
ex	8514 90	Parts of apparatus for rapid heating of wafers	For Attachment B
ex	8514 90	Parts of furnaces and ovens of Headings No 8514 10 to No 8514 30	
ex	8536 90	Wafer probers	For Attachment B
	8543 11	Ion implanters for doping semiconductor materials	
ex	8543 30	Apparatus for wet etching, developing, stripping or cleaning semiconductor wafers and flat panel displays	For Attachment B
ex	8543 90	Parts of apparatus for wet etching, developing, stripping or cleaning semiconductor wafers and flat panel displays	For Attachment B
ex	8543 90	Parts of ion implanters for doping semiconductor materials	
	9010 41 to 9010 49	Apparatus for projection, drawing or plating circuit patterns on sensitized semiconductor materials and flat panel displays	
ex	9010 90	Parts and accessories of the apparatus of Headings No 9010 41 to 9010 49	
ex	9011 10	Optical stereoscopic microscopes fitted with equipment specifically designed for the handling and transport of semiconductor wafers or reticles	For Attachment B
ex	9011 20	Photomicrographic microscopes fitted with equipment specifically designed for the handling and transport of semiconductor wafers or reticles	For Attachment B
ex	9011 90	Parts and accessories of optical stereoscopic microscopes fitted with equipment specifically designed for the handling and transport of semiconductor wafers or reticles	For Attachment B
ex	9011 90	Parts and accessories of photomicrographic microscopes fitted with equipment specifically designed for the handling and transport of semiconductor wafers or reticles	For Attachment B
ex	9012 10	Electron beam microscopes fitted with equipment specifically designed for the handling and transport of semiconductor wafers or reticles	For Attachment B
ex	9012 90	Parts and accessories of electron beam	For

		microscopes fitted with equipment specifically designed for the handling and transport of semiconductor wafers or reticles	Attachment B
ex	9017 20	Pattern generating apparatus of a kind used for producing masks or reticles from photoresist coated substrates	For Attachment B
ex	9017 90	Parts and accessories for pattern generating apparatus of a kind used for producing masks or reticles from photoresist coated substrates	For Attachment B
ex	9017 90	Parts of such pattern generating apparatus	For Attachment B
	9030 82	Instruments and apparatus for measuring or checking semiconductor wafers or devices	
ex	9030 90	Parts and accessories of instruments and apparatus for measuring or checking semiconductor wafers or devices	
ex	9030 90	Parts of instruments and appliances for measuring or checking semiconductor wafers or devices	
	9031 41	Optical instruments and appliances for inspecting semiconductor wafers or devices or for inspecting masks, photomasks or reticles used in manufacturing semiconductor devices	
ex	9031 49	Optical instruments and appliances for measuring surface particulate contamination on semiconductor wafers	
ex	9031 90	Parts and accessories of optical instruments and appliances for inspecting semiconductor wafers or devices or for inspecting masks, photomasks or reticles used in manufacturing semiconductor devices	
ex	9031 90	Parts and accessories of optical instruments and appliances for measuring surface particulate contamination on semiconductor wafers	

Attachment B

Positive list of specific products to be covered by this agreement wherever they are classified in the HS.

Where parts are specified, they are to be covered in accordance with HS Notes 2(b) to Section XVI and Chapter 90, respectively.

Computers: automatic data processing machines capable of 1) storing the processing program or programs and at least the data immediately necessary for the execution of the program; 2) being freely programmed in accordance with the requirements of the user; 3) performing arithmetical computations specified by the user; and 4) executing, without human intervention, a processing program which requires them to modify their execution, by logical decision during the processing run. The agreement covers such automatic data processing machines whether or not they are able to receive and process with the assistance of central processing unit telephony signals, television signals, or other analogue or digitally processed audio or video signals. Machines performing a specific function other than data processing, or incorporating or working in conjunction with an automatic data processing machine, and not otherwise specified under Attachment A or B, are not covered by this agreement.
Electric amplifiers when used as repeaters in line telephony products falling within this agreement, and parts thereof
Flat panel displays (including LCD, Electro Luminescence, Plasma and other technologies) for products falling within this agreement, and parts thereof.
Network equipment: Local Area Network (LAN) and Wide Area Network (WAN) apparatus, including those products dedicated for use solely or principally to permit the interconnection of automatic data processing machines and units thereof for a network that is used primarily for the sharing of resources such as central processor units, data storage devices and input or output units - including adapters, hubs, in-line repeaters, converters, concentrators, bridges and routers, and printed circuit assemblies for physical incorporation into automatic data processing machines and units thereof.
Monitors : display units of automatic data processing machines with a cathode ray tube with a dot screen pitch smaller than 0,4 mm not capable of receiving and processing television signals or other analogue or digitally processed audio or video signals without assistance of a central processing unit of a computer as defined in this agreement. The agreement does not, therefore, cover televisions, including high definition televisions.[1]
Optical disc storage units, for automatic data processing machines (including CD drives and DVD-drives), whether or not having the capability of writing/recording as well as reading, whether or not in their own housings.
Paging alert devices, and parts thereof .
Plotters whether input or output units of HS heading No 8471 or drawing or drafting machines of HS heading No 9017.
Printed Circuit Assemblies for products falling within this agreement, including such assemblies for external connections such as cards that conform to the PCMCIA standard. Such printed circuit assemblies consist of one or more printed circuits of heading 8534 with one or more active

1 Participants will conduct a review of this product description in January 1999 under the consultation provisions of paragraph 3 of the Declaration

elements assembled thereon, with or without passive elements "Active elements" means diodes, transistors, and similar semiconductor devices, whether or not photosensitive, of heading 8541, and integrated circuits and micro assemblies of heading 8542.
Projection type flat panel display units used with automatic data processing machines which can display digital information generated by the central processing unit.
Proprietary format storage devices including media therefor for automatic data processing machines, with or without removable media and whether magnetic, optical or other technology, including Bernoulli Box, Syquest, or Zipdrive cartridge storage units.
Multimedia upgrade kits for automatic data processing machines, and units thereof, put up for retail sale, consisting of, at least, speakers and/or microphones as well as a printed circuit assembly that enables the ADP machines and units thereof to process audio signals (sound cards).
Set top boxes which have a communication function: a microprocessor-based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange