

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

**(WT/DS375, WT/DS376, WT/DS377)**

**FIRST WRITTEN SUBMISSION  
OF  
THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU,  
KINMEN AND MATSU**

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**TABLE OF CASES CITED IN THIS SUBMISSION**

<b>Short Title</b>	<b>Full Case Title and Citation</b>
<i>Argentina – Textiles and Apparel</i>	Appellate Body Report, <i>Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items</i> , WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998:III, 1003
<i>China – Auto Parts</i>	Appellate Body Reports, <i>China – Measures Affecting Imports of Automobile Parts</i> , WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R, adopted 12 January 2009
<i>China – Auto Parts</i>	Panel Reports, <i>China – Measures Affecting Imports of Automobile Parts</i> , WT/DS339/R, WT/DS340/R, WT/DS342/R and Add.1 and Add.2, adopted 12 January 2009, as upheld (WT/DS339/R), and as modified (WT/DS340/R, WT/DS342/R) by Appellate Body Reports WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R
<i>Dominican Republic – Import and sale of Cigarettes</i>	Panel Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS302/AB/R, DSR 2005:XV, 7425
<i>EC – Bananas III (Article 21.5-Ecuador II)</i>	Panel Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador</i> , WT/DS27/RW2/ECU, adopted 11 December 2008, as modified by Appellate Body Report WT/DS27/AB/RW2/ECU
<i>EC – Chicken Cuts</i>	Appellate Body Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts</i> , WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, 9157
<i>EC – Chicken Cuts (Brazil)</i>	Panel Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts, Complaint by Brazil</i> , WT/DS269/R, adopted 27 September 2005, as modified by Appellate Body Report WT/DS269/AB/R, WT/DS286/AB/R, DSR 2005:XIX, 9295
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<i>EC – Hormones</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
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<i>India – Patents (US)</i>	Appellate Body Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</i> , WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9
<i>US – Gambling</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, 5663 (Corr.1, DSR 2006:XII, 5475)
<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3

<b>Short Title</b>	<b>Full Case Title and Citation</b>
<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Panel Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/R and Corr.1, adopted 17 December 2004, as modified by Appellate Body Report, W/DS/268/AB/R, DSR 2004:VIII, 3421
<i>US – Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755
<i>US – Underwear</i>	Appellate Body Report, <i>United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear</i> , WT/DS24/AB/R, adopted 25 February 1997, DSR 1997:I, 11
<i>US – Underwear</i>	Panel Report, <i>United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear</i> , WT/DS24/R, adopted 25 February 1997, as modified by Appellate Body Report WT/DS24/AB/R, DSR 1997:I, 31

### **LIST OF ABBREVIATIONS**

ADP machines	Automatic-data processing machines
BTI	Binding Tariff Information
CCC	Council Regulation (EC) No. 2913/92 of 12 October 1992, establishing the Community Customs Code, OJ L 302, 19.10.1992, p. 1 as last amended
CCCIR	Commission Regulation (EEC) No. 2454/93 of 2 July 1993, laying down provisions for the implementation of Council Regulation (EEC) No. 2913/92 establishing the Community Customs Code
CCT	Common Customs Tariff
CN	Combined Nomenclature
CNEN	Explanatory Notes to the Combined Nomenclature
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
DTV	Digital Television
DVI	Digital Video Interface
EC	European Communities
EC Commission	European Commission
EU Council	Council of the European Union
EC member States	Member States of the European Union
ECJ	European Court of Justice
ECR	European Court Reports
EC Treaty	Treaty establishing the European Communities
EICTA	European Information, Communications and Consumer Electronics Technology Industry Association
FPDs	Flat Panel Displays

GATT 1994	General Agreement on Tariffs and Trade 1994
GIR	General Rules for the Interpretation of the Harmonized System
HS	Harmonized Commodity Description and Coding System
HS Committee or HSC	Harmonized System Committee
HSEN	Explanatory Notes of the Harmonized System
IT	Information technology
ITA	Information Technology Agreement or the Ministerial Declaration on Trade in Information Technology Products (WT/MIN(96)/16)
LCD	Liquid Crystal Display
MFM's	Multifunctional Machines
OJEU	Official Journal of the European Union
OLAF	European Anti-Fraud Office ( <i>Office Européen de Lutte Anti-Fraude</i> )
OLED	Organic Light Emitting Diode
PoI	Points of Information
PoS	Points of Sale
STBs	Set-top boxes
STBs with a HDD	Set-top boxes with a hard disk drive
Taric	Integrated Tariff of the EC
TPKM	Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu
UK	United Kingdom
US	United States
VGA	Video Graphics Array
VESA	Video Electronic Standard Association
Vienna Convention	Vienna Convention on the Law of Treaties 1969

WCO	World Customs Organisation
WTO	World Trade Organisation
WTO Agreement	Marrakech Agreement Establishing the World Trade Organisation

## I. INTRODUCTION

1. During the Uruguay Round negotiations, the European Communities (“EC”) *inter alia* committed itself not to raise tariffs above levels negotiated and bound under its Schedule of Concessions to the GATT 1994 (“EC Schedule LXXX” or “EC Schedule”).<sup>1</sup> Almost two years after its establishment, the WTO held its first Ministerial Conference in Singapore in December 1996. Twenty-nine (including the 15 EC member States) WTO Members and States or separate customs territories agreed during this Conference to expand world trade in information technology (IT) products and adopted the *Ministerial Declaration on Trade in Information Technology Products* (“Declaration” or “ITA”, Information Technology Agreement)<sup>2</sup> in which they committed to grant duty-free treatment to the products covered in that Declaration. Rate reductions had to take place in equal steps starting no later than 1 July 1997 and ending no later than 1 January 2000.
2. As a participant in the ITA, the EC modified its Schedule to reflect the commitments made under the ITA.<sup>3</sup> Such modifications became effective on 2 July 1997.<sup>4</sup> 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 (hereafter referred as “multifunctional machines” or “MFMs”).
3. 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 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.
4. 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 (“US”), Japan and TPKM requested consultations with the EC and its member States regarding the tariff treatment the EC and its member States accord to FPDs, STBs and MFMs. The US 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

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<sup>1</sup> Schedule LXXX of the European Communities, *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, done at Marrakech, 15 April 1994.

<sup>2</sup> ITA attached as Exhibit TPKM-1. See also *Implementation of the Ministerial Declaration on Trade in Information Technology Products*, G/L/160 (2 April 1997).

<sup>3</sup> Committee on Market Access – Rectifications and Modifications of Schedules – Schedule CXL – European Communities, G/MA/TAR/RS/16 (2 April 1997).

<sup>4</sup> Certification of Modifications to Schedule LXXX – European Communities, dated 2 July 1997, WT/Let/156 (15 August 1997). See Exhibit TPKM-2.

- 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. TPKM 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.
5. The US 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. TPKM 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.
  6. As a result, pursuant to Article 6 of the DSU and Article XXIII of the GATT 1994, in a communication dated 19 August 2008, the US, Japan and TPKM requested the establishment of a panel, with standard terms of reference as set out in Article 7 of the DSU.<sup>5</sup>
  7. At its 23 September 2008 meeting, the Dispute Settlement Body (“DSB”) established a single Panel pursuant to the request of the three complainants with the standard terms of reference. The terms of reference for the Panel are therefore the following:

"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."<sup>6</sup>
  8. This dispute principally involves the issue of the treatment that the EC should apply to the products at issue under its Schedule. It concerns, *inter alia*, the question as to whether the EC, through a number of measures, accords to the commerce of the complainants treatment that is less favourable than that provided in the EC Schedule and therefore violates Articles II:1(a) and II:1(b) of the GATT 1994. The dispute therefore requires a thorough analysis of the scope of the relevant concessions made by the EC in its Schedule. It is important to keep in mind that the present dispute is not a dispute on the classification of the products concerned but on the treatment accorded by the EC on the products at issue which must, pursuant to Article II of the GATT 1994, not be less favourable than that provided in its Schedule.
  9. In addition, with respect to STBs, this dispute also involves the question as to whether 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 publish EC classification-related regulations promptly and by applying duties prior to their publication.

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<sup>5</sup> European Communities and its Member States – Tariff Treatment of Certain Information Technology Products, WT/DS375/8, WT/DS376/8 and WT/DS377/6, 19 August 2008.

<sup>6</sup> Note by the Secretariat: 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, WT/DS376/9 and WT/DS377/7, 26 January 2009.

10. Throughout this submission, TPKM will present evidence and legal arguments to demonstrate the precise scope of the concessions made by the EC in its Schedule pursuant to the ITA and how, through the measures at issue, the EC and its member States act inconsistently with their obligations under Articles II:1(a), II:1(b), X:1 and X:2 of the GATT 1994, and thereby nullify and impair benefits accruing to TPKM within the meaning of Article XXIII:1 of the GATT 1994. In light of these violations by the EC, TPKM requests the Panel to issue the findings and recommendations as set forth under Section IV of this submission.

## **II. FACTUAL BACKGROUND**

### **A. Product Description**

#### **1. FPDs**

11. FPDs are display devices capable of receiving signals from automatic data-processing (“ADP”) machines only or from both ADP machines and other sources. They are lighter and much thinner than traditional displays because they do not contain cathode ray tubes. FPDs use various different technologies such as Liquid Crystal Display (“LCD”), Electro Luminescence, Plasma, Vacuum-Fluorescence or Organic Light Emitting Diode (“OLED”) among others.
12. The FPDs concerned in this dispute have sizes varying from very small to very large and various technical specifications in terms of brightness, aspect ratio and resolution. They normally have a variety of connectors from the traditional VGA connector to Digital Video Interface (“DVI”), among other connectors. Although not limited to such types of FPDs, the FPD types most affected by the EC measures are LCD displays with a DVI connector.
13. The DVI was developed by the “Digital Display Working Group” in 1998 as a connector between ADP apparatus and digital display devices. The Digital Display Working Group is a so-called “open industry” group presided by leading computer manufacturers such as Intel, Compaq, Fujitsu, Hewlett Packard, IBM, NEC and Silicon Image. The DVI is designed to enable high bandwidth connection between ADP machines and the display device and is therefore specifically designed for ADP machines.<sup>7</sup>
14. The common element to all FPDs concerned is that they can only be used with ADP machines, or with ADP machines and other apparatus. The FPDs concerned are generally used in connection with ADP machines or as part of computer networks in office, industrial or home environments as well as at Points of Information (“PoI”) or Points of Sale (“PoS”).

#### **2. STBs**

15. STBs with a communication function are devices that enable a television set to receive and decode digital television (“DTV”) signals. They are used for satellite, cable and terrestrial digital television. They include the capability to connect to the Internet through

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<sup>7</sup> See website <http://www.ddwg.org/> and <http://www.ddwg.org/faqs.asp>.

a modem.

16. STBs with a communication function 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.

**3. MFMs**

17. MFMs are machines capable of performing two or more of the following functions: printing, scanning, copying and faxing. All MFMs concerned by the present dispute incorporate an electrostatic print unit. They can be further divided into two main categories of products.
18. The first category includes MFMs that are connectable to an ADP machine or to a computer network. Products belonging to this category are sometimes referred to as multifunctional printers. They normally incorporate in addition to the printing function, a scanning and copying function. They sometimes also have a fax function.
19. The second category includes MFMs that cannot connect to an ADP machine but that operate in connection with a phone line. These MFMs usually have a sheet feed scanner instead of flat bed scanner and are commercially referred to as facsimile machines.
20. None of the MFMs at issue include a function using traditional photocopying technology.

**B. The Information Technology Agreement**

21. The ITA was signed by several Members of the WTO and States or separate customs territories in the process of acceding to the WTO during the Ministerial Conference held in Singapore on 13 December 1996.<sup>8</sup>
22. The parties involved were seeking rapid market opening by providing duty-free treatment for IT products, including computers, telecommunications, semiconductors, semiconductor manufacturing equipment, software and scientific instruments and other products.
23. At the Ministerial Conference in Singapore, the Declaration was signed by 29 WTO Members or State or customs territories in the process of acceding to the WTO,<sup>9</sup> among which the EC, the US, Japan and TPKM. It was still unclear at that time whether the provisions of the Declaration would come into effect, as the Declaration stipulated that participants representing approximately 90 percent of world trade in IT products would have had to notify their acceptance of the ITA by 1 April 1997.<sup>10</sup> The original 29 participants collectively only accounted for 83 percent thereof. However, the 90 percent criterion was met in the ensuing months as a number of other countries notified their

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<sup>8</sup> ITA. See Exhibit TPKM-1.

<sup>9</sup> The signatories included Australia, Canada, the 15 member States of the EC, Hong Kong, Iceland, Indonesia, Japan, Korea, Liechtenstein, Norway, Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, Singapore, Switzerland, Turkey and the United States.

<sup>10</sup> Annex to the ITA, point 4.

- acceptance of the ITA.<sup>11</sup> As of 17 October 2008, the ITA had 44 participants (covering 71 Members and States or separate customs territories in the process of acceding to the WTO) representing approximately 97 percent of world trade in IT products.<sup>12</sup>
24. 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:2(b) of the GATT 1994 with respect to the products listed in the Annexes to the Declaration.<sup>13</sup> 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. Attachment A identifies the products by reference to the headings under the Harmonized System (“HS”) 1996. All products classified (or classifiable) with the HS 1996 listed in that Attachment are covered by the ITA. Attachment B identifies the products by reference to their description. All products specified in Attachment B are covered by the ITA wherever they are classified in the HS.
25. For the purpose of fulfilling their obligation under the ITA, participants agreed to provide all other participants a document containing (a) the details concerning how the appropriate duty treatment will be provided in their WTO schedule of concessions and (b) a list of the detailed HS headings involved for products specified in Attachment B.<sup>14</sup> These documents had to be reviewed and approved on a consensus basis and this review process be completed no later than 1 April 1997. As soon as this review process had been completed for any such documents, these documents were to be submitted as a modification to the Schedule of the participants concerned, in accordance with the Decision of 26 March 1980 on Procedures for Modification and Rectification of Schedules of Tariff Concessions (BISD 27S/25).<sup>15</sup>
26. Due to the large participation of WTO Members in the ITA and the fact that the ITA has been implemented through concessions granted on an MFN basis, the ITA had the potential of having substantial trade effects. In fact, as a result of the signature and implementation of the ITA, the global trading system has seen an unprecedented expansion of trade in IT products. IT products now account for over USD 1,500 billion of exports world-wide, i.e., one fifth of total world exports of manufactured products, while they accounted for USD 600 billion in 1996.<sup>16</sup>
27. The concessions granted through the ITA were drafted in general terms. Product descriptions containing references to certain technologies should therefore be considered as illustrative (e.g., the list of possible technologies applied to FPDs). However, products which fall under the general description of the concessions are obviously covered by the concession even though the specific technology or features did not yet exist at the time the ITA was drafted. Such interpretation is the only one which is in line with the object

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<sup>11</sup> These include: Czech Republic, Costa Rica, Estonia, India, Israel, Macau China, Malaysia, New Zealand, Romania, Slovak Republic, and Thailand. In addition, El Salvador, Panama, the Philippines, and Poland submitted schedules by 1 April 1997 but these were not approved at the time. However, all of these countries have subsequently become ITA participants in either 1997 or 1998.

<sup>12</sup> See Status of Implementation, G/IT/1/Rev.41 (23 October 2008).

<sup>13</sup> ITA, point 2.

<sup>14</sup> ITA, point 2.

<sup>15</sup> ITA, point 2.

<sup>16</sup> See the EC website, [http://ec.europa.eu/trade/issues/newround/memo150908\\_en.htm](http://ec.europa.eu/trade/issues/newround/memo150908_en.htm), visited on 2 October 2008.

and purpose of the Agreement, namely, to expand and enhance trade in IT products. Any interpretation of such concessions that would limit their scope to historical products, namely products with the precise technologies and features existing at the time the concessions were made, would frustrate such object and purpose. As long as such concessions can be interpreted in accordance with the applicable principles of interpretation such as to cover products and technologies that are more advanced than those existing at the time the concessions were made, such interpretation is the correct one.

**C. The EC Schedule**

28. One of a WTO Member's main obligations under the GATT 1994 is the obligation contained in Article II of GATT 1994, which requires Members to accord to the commerce of the other Members treatment no less favourable than that provided in its schedule of concession (Article II:1(a)) and, in particular, to exempt the products described in their schedule, subject to the terms, conditions or qualifications set forth in the schedule, from ordinary customs duties or any other duties or charges of any kind in excess of those set forth and provided in such schedule (Article II:1(b)).
29. EC Schedule LXXX was the subject of negotiations during the Uruguay Round between 1986 and 1994. The nomenclature used in Schedule LXXX followed the 1992 version of the Harmonized Commodity Description and Coding System of the World Customs Organization (the Harmonized System or "HS"). EC Schedule LXXX was incorporated into the legal instruments embodying the results of the Uruguay Round which was signed on 15 April 1994.<sup>17</sup>
30. The EC was an original participant to the ITA and accepted this Agreement by Council Decision 97/359/EC of 24 March 1997.<sup>18</sup> In order to undertake its commitments under the ITA, the EC modified its Schedule. The modifications were communicated to all WTO Members on 2 April 1997<sup>19</sup> and became effective on 2 July 1997.<sup>20</sup> In accordance with the ITA, the nomenclature used in the modified EC Schedule followed the 1996 version of the HS.
31. In accordance with the terms of the ITA, the EC undertook in its modified Schedule to bind and eliminate all customs duties and other duties and charges on items listed in the Attachments to the ITA, including on FPDs, STBs, "input and output units" of "automatic data processing machines" and "facsimile machines" no later than 1 July 1997 and to reduce, through rate reductions in equal steps, the customs duties on these items such as to eliminate all customs duties no later than 1 January 2000.
32. The modifications to EC Schedule LXXX included in document WT/Let/156 contain three parts.

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<sup>17</sup> Schedule LXXX of the European Communities, *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, done at Marrakech, 15 April 1994.

<sup>18</sup> Council Decision 97/359 of 24 March 1997 concerning the elimination of duties on information technology products, OJ L 155, 12.06.1997, pp. 1–2. See Exhibit TPKM-3.

<sup>19</sup> Rectifications and Modifications of Schedules, G/MA/TAR/RS/16 (2 April 1997).

<sup>20</sup> WT/Let/156 (15 August 1997). See Exhibit TPKM-2.

33. The first one is a table which includes the following columns:
- Tariff item number under the HS96
  - Description of the product
  - Base rate
  - Bound rate
  - Implementation
  - Present concession established
  - INR
  - Concession incorporated in GATT Schedule
  - Earlier INR
  - Other duties and charges
34. The second one includes a headnote and a list of all products of Attachment B to the ITA which specifies for each product the detailed HS headings at the EC tariff line level (i.e., at eight-digit level).
35. The third one is a table which indicates, for each HS heading at the EC tariff line level (i.e., eight-digit level) concerned by these modifications, the base rate and the steps of reduction of customs duties.
36. Reproduced below are the concessions contained in the EC Schedule to which reference is made in this dispute:
37. With respect to FPDs, the EC Schedule provides for the following concessions.  
First, products falling under the tariff line 8471.60.90 are subject to a bound duty rate of 0%.

HS96	Description	Base rate	Bound rate	Implementation	Present concession established	INR	Concession first incorporated in a GATT Schedule	Earlier INRs	ODCs
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	WT/Let				0.0
	-- Other								
8471 60 40	--- Printers	2	0.0	1999	WT/Let				0.0
8471 60 50	--- Keyboards	2	0.0	1999	WT/Let				0.0
8471 60 90	--- Other	2	0.0	1999	WT/Let				0.0

38. Second, the EC Schedule contains a head-note stating 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 within the meaning of Article II:1(b) of the GATT 1994 shall be bound and eliminated, as set forth in paragraph 2(a) of the Annex to the Declaration, wherever the product is classified.” The bound duty rate for these products is thus 0%.
39. Attachment B includes *inter alia* “[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 EC Schedule also contains a list of all products specified in Attachment B to the ITA for which the EC has identified the HS headings at EC tariff line level (i.e., at eight digit level). For FPDs, the EC identified the following HS headings at the EC tariff line level (i.e., eight-digit level): 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.
40. With respect to STBs, Attachment B to the ITA also contains a concession of duty-free treatment for “[s]et-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 list, the EC has identified the following HS headings at the EC tariff line level (i.e., eight-digit level): 8517.50.90, 8517.80.90 8525.20.99. In the year 2000, the EC created tariff line 8528.12.91 applicable to “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” and the EC amended its Schedule accordingly. The bound duty rate for these products is 0%.
41. With respect to MFMs, the EC Schedule provides for the following concessions:

HS96	Description	Base rate	Bound rate	Implementation	Present concession established	INR	Concession first incorporated in a GATT Schedule	Earlier INRs	ODCs
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	WT/Let				0.0
	-- Other								
8471 60 40	--- Printers	2	0.0	1999	WT/Let				0.0
8471 60 50	--- Keyboards	2	0.0	1999	WT/Let				0.0
8471 60 90	--- Other	2	0.0	1999	WT/Let				0.0
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								
(...)									
	- Facsimile machines and teleprinters								
8517 21 00	-- Facsimile machines	7.5	0.0	2000	WT/Let				0.0

42. Products falling under tariff lines 8471.60, 8471.60.40, 8471.60.90 and 8517.21.00 are all subject to a bound 0% duty rate.
43. In order to implement its concessions, the EC modified Annex I to Council Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff. This has been done through Commission Regulation (EC) No. 1153/97 of 24 June 1997<sup>21</sup> that entered into force on 1 July 1997.

**D. Factual Aspects concerning EC customs law**

44. The present dispute mainly deals with the issue as to whether the EC, through the various measures at issue, accords treatment to the products at issue that is less favourable than that provided for in the EC Schedule. As it will be explained in detail below, the measures at issue include various EC Commission or EU Council Regulations, Explanatory Notes of the Combined Nomenclature as well as Statements of the Customs Code Committee. TPKM considers that it is crucial to correctly understand the legislative and institutional framework as well as the mechanisms involved in the making and administration of EC customs law relating to classification and tariffication in order to properly address the

<sup>21</sup> Commission Regulation (EC) No. 1153/97 of 24 June 1997 amending Annex I to Council Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, OJ L 168, 26.06.97, p. 35 to 64, attached as Exhibit TPKM-4. See also Council Regulation (EC) No. 2216/97 of 3 November 1997 that has introduced autonomous duty suspensions with respect to certain IT products OJ L 305, 08.11.97, p.1 to 16.

issues raised in the present dispute. This is the object of the present section.

**1. The Common Customs Tariff and the Combined Nomenclature**

45. As a customs union, the EC has a tariff which is common to all its member States. It is the Common Customs Tariff (“CCT”). The CCT was established by Council Regulation (EC) No. 2658/87 of 23 July 1987 (“Council Regulation (EEC) No. 2658/87”)<sup>22</sup>, which covers customs tariffs and the collection of international trade statistics. In turn, the CCT establishes the Combined Nomenclature (“CN”) which is contained in Annex I of the said Council Regulation. The Annex I also includes the rates of duty of the CCT.

46. Being a signatory to the HS Convention, the EC bases the CN on the HS.<sup>23</sup> The HS is a structured nomenclature. The HS comprises around 1,200 headings which are grouped in 96 chapters, the latter being themselves arranged in 21 sections. Each heading of the HS is identified by a 4-digit code, the first two digits of which indicate the chapter which the heading belongs to, while the latter two digits indicate the position of the heading in the chapter. In addition, most of the headings are further subdivided into subheadings which are identified by a six-digit code.

47. WCO Members are not prevented from establishing subdivisions classifying goods beyond the level of the HS, provided that any such subdivision is added and coded at a level beyond that of the six-digit numerical code.<sup>24</sup> In the framework of the CN, the EC has thus defined CN subheadings which have an eight-digit code number. The first six digits are the code numbers relating to the headings and subheadings of the HS. The seventh and eighth digits which appear in the CN identify the CN subheadings. Additionally, there may be a ninth and tenth digit for the Integrated Tariff of the EC, known as the “Taric”.

1	2										HS chapter
1	2	3	4								HS heading
1	2	3	4	5	6						HS subheading
1	2	3	4	5	6	7	8				CN subheading
1	2	3	4	5	6	7	8	9	10		Taric subheading

48. Pursuant to Article 12 of Council Regulation (EEC) No. 2658/87, the EC Commission adopts each year by means of a Regulation a complete updated version of the CN together with the corresponding rates of duty of the CCT that replaces the thus applicable Annex I to Council Regulation (EEC) No. 2658/87. The version of Annex I to Council Regulation (EEC) No. 2658/87 applicable as of 1 January 2009 is contained in Commission Regulation (EC) No. 1031/2008 and was published in the Official Journal of the European Union on 31 October 2008.<sup>25</sup> The said version came into force on 1 January

<sup>22</sup> 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, 7.9.1987, p.1. See Exhibit TPKM-5.

<sup>23</sup> For further details on the HS, please see para. 149-171 below.

<sup>24</sup> International Convention on the Harmonized Commodity Description and Coding System, 14 June 1983, Article 3(3). See Exhibit TPKM-6.

<sup>25</sup> 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, 31.10.2008.

2009. The nomenclature which was adopted in order to implement the concessions made pursuant to the ITA is contained in Commission Regulation (EC) No. 1153/97 of 24 June 1997 which entered into force on 1 July 1997.<sup>26</sup>

## 2. Tariff Classification

49. The term “tariff classification” is defined in Article 20(6) of Council Regulation (EEC) No. 2913/92 which establishes the Community Customs Code (“the Community Customs Code” or “CCC”) as the determination of the relevant subheading of: (a) the CN or any other nomenclature based on it, with or without further subdivisions, which is used for the application of Community tariff measures relating to trade in goods (e.g., tariff suspensions, tariff preferences, anti-dumping duties); or (b) any other Community nomenclature based on the CN, with or without further subdivisions, which is used for the application of non-tariff measures relating to trade in goods (e.g., import quotas for textile products, export refunds for agricultural goods).

50. The obligation to classify products under the CCC is borne by “customs authorities” that are defined in Article 4(3) of the CCC as the authorities responsible *inter alia* for applying customs rules. In the context of the EC, which is a customs union and which has a common customs tariff between its member States and third countries, the Member State administrations are responsible for all operations relating to the implementation on a day-to-day basis of the CN, including the making of classification decisions.

51. The European Court of Justice (“ECJ”) has consistently held that tariff classification must be carried out on the basis “of the objective characteristics and properties of products which can be ascertained when customs clearance is obtained”.<sup>27</sup> Classification instruments that are applicable throughout the EC include classification regulations, explanatory notes and opinions of the HS, explanatory notes of the Combined Nomenclature, opinions of the Customs Code Committee and binding tariff information.

### (1) Classification Regulations

52. Pursuant to Article 9(1)(a) of Council Regulation (EEC) No. 2658/87, the EC Commission may adopt regulations on the classification of goods. Such classification regulations are adopted by the EC Commission which must seek the opinion of the Customs Code Committee (that includes representatives of each Member State) in accordance with the management procedure.<sup>28</sup> Classification regulations determine the tariff subheading to be applied to the specific good described in the classification regulation but may also become relevant by analogy to products similar to those described in the regulation.<sup>29</sup> A classification regulation is binding throughout the EC but

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<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:291:0001:0894:EN:PDF>

<sup>26</sup> Commission Regulation (EC) No. 1153/97 of 24 June 1997 amending Annex I to Council Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, OJ L 168, 26.06.97, p. 35. See Exhibit TPKM-4.

<sup>27</sup> Case C-233/88 *Gijs van de Kolk – Douane Expéditeur BV v Inspecteur der Invoerrechten en Accijnzen*, [1990] ECR I-265, para. 12. See Exhibit TPKM-7

<sup>28</sup> Article 10 of Regulation (EEC) No. 2658/87. See Exhibit TPKM-5. For further information on the management procedure, please see para. 65 below.

<sup>29</sup> Case C-130/02, *Krings GmbH v Oberfinanzdirektion Nürnberg*, [2004] ECR I-2121, para. 35. See Exhibit TPKM-8.

cannot amend the CN.<sup>30</sup>

(2) Explanatory Notes to the Combined Nomenclature (“CNEN”)

53. Pursuant to Article 9(1)(a) of Council Regulation (EEC) No. 2658/87, the EC Commission may issue CNEN in order to clarify particular issues of tariff classification arising under the CN. CNEN apply to a range of situations or cases and affect an unidentified number of economic operators. They are thus of general application.
54. The procedure for the adoption of CNEN is identical to the procedure applicable to classification regulations. In other words, CNEN are adopted by the EC Commission which must seek the opinion of the Customs Code Committee in accordance with the management procedure.
55. The ECJ has consistently held that CNEN constitute an important means for ensuring the uniform application of the CCT by the customs authorities of the member States.<sup>31</sup> The ECJ has also considered that such CNEN do not have legally binding force so that, where appropriate, it is necessary to consider whether their content is in accordance with the actual provisions of the CCT and whether they alter the meaning of such provisions.<sup>32</sup> It is however important to emphasise that the ECJ’s ruling that CNEN are “not legally binding” refers to the fact that such CNEN cannot alter the meaning of the provisions of the CCT. It does not mean that customs authorities would be free to follow or disregard such explanatory notes. In fact, as it will be explained in more detail below, CNEN are binding on the customs authorities of the member States and they are obliged to follow such explanatory notes.<sup>33</sup>

(3) Opinions and statements of the Customs Code Committee

56. In accordance with Article 8 of Council Regulation (EEC) No. 2658/87, the Customs Code Committee may examine any matter referred to it by its chairman concerning the CN. More specifically, the Committee may adopt opinions on questions relating to the application and interpretation of the CN. Such opinions are distinct from opinions which

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<sup>30</sup> Case C-401/93, *GoldStar Europe GmbH v Hauptzollamt Ludwigshafen*, [1994] ECR I-5587, para. 19, attached as Exhibit TPKM-9; Case C-265/89, *Gebr. Vismans Nederland BV v Inspecteur der Invoerrechten en Accijnzen*, [1990] ECR I-3411, para. 13, attached as Exhibit TPKM-10.

<sup>31</sup> C-312/07 *JVC France SAS v Administration des Douanes – Direction Nationale du Renseignement et des Enquêtes douanières*, not yet published in the ECR, para. 33, attached as Exhibit TPKM-11; C-229/06 *Sunshine Deutschland Handelsgesellschaft mbH v Hauptzollamt Kiel*, [2007] ECR I-3251, para. 26, attached as Exhibit TPKM-12; C-495/03 *Intermodal Transports BV v Staatssecretaris van Financiën*, [2005] ECR I-8151, para. 47, attached as Exhibit TPKM-13; C-445/04 *Possehl Erzkontor GmbH v Hauptzollamt Duisburg*, [2005] ECR I-10721, para. 19, attached as Exhibit TPKM-14; C-500/04 *Proxxon GmbH v Oberfinanzdirektion Köln*, [2006] ECR I-1545, para.21, attached as Exhibit TPKM-15.

<sup>32</sup> C-312/07 *JVC France SAS v Administration des Douanes – Direction Nationale du Renseignement et des Enquêtes douanières*, not yet published in the ECR, para. 34, attached as Exhibit TPKM-11; C-229/06 *Sunshine Deutschland Handelsgesellschaft v Hauptzollamt Kiel*, [2007] ECR I-3251, para. 27, attached as Exhibit TPKM-12; C-495/03 *Intermodal Transports BV v Staatssecretaris van Financiën*, [2005] ECR I-8151, para. 48, attached as Exhibit TPKM-13; C-445/04 *Possehl Erzkontor GmbH v Hauptzollamt Duisburg*, [2005] ECR I-10721, para. 20, attached as Exhibit TPKM-14; C-500/04 *Proxxon GmbH v Oberfinanzdirektion Köln*, [2006] ECR I-1545, para. 22, attached as Exhibit TPKM-15.

<sup>33</sup> See paras. 466-467 below.

- the Committee adopts in line with the comitology procedure<sup>34</sup> on measures proposed by the EC Commission. They may take the form of statements.
- (4) Binding Tariff Information (“BTI”)
57. BTIs are decisions issued by national customs authorities on the correct classification in the relevant nomenclature for a given product.<sup>35</sup> The purpose is to give to the economic operator requesting BTI legal certainty as to the correct applicable tariff classification for the goods he intends to import or export.
58. BTIs are binding with respect to the tariff classification contained therein not only on customs authorities who have issued the BTI but on the competent authorities of all EC member States.
59. BTIs are normally valid for 6 years as from the date of issue. However, a BTI may be annulled where the customs authorities determine that the information is based on inaccurate or incomplete information from the applicant.<sup>36</sup> Furthermore, under certain circumstances, a BTI will cease to be valid including where it has been revoked or amended in accordance with Article 9 of the CCC.<sup>37</sup>
60. The procedure that applies in the event of inconsistencies arising in BTIs is set out in Article 9 of the CCCIR. In particular, such inconsistencies may be considered by the Customs Code Committee if it has been placed on the agenda of the next meeting by the EC Commission or at the request of a representative of a EC member State.
61. The question has been raised as to whether customs authorities can issue BTIs with respect to products the classification of which is discussed in the Customs Code Committee. During its 433<sup>rd</sup> meeting, the Chairman of the Committee 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 EC member States. It follows from the above that as soon as an opinion has been voted, EC member States can issue BTIs for the products concerned, even before the measure has been adopted by the EC Commission and published in the Official Journal”.<sup>38</sup>

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<sup>34</sup> In accordance with the Treaty Establishing the EC, it is the task of the Commission to implement legislation at Community level. In practice, each legislative instrument specified the scope of the implementing powers conferred on the EC Commission by the Council of the EU. In this context, the Treaty provides for the Commission to be assisted by a committee, in line with the procedure known as “comitology”. Committees consist of representatives from member States and are chaired by the Commission. There are various categories of committees the functioning of which is included in Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (1999/468/EC) as amended. With respect to customs issues, the Commission is assisted by the Customs Code Committee that delivers opinions in accordance with the rules laid down in the above-mentioned Decision.

<sup>35</sup> See CCC, Article 12 and CCCIR, Articles 5 to 14.

<sup>36</sup> CCC, Article 12(4), see Exhibit TPKM-16

<sup>37</sup> CCC, Article 12(5), see Exhibit TPKM-16.

<sup>38</sup> Customs Code Committee – Tariff and Statistical Nomenclature Section (Heads of Tariff), *Summary Report of the 433<sup>rd</sup> meeting of the Committee held on 22 October 2007*, point 5. See Exhibit TPKM-17.

### **3. The Customs Code Committee**

62. The Customs Code Committee is established by Articles 247a(1) and 248a(1) of the CCC. The Customs Code Committee has adopted its own Rules of Procedure,<sup>39</sup> which are based – with some minor modifications – on the standard rules of procedure for comitology committees.
63. In accordance with Article 1(1) of its Rules of Procedure, the Customs Code Committee comprises various sections among which the Tariff and Statistical Nomenclature Section that deals with the classification of products in the CN. The Customs Code Committee is composed of representatives from each EC member State and chaired by a representative of the EC Commission.
64. Pursuant to Article 8 of Council Regulation (EEC) No. 2658/87, the Committee may examine any matter referred to it by its chairman, either on its own initiative or at the request of a representative of an EC member State, concerning the CN or the Taric.
65. In particular, the Committee will assist the EC Commission in the adoption of classification regulations and explanatory notes. Indeed, Article 9 of Council Regulation (EEC) No. 2658/87 which provides for the adoption of classification regulations and explanatory notes, provides for the said measures to be adopted in accordance with the so-called “management procedure” under Articles 4 and 7 of Decision 1999/468/EC.<sup>40</sup> The “management procedure” is as follows: the EC Commission submits to the Committee a draft of the measures to be taken. The Committee must deliver its opinion. The opinion is delivered according to the qualified majority<sup>41</sup> used for voting at the EU Council. If the opinion of the Committee is unfavourable, the draft measures must be communicated to the EU Council. The EU Council may take a different decision by qualified majority within a time period which cannot exceed three months. Thus, in such a case, the EC Commission proposal would only be adopted if the EU Council fails to adopt a different decision within a period of 3 months maximum. The opinion of the Nomenclature Committee will be regarded as unfavourable if a qualified majority of the Committee opposes the adoption of the draft measure.

### **E. The EC Measures at issue**

#### **1. FPDs**

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<sup>39</sup> The Rules of Procedure of the Customs Code Committee are available on the public website of the EC Commission:

[http://europa.eu.int/comm/taxation\\_customs/customs/procedural\\_aspects/general/community\\_code/index\\_en.htm](http://europa.eu.int/comm/taxation_customs/customs/procedural_aspects/general/community_code/index_en.htm) The Customs Code Committee has adopted new Rules of Procedure which are not yet available on this website.

<sup>40</sup> Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ L 184, 17.7.1999, p. 23. Decision as amended by Decision 2006/512/EC (OJ L 200, 22.7.2006, p. 11). See Exhibit TPKM-18.

<sup>41</sup> Pursuant to Articles 205(2) of the EC Treaty and Declarations No. 20 and 21 of the Treaty of Nice, a qualified majority is achieved with 232 votes out of 321, expressed by a majority of the 27 member States. Article 205(4) of the EC Treaty specifies that, at the request of a member of the Council, a check will be made, when a decision is taken by qualified majority, to ensure that this majority represents at least 62% of the population of the Union. If this is not the case, the act will not be adopted.

(1) Commission Regulation (EC) No. 634/2005<sup>42</sup>

66. On 26 April 2005, the EC published Commission Regulation (EC) No. 634/2005 which provides that LCD FPDs with certain characteristics would be classified as dutiable.

67. Item 4 of the Annex to this Regulation classifies under CN subheading 8528.21.90 (14% tariff) the following product:

“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 and 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.”

68. Classification as an output unit of an ADP machine in heading 8471 is excluded because the monitor is not of the kind solely or principally used in an ADP machine system in view of its capabilities to display signals from various sources.

69. Therefore, classification under heading 8471 subject to a zero tariff is excluded because the monitor is not for use exclusively with an ADP system.

(2) Commission Regulation (EC) No. 2171/2005<sup>43</sup>

70. On 29 December 2005, the EC published Commission Regulation (EC) No. 2171/2005 which provides that certain LCD FPDs would be classified as dutiable.

71. Item 2 of the Annex to this Commission Regulation classifies under CN subheading 8528.21.90 the following FPD:

“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 can also display texts, spread sheets, presentations and the like.”

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<sup>42</sup> Commission Regulation (EC) No 634/2005 of 26 April 2005, concerning the classification of certain goods in the Combined Nomenclature, OJ L 106, 27.04.2005, pp. 7-9 attached as Exhibit TPKM-19.

<sup>43</sup> Commission Regulation (EC) No 2171/2005 of 23 December 2005, concerning the classification of certain goods in the Combined Nomenclature, OJ L 346, 29.12.2005, pp. 7-9 attached as Exhibit TPKM-20.

72. Classification under heading 8471 as output unit of an ADP machine is excluded because the monitor is not of the kind solely or principally used in an ADP system.
73. Item 3 of the Annex to this Commission Regulation classifies under CN subheading 8528.21.90 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.”
74. Classification under heading 8471 is excluded as the monitor is not of a kind solely or principally used in an ADP system but is capable of displaying signals from various sources.
75. According to Item 4 of the Annex to this Commission Regulation, the following FPD is classified under CN subheading 8528.21.90:
- “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.”
76. Classification under heading 8471 is excluded because the monitor is not of the kind solely or principally used in an ADP system but is capable of displaying signals from various sources.
77. In all three cases above, classification under heading 8471 subject to a zero tariff as an output unit of an ADP machine is excluded because the FPD is not considered to be for exclusive use with an ADP machine.
- (3) 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<sup>44</sup>
78. In the 1997 version of the CCT<sup>45</sup>, the following descriptions applied to subheadings 8471

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<sup>44</sup> Commission Regulation (EC) No. 1031/2008 of 19 September 2008 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 291, 31.10.2008. See Exhibit TPKM-21.

<sup>45</sup> Annex I to Council Regulation (EEC) No. 2658/87 as amended by Commission Regulation No. 1734/96 of 9 September 1996, OJ L 238, 19.09.1996. See Exhibit TPKM-22.

and 8528, as shown in the excerpts reproduced below:

CN subheading	Description	Rate of duty	
		Autonomous	Conventional
8471 60	- Input or output units, whether or not containing storage units in the same housing:		
8471 60 10	- - For use in civil aircraft <sup>(1)</sup>	11	Free
	- - Other:		
8471 60 40	- - - Printers	11	1.5
8471 60 50	- - - Keyboards	11	4.5
8471 60 90	- - - Other	11	1.5

CN subheading	Description	Rate of duty	
		Autonomous	Conventional
8528 13 00	- - Black and white or other monochrome	22	6.8
	- Video monitors:		
8528 21	- - Colour:		
	- - - With cathode-ray tube:		
8528 21 14	- - - - With a screen width/height ratio less than 1,5	22	14
	- - - - Other:		
8528 21 16	- - - - - With scanning parameters not exceeding 625 lines	22	14
8528 21 18	- - - - - With scanning parameters exceeding 625 lines	22	14
8528 21 90	- - - Other	22	14
8528 22 00	- - Black and white or other monochrome	22	14

79. On 31 October 2008, the EC published Commission Regulation (EC) No. 1031/2008<sup>46</sup> amending Council Regulation (EEC) No. 2658/87 and establishing the CN and CCT for 2009. With regard to FPDs, the structure is the same as the one contained in the 2007 CN adopted by Commission Regulation (EC) No. 1549/2006 of 17 October 2006<sup>47</sup> and implementing the HS 2007 into the EC legal order. The structure of heading 8528 was significantly amended as a result of the HS 2007. In particular, FPDs for use solely or principally with ADP machines would now also be classified under heading 8528 and excluded from heading 8471. However, the applicable zero tariff was maintained for FPDs solely or principally used with ADP systems.
80. The 2009 CN adopted by Commission Regulation (EC) No. 1031/2008 contains the following description with regard to FPDs:<sup>48</sup>

CN subheading	Description	Conventional Rate of duty (%)
	- Other monitors:	
8528 51 00	- - Of a kind solely or principally used in an automatic data-processing system of heading 8471	Free

<sup>46</sup> Commission Regulation (EC) No 1031/2008. See Exhibit TPKM-21.

<sup>47</sup> Commission Regulation (EC) No 1549/2006 of 17 October 2006, OJ L 301, 31.10.2006.

<sup>48</sup> See Exhibit TPKM-21.

8528 59	-- Other:	
8528 59 10	--- Black and white or other monochrome	14
8528 59 90	--- Colour	14

81. FPDs classified under CN subheading 8528.21.90 by the above-mentioned Commission Regulation (EC) No. 634/2005 and Commission Regulation (EC) No. 2171/2005 fall into the 2009 CN under CN subheading 8528.59.90.

(4) Explanatory Notes to the Combined Nomenclature of the European Communities, 2008/C 133/01<sup>49</sup>

82. On 30 May 2008, the EC published a consolidated version of the CNEN (2008/C 133/01) that clarified, *inter alia*, which FPDs are dutiable. The CNEN relating to FPDs had initially been published in the Official Journal on 30 December 2006.<sup>50</sup> It has now been included with the identical content in the Consolidated CNEN published in May 2008 as follows<sup>51</sup>:

**“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;
- incorporate components (for example, a chroma decoder, a Y/C separator)

<sup>49</sup> CNEN of the European Communities, 2008/C 133/01, OJ C 133, 30.05.2008, pp. 352-3. See Exhibit TPKM-23.

<sup>50</sup> Uniform Application of the CN (Classification of goods), 2006/C 332/05, OJ C 332, 30.12.2006, p.7. See Exhibit TPKM-24.

<sup>51</sup> See Exhibit TPKM-23.

- 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<sub>B</sub>C<sub>R</sub>, YP<sub>B</sub>P<sub>R</sub>), 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<sub>B</sub>C<sub>R</sub>, YP<sub>B</sub>P<sub>R</sub>), 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**      **Other monitors**  
**to 8528 59 90**

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 mutandi*.

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**      **Other**  
**8528 59 90**

The Explanatory Notes to subheadings 8528 49 35 to 8528 49 99 apply, *mutatis mutandi*.

For the monitors of these subheadings the aspect ratio is often 16:9 or 16:10.

- 83. The FPDs concerned in the present dispute are affected by the CNEN to CN subheading 8528.51.00 (0% customs duty) and to CN subheadings 8528.59.10 to 8528.59.90 (14% customs duty).
- 84. The above CNEN confirm that any FPD which is not *exclusively* used with ADP machines or systems will be excluded from the zero tariff treatment. Moreover, the CNEN also state that FPDs subject to the zero customs duty generally have a diagonal measurement of the screen of 48.5 cm (19 inches) or less. FPDs such as those covered by this dispute and which are principally for use with ADP systems or other ITA products are therefore excluded from the duty-free tariff treatment.

(5) Council Regulation (EC) No. 493/2005<sup>52</sup>

85. On 16 March 2005, the EC published Council Regulation (EC) No. 493/2005 which suspended 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 from 1 January 2005 to 31 December 2006.
86. Duties were suspended to the extent that such monitors were classified under CN subheading 8528.21.90 as dutiable and not as output units of an ADP system.
87. The EC took the view that such monitors are excluded from the ITA even if they are “mainly used as output units of automatic data-processing machines” as acknowledged in recital (3) of this Council Regulation. The EC did not consider that the requirement of solely or principally used with automatic data processing systems was met since such monitors are “frequently also capable of reproducing video images from a source other than an automatic data processing machine”, as also stated in Recital (3) of this Council Regulation. The duty suspension was granted because, as clarified in Recital (4), it was considered to be in the interest of the Community to suspend the duties.
88. This Council Regulation applied from 1 January 2005 but expired on 31 December 2006.<sup>53</sup>
89. However, Council Regulation (EC) No. 301/2007 dated 22 March 2007 prolonged the suspension from 1 January 2007 until 31 December 2008.<sup>54</sup> As a result of the change of CN subheadings following the implementation of the HS 2007, the duty suspension applies as of 1 January 2007 to certain FPDs falling under CN subheading 8528.59.90. The duty suspension ended on 31 December 2008 without having been replaced by a new duty suspension, although the EC Commission has forwarded a proposal to grant a further suspension to the EU Council.<sup>55</sup>

2. STBs

(1) Explanatory Notes to the CN 2008/C 112/03<sup>56</sup>

90. In 2006, the EC Commission proposed a draft CNEN for the classification of STBs under CN subheading 8528.12.20 as “reception apparatus for colour television, incorporating a video recorder or reproducer”, under CN subheadings 8528.12.90 to 8528.12.95 as “video tuners”; under CN subheading 8528.12.91 as “set-top boxes with communication

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<sup>52</sup> Council Regulation (EC) No. 493/2005 of 16 March 2005, amending Annex I to Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, OJ L 82, 31.03.2005, pp. 1-2. See Exhibit TPKM-25.

<sup>53</sup> Council Regulation (EC) No. 493/2005, Recitals (4) and (6). See TPKM-25.

<sup>54</sup> Council Regulation (EC) No. 301/2007 of 19 March 2007, amending Annex I to Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, OJ L 81, 22.03.2007, p.11, Recitals (4) and (7). See Exhibit TPKM-26.

<sup>55</sup> A proposal to re-introduce the duty suspension with a different product scope has been made by the EC Commission: see Commission proposal for a Council Regulation amending Annex I to Regulation (EEC) No 2658/87, COM (2009) 3 final of 15 January 2009, Exhibit TPKM-27.

<sup>56</sup> CNEN of the European Communities, 2008/C 112/03, OJ C 112, 7.05.2008, pp. 8-9. See Exhibit TPKM-28.

- function” and under CN subheading 8528.12.98 as “other”.<sup>57</sup>
91. The main purpose of this draft CNEN was to clarify the types of STBs covered by CN subheading 8528.12.91 by defining the criteria to determine the scope of application of this CN subheading. The text of the draft CNEN on which the Customs Code Committee voted in October 2006 is reproduced in the minutes of the 407<sup>th</sup> Meeting of the Customs Code Committee.<sup>58</sup>
92. The text of the CNEN regarding STBs with a communication function and the “other” STBs was adopted by the Customs Code Committee during its meeting of October 2006. In particular, the Committee supported by unanimity the wording of the CNEN to CN subheadings 8528.12.90 to 8528.12.95 and CN subheading 8528.12.98. The opinion was favourable only with regard to CN subheading 8528.12.91. The vote on the draft CNEN concerning STBs incorporating a hard disk (“STBs with HDD”) drive was postponed for procedural reasons until a later stage.<sup>59</sup>
93. Although the above CNEN were adopted, they were not published in the Official Journal of the European Union until 7 May 2008 while they were already applied by EC member States.
94. The draft CNEN concerning STBs with HDD were on the agenda of the Customs Code Committee meeting of April 2007 as an item for a vote. However, according to the minutes, the Customs Code Committee delivered no opinion.<sup>60</sup> Nevertheless, the CNEN were considered adopted under the management procedure.<sup>61</sup> As a result, the draft CNEN was added to the minutes of the Customs Code Committee meeting as an Annex.<sup>62</sup> The Customs Code Committee only discloses classification measures in the minutes when the file is considered closed by the Customs Code Committee<sup>63</sup>. Therefore, the CNEN concerning STBs with HDD was deemed adopted following the April 2007 meeting.
95. This CNEN was not published in the Official Journal of the European Union until 7 May 2008. However, it was already applied by several EC member States before its

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<sup>57</sup> Customs Code Committee – Tariff and Statistical Nomenclature Section (Mechanical/Miscellaneous Sector), *Working Document on “Satellite receivers with built-in modem”*, 18.05.2006. See Exhibit TPKM-29.

<sup>58</sup> Customs Code Committee – Tariff and Statistical Nomenclature Section (Mechanical/Miscellaneous Sector), *Conclusions of the 407<sup>th</sup> Meeting of the Committee*, Draft CNEN on “Satellite receivers with built-in modem” in Annex VI. See Exhibit TPKM-30

<sup>59</sup> Customs Code Committee – Tariff and Statistical Nomenclature Section (Mechanical/Miscellaneous Sector), *Conclusions of the 407<sup>th</sup> Meeting of the Committee*, Draft CNEN on “Satellite receivers”, point 3.7. See Exhibit TPKM-30.

<sup>60</sup> Customs Code Committee – Tariff and Statistical Nomenclature Section (Mechanical/Miscellaneous Sector), *Conclusions of the 420<sup>th</sup> Meeting of the Committee*, Draft CNEN on “Set-top boxes incorporating a hard disk”, point 3.3. See Exhibit TPKM-31.

<sup>61</sup> See para. 65 above for an explanation of the “management procedure”.

<sup>62</sup> Customs Code Committee – Tariff and Statistical Nomenclature Section (Mechanical/Miscellaneous Sector), *Conclusions of the 420<sup>th</sup> Meeting of the Committee*, Draft CNEN on “Set-top boxes incorporating a hard disk”, Annex IV. See Exhibit TPKM-31.

<sup>63</sup> Customs Code Committee – Tariff and Statistical Nomenclature Section (Mechanical/Miscellaneous Sector), *Conclusions of the 360<sup>th</sup> meeting of the Committee*, Any other business, point 5. See Exhibit TPKM-32. See also case T-144/05, *Pablo Muñoz v Commission of the European Communities*, judgment of 18 December 2008 Exhibit TPKM-33.

publication in the Official Journal.

96. On 7 May 2008,<sup>64</sup> the EC finally published an amendment to the consolidated CNEN with respect to STBs in its Official Journal as follows:

**8521 90 00 Other**

This subheading includes apparatus without a screen capable of receiving signals, so-called “set-top boxes”, which incorporate a device performing a recording or reproducing function (for example, a hard disk or DVD drive).’

**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**

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<sup>64</sup> CNEN of the European Communities, 2008/C 112/03, OJ C 112, 7.05.2008, pp. 8-9. See Exhibit TPKM-28.

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.’

97. These CNEN now classify STBs either under CN subheading 8528.71.13 (0%), CN subheading 8528.71.19 (14%), CN subheading 8528.71.90 (14%) or under CN subheading 8521.90.00 (13.9%). The available classification options are thus no longer limited to subheadings within heading 8528 only, as was the case in the CNEN adopted by the October 2006 meeting of the Customs Code Committee. This change was due to the changes in the CN resulting from the introduction of the HS 2007 as of 1 January 2007. In fact, under the CCT 2006, the structure for the classification of “reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus” was as follows:

	<b>- Reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus:</b>	
8528 12	-- Colour	
8528 12 10	--- Television projection equipment	14 %
8528 12 20	--- Apparatus incorporating a video recorder or reproducer	14 %
	---- With integral tube	
	---- Other	
	----- With screen	
	----- Without screen:	
	----- Video tuners:	
8528 12 90	----- Electronic assemblies for incorporation into ADP machines	0 %
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 communication function’)	0 %
	----- Other:	
8528 12 94	----- Digital (including mixed digital and analogue)	14 %
8528 12 95	----- Other	14 %
8528 12 98	----- Other	14 %

98. The EC Commission always argued that a STB with a HDD is an apparatus that incorporates a video recorder or reproducer. To the extent that it does, it should thus be classified under CN subheading 8528.12.20 (14 %) which is at a three-dash level, and not under CN subheading 8528.12.91 (0%) which is at seven-dash level, even though the STB with a HDD is covered by the description of CN subheading 8528.12.91.

99. This argument loses strength by the entry into force of the CCT 2007 which has a completely new structure with respect to “reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing

apparatus”:

	<b>- Reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus:</b>	
8528 71	-- not designed to incorporate a video display or screen	
	--- Video tuners:	
8528 71 11	--- Electronic assemblies for incorporation into ADP machines	0%
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')	0 %
8528 71 19	---- Other	14%
8528 71 90	--- Other	14%
8528 72	-- Other, colour	
8528 72 10	--- Television projection equipment	14%
8528 72 20	--- Apparatus incorporating a video recorder or reproducer	14%
	--- Other:	

100. STBs with a HDD clearly fall into the first of the two HS subheadings, i.e., 8528.71 “not designed to incorporate a video display or screen” rather than under 8528.72. Within HS subheading 8528.71, since STBs with HDD meet the description of STBs with a communication function, they have to be classified as such, i.e., under CN subheading 8528.71.13 (0%).
101. Given the implications of the changes brought by the CCT 2007, the EC Commission decided to argue that STBs with HDD must be classified in heading 8521. Indeed, the classification arguments put forward by the EC Commission would have necessarily lead to a classification of STBs under CN subheading 8528.71.13 (0 %). This is the reason why after having initially proposed to classify STBs with HDD in heading 8528, the EC Commission decided to change the classification to heading 8521.
102. It should be noted that the content of the CNEN adopted by the Customs Code Committee in October 2006 was amended before its publication on 7 May 2008 without this amendment having the necessary support of the Customs Code Committee under the comitology procedure. The wording “Set-top boxes of this subheading must enable the user of the apparatus to access the Internet by accessing any IP address” was replaced by the wording “Set-top boxes of this subheading must enable the user of the apparatus to access the Internet”. The amendment was proposed by the EC Commission during the Customs Code Committee meeting held in February 2008. Although the Customs Code Committee did not support the EC Commission amendment by qualified majority, the amendment was still introduced in the CNEN as finally published in the Official Journal of the European Union.
103. As a result, the zero tariff now applies only to STBs classified under CN subheading 8528.71.13 pursuant to the above-mentioned CNEN. STBs which incorporate a device performing an additional video recording or reproducing function (e.g., hard disk or DVD drive) are classified as video recorders under CN 8521.90.00 and are subject to a 13.9% customs duty rate.

104. In addition, STBs that include devices that allow access to Internet, such as ISDN- or WLAN- devices, are excluded from CN subheading 8528.71.13 and thus from duty-free tariff treatment as such devices are not considered by the CNEN to be “modems”. Finally, STBs which use an external modem are also excluded from CN subheading 8528.71.13 and thus are not granted duty-free treatment. Both types of STBs are now classified under CN subheading 8528.71.19 which is subject to a 14% customs duty.

(2) 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

105. The 1997 version of the CCT<sup>65</sup> contains the following descriptions with respect to headings 8521 and 8528, as shown in the following tables:

CN subheading	Description	Rate of duty	
		Autonomous	Conventional
<b>8521</b>	<b>Video recording or reproducing apparatus, whether or not incorporating a video tuner:</b>		
<b>8521 10</b>	<b>- Magnetic tape-type:</b>		
<b>8521 10 10</b>	- - For use in civil aircraft (1) - - Other	13	Free
<b>8521 10 30</b>	- - - Of a width not exceeding 1,3 cm and allowing recording or reproduction at a tape speed not exceeding 50 mm per second	14	14
<b>8521 10 80</b>	- - - Other	13	8

CN subheading	Description	Rate of duty	
		Autonomous	Conventional
<b>8528</b>	<b>Reception for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus; video monitors and video projectors:</b> <b>- Reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus:</b>		
<b>8528 12</b>	<b>- - Colour:</b> - - - Television projection equipment :		
<b>8528 12 14</b>	- - - - With scanning parameters not exceeding 625 lines - - - - With scanning parameters exceeding 625 lines:	22	14
<b>8528 12 16</b>	- - - - - With a vertical resolution of less than 700 lines	22	14
<b>8528 12 18</b>	- - - - - With a vertical resolution of 700 lines or more - - - Apparatus incorporating a video recorder or reproducer:	22	14
<b>8528 12 22</b>	- - - - With a screen width/height ratio less than 1,5	22	14
<b>8528 12 28</b>	- - - - Other - - - - Other: - - - - With integral tube: - - - - - With a screen width-height ratio less than 1,5 with a	22	14

<sup>65</sup> Commission Regulation (EC) 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, 19.09.1996. See Exhibit TPKM-22.

	diagonal measurement of the screen		
8528 12 52	----- Not exceeding 42 cm	22	14
8528 12 54	----- Exceeding 42 cm but not exceeding 52 cm	22	14
8528 12 56	----- Exceeding 52 cm but not exceeding 72 cm	22	14
8528 12 58	----- Exceeding 72 cm ----- Other: ----- With scanning parameters not exceeding 625 lines, with a diagonal measurement of the screen	22	14
8528 12 62	----- Not exceeding 75 cm	22	14
8528 12 66	----- Exceeding 75 cm ----- With scanning parameters exceeding 625 lines:	22	14
8528 12 72	----- With a vertical resolution of less than 700 lines	22	14
8528 12 76	----- With a vertical resolution of 700 lines or more ----- Other: ----- With screen:	22	14
8528 12 81	----- With a screen width/height ratio less than 1,5	22	14
8528 12 89	----- Other ----- Without screen: ----- Video tuners	22	14
8528 12 92	----- Digital (including mixed digital and analogue)	22	14
8528 12 94	----- Other	22	14
8528 12 98	----- Other	22	14

106. On 31 October 2008, the EC published Commission Regulation (EC) No. 1031/2008<sup>66</sup> establishing the CN for 2009 together with the applicable conventional rate of duty. The structure concerning the relevant subheadings for STBs is the same as the one contained in the 2007 CN adopted by Commission Regulation No. 1549/2006 of 17 October 2006<sup>67</sup> and implementing into the EC legal order the HS 2007. As a result of the introduction of the HS 2007, the structure of heading 8528 had to be amended. The 2009 CN adopted by Commission Regulation (EC) No. 1031/2008 contains the following description with regard to headings 8521 and 8528 as far as they relate to STBs:

CN subheading	Description	Conventional Rate of duty
8521	<b>Video recording or reproducing apparatus, whether or not incorporating a video tuner:</b>	
8521 10	- <b>Magnetic tape-type:</b>	
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 (1)
8521 10 95	- - Other	8
8521 90 00	- Other	13.9

	<b>- Reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video</b>	
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<sup>66</sup> Commission Regulation (EC) No. 1031/2008. See Exhibit TPKM-21.

<sup>67</sup> Commission Regulation (EC) No. 1549/2006. See Exhibit TPKM-34.

	<b>recording or reproducing apparatus:</b>	
<b>8528 71</b>	-- <b>Not designed to incorporate a video display or screen:</b> --- Video tuners:	
<b>8528 71 11</b>	---- Electronic assemblies for incorporation into automatic data-processing machines	Free
<b>8528 71 13</b>	---- 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
<b>8528 71 19</b>	---- Other	14
<b>8528 71 90</b>	--- Other	14

### 3. MFMs

(1) Commission Regulation (EC) No. 517/1999<sup>68</sup>

107. On 9 March 1999, the EC published Commission Regulation (EC) No. 517/1999.

108. Item 1 of the Annex to this Commission Regulation classified the following product under CN subheading 8517.21.00:

“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.”

Classification takes place pursuant to GIR 1 and 6, Note 3 to Section XVI and Note 5(E) to Chapter 84. The principal function of the apparatus is considered to be that of faxing.

109. Item 2 of the Annex to this Commission Regulation classified the following product under CN subheading 9009.12.00 subject to 6% import duty:

“2. A multifunctional apparatus (so-called ‘digital copier’) capable of performing the following functions:

- scanning,
- printing,
- faxing,

<sup>68</sup> Commission Regulation (EC) No. 517/1999 of 9 March 1999, concerning the classification of certain goods in the Combined Nomenclature, OJ L 61, 10.03.1999, pp. 23-24. See Exhibit TPKM-35.

– 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).”

110. Classification takes place pursuant to GIR 1, 3(c) and 6 and also Note 5(E) to Chapter 84. The apparatus has several functions, none of which are considered to give the product its essential character.

(2) Commission Regulation (EC) No. 400/2006<sup>69</sup>

111. On 9 March 2006, the EC published Commission Regulation (EC) No. 400/2006.

112. Item 4 of the Annex to this Commission Regulation classified the following MFM under CN subheading 9009.12.00:

“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).”

113. Classification was determined by GIR 1, 3(c) and 6 and Note 5(E) to Chapter 84. The product has several functions none of which are considered to give the product its essential character.

(3) Statement of the Customs Code Committee, Tariff and Statistical Nomenclature Section, contained in the Report of Conclusions of its 360<sup>th</sup> Meeting<sup>70</sup>

114. From 26 January to 28 January 2005, the 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 and the clarification was reflected as attached in Annex VII of the Minutes of that meeting as follows:

“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

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<sup>69</sup> Commission Regulation (EC) No. 400/2006 of 8 March 2006, concerning the classification of certain goods in the Combined Nomenclature, OJ L 70, 9.03.2006, pp. 9-11. See Exhibit TPKM-36.

<sup>70</sup> Customs Code Committee – Tariff and Statistical Nomenclature Section, *Report of the Conclusions of the 360<sup>th</sup> meeting of the Committee*, TAXUD/555/2005-EN, Annex VII (March 2005). See Exhibit TPKM-32.

9009 as a photocopying apparatus.”

- (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

115. The CN for 1997<sup>71</sup> contained the following CN subheading for heading 8471, heading 8517 and heading 9009:

CN subheading	Description	Rate of duty	
		Autonomous	Conventional
<b>8471 50</b>	<b>- Digital processing units other than those of subheadings 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:</b>		
<b>8471 50 10</b>	- - For use in civil aircraft (1)	11	Free
<b>8471 50 90</b>	- - Other	11	3,5
<b>8471 60</b>	<b>- Input or output units, whether or not containing storage units in the same housing:</b>		
<b>8471 60 10</b>	- - For use in civil aircraft - - Other	11	Free
<b>8471 60 40</b>	- - - Printers	11	2
<b>8471 60 50</b>	- - - Keyboards	11	2
<b>8471 60 90</b>	- - - Other	11	2

CN subheading	Description	Rate of duty	
		Autonomous	Conventional
<b>8517</b>	<b>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: - Telephone sets; videophones</b>		
<b>8517 11 00</b>	- - Line telephone sets with cordless handsets	15	7,5
<b>8517 19</b>	- - Other:		
<b>8517 19 10</b>	- - - Videophones	22	14
<b>8517 19 90</b>	- - - Other - Facsimile machines and teleprinters :	15	7,5
<b>8517 21 00</b>	- - Facsimile machines	15	7,5
<b>8517 22 00</b>	- - Teleprinters	15	7,5
<b>8517 30 00</b>	- Telephonic or telegraphic switching apparatus	15	7,5

CN subheading	Description	Rate of duty	
		Autonomous	Conventional

<sup>71</sup> Annex I to Council Regulation (EEC) No. 2658/87 as amended by Commission Regulation No. 1734/96. See Exhibit TPKM-5.

<b>9009</b>	<b>Photocopying apparatus incorporating an optical system or of the contact type and thermo-copying apparatus: - Electrostatic photocopying apparatus:</b>		
<b>9009 11 00</b>	<b>- - Operating by reproducing the original image directly onto the copy (direct process)</b>	18	6,5
<b>9009 12 00</b>	<b>- - Operating by reproducing the original image via an intermediate onto the copy (indirect process) - Other photocopying apparatus:</b>	18	6,5
<b>9009 21 00</b>	<b>- - Incorporating an optical system</b>	18	6,5
<b>9009 22</b>	<b>- - Of the contact type:</b>		
<b>9009 22 10</b>	<b>- - - Blueprinters and diazocopiers</b>	15	3,8
<b>9009 22 90</b>	<b>- - - Other</b>	15	3,8
<b>9009 30 00</b>	<b>- Thermo-copying apparatus</b>	15	3,6

116. On 31 October 2008, the EC published Commission Regulation (EC) No. 1031/2008 amending Annex I to Council Regulation (EEC) No. 2658/87 for the year 2009.<sup>72</sup>
117. Commission Regulation (EC) No.1031/2008 confirms the changes in the CN already included for the first time by Commission Regulation No. 1549/2006 of 17 October 2006 as part of the HS 2007 implementation into the EC.
118. As a result of the introduction of HS 2007, heading 8443 was amended and its scope was broadened such as to include all printers, copying machines, and facsimile machines, as well as multifunctional machines. Heading 9009 no longer exists and the above products therefore no longer fall under heading 8471.
119. HS heading 8443 is structured as follows:

<b>84.43</b>	<b>Printing machinery used for printing by means of plates, cylinders and other printing components of heading 84.42; other printers, copying machines and facsimile machines, whether or not combined; parts and accessories thereof</b>
	- Printing machinery used for printing by means of plates, cylinders and other printing components of heading 84.42:
8443.11	-- Offset printing machinery, reel-feed
8443.12	-- Offset printing machinery, sheet-fed, office-type (using sheets with one side not exceeding 22 cm and the other side not exceeding 36 cm in the unfolded state)
8443.13	-- Other offset printing machinery
8443.14	-- Letterpress printing machinery, reel fed, excluding flexographic printing
8443.15	-- Letterpress printing machinery, other than reel fed, excluding flexographic printing
8443.16	-- flexographic printing machinery
8443.17	-- Gravure printing machinery
8443.19	-- Other
	- 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
8443.32	-- Other, capable of connecting to an automatic data processing machine or to a network
8443.39	-- Other
	- Parts and accessories
8443.91	-- Parts and accessories of printing machinery used for printing by means of plates, cylinders

<sup>72</sup> Commission Regulation (EC) No. 1031/2008. See Exhibit TPKM-21.

	and other printing components of heading 84.42
8443.99	-- Other

120. The EC has defined, as far as MFMs are concerned (HS subheading 8443.31) further categories at eight-digit level with the following applicable duty rate:

	- Other printers, copying machines and facsimile machines, whether or not combined:	Duty rate
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	0
	--- Other:	
8443.31.91	---- Machine performing a copying function by scanning the original and printing the copies by means of an electrostatic print engine	6
8443.31.99	---- Other	0

121. The EC has introduced a further distinction between the different types of MFMs incorporating an electrostatic print engine:

- MFMs which perform a fax function are subject to 6% customs duty in case they are able to copy more than 12 monochrome pages per minute.
- MFMs which perform a fax function are subject to 0% customs duty if they are able to copy 12 or less monochrome pages per minute.
- All MFMs which do not incorporate a fax function are subject to 6% customs duty and this irrespective of their copying speed.

### **III. ARGUMENTS**

#### **A. Article II of the GATT 1994: General Principles**

##### **1. The EC shall accord treatment to the products at issue no less favourable than that provided for in its Schedule**

122. 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.

123. In order to comply with the commitments undertaken as a signatory to the ITA, the EC modified its Schedule<sup>73</sup> committing itself to accord duty-free treatment to the products as described in Attachments A and B to the ITA, including, *inter alia*, the products at issue (FPDs, STBs and MFMs). Pursuant to Articles II:1(a) and (b) of the GATT 1994, the EC

<sup>73</sup> WT/Let/156. See Exhibit TPKM-2.

- must therefore refrain from according treatment less favourable than that provided for in its Schedule and, in particular, from imposing any customs duties on these products.
124. TPKM submits that the EC accords, 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 customs duties on certain FPDs, STBs and MFMs through the measures at issue instead of applying duty-free treatment on these as provided for in the EC Schedule. For certain FPDs, the EC makes the granting of a zero tariff upon importation subject to terms, conditions and qualifications not set forth in the EC Schedule. The EC thus violates its obligations under Articles II:1(a) and (b) of the GATT 1994.
125. In *EC – Chicken Cuts (Brazil)*, the Panel had to deal with a similar question. It considered that in determining whether or not the measures at issue are inconsistent with Article II:1(a) and Article II:1(b) of the GATT 1994, the following must be ascertained: (a) the treatment accorded to the products at issue under the EC Schedule; (b) the treatment accorded to the products at issue under the measures at issue and (c) whether the measures at issue result in less favourable treatment than that provided for in the EC Schedule and more specifically, whether those measures result in the imposition of duties and conditions on the products at issue in excess of those provided for in the EC Schedule.<sup>74</sup>
126. In the view of TPKM, the central element is that the products at issue are covered by the tariff concessions referred to in the EC Schedule. The key issue therefore revolves around the interpretation of the tariff concessions concerned. In that respect, before analyzing it for each product at issue in particular, we will in the following section, as a preliminary point, describe how TPKM considers that the interpretation of the relevant concessions within the EC Schedule should be made.
127. This dispute is not about customs classification but about tariff treatment as indicated by the title of this dispute, namely “tariff treatment of certain IT products”. The Panel is asked to decide on the scope of the EC tariff concessions and whether or not the EC measures at issue have resulted in an undue limitation of such scope. The Panel is as such not concerned with the question whether the classification adopted by the EC is correct or not. What is important is the tariff which applies as a result of such classification decision. Therefore, customs classification rules may certainly be helpful but can never be decisive for the above analysis. Indeed, customs classification rules have a different objective, namely to arrive at a uniform, harmonized, classification of all possible products and commodities. In order to achieve this, customs classification rules sometimes sacrifice accuracy in favour of expediency.
128. The most obvious example of the above is GIR 3(c) which classifies products under the heading with the highest heading number among those potentially applicable. Such arbitrary methodology is completely inappropriate to determine the precise scope of tariff concessions negotiated in the WTO. Therefore, classification measures based on the application of GIR 3(c) should be treated with the utmost care and suspicion in the context of the present dispute.

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<sup>74</sup> Panel Report, *EC – Chicken Cuts (Brazil)*, para. 7.65.

**2. Interpretation of the EC Schedule: Application of the principles of treaty interpretation as contained in the Vienna Convention on the Law of Treaties**

(1) General

129. Pursuant to Article II:2 of the WTO Agreement, the Agreements contained in its Annexes, including the GATT 1994, are integral parts of the WTO Agreement. Article II:7 of the GATT 1994 provides that the schedules annexed to the GATT 1994 are made an integral part of the GATT 1994. In other words, the concessions provided for in such schedules are part of the terms of the treaty, namely the GATT 1994.<sup>75</sup> Therefore, on the basis of Article II:7 of the GATT 1994 and Article II:2 of the WTO Agreement, concessions contained in the EC Schedule are treaty terms of the GATT 1994 and of the WTO Agreement. The content of the EC Schedule must thus be considered treaty language.
130. In terms of interpretation of treaties, TPKM recalls that Article 3.2 of the DSU lays down the rules for interpreting the terms contained in the covered agreements. Article 3.2 states that the Members recognize that the dispute settlement system of the WTO “serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law...” (emphasis added).
131. In other words, pursuant to Article 3.2 of the DSU, the GATT 1994 and other covered agreements must be clarified or interpreted in line with customary rules of interpretation of public international law. In this regard, it is well-established in the WTO jurisprudence that 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.<sup>76</sup> These provisions comprise the legal framework within which any interpretative exercise of language contained in the WTO covered agreements must take place.
132. Given that the EC Schedule is an integral part of the GATT 1994 and of the WTO Agreement and thus constitutes treaty language, the content of the concessions included in the EC Schedule must therefore be interpreted in accordance with Articles 31 and 32 of the *Vienna Convention*.<sup>77</sup>
133. Article 31 of the *Vienna Convention* reads as follows:
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.
  2. 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

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<sup>75</sup> Appellate Body Report, *EC – Computer Equipment*, para. 84.

<sup>76</sup> See, *inter alia*, Appellate Body Report, *US – Gasoline*, para. 17; Appellate Body Report, *India – Patents (US)*, para. 45; Appellate Body Report, *US – Shrimp*, para. 114.

<sup>77</sup> Panel Report, *EC – Bananas III (Article 21.5 – Ecuador II)*, para. 7.410.

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:
  - a. any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
  - b. any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
  - c. 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.

134. Article 32 of the *Vienna Convention* reads as follows:

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:

- a. leaves the meaning ambiguous or obscure; or
- b. leads to a result which is manifestly absurd or unreasonable

135. In a first section, TPKM will briefly address each of the elements of interpretation as referred to in the *Vienna Convention*. In a second section, TPKM will in particular examine the status of the Harmonized System.

(2) Interpretation elements under the Vienna Convention

(i) *Ordinary meaning (Article 31(1) of the Vienna Convention)*

136. In *US – Shrimp*, the Appellate Body clarified that treaty interpretation must begin with, and focus upon the text of the particular provision to be interpreted. It is in the words constituting the text of the particular provision, read in their context, that the object and purpose of the state parties to the treaty must first be sought.<sup>78</sup>

137. In the present case, TPKM will thus start with the analysis of the ordinary meaning of the concessions. As underlined by the Appellate Body, “dictionaries are a useful starting point for the analysis of ordinary meaning of a treaty term, but they are not necessarily dispositive. 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”.<sup>79</sup> The analysis of the ordinary meaning below may thus include, in addition to the analysis of the definitions of the terms being examined in various dictionaries, an analysis in the light of the surrounding circumstances of this case.

(ii) *Context (Article 31(1) and Article 31(2) of the Vienna Convention)*

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<sup>78</sup> Appellate Body Report, *US – Shrimp*, para. 114.

<sup>79</sup> Appellate Body Report, *EC – Chicken Cuts*, para. 175.

138. As part of the analysis under Article 31 of the *Vienna Convention*, TPKM will also analyse the “context” as defined in Article 31(1) and Article 31(2) of the *Vienna Convention*.

139. The chapeau of Article 31(2) of the *Vienna Convention* indicates that the text of the treaty, the terms of which are being interpreted, including its preamble and annexes, qualifies as “context” under Article 31(2) of the *Vienna Convention*. According to the Appellate Body in *EC – Chicken Cuts*, the context consists of the immediate as well as the broader context of the terms to be interpreted: the immediate context is the other terms of the product description contained in the tariff heading at issue and the broader context includes the other tariff headings in the relevant chapter of the Member’s Schedule, as well as other WTO Member Schedules.<sup>80</sup> TPKM will thus start the analysis of the “context” by analyzing the text of the treaty itself, including the other terms of the product description contained in the tariff headings at issue as well as the other tariff headings in the relevant chapter of the EC Schedule.

(iii) *Elements that must be taken into account together with the context: subsequent practice (Article 31(3) of the Vienna Convention)*

140. Subsequent agreements, practice or rules have to be examined together with the context to the extent that they are covered by Article 31(3)(a)(b) or (c) of the *Vienna Convention*.

141. Of specific relevance in this case is Article 31(3)(b) which provides that shall be taken into account together with the context “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.”

142. In *US – Gambling*, the Appellate Body clarified that in order to qualify as subsequent practice within the meaning of Article 31(3)(b) of the *Vienna Convention*, (i) there must be a common, consistent and discernible pattern of acts or pronouncements and (ii) these acts or pronouncements must imply agreement on the interpretation of the relevant provisions.<sup>81</sup>

(iv) *Object and Purpose (Article 31(1) of the Vienna Convention)*

143. According to Article 31(1) of the *Vienna Convention*, a treaty must be interpreted in the light of its object and purpose. The term “its object and purpose” makes it clear that the starting point for ascertaining “object and purpose” is the treaty itself in its entirety.<sup>82</sup> Since the concessions contained in the EC Schedule are treaty terms of the GATT 1994 and the WTO Agreement, it is necessary to examine the object and purpose of the WTO Agreement and the GATT 1994.

144. As noted by the Panel in *EC – Chicken Cuts (Brazil)*,

“the object and purpose of the WTO Agreement can be deduced from the preambles of the WTO Agreement and of the Agreements annexed thereto. The preamble of the WTO Agreement states that one of the purposes of the

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<sup>80</sup> Appellate Body Report, *EC- Chicken Cuts*, para. 193.

<sup>81</sup> Appellate Body Report, *US – Gambling*, para. 192.

<sup>82</sup> Appellate Body Report, *EC – Chicken Cuts*, para. 238.

Agreement is to 'expand [...] trade in goods and services'. It also states that Members should contribute to the above-mentioned expansion 'by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade'<sup>83</sup>.

In that same dispute, the Panel also underlined that "the security and predictability of the reciprocal and advantageous arrangements directed to the substantial reduction of tariffs and other trade barriers to trade" is an object and purpose of the WTO Agreement as well as of the GATT 1994.<sup>84</sup>

145. There appear to be two elements: on the one hand, the objective of "substantial reduction of tariffs and other barriers to trade" which is to be achieved through "mutually advantageous arrangements", and on the other hand, the objective of "security and predictability" of such reciprocal and advantageous arrangements.
146. For each of the products at issue, TPKM will analyse the object and purpose in the light of the above-mentioned principles.

(v) *Supplementary Means of Interpretation (Article 32 of the Vienna Convention)*

147. The means of interpretation listed in Article 32 of the *Vienna Convention* are supplementary means to be resorted to 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.<sup>85</sup> TPKM's analysis of the various concessions below will therefore include the examination of such supplementary means of interpretation.
148. Regarding the scope of supplementary means of interpretation to which an interpreter may have recourse under Article 32 of the *Vienna Convention*, the Appellate Body stated that Article 32 of the *Vienna Convention* does not define it exhaustively and thus 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.<sup>86</sup> As such, "supplementary means of interpretation" include the preparatory work of the treaty and the circumstances of its conclusion, but are not limited to these elements. They may also include other elements to the extent that they are useful to determine the common intentions of the parties.

(3) Other interpretative element relevant in this dispute - the Harmonized System

149. The concessions at stake in this dispute have been made on the basis of the Harmonized System 1996<sup>87</sup> in accordance with the commitments made in the ITA.<sup>88</sup> It is therefore appropriate to examine the relevance, if any, of the HS for the purpose of interpreting the

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<sup>83</sup> Panel Report, *EC – Chicken Cuts (Brazil)*, para. 7.318. See also Panel Report, *EC – Bananas III (Article 21.5 – Ecuador II)*, para. 7.431 and Panel Report, *China – Auto Parts*, paras. 7.699-7.770.

<sup>84</sup> Panel Report, *EC – Chicken Cuts (Brazil)*, para. 7.318.

<sup>85</sup> Appellate Body Report, *EC – Chicken Cuts*, par. 282. See also, Panel Report, *China – Auto-Parts*, para. 7.724.

<sup>86</sup> Appellate Body Report, *EC – Chicken Cuts*, para. 283.

<sup>87</sup> See WT/Let/156. See Exhibit TPKM-2.

<sup>88</sup> See ITA, point 2 (a) and Annex, para. 1.

concessions concerned in this case. In the paragraphs below, TPKM will first describe the HS, and second, address the issue of the relevance of the HS in interpreting the concessions contained in the EC Schedule.

a) *Description of the Harmonized System*

150. The Harmonized Commodity Description and Coding System, which is generally referred to as the “Harmonized System” or the “HS” is a multipurpose international product nomenclature developed by the World Customs Organization (“WCO”).
151. The HS is a structured nomenclature. The HS comprises around 1,200 headings which are grouped in 96 chapters, the latter being themselves arranged in 21 sections. Each heading of the HS is identified by a 4-digit code, the first two digits of which indicate the chapter which the heading belongs to, while the latter two digits indicate the position of the heading in the chapter. In addition, most of the headings are further subdivided into subheadings which are identified by a six-digit code. The HS comprises in total around 5,000 commodity groups which are identified by a six-digit code.
152. WCO Members are not prevented from establishing subdivisions classifying goods beyond the level of the HS, provided that any such subdivision is added and coded at a level beyond that of the six-digit numerical code.<sup>89</sup> In the EC, this is achieved through subheadings to the Combined Nomenclature or “CN subheadings” which are defined at eight digit level. The first six digits are the code numbers relating to the headings and subheadings of the HS. The seventh and eighth digits which appear in the CN identify the CN subheadings.

1	2									HS chapter
1	2	3	4							HS heading
1	2	3	4	5	6					HS subheading
1	2	3	4	5	6	7	8			CN subheading

153. When a heading or subheading of the HS is not further subdivided for Community purposes, the seventh and eighth digits are ‘00’.
154. The HS is arranged in a legal and logical structure, and is supported by well-defined rules to achieve uniform classification. The structure of the HS is as follows. It comprises: six General Rules for the Interpretation of the HS (“GIR”), Section and Chapter Notes and the list of headings arranged systematically and, where necessary, subdivided into subheadings.
155. The HS is used by more than 190 countries and economies as a basis of their customs tariffs and for the collection of international trade statistics. The EC became a contracting party to the HS on 22 September 1987. The United States and Japan are also contracting parties to the HS, however, TPKM is not a contracting party to the HS.
156. The HS entered into force on 1 January 1988, and has since been amended four times since 1988 in order to take account of changes in technology or in patterns of international trade. The first amendment took place in 1992, the second one in 1996, the

<sup>89</sup> HS, Article 3(3). See Exhibit TPKM-6.

- third one in 2002 and the last one in 2007. As noted above, the concessions made pursuant to the ITA by the EC are based on the HS 1996.
157. The HS is governed by the International Convention on the Harmonized Commodity Description and Coding System (the “HS Convention”). According to the HS Convention, “Harmonized System” is “the Nomenclature comprising the headings and subheadings and their related numerical codes, the Section, Chapter and Subheading Notes and the General Rules for the Interpretation of the HS”<sup>90</sup>. Pursuant to Article 3.1 of the HS Convention, the contracting parties must use the HS headings and subheadings at the 6-digit level without modification, apply the GIR and all the Section, Chapter and Subheading Notes and not modify the scope of the Sections, Chapters, headings or subheadings of the HS and must follow the numerical sequence of the HS.
158. The HS Convention provides that, in order to ensure the uniform interpretation of the HS, the WCO may issue explanatory notes (“HSEN”) and classification opinions (“WCO Opinions”). However, these HSEN and WCO Opinions are not part of the HS itself. They are only “guides to the interpretation of the HS” and are thus not legally binding.
159. According to Article 7(1)(b) of the HS Convention, it is the Harmonized System Committee (the “HS Committee” or the “HSC”) which deals with the preparation of HSEN and WCO opinions.<sup>91</sup> Indeed, the HSC has among its functions the preparation of HSEN, WCO Opinions and other advice as guides to the interpretation of the HS.
160. The HSC meets twice a year. In the HSC, each contracting party has the right to one vote.<sup>92</sup> Decisions in the HSC are taken by a simple majority of the votes cast by the Members of the Committee.<sup>93</sup>
161. Decisions concerning the interpretation and application of the HS, such as classification decisions and amendments to the HSEN or to the Compendium of WCO Opinions are deemed approved by the WCO Council if, not later than the end of the second month following the month during which the session of the HSC which approved them was closed, no contracting party has notified the Secretary General that it requests that such matter be referred to the WCO Council.<sup>94</sup> In other words, decisions taken by the HSC are adopted by a simple majority but only become effective two months after the approval by that Committee if no “reservation” has been made by any WCO Member.
162. In other words, any contracting party that disagrees with a classification decision or an amendment to HSEN that has been voted by the HSC may enter a “reservation”, by requesting the Secretary General that the matter be referred either to the WCO Council or directly back to the HSC for re-examination at its next session.<sup>95</sup> In such a case, the decision or amendment to an HSEN will not become effective even though it has been voted by the HSC.

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<sup>90</sup> HS, Article 1 (a).

<sup>91</sup> HS, Article 7.1(b).

<sup>92</sup> HS, Article 6(4).

<sup>93</sup> Rules of Procedure of the HSC, Rule 19.

<sup>94</sup> HS, Article 8 and Rules of Procedure of the HSC Rule 20.

<sup>95</sup> See Council Decision No. 298 on the “Procedure for Re-examination of Certain Matters by the Harmonized System Committee”.

163. In case the matter is referred to WCO Council, “the Council shall approve such explanatory Notes, Classification Opinions, other advice or recommendations, unless any Council Member which is a Contracting Party to this Convention requests that they be referred in whole or part to the Committee for re-examination”.<sup>96</sup>
164. Finally, The ECJ has stated in its case law that, even though they are not normally binding in EC law, HSEN and WCO Opinions are important aids in the interpretation of the CCT.<sup>97</sup> Nevertheless, the ECJ has also found that an interpretation of the HS approved by the WCO Council is binding on the EC when it reflects general practice followed by the EC member States, unless it is incompatible with the wording of the heading concerned or goes manifestly beyond the discretion conferred on the WCO.<sup>98</sup>

b) *Relevance of the HS for the interpretation of the EC Schedule*

165. In *EC – Chicken Cuts (Brazil)*, the Panel considered that the HS was relevant to the interpretation of concessions contained in the EC Schedule. This has been confirmed on appeal by the Appellate Body which stated that it considered that “the Harmonized System is relevant for purposes of interpreting tariff commitments in the WTO Members’ Schedules”.<sup>99</sup>
166. More recently, the Appellate Body held<sup>100</sup>:

“The negotiators of the WTO Agreement used the Harmonized System as the basis for negotiating Members’ Schedules of Concessions, and included express references to the Harmonized System in certain covered agreements for purposes of defining product coverage of those agreements or specific provisions thereof. It 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 and for defining the product coverage of certain covered agreements.”

167. The Appellate Body also held that<sup>101</sup>:

“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.”

168. Therefore, existing case-law confirms that the HS is also relevant for the purposes of interpreting and clarifying the meaning and scope of the terms contained in the

<sup>96</sup> HS, Article 8(3).

<sup>97</sup> Case C-396/02, *DFDS BV v Inspecteur der Belastingdienst - Douanedistrict Rotterdam*, [2004] ECR I-8439, para. 28 attached as Exhibit TPKM-37; Case 14-70, *Deutsche Bakels, GmbH v Oberfinanzdirektion München*, [1970] ECR 1001, paras 9-10, attached as Exhibit TPKM-38. .

<sup>98</sup> Case C-233/88, *Gijs van de Kolk – Douane Expéditeur BV v Inspecteur der Invoerrechten en Accijnzen*, [1990] ECR I-265, para. 9. See Exhibit TPKM-7.

<sup>99</sup> Appellate Body Report, *EC – Chicken Cuts*, para. 199.

<sup>100</sup> Appellate Body Report, *China – Auto parts*, para. 149.

<sup>101</sup> Appellate Body Report, *China – Auto parts*, para. 151.

concessions which are being examined in the present case.

169. However, it is important to note that the HS itself, according to the definition which is included in the HS Convention,<sup>102</sup> only comprises (i) the headings and subheadings and their related numerical codes, (ii) the Section, Chapter and Subheading Notes and (iii) the GIR of the HS. Explanatory notes and classification opinions are not part of the HS itself. As a result, the Panel should be very cautious when reviewing explanatory notes (HSEN) or classification opinions (WCO Opinion) in the context of the interpretation of the concessions, and should give only minor importance, if any, to such notes and opinions. In particular, HSEN and WCO opinions should not be taken into account for the interpretation of the concessions if they are inconsistent with the wording of the HS itself.
170. Finally, it should be noted that the concessions that we are looking at in this case have been made pursuant to the ITA and are based on the HS 1996. Therefore, within the above limits, it is the HS 1996 that is relevant for the purposes of the interpretation of the concessions that are being examined.
171. The HS has been updated and modified twice since 1996: in 2002 and 2007. While subsequent versions of the HS may be useful to confirm the correct interpretation of the tariff concessions as “supplementary means of interpretation” pursuant to Article 32 of the *Vienna Convention*, they cannot be used such as to modify the scope of the tariff concessions. This is particularly true in the present case where TPKM is not a WCO Member, and by acceding to the ITA, it only expressed at the time its acceptance of the use of the HS 1996. That acceptance cannot be implicitly extended to any subsequent version of the HS.

**B. 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. Treatment of the products at issue**

172. This claim concerns the treatment given by the EC to imports of certain FPDs. Through the challenged measures which are described in paras. 66-89, the EC is imposing customs duties on certain FPDs, instead of providing duty-free treatment as required by the EC Schedule.
173. In light of the above, TPKM considers that its commerce has been accorded treatment less favourable than that provided in the EC Schedule, and that ordinary customs duties, or other duties and charges, in excess of those set forth in the EC Schedule have been applied to FPDs, 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 Article XXIII of the GATT 1994, benefits accruing, directly or indirectly, to TPKM.

(1) Treatment in the EC Schedule

174. Two concessions are relevant as far as FPDs are concerned.

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<sup>102</sup> HS, Article 1.

175. The first concession on “flat panel display devices” has been made by the EC in its Schedule in accordance with Attachment B to the ITA<sup>103</sup> 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 ... shall be bound and eliminated, as set forth in paragraph 2(a) of the Annex to the Declaration, wherever the product is classified”.

176. Flat panel display devices were included in Attachment B of the ITA. The Schedule also contains a list stating where the EC classified FPDs at the time it made the ITA concession, as follows:

Description	HS
Flat panel display devices (including LCD, Electro Luminescence, Plasma, Vacuum-Fluorescence and other technologies) for products falling within this agreement, and parts thereof	84716090, 84733010, 84733090, 85312030, 85312051, 85312059, 85312080, 85318030, 85319010, 85319030, 90138011, 90138019, 90138030, 90139010

177. Second, the EC Schedule contains the following concession with respect to “input or output units” of ADP machines under tariff line 8471.60.90: 0%.

HS96	Description	Base rate	Bound rate	Implementation	Present concession established	INR	Concession first incorporated in a GATT Schedule	Earlier INRs	OD Cs
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								
	-- Other								
8471 60 40	--- Printers	2	0.0	1999	WT/Let				0.0
8471 60 50	--- Keyboards	2	0.0	1999	WT/Let				0.0
8471 60 90	--- Other	2	0.0	1999	WT/Let				0.0

178. With respect to both concessions, the applicable treatment is duty-free.

<sup>103</sup> WT/Let/156. See TPKM-2.

(2) Treatment under the measures at issue

179. The EC imposes on certain FPDs a 14% customs duty by classifying them under CN subheading 8528.21.90 (that has become CN subheading 8528.59.90 as of 1 January 2007 with the implementation of the HS 2007) by means of Commission Regulation (EC) No. 634/2005, Commission Regulation (EC) No. 2171/2005, EN 2008/C 133/01 as well as Council Regulation (EEC) No. 2658/87 as last amended. These are the measures at issue.
180. The EC justifies that classification on the ground that those FPDs have certain features, including DVI or other connectors, which enable them to receive or display signals both from an ADP machine and other sources, such as a closed circuit television system, a DVD player, a digital camera or a camcorder. As a result, the EC concludes that those FPDs would not be of a kind solely or principally used with an ADP system. Therefore, such FPDs are excluded from the zero tariff rate under CN subheading 8471.60.80.<sup>104</sup> As shown below, the EC has repeatedly emphasized that FPDs can only be classified under heading 8471 on the condition that they are capable of accepting a signal *only* from an ADP machine.<sup>105</sup>
181. With the implementation of the HS 2007, all FPDs will be classified under Heading 8528 and excluded from Heading 8471. Products classified previously under CN subheading 8528.21.90 are now classified under CN subheading 8528.59.90 and products classified under CN subheading 8471.60.80 are now classified under CN subheading 8528.51.00. The analysis below refers to the headings applicable at the time the concessions were made by the EC (i.e., before 1 January 2007). The table below reproduces the correlation of CN subheadings applicable to the product concerned during the relevant period:

<i>Until 31 December 2005</i>	<i>1 January 2006 to 31 December 2006</i>	<i>1 January 2007 to present</i>
8471.60.90	8471.60.80	8528.51.00
8528.21.90	8528.21.90	8528.59.90

182. It should however be noted that the principles invoked by the EC to exclude FPDs from the 0% customs duty before or after the implementation the HS 2007 are the same. FPDs concerned in this dispute are excluded from the 0% tariff subheading if they can reproduce signals from a source other than an ADP machine, also under the EC measures applicable after 1 January 2007.

<sup>104</sup> CN subheading 8471.60.80 applied as from 1 January 2006. The equivalent CN subheading applicable until 31 December 2005 was CN subheading 8471.60.90.

<sup>105</sup> CNEN of the European Communities, 2008/C 133/01, OJ C 133, 30.05.2008, pp. 352-3. See TPKM-23.

183. Council Regulation (EC) No. 493/2005<sup>106</sup> temporarily suspended the application of customs duties on certain FPDs until 31 December 2006. The duty suspension was prolonged until 31 December 2008 by Council Regulation (EC) No. 301/2007.<sup>107</sup> However, such suspension is temporary and conditional and may be terminated unilaterally as soon as the EC considers that the conditions for its continuation are no longer fulfilled. The duty suspension actually expired on 31 December 2008. The EC Commission has forwarded a proposal to grant a further suspension to the EU Council.<sup>108</sup> However, there are various types of FPDs that fall outside the scope of the duty suspension and are therefore subject to payment of customs duties.

(3) Treatment under the measures at issue is less favourable than the treatment in the EC Schedule

184. In its Schedule, the EC bound duty-free tariff treatment for all imports of flat panel displays devices and input or output units of ADP machines. By imposing a 14% customs duty on the products at issue, the EC accords a treatment that is clearly less favourable than the treatment of the EC Schedule. The temporary suspension of the customs duties does not lead to a different conclusion since such suspension is temporary and conditional. In addition, there are various types of FPDs which fall outside of the scope of the duty suspension and therefore remain subject to customs duty.

185. The Panel will have to determine the scope of the concessions at stake. In TPKM's view, the EC's exclusion of certain FPDs from classification under heading 8471 or any other applicable heading subject to a zero tariff, such as heading 8531 or heading 9013, constitutes treatment less favourable than that provided for in the EC Schedule. More concretely, the question at issue is whether FPDs with certain connectors, such as DVI, enabling them 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.

186. TPKM submits that those FPDs classified under heading 8528 by the EC measures at issue are to be considered as "flat panel display devices" covered by Attachment B of the ITA as incorporated in the EC schedule, and are in many cases also covered by the concession on "input or output units" of ADP machines under heading 8471. Therefore, they must be granted duty-free treatment in accordance with the EC Schedule. It follows that the EC violates its obligations under Article II of the GATT 1994 in excluding from the coverage of the zero tariff those FPDs capable of receiving signals from both an ADP machine and other sources.

187. Before analyzing the scope of the concessions at issue in accordance with the principles of treaty interpretation included in the *Vienna Convention*, TPKM first provides an overview of the background of the measures at issue concerning FPDs.

**2. Background of the measures at issue**

(1) Tariff classification

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<sup>106</sup> Council Regulation (EC) No. 493/2005. See TPKM-25.

<sup>107</sup> Council Regulation (EC) No. 301/2007. See TPKM-26.

<sup>108</sup> Please see paragraph 89.

188. The summary below describes the gradual process adopted by the EC to reclassify FPDs under CN subheadings subject to duties, instead of under the zero tariff resulting from the relevant concessions of the EC contained in its Schedule. The process started first with plasma FPDs. The principles followed by the EC to reclassify plasma FPDs under dutiable headings were then applied to LCD FPDs, leading to the measures concerned in this dispute.
189. The tariff classification of plasma FPDs was first put on the agenda of the Customs Code Committee meeting of April 2003.<sup>109</sup>
190. In December 2003, the Customs Code Committee agreed to classify plasma FPDs with a DVI connector under heading 8528.<sup>110</sup> The EC Commission took the view that plasma FPDs with a DVI could reproduce signals from a source other than an ADP machine. As a result, they were excluded from heading 8471. In other words, heading 8471 was reserved for FPDs which could *only* reproduce signals from an ADP machine. This classification measure was published in April 2004 as Commission Regulation (EC) No. 754/2004.<sup>111</sup>
191. Following the adoption of the classification regulation, Dutch Customs authorities took the view that LCD FPDs with a DVI connector should also be classified by analogy with plasma FPDs under heading 8528. As a result, the Netherlands terminated their consistent practice of classifying LCD FPDs under heading 8471 in 2004 and reclassified LCD FPDs under heading 8528 subject to a 14% tariff. This change in practice was motivated by reference to the reclassification of plasma FPDs adopted by the EC Commission.
192. The discrepancies between EC member States in the tariff classification of LCD FPDs obliged the EC Commission to put this item on the agenda of the Customs Code Committee April 2004 meeting, where no conclusion was reached.<sup>112</sup>
193. In July 2004, the Customs Code Committee adopted the following “statement” that is intended to clarify the classification of LCD FPDs:

“[u]nless an importer can demonstrate that a monitor is only for use with an ADP machine or to be used as an indicator panel (heading 8531), it has to be classified in heading 8528”.<sup>113</sup>

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<sup>109</sup> Customs Code Committee – Tariff and Statistical Nomenclature Section (Mechanical/Miscellaneous), *Agenda of the 310<sup>th</sup> Meeting of the Committee to be held from 28 to 30 April 2003*, Item 4.7 “Plasma monitors”. See Annex Exhibit TPKM-39.

<sup>110</sup> Customs Code Committee – Tariff and Statistical Nomenclature Section (Mechanical/Miscellaneous), *Extract of the Minutes of the 329<sup>th</sup> Meeting of the Committee held on 8 and 10 December 2003*, point 2.6. See Exhibit TPKM-40.

<sup>111</sup> Commission Regulation (EC) No. 754/2004, of 21 April 2004, concerning the classification of certain goods in the Combined Nomenclature, OJ L118, 23.04.2004, p. 32. See Exhibit TPKM-41.

<sup>112</sup> Customs Code Committee – Tariff and Statistical Nomenclature Section (Mechanical/Miscellaneous Sector), *Conclusions of the 340<sup>th</sup> meeting of the Committee held from 19 to 21 April 2004*, point 3.1. See Exhibit TPKM-42.

<sup>113</sup> Customs Code Committee – Tariff and Statistical Nomenclature Section (Mechanical/Miscellaneous Sector), *Conclusions of the 346<sup>th</sup> meeting of the Committee held from 30 June to 2 July 2004*, Item 3.16. See Exhibit TPKM-43.

194. The July 2004 Committee also agreed on the classification of plasma FPDs with a slot-in under heading 8528. Plasma FPDs with a slot-in can only reproduce signals from an ADP machine at the time of importation. However, an interface board can be added after importation to enable the FPD to reproduce signals from other sources. This measure was published in December 2004 as item 4 of Commission Regulation (EC) No. 2147/2004.<sup>114</sup>
195. Some EC member States did not follow the Customs Code Committee's Statement and continued their existing practice of classifying LCD FPDs under CN subheadings subject to a zero tariff. The Chairman of the Customs Code Committee had to remind all EC member States during the September 2004 meeting of the Customs Code Committee that the Statement should be implemented by all customs authorities:

“[a]ll MS were advised to make sure they follow the line agreed in the 346th meeting (see point 3.16)”<sup>115</sup>

196. It is only after strong insistence from the EC Commission that some EC member States such as the UK finally decided to change their practice and to start complying with the Customs Code Committee's Statement. The UK Customs Authorities published on their website a Tariff Notice 13/04 which stated that LCD FPDs with a DVI connector would be classified under heading 8528 and that heading 8471 was now limited to FPDs that could *only* reproduce signals from an ADP machine.<sup>116</sup> This classification would be applicable as of 1 October 2004. The Tariff Notice made it very clear that this classification represented a change of UK classification practice insofar as certain LCD FPDs with a DVI connector were previously classified under heading 8471 subject to a zero tariff.
197. Moreover, the minutes of the Customs Code Committee meeting held in November 2004 similarly demonstrate the strong opposition that the EC Commission faced in changing an otherwise well-established tariff classification practice under heading 8471. The EC Commission had to threaten EC member States with additional measures to ensure that they would change their classification practice:

“4. Invalidation of certain binding tariff information

Commission is preparing decisions invalidating incorrect BTIs.

Following a lengthy debate on methodology in issuing and revoking/annulling BTIs, the chair took note of the views expressed. The BTI sector will be informed of the different methods, some of which seem to conflict with the jurisprudence of the ECJ and EC law.

5. Launching infringement procedures

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<sup>114</sup> Commission Regulation (EC) No. 2147/2004, of 16 December 2004, concerning the classification of certain goods in the Combined Nomenclature, OJ L 370, 17.12.2004, p.19. See TPKM-44.

<sup>115</sup> Customs Code Committee – Tariff and Statistical Nomenclature Section (Mechanical/Miscellaneous Sector), *Conclusions of the 350<sup>th</sup> meeting of the Committee held on 20 September 2004*, point 3.7. See Exhibit TPKM-45.

<sup>116</sup> HM Customs & Excise, *Tariff Notice 13/04: Tariff Classification of LCD Monitors Incorporating a Digital Visual Interface (DVI) Connector*, attached as Exhibit TPKM-46.

MS were advised that the Commission services will be initiating infringement procedures when MS do not act in accordance with their obligations under the Treaty. This would include the case where one (or more MS) are found, in a consistent manner, to maintain and/or issue incorrect BTIs.”<sup>117</sup>

198. In November 2004, Dutch Customs decided to change its classification practice again from heading 8528 (14%) back to heading 8471 (0%).<sup>118</sup> Certain LCD FPDs with a DVI connector would be classified *retroactively* again under heading 8471. The new approach was motivated by the loss of imports of LCD FPDs in the Netherlands due to the fact that they had been rerouted to other EC member States that were still allowing customs clearance under heading 8471. The Dutch Customs newsletter expressly mentions, for instance, Belgium. The Dutch Secretary of Finance announced that LCD FPDs with a DVI connector fulfilling certain criteria would be classified under heading 8471. For all practical purposes, Dutch Customs was reverting to its previous practice of classifying LCD FPDs under heading 8471. The criteria applied by Dutch customs were the following:

- The monitors are equal or smaller than 20 inch (ratio approx. 4:3); (Wide screens are excluded);
- No other connection than VGA and/or DVI. Audio connection is allowed;
- No remote control available;
- No infra-red sensor on the monitor for a remote control;
- No provisions allowing using the monitor as a TV or video monitor after importation, e.g. slot-in type;
- No provisions for channel selection or other provisions which indicate the use as TV or video monitor;
- The monitor should support VESA standards;
- The possibility to adjust the monitor.
- Monitors should not support the HDCP standard;
- The way how the monitors are presented in brochures.

199. The discrepancies in the classification of LCD FPDs and the refusal by some EC member States to implement the Customs Code Committee’s Statement led the Committee to adopt a separate classification measure for LCD FPDs. The Customs Code Committee adopted in January 2005 a measure classifying LCD FPDs with an S-video (Y/C) connector under the heading 8528.<sup>119</sup> This is one of the measures challenged in this dispute.

200. In February 2005, Germany published a national Explanatory Note to the Combined Nomenclature classifying LCD FPDs of all sizes with a DVI under the heading 8471.<sup>120</sup> German Customs reconfirmed that they supported the classification of LCD FPDs of all

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<sup>117</sup> Customs Code Committee – Tariff and Statistical Nomenclature Section (Mechanical/Miscellaneous Sector), *Conclusions of the 354<sup>th</sup> meeting of the Committee held on 11 and 12 November 2004*, point 6 “Monitor Issue”. See Exhibit TPKM-47.

<sup>118</sup> Douanenieuws (Customs Newsletter) of 22 November 2004. See Exhibit TPKM-48.

<sup>119</sup> Commission Regulation (EC) No. 634/2005.

<sup>120</sup> VSF-Nachrichten of 25 February 2005 in: *Vorschriftensammlung der Bundesfinanzverwaltung N 22 2005*. See Exhibit TPKM-49.

- sizes with a DVI under the heading 8471.
201. Dutch Customs published in July 2005 a Royal Decree containing the criteria for classification of LCD FPDs with a DVI connector under the heading 8471.<sup>121</sup> The Decree included the criteria that had already been announced in November 2004 by the Secretary of Finance.
202. The Customs Code Committee approved in December 2005 another classification measure which classified a number of LCD FPDs under heading 8528.<sup>122</sup> This is one of the measures challenged in this dispute.
203. The Dutch Royal Decree was officially revoked by a Decree of the State Secretary of Finance of 21 April 2006 with retroactive effect as of 18 January 2006.<sup>123</sup>
204. The Customs Code Committee adopted during its meeting of 18 – 20 October 2006 a new CNEN to CN subheading 8471.60.80 and CN subheadings 8528.21.14 to 8528.21.90. This CNEN clarified which FPDs must be classified under heading 8471 and which FPDs must be classified under heading 8528. The EC Commission emphasized again that monitors of heading 8471 can *only* reproduce signals from the central processing unit of an ADP machine. This CNEN was published in the Official Journal of the European Union on 30 December 2006.<sup>124</sup> The CNEN was included in the consolidated version of the CNEN published in 2008.<sup>125</sup> This consolidated CNEN is one of the measures challenged in this dispute.
205. This CNEN was adopted to ensure the uniform classification of LCD FPDs following the Appellate Body Report in *EC – Selected Customs Matters* which confirmed the Panel Report finding that:
- “The tariff classification of liquid crystal display monitors with digital video interface amounts to non-uniform administration within the meaning of Article X:3(a) of the GATT 1994. Therefore, the Panel finds a violation of Article X:3(a) of the GATT 1994 with respect to the tariff classification of liquid crystal display monitors with digital video interface”.<sup>126</sup>
206. The Panel had noted a possible discrepancy between the requirement of “sole or principal” use as a classification criterion in the legal reasoning of the LCD FPDs regulations on the one hand, and the requirement for “exclusive” use with an ADP machine for a classification under heading 8471 as required by the Customs Code Committee’s statement on the other hand. The CNEN published in December 2006 was intended to clarify this issue to avoid any possible non-uniform application. The CNEN

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<sup>121</sup> Douanerechten. Indeling van bepaalde LCD monitoren in de gecombineerde nomenclatuur; Besluit van 8 juli 2005, nr. CPP2005/1372M. See Exhibit TPKM-50.

<sup>122</sup> Commission Regulation (EC) No. 2171/2005. See Exhibit TPKM-20.

<sup>123</sup> Douanerechten. Indeling in de Goederennomenclatuur van bepaalde LCD-monitoren; Besluit van 21 April 2006, nr. CPP2006/915M. See Exhibit TPKM-51.

<sup>124</sup> Uniform Application of the CN, 2006/C 332/05, OJ 2006 C 332, 30.12.2006, p.7. See Exhibit TPKM-24.

<sup>125</sup> Explanatory Notes to the CN of the European Communities, OJ 2008 C 133, 30.05.2008, p.1. See Exhibit TPKM-23.

<sup>126</sup> Panel Report, *EC – Selected Customs Matters*, para. 7.355.

- confirmed that a classification of an LCD FPDs as a computer monitor subject to a zero tariff was only possible where the monitor could *only* be used with a computer.
207. On 19 February 2009, the ECJ delivered its ruling in *Kamino*<sup>127</sup>. The case dealt with the customs classification of FPDs using LCD technology where such FPDs are not for exclusive use with ADP machines. The ECJ rejected all the arguments raised by the EC Commission in favour of an interpretation which would exclude FPDs from heading 8471 where the FPDs could also be used with apparatus other than ADP machines.
208. The ECJ ruled that the “*solely or principally*” requirement in Note 5(B)(a) to Chapter 84 cannot be interpreted as precluding a classification under Heading 8471 of all FPDs that can display signals not only from an ADP machine but also from other sources. An interpretation such as the one supported by the Commission cannot be accepted because it would amend the scope of Note 5(B)(a) to Chapter 84. This Note does not require “*exclusive*” use with an ADP machine for a classification under Heading 8471. The ECJ also confirmed that any CNEN and HSEN that would require exclusive use with an ADP machine for a classification under Heading 8471 is inapplicable, since it would modify the scope of Note 5(B)(a) to Chapter 84. Finally, the ECJ confirmed that the type of connectors present on an FPD cannot be decisive in determining the tariff classification of FPDs. An FPD may include connectors such as S-video, DVI, composite-video, or any other connector that allows use with a device other than an ADP machine, and still be classified under Heading 8471.
209. The ECJ, therefore, concluded that:
- “classification of monitors such as those at issue in the main proceedings in subheading 8471 60 90, as units of the kind used ‘principally’ in an automatic data-processing system within the meaning of Note 5(B)(a) to Chapter 84 of the CN 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.”<sup>128</sup>

(2) Duty suspension

210. In parallel with the discussions on the tariff classification of FPDs, the EC Commission also considered the adoption of a duty suspension for certain LCD FPDs.
211. The EC Commission proposal to the EC Council explains the background to this duty suspension:

“A recent challenge is the classification of video monitors. Heading 8528 in the CCT covers more than television sets. It is, moreover, the main heading for video monitors. Classification outside that heading, for example in headings 8471 and 8531, requires that certain conditions, based on objective and quantifiable data, are met. With the current trend in industry, whether IT or consumer electronics,

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<sup>127</sup> Case C-376/07, *Staatssecretaris van Financiën v Kamino International Logistics BV*, judgment of 19 February 2009, in particular paras 42 to 57, attached as Exhibit TPKM-52.

<sup>128</sup> Case C-376/07, *Staatssecretaris van Financiën v Kamino International Logistics BV*, judgment of 19 February 2009, para. 51. See Exhibit TPKM-52.

to manufacture multi-purpose monitors, it is becoming impossible to determine, by reference to simple technical characteristics, the main purpose of a particular monitor. This is a trend recognised by the Commission services, most Member States and the relevant European Federation, EICTA. Thus, most video monitors (other than the cathode ray tube type) are likely to be classified in heading 8528 under one of the codes associated with a 14% rate of duty, even in those cases where the monitors are actually imported or used after importation with personal computers.”<sup>129</sup>

212. The duty suspension which was published in the form of Council Regulation (EC) No. 493/2005<sup>130</sup> was applicable as of 1 January 2005 until 31 December 2006. The duty suspension covered “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” under Taric<sup>131</sup> code 8528.21.90.30. The duty suspension was thus applicable to LCD FPDs of 19” and less.

213. Recital 3 of this Council Regulation acknowledged that monitors of 19” or less were indeed

“mainly used as output units of automatic data-processing machines. However, such monitors are frequently also capable of reproducing video images from a source other than an automatic data-processing machine and therefore do not meet the condition of being solely or principally for use with such machines. Such monitors are therefore not covered by the Agreement on trade in information technology products.”

Although some monitors met the condition of being solely or principally for use with an automatic data processing machine, their classification as computer monitors was excluded only because they could not be used exclusively with a computer.

214. The duty suspension was prolonged by Council Regulation (EC) No. 301/2007 for the time period from 1 January 2007 to 31 December 2008.<sup>132</sup> Recital 4 of this Council Regulation emphasises how the duty suspension is adopted because it is in the “interest of the Community”:

“On consumer benefit grounds, to ensure rational development of production and an expansion of consumption within the Community and to promote trade between Member States and third countries, it is in the interest of the Community to extend the current autonomous duty suspension for certain types of monitors classified under CN subheading 8528 59 90 for another two years from 1 January 2007.”

215. The duty suspension which is applicable until the end of 2008 has expired. The EC Commission has forwarded a proposal to grant a further suspension to the EC Council<sup>133</sup>.

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<sup>129</sup> Proposal for a Council Regulation amending Annex I to Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff (COM (2005) 2 final, 12.01.2005). See Exhibit TPKM-53.

<sup>130</sup> Council Regulation (EC) No. 493/2005 amending Annex I to Regulation (EEC) No. 2658/87.

<sup>131</sup> For further information on Taric code, please refer to para. 47. See TPKM-25.

<sup>132</sup> Council Regulation No. 301/2007. See TPKM-26.

<sup>133</sup> Please refer to para. 89 above concerning the EC Commission proposal for renewal.

**3. The EC Schedule incorporates Attachment B to the ITA which obliges the EC to grant duty-free treatment to Flat Panel Display Devices for products falling within the ITA**

216. A number of previous WTO disputes touched upon the issue as to whether a Member's tariff treatment of a product at issue is consistent with its Schedule. Panels<sup>134</sup> and the Appellate Body<sup>135</sup> in those disputes were usually requested to clarify whether specific terms of the concessions contained in that Member's Schedule covered the products at issue. For the purpose of resolving those disputes, panels and the Appellate Body used the principles of interpretation that are included in the *Vienna Convention* to determine the scope of these concessions.
217. The principles of treaty interpretation contained in the *Vienna Convention* will also be relevant and useful for the interpretation of the concessions in the framework of the present case. It is however important to emphasize once again that the present dispute is not a dispute on how FPDs must be classified but whether the treatment applied by the EC with respect to FPDs is consistent with its Schedule.
218. In order to implement its commitments under the ITA, the EC modified its Schedule and included in its Schedule a head-note stating 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 to the ITA includes "flat panel display devices (including LCD, Electro Luminescence, Plasma, Vacuum-Fluorescence and other technologies) for products falling within this agreement, and parts thereof".
219. It follows from the foregoing that 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, it is not relevant for this dispute whether a FPD is classified under a specific subheading in the EC's Schedule or whether a specific subheading includes this product. On the contrary, this dispute is concerned only with what the scope of "flat panel display devices" as referred to in the EC Schedule is. In case a product at issue falls within the definition of "flat panel display devices", this product must be granted zero tariff treatment regardless of its classification in the EC Schedule or the Common Customs Tariff.
220. The question before the Panel is therefore 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 which may allow use of the FPD with a source

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<sup>134</sup> Panel Report, *EC – Chicken Cuts (Brazil)*,

<sup>135</sup> Appellate Body Report, *EC – Chicken Cuts*; Appellate Body Report, *EC – Computer Equipment*.

other than an ADP machine. The Panel must decide whether the EC can limit the scope of the FPDs covered by the concession to those that can *only* be used with an ADP machine. The Panel will need to determine if the treatment granted by the EC as a result of such exclusion is less favourable than that provided for in the EC Schedule. Those questions will be examined below in the light of Articles 31 and 32 of the *Vienna Convention*.

(1) Ordinary meaning

221. FPDs are high-tech products. Therefore, beyond general dictionaries, certain dictionaries specialised in the terminology of the IT sector may be relevant to examining the terms “flat”, “panel”, “display” and “devices”.

222. We start the exercise with the ordinary meaning of “flat panel display devices” as found in the *New Shorter Oxford English Dictionary*.

223. The *New Shorter Oxford English Dictionary* defines “**flat**” as (adjective and adverb): “(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. (Electronics) Uniform in behaviour over a given range of frequencies; responding equally to signals of all frequencies.”<sup>136</sup>

224. The *New Shorter Oxford English Dictionary* defines “**panel**” as (noun): “(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.”<sup>137</sup>

225. The *New Shorter Oxford English Dictionary* defines “**display**” as (noun): “(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.”<sup>138</sup>

226. The *New Shorter Oxford English Dictionary* defines “**devices**” as (noun): “a thing designed for a particular function or adapted for a purpose; an invention, a contrivance.”<sup>139</sup>

227. These definitions given by the *New Shorter Oxford English Dictionary* of the terms “flat”, “panel”, “display” and “devices” indicate the ordinary meaning of “flat panel display device” as a smooth and thin board used as a visual presentation of data or signals on that board.

228. There are certain technical dictionaries helpful for defining the term “flat panel display devices”.

229. The *Microsoft Computer Dictionary* defines “**flat-panel display**” as “[a] video display with a shallow physical depth, based on technology other than the CRT (cathode-ray

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<sup>136</sup> The *New Shorter Oxford English Dictionary*, 1993 (4<sup>th</sup> edition), Vol.1, p. 968.

<sup>137</sup> *Id.*, Vol. 2, p. 2083.

<sup>138</sup> *Id.*, Vol. 1, p. 699.

<sup>139</sup> *Id.*, Vol. 1, p. 655.

- 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”<sup>140</sup>.
230. The *Microsoft Computer Dictionary* defines “**device**” as: “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.”<sup>141</sup>
231. The *Techweb On-line Dictionary* defines the term “**flat panel displays**” as “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.”<sup>142</sup>
232. The *Techweb On-line Dictionary* defines the term “**device**” as: “(1) any electronic or electromechanical machine or component from a transistor to a disk drive. The term “device” always refers to hardware, never software. However, a “device driver” always refers to software.”<sup>143</sup>
233. The definitions provided by these technical dictionaries indicate that a flat panel display device is a thin display screen employing plasma, LCDs and other technologies for use with computers or other apparatus.

*Conclusions concerning ordinary meaning*

234. It follows from the above definitions found in various dictionaries that flat panel display devices are thin screen devices to visualize data or signals. Flat panel display devices employ various technologies, such as LCD and plasma, with the exception of CRT technologies. They have a variety of applications including reproduction of signals from ADP machines. However, they can also visualize data from other sources. Therefore, it follows from the ordinary meaning that a flat panel display device is *not* limited to receiving signals from an ADP machine only.
235. TPKM will examine below this conclusion by other interpretative means provided in the *Vienna Convention*.

(2) Context

236. In order to carry out a proper interpretation of the concessions at stake, it is necessary, in accordance with Article 31(1) and Article 31(2) of the *Vienna Convention*, to examine the “context” from the closer context to the broader context.

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<sup>140</sup> *Microsoft Computer Dictionary*, 2002 (5<sup>th</sup> edition), p. 217.

<sup>141</sup> *Id.*, p. 155.

<sup>142</sup> <http://www.techweb.com/encyclopedia/defineterm.jhtml?term=flatpaneldisplay>, visited on 4 December 2008.

<sup>143</sup> <http://www.techweb.com/encyclopedia?term=device&x=18&y=6>, visited on 4 December 2008.

237. As indicated above,<sup>144</sup> the “context” covers in the first place elements that exist in the text of the treaty.<sup>145</sup> In the light of the case-law of the Appellate Body in *EC – Chicken Cuts* which has distinguished between the immediate and broader context, TPKM will analyse first the terms other than the term at issue contained in the concession, secondly, the wording of other concessions contained in the EC Schedule, and thirdly, the tariff headings indicated in the EC schedule regarding its concession on “flat panel display devices”.
238. TPKM reviews below the “context” under Article 31(1) and (2) of the *Vienna Convention*.
- (i) *The terms other than that of “flat panel display devices” included in the concession*
239. The concession contained in the EC Schedule refers to “[F]lat panel display devices (including LCD, Electro Luminescence, Plasma, Vacuum-Fluorescence and other technologies) for products falling within this agreement, and parts thereof” (emphasis added). TPKM has interpreted the terms “flat panel display devices” in the previous section on the “ordinary meaning”. TPKM considers that while the terms “flat panel display devices” are central to the interpretation of the scope of the concession, the other terms, namely “for products falling within this agreement” are also relevant and, as explained below, support the conclusion that the scope of the concession is not limited to FPDs that receive only signals from ADP machines.
240. The concession for “flat panel display devices (including LCD, Electro Luminescence, Plasma, Vacuum-Fluorescence and other technologies) for products falling within this agreement, and parts thereof” has been included by the EC in its Schedule in order to implement the commitment undertaken in Attachment B to the ITA.<sup>146</sup> Since the word “agreement” in Attachment B means the ITA itself, the term “agreement” in the EC Schedule should also refer to the ITA. Therefore, the term “for products falling within this agreement” could be rephrased as “for products falling within the ITA”.
241. The concession only requires that flat panel display devices be “for” products falling within the ITA. In the *New Shorter Oxford English Dictionary*, the word “**for**” is defined *inter alia* as “12. to be received by, or to belong to; to be used by, with, or in connection with.” (emphasis added)<sup>147</sup> According to the ordinary meaning of the word “for”, the concession thus only requires that flat panel display devices can be used in connection with products falling within the ITA, which includes without any doubt ADP machines. According to the ordinary meaning of the word “for”, 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.
242. The concession does not contain any additional word than “for”. It is a well-established principle of interpretation that the interpreter should not read words that are not there<sup>148</sup>.

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<sup>144</sup> See para. 139 above.

<sup>145</sup> See Article 31(2) of the *Vienna Convention*, Chapeau.

<sup>146</sup> It should be noted that, in comparison to the wording included in Attachment B to the ITA, the EC added the words “device” and “vacuum-fluorescence” in its Schedule.

<sup>147</sup> *The New Shorter Oxford English Dictionary*, 1993 (4<sup>th</sup> edition), p. 996.

<sup>148</sup> Appellate Body Report, *EC – Hormones*, para. 181.

243. It is also clear from the analysis below that “products falling within the ITA” are not limited to ADP machines.
244. The meaning of “products falling within this agreement” must be reviewed in the light of the type of products covered by both Attachment A and Attachment B.
245. Indeed, some of the products listed in Attachment A and Attachment B are not ADP machines. However, they still fall within the scope of the ITA. This is the case for instance of a digital still-image video camera in Attachment A, section 1, or set-top boxes with a communication function in Attachment B.
246. Thus, it is clear from the ordinary meaning of the terms used in the concession that its scope is not limited to flat panel display devices that are only used with ADP machines. The concession does not contain any limitation which can be inferred from the term “for”. As a result, FPDs are covered by that concession even though they may be able to be connected to apparatus other than ADP machines.
- (ii) *The wording of other concessions contained in the EC schedule*
247. That FPDs are covered by that concession even though they may be able to be connected to apparatus other than ADP machines is further confirmed by the other concessions made by the EC pursuant to the ITA.
248. First, numerous products for which the EC granted duty-free concessions pursuant to Attachment B to the ITA expressly restrict them to “of ADP machines” or “for ADP machines”. For instance, the concession with respect to “projection type flat panel display units” is limited to those “used with ADP machines which can display digital information generated by the central processing units” or the concession for “multimedia upgrade kits” is limited to “multimedia upgrade kits for ADP machines”. On the contrary, the concessions made with respect to flat panel display devices are “for products falling within this agreement”. Since the scope of products falling within the ITA is broader than ADP machines, the concession with respect to “flat panel display devices” is broader and includes FPDs, even though they may be able to be connected to apparatus other than ADP machines..
249. Secondly, the above is confirmed by the concession granted by the EC with respect to “projection type flat panel display units” which reads 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”. It is therefore sufficient that the flat panel display unit **can, i.e., is able to**, display information from an ADP machine in order to fall under the scope of the ITA. 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.
250. In fact, the EC has consistently applied a zero tariff to FPD projectors which can reproduce signals from both an ADP machine and from other sources, even though the projectors are not of a kind solely or principally used in an ADP system. As shown by the following excerpt from Council Regulation (EEC)No. 2658/87, as amended, the EC

grants duty-free treatment to any dual use FPD projectors under CN subheading 8528.30.05 prior to 2007 and under CN subheading 8528.69.10 as of 1 January 2007.

CN subheading	Description	Conventional rate of duty %
	- Projectors	
8528 61	-- Of a kind solely or principally used in an automatic data-processing system of heading 8471	Free
8528 69	-- Other	
8528 69 10	--- Operating by means of flat panel display (for example, a liquid crystal device), capable of displaying digital information generated by an automatic data-processing machine	Free

251. The above EC practice in relation to FPD projectors demonstrates that, to benefit from the zero tariff treatment, it is sufficient that the FPD projector can be used with an ADP machine and is capable of displaying information from an ADP machine.
252. Thus, the words “used with” and “which can display” are in practice interpreted by the EC as covering use with both an ADP machine and other sources.
253. Therefore, there is no reason to interpret the wording “for products falling within this agreement” any differently.
254. In conclusion, the terms of the concession are clear. A FPD device capable of receiving signals from an ADP machine and other sources falls within the scope of the EC concession at stake. This is consistent with the wording of the other concession granted by the EC to devices operating by means of a FPD such as projectors.
255. For the reasons stated above, the EC violated its WTO obligations by adopting measures which exclude FPDs that can be used both with an ADP machine and other sources from the scope of its concession with respect to FPD devices.
- (iii) *Tariff headings indicated in the EC Schedule regarding its concession on “flat panel display devices”*
256. In connection with “flat panel display devices”, the EC listed in its modified Schedule 14 CN subheadings under which those devices could be classified. Since these 14 CN subheadings have been expressly identified by the EC as reflecting its commitments with respect to FPDs, TPKM considers it useful to examine the terms contained in these 14 CN subheadings in order to clarify the meaning of the term “flat panel display devices” contained in the EC Schedule.
257. These 14 CN subheadings are 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. The fact that the EC found it necessary to include such an extensive list of CN subheadings in its Schedule already 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. The corresponding description of the products covered by these codes is reproduced in the following table

containing the relevant parts of the EC Schedule.

Tariff item number	Description of Products	Final bound rate of duty
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	
(...)		
<b>8471 60 90</b>	<b>--- Other</b>	<b>0.0</b>

Tariff item number	Description of Products	Final bound rate of duty
8473	Parts and accessories (other than covers, carrying cases and the like) suitable for use solely or principally with machines of headings No.s 8469 to 8472	
(...)		
8473 30	- Parts and accessories of the machines of heading No 8471	
(...)		
<b>8473 30 10</b>	<b>-- Electronic assemblies</b>	<b>0.0</b>
<b>8473 30 90</b>	<b>-- Other</b>	<b>0.0</b>

Tariff item number	Description of Products	Final bound rate of duty
8531	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	
(...)		
8531 20	- Indicator panels incorporating liquid crystal devices (LCD) or light emitting diodes (LED)	
(...)		
<b>8531 20 30</b>	<b>--- Incorporating light emitting diodes (LED)</b> <b>--- Incorporating liquid crystal devices (LCD)</b> <b>---- Incorporating active matrix liquid crystal devices (LCD)</b>	<b>0.0</b>
<b>8531 20 51</b>	<b>----- Colour</b>	<b>0.0</b>
<b>8531 20 59</b>	<b>----- Black and white or other monochrome</b>	<b>0.0</b>
<b>8531 20 80</b>	<b>--- Other</b>	<b>0.0</b>
8531 80	- Other apparatus	
(...)		
<b>8531 80 30</b>	<b>--- Flat panel display devices</b>	<b>0.0</b>

(...)		
8531 90	- Parts	
<b>8531 90 10</b>	<b>-- Of apparatus of subheadings No 8531 20</b>	<b>0.0</b>
<b>8531 90 30</b>	<b>-- Of apparatus of subheading 8531 80 30</b>	<b>0.0</b>

<b>Tariff item number</b>	<b>Description of Products</b>	<b>Final bound rate of duty</b>
9013	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	
(...)		
9013 80	- Other devices, appliances and instruments: -- Liquid crystal devices: --- Active matrix liquid crystal devices	
<b>9013 80 11</b>	<b>---- Colour</b>	<b>0.0</b>
<b>9013 80 19</b>	<b>---- Black and white or other monochrome</b>	<b>0.0</b>
<b>9013 80 30</b>	<b>--- Other</b>	<b>0.0</b>
(...)		
9013 90	- Parts and accessories	
<b>9013 90 10</b>	<b>--- For liquid crystal devices (LCD)</b>	<b>0.0</b>

258. In order to determine what kind of FPDs are covered by the EC Schedule, TPKM will examine the term of each of the 14 CN subheadings.

a) *CN subheading 8471.60.90*

259. Heading 8471 covers "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." Subheading 8471.60.90 covers "input or output units, whether or not containing storage units in the same housing---other."

260. The wording of heading 8471 and of subheading 8471.60.90 does not require that products falling under this heading must be used only with an ADP machine.

b) *CN subheadings 8473.30.10 and 8473.30.90*

261. Heading 8473 covers "Parts and accessories (other than covers, carrying cases and the like) suitable for use solely or principally with machines of headings No.s 8469 to 8472."

262. Subheading 8473.30.10 covers "parts and accessories of the machines of heading No 8471- Electronic assemblies." Subheading 8473.30.90 covers "parts and accessories of the machines of heading No 8471- other."

263. Both subheadings 8473.30.10 and 847.30.90 cover products in connection with heading

8471. It cannot be concluded from subheadings 8473.30.10 and 8473.30.90 that a product covered thereby shall be limited to that capable of receiving signals *only* from an ADP machine.
- c) *CN subheadings 8531.20.30, 8531.20.51, 8531.20.59, 8531.20.80, 8531.80.30, 8531.90.10 and 8531.90.30*
264. Heading 8531 covers “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.”
265. Subheading 8531.20.30 covers “indicator panels incorporating liquid crystal devices (LCD) or light emitting diodes (LED) – incorporating light emitting diodes (LED), incorporating liquid crystal devices (LCD), incorporating active matrix liquid crystal devices (LCD).”
266. Subheading 8531.20.51 covers “indicator panels incorporating liquid crystal devices (LCD) or light emitting diodes (LED)–colour”.
267. Subheading 8531.20.59 covers “indicator panels incorporating liquid crystal devices (LCD) or light emitting diodes (LED)–black and white or other monochrome.”
268. Subheading 8531.20.80 covers “indicator panels incorporating liquid crystal devices (LCD) or light emitting diodes (LED)–other.”
269. Subheading 8531.80.30 covers “other apparatus–flat panel display devices.”
270. Subheading 8531. 90.10 covers “parts–of apparatus of subheadings No 8531 20.”
271. Subheading 8531.90.30 covers “parts–of apparatus of subheading 8531 80 30.”
272. It is obvious that the terms of the subheadings referred to above in no way exclude FPDs that may be able to be connected to apparatus other than ADP machines. The only products excluded from heading 8531 are those covered by headings 8512 or 8530. However, the products falling under these two headings do not bear any relationship with flat panel display devices and therefore cannot shed light on the issue before the Panel.<sup>149</sup>
273. Therefore, the terms describing the products falling under subheadings 8531.20.30, 8531.20.51, 8531.20.59, 8531.20.80, 8531.80.30, 8531.90.10 and 8531.90.30 do not indicate that a flat panel display device capable of receiving signals from an ADP machine would be excluded from the coverage of these subheadings if it is also able to reproduce signals coming from other sources.
- d) *CN subheadings 9013.80.11, 9013.80.19, 9013.80.30 and 901. 90.10*

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<sup>149</sup> Heading 8512 covers “Electrical lighting or signalling equipment (excluding articles of heading 8539), windscreen wipers, defrosters and demisters, of a kind used for cycles or motor vehicles”. Heading 8530 covers “Electrical signalling, safety or traffic control equipment for railways, tramways, roads, parking facilities, port installations or airfields (other than those of Headings 8608)”.

274. Heading 9013 covers “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.”
275. Subheading 9013.80.11 covers “other devices, appliances and instruments, liquid crystal devices, active matrix liquid crystal devices–colour.”
276. Subheading 9013.80.19 covers “other devices, appliances and instruments, liquid crystal devices, active matrix liquid crystal devices–Black and white or other monochrome.”
277. Subheading 9013.80.30 covers “other devices, appliances and instruments, liquid crystal devices, active matrix liquid crystal devices–others.”
278. Subheading 9013.90.10 covers “parts and accessories–for liquid crystal devices (LCD).”
279. It is clear from the wording of these subheadings that they do not exclude products that may be able to be connected to apparatus other than ADP machines. From the coverage of these subheadings, TPKM submits, therefore, that subheadings 9013.80.11, 9013.80.19, 9013.80.30 and 9013.90.10 cannot possibly be interpreted as excluding a flat panel display device capable of receiving signals both from an ADP machine and other sources. Moreover, since the wording of heading 9013 clearly states “*not constituting articles provided for more specifically in other headings*”, heading 9013 and the above subheadings will cover LCD FPDs which fail to be classified under any of the other tariff lines identified by the EC in its concession, i.e., 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 and 8531.90.30.
280. Having analysed the 14 tariff subheadings which were identified by the EC as covering “flat panel display devices”, TPKM considers that they do not support the proposition that FPDs are not covered by that concession if they are able to be connected to apparatus other than ADP machines. On the contrary, it is clear that it was intended to cover as many products as possible. The fact that the EC has included the above-mentioned subheadings and in particular subheading 9013, which is a residual heading covering LCD FPDs not specifically identified in other headings, clearly shows that the EC intended to include all forms of FPDs in the scope of the concessions concerning “flat panel display devices”.

(3) Object and purpose

281. Since the concessions made by the EC in its Schedule are treaty terms of the GATT 1994 and the WTO Agreement, it is necessary to examine the object and purpose of the WTO Agreement and of the GATT 1994.
282. As underlined by the panel in *EC – Chicken Cuts (Brazil)*, the relevant aspects of the WTO Agreement and the GATT 1994 indicate 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. It is also clear that such an interpretation is limited by the condition that arrangements entered into by Members be reciprocal and mutually advantageous. Finally, the interpretation must ensure the security and predictability of the reciprocal and mutually advantageous arrangements manifested in

the form of concessions.<sup>150</sup>

(i) *Expansion of trade in goods and substantial reduction of tariffs*

283. In *EC – Chicken Cuts (Brazil)*, the panel concluded 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” but that it is also clear that “such an interpretation is limited by the conditions that arrangements entered into by Members be reciprocal and mutually advantageous”.<sup>151</sup>
284. The concession concerning “flat panel display devices” has been made by the EC pursuant to the ITA, i.e., in order to implement the ITA. Actually, all the participants to the ITA have made the same concession since under the ITA, all participants committed themselves to bind and eliminate duties with respect to all products specified in Attachments A and B to the Annex to the Declaration, including with respect to “flat panel displays”. In that respect, the concession made by the EC is by definition reciprocal and mutually advantageous because the same concession has been made by all other participants to the ITA.
285. Since the concession has been made by the EC pursuant to the ITA, TPKM considers that it is essential to examine carefully the ITA in order to properly assess the “common intention” of the parties.
286. In that respect, the wording used in the ITA and in its Preamble is highly relevant. First, the Preamble to the ITA underlines the key role of trade in information technology products in the development of information industries and in the dynamic expansion of the world economy. Second, it emphasizes the participants’ desire “to achieve *maximum freedom* for world trade in information technology products.” (emphasis added) Paragraph 1 of the ITA further provides that “each party’s trade regime should *evolve in a manner that enhances market access opportunities* for information technology products.” (emphasis added)
287. It thus flows 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 broadly drafted EC concession with respect to “flat panel display devices”, products that are capable of receiving signals not only from ADP machines but also from other sources is contrary to the objective of substantial reduction of tariffs through reciprocal and mutually advantageous arrangements.

(ii) *The security and predictability of the reciprocal and mutually advantageous arrangements*

288. As indicated above, one of the main objects and purposes of the WTO Agreement and of

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<sup>150</sup> Panel Report, *EC – Chicken Cuts (Brazil)*, para. 7.320.

<sup>151</sup> Panel Report, *EC – Chicken Cuts (Brazil)*, para. 7.320 confirmed on appeal by the Appellate Body, para. 243.

the GATT 1994 is the security and predictability of the reciprocal and mutually advantageous arrangements aimed at the substantial reduction of tariffs and other barriers to trade.

289. In order to promote security and predictability, the interpretation of a concession is to be limited by the terms used in that concession. The wording used in the concession concerning “flat panel display devices” does not in any way limit its scope to those FPDs which are capable of receiving *only* signals from ADP machines.
290. The objective of security and predictability would thus strongly be undermined if the EC could unilaterally restrict the scope of the concession granted with respect to flat panel display devices by excluding from it FPDs that can also receive signals from apparatus other than ADP machines.

(4) Other Considerations

291. The EC’s tariff treatment on FPDs, in particular LCD FPDs, since its acceptance of the ITA, can be demonstrated by consistent practice that covers a major proportion of the imports of FPDs into the EC. The classification of FPDs under headings subject to a zero customs duty such as 8531, 8471 or 9013 was the consistent EC practice until 2004. The EC Commission started to reclassify FPDs under heading 8528 subject to a 14% customs duty in the course of 2004 and 2005 only. Since the EC had to oblige its member States to change their practice of classifying FPDs under duty-free headings, the EC Commission had to push through gradually this reclassification during 2004 and 2005. Some EC member States opposed the reclassification imposed by the EC and even adopted national guidelines which maintained FPDs classified under duty-free headings.<sup>152</sup>
292. First, the EC consistently classified plasma FPDs under duty-free headings until 2004 when it adopted various classification regulations. The EC Commission adopted Regulation (EC) No. 754/2004 of 21 April 2004 classifying plasma FPD with DVI under heading 8528 and Commission Regulation (EC) No. 2147/2004 of 16 December 2004 classifying plasma FPDs with a slot-in board under heading 8528. As a result, plasma FPDs were subject to 14% import duty. These two regulations had to be adopted in order to change the EC member States’ practice.
293. Plasma FPDs were excluded from the duty-free treatment because they could reproduce signals from an ADP machine and also from other sources. The zero tariff treatment was limited to plasma FPDs which could *only* be used with an ADP machine.
294. However, EC member States continued to issue BTIs classifying plasma FPDs under heading 8471 subject to a 0% customs duty until the entry into force of the above classification regulations. This confirms that EC member States favoured a classification under the duty-free headings until they were forced to change the classification as a result of the entry into force of the above classification regulations.
295. For instance, EC member States were still classifying plasma FPDs with a DVI or slot-in under duty-free heading 8471 in 2003 and early 2004 as long as the classification regulations had not entered into force. This was the case with the French BTI of 24

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<sup>152</sup> See paras. 200-201 above.

- February 2004<sup>153</sup> classifying a plasma FPD with DVI under heading 8471, the German BTI of 4 March 2004 classifying a plasma FPD with DVI under heading 8471<sup>154</sup>, the UK BTI of 13 February 2004 classifying a plasma FPD with slot-in under heading 8471<sup>155</sup>. Reference is also made to the Dutch BTIs of 28 June 2002<sup>156</sup> and 22 January 2002<sup>157</sup> classifying plasma FPDs with slot-in under heading 8471.
296. Secondly, the EC consistently classified LCD FPDs under duty-free headings until 2004. Indeed, as the Panel found in *EC – Selected Customs Matters*, the classification of LCD FPDs under headings subject to a zero customs duty was consistent until the end of 2004:

“The Panel notes that the European Communities does not appear to dispute that, in 2004, a divergence in the tariff classification of LCD monitors with DVI among customs authorities of the member States occurred, namely that customs authorities in the Netherlands classified LCD flat monitors with DVI "video monitors" under heading 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") whereas customs authorities in other member States classified such LCD monitors as "computer monitors" under heading 8471 ("Automatic data processing machines and units thereof ...”<sup>158</sup>

297. The EC Commission initially expected EC member States to reclassify LCD FPDs by analogy with the principles applicable to plasma FPDs. In particular, the Netherlands started in 2004 to apply the plasma FPDs classification principles by analogy to LCD FPDs. As a result, LCD FPDs which were not for use solely with an ADP machine would be reclassified under a heading subject to duty (e.g. heading 8528).
298. Other EC member States were reticent to change their classification practice. The discrepancies in the tariff classification of LCD FPDs generated by the EC Commission in 2004 obliged the EC to put this item on the agenda of the Customs Code Committee for its April 2004 meeting.<sup>159</sup> In July 2004, the Customs Code Committee adopted the following “Statement”:

“Unless an imported can demonstrate that a monitor is *only* for use with an ADP machine or to be used as an indicator panel (heading 8531), it has to be classified in heading 8528”. (emphasis added)<sup>160</sup>

299. Following this Statement, UK Customs published on its website a Tariff Notice 13/04

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<sup>153</sup> BTI Reference FR-E4-2001-2001-002158-02. See Exhibit TPKM-54.

<sup>154</sup> BTI reference DEM/589/04-1. See Annex Exhibit TPKM-54.

<sup>155</sup> BTI UK112511724. See Exhibit TPKM-54.

<sup>156</sup> BTI NL-RTB-2002-001815. See Exhibit TPKM-54.

<sup>157</sup> BTI NL-RTB-2002-000012. See Exhibit TPKM-54.

<sup>158</sup> *EC – Selected Customs Matters*, para. 7.294.

<sup>159</sup> Customs Code Committee – Tariff and Statistical Nomenclature Section (Mechanical/Miscellaneous Sector), *Conclusions of the 340<sup>th</sup> meeting of the Committee held from 19 to 21 April 2004*, point 3.1. See Exhibit TPKM-42.

<sup>160</sup> Customs Code Committee – Tariff and Statistical Nomenclature Section (Mechanical/Miscellaneous Sector), *Conclusions of the 346<sup>th</sup> meeting of the Committee held from 30 June to 2 July 2004*, point 3.16. See Exhibit TPKM-43.

- which clarified that LCD FPDs with DVI would be classified under heading 8528 and that heading 8471 was now limited to FPDs that could *only* reproduce signals from an ADP machine.<sup>161</sup> Indeed, the UK had still on 12 January 2004 issued a BTI classifying an LCD FPD under heading 8471.<sup>162</sup> Nonetheless, some other EC member States did not follow the 2004 NC Statement and continued allowing a classification under heading 8471 or 8531<sup>163</sup>. This was the case of Germany but also of other EC member States such as Belgium.<sup>164</sup>
300. The discrepancies in the classification of LCD FPDs and the refusal by some EC member States to implement the 2004 NC Statement led the Customs Code Committee to adopt certain classification measures for LCD FPDs, such as Commission Regulation (EC) No. 634/2005<sup>165</sup> and Commission Regulation (EC) No. 2171/2005<sup>166</sup>, both are measures challenged in this case.
301. A possible discrepancy occurred between the requirements of “solely or principally” mentioned as classification criteria in Commission Regulation (EC) No. 634/2005 and Commission Regulation (EC) No. 2171/2005 on the one hand, and the requirement for “exclusive” use with an ADP machine for a classification under heading 8471 as required by the 2004 Statement of the Customs Code Committee on the other hand. The relevance of this discrepancy was noted by the Panel in the *EC – Selected Customs Matters*:

“The Panel considers that the steps that Regulation No. 634/2005 may have made towards resolving the divergent classification of LCD monitors could be undermined when read in light of the opinion of the Customs Code Committee taken at its 346th meeting of 30 June – 2 July 2004, especially in light of the fact that, as a matter of practice, representatives of member State customs authorities participate in the Customs Code Committee decision-making process and the same customs authorities apply Regulation No. 634/2005. In particular, the Customs Code Committee opined that “unless an importer can demonstrate that a monitor is only to be used with an ADP machine (heading 8471) or to be used as an indicator panel (heading 8531), it has to be classified under heading 8528”. In other words, the Customs Code Committee’s opinion requires that a monitor must only be used with an ADP machine in order for it to be classifiable under heading 8471. *This statement contrasts with the formulation used in Regulation No. 634/2005 which implicitly states that heading 8471 60 only applies to monitors of a kind solely or principally used (not only used) in an automatic data-processing*

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<sup>161</sup> This classification would be applicable as of 1 October 2004. UK Customs also acknowledged that this criterion represented a UK change of classification practice insofar as certain LCD FPDs with a DVI connector were previously classified under Heading 8471. HM Customs & Excise, *Tariff Notice 13/04: Tariff Classification of LCD Monitors Incorporating a Digital Visual Interface (DVI) Connector*, attached as Exhibit TPKM-46.

<sup>162</sup> BTI UK112464406. See Exhibit TPKM-54.

<sup>163</sup> The Chairman of the Nomenclature Committee reminded all Member States in the September 2004 meeting of the Nomenclature Committee that the 2004 NC Statement should be implemented by all customs authorities. See Customs Code Committee – Tariff and Statistical Nomenclature Section (Mechanical – Miscellaneous Sector), *Conclusions of the 350<sup>th</sup> meeting of the Committee held on 20 September 2004*, point 3.7. See TPKM-45.

<sup>164</sup> See *Douanenuieuws* of 22 November 2004 (Dutch Customs Newsletter), Exhibit TPKM-48.

<sup>165</sup> Commission Regulation (EC) No. 634/2005. See Exhibit TPKM-19.

<sup>166</sup> Commission Regulation (EC) No. 2171/2005. See Exhibit TPKM-20.

*system*. This difference in formulation used in Regulation No. 634/2005 on the one hand and by the Customs Code Committee on the other could well have significant practical effects. We note in this regard the European Communities' submission that opinions of the Customs Code Committee play an important role in the uniform administration of the Common Customs Tariff and that member State customs authorities attach some importance to those opinions. (Footnotes omitted – emphasis added)<sup>167</sup>

302. Therefore, the EC published a CNEN in 2006 in order to clarify the interpretation of “solely or principally”.<sup>168</sup> The CNEN applies to all FPD technologies and confirms that the EC interprets the requirement of “solely or principally” as “exclusive” use with an ADP machine. The classification under the CN subheading subject to a 0% customs duty is excluded unless the FPD can be used *only* with ADP machines.
303. The EC considers that CNEN only clarify the already existing classification rules and are applicable retroactively. Therefore, despite the legal reasoning contained in Commission Regulation (EC) No. 634/2005 and Commission Regulation (EC) No. 2171/2005 which refers to “solely or principally”, the EC confirmed with the publication of the CNEN that “solely or principally” used with ADP machines in such regulations should be read as “exclusively” for use with ADP machines.
304. Thirdly, the opposition by some EC member States to reclassify FPDs under a heading subject to duty was also followed by rulings from national courts which classified FPDs under duty-free headings even if they were not “exclusively” for use with an ADP machine. It was sufficient that the FPD was for use at least “principally” with an ADP machine. For instance, the Court of Haarlem in the Netherlands, in a ruling of 11 December 2007 classified a FPD which could reproduce signals from sources other than an ADP machine under heading 8471 subject to zero customs duty.<sup>169</sup>
305. The case concerned FPDs (TFT-monitors) with a diagonal measurement of 24 inch (61cm), overall dimensions of 55,84 x 9,2 x 36,6 cm; and a screen aspect ratio of 16:10. The screen resolution was 1920 x 1200, pixel size of 0,27 mm, maximum 16,7 million colours and a contrast ratio of 1000:1. They had two DVI-I-connectors (VGA analogue and digital) and a USB-hub. The fact that the FPDs had a USB connector - which could be used to connect peripheral equipment such as a mouse or a keyboard-, that they could rotate and their height was adjustable, indicated that they had the objective characteristics to be used in the business market for monitors for ADP systems. Therefore, even though it was not disputed that the monitors could display signals from different sources, the Dutch Court found that the FPDs were principally used in an ADP system and should be classified under heading 8471 as a monitor for use solely or principally in an ADP system.

(5) Conclusion

306. The ordinary meaning, the context and the object and purpose of the concession are clear

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<sup>167</sup> Panel Report, *EC - Selected Customs Matters*, para. 7.299.

<sup>168</sup> Uniform Application of the CN, 2006/C 332/05, OJ 2006 C 332, 30.12.2006, p. 7. See Exhibit TPKM-24.

<sup>169</sup> Uitspraak van de Rechtbank van Haarlem 07/2309, 11 December 2007, LJN: BC0767. See Exhibit TPKM-55.

and straightforward: it covers FPDs that receive signals not only from ADP machines but also from other sources.

4. **The EC Schedule incorporates Attachment A to the ITA which obliges the EC to grant duty-free treatment to input or output units including certain FPDs**

307. The ITA includes two attachments, Attachment A and Attachment B. Attachment B lists specific products to be covered by the ITA commitments, wherever they may be classified in the HS. Attachment A identifies the products covered by the ITA commitments by reference to the HS headings or parts thereof in which these products are normally classified.

308. In order to reflect its commitment under the ITA, the EC incorporated those headings and subheadings listed in Attachment A in its Schedule. Among others, the EC committed in its Schedule to grant to the products covered by heading 8471 and subheading 8471.60 duty-free treatment. More specifically, the EC committed to grant duty-free treatment under CN subheading 8471.60.90 to “input or output units, whether or not containing storage units in the same housing - Other”.

309. TPKM submits, independently from the concession made with respect to “flat panel display devices” pursuant to Attachment B to the ITA, that the concession made with respect to CN subheading 8471.60.90 covers certain FPDs capable of receiving signals both from an ADP machine and other sources. Therefore, by imposing a customs duty on these FPDs, the EC is violating Article II of the GATT 1994.

(1) Ordinary meaning

310. The “output units” to which subheading 8471.60 refers are “output units” of “automatic data processing” machines since heading 8471, under which subheading 8471.60 is located, covers “automatic data processing machines and units thereof”. TPKM will examine the ordinary meaning of the tariff terms “output units” to show that these terms include those FPDs capable of receiving signals both from an ADP machine and other sources.

311. TPKM will examine the ordinary meaning of the terms “output unit” both from general dictionaries and from certain dictionaries specialized in the terminology of the IT sector.

312. The *New Shorter Oxford English Dictionary* gives the following definitions of “output” and “unit”:

313. *The New Shorter Oxford English Dictionary* defines “**output**” as “(noun): 1. (The amount of) what is produced by an industry or process, or by mental or artistic effort. b. 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.”<sup>170</sup>

314. *The New Shorter Oxford English Dictionary* defines “**unit**” as: “3. An individual thing,

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<sup>170</sup> *The New Shorter Oxford English Dictionary*, 1993 4<sup>th</sup> edition, Vol. 2, p. 2040.

- person or group regarded as single and complete, esp. for the purposes of calculation.”<sup>171</sup>
315. A similar definition is given in the *Merriam-Webster Online Dictionary*:
316. **Output:** 1. something produced as a: mineral, agricultural or industrial production; b: mental or artistic production, c: the amount produced by a person in a given time, d: 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.<sup>172</sup> (emphasis added)
317. **Unit:** a piece or complex of apparatus serving to perform one particular function.<sup>173</sup>
318. In view of the above definitions, an “output unit” is a piece or complex of apparatus serving to deliver information or data produced by a computer.
319. The *Sci-Tech Dictionary* defines “output unit” as follows: “a unit which delivers information from the computer to an external device or from internal storage to external storage.”<sup>174</sup>

#### *Conclusion*

320. In light of the definitions found in the general and technical dictionaries, the term “output units” is very broad and covers any element or item capable of delivering information from the computer. It follows that a FPD with the capability of receiving signals both from an ADP machine and other sources fall within the definition 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.
321. We move on to examine this conclusion by other interpretative means provided in the *Vienna Convention*.

#### (2) Context

322. Under Article 31(2) of the *Vienna Convention*, first, TPKM will review the terms other than that of “input or output units” in subheading 8471.60 of the EC Schedule, and secondly other tariff headings contained in the EC Schedule. The foregoing is considered as “context” relevant for interpreting the concession made by the EC with respect to “input or output units” of ADP machines in subheading 8471.60.

#### (i) *The terms other than that of “input or output units” in subheading 8471. 60 of the EC Schedule*

323. The EC in its Schedule defines subheading 8471.60 as “input or output units, whether or not containing storage units in the same housing”. We have interpreted in the above section the ordinary meaning of “output units” contained in subheading 8471.60 and

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<sup>171</sup> *The New Shorter Oxford English Dictionary*, 1993, 4<sup>th</sup> edition, Vol. 2, p. 3491.

<sup>172</sup> <http://www.merriam-webster.com/dictionary>.

<sup>173</sup> <http://www.merriam-webster.com/dictionary>.

<sup>174</sup> *The McGraw-Hill Dictionary of Scientific and Technical Terms*, 1994, 5<sup>th</sup> edition, p.1419.

concluded that this term covers those FPDs capable of receiving signals both from an ADP machine and other sources. We then turn to the other terms contained in subheading 8471.60 to examine the meaning of “output units”. Under “context”, TPKM will examine the terms “whether or not containing storage units in the same housing”.

324. Reading subheading 8471.60 in conjunction with heading 8471, the term “whether or not containing storage units in the same housing” indicates that an input unit or output unit capable of working with an ADP machine would be covered by subheading 8471.60, irrespective of whether this input or output unit contains storage units in itself.
325. The term “whether or not containing storage units in the same housing” does not therefore suggest that a FPD capable of receiving signals both from an ADP machine and other sources would be excluded from the definition of subheading 8471.60.

(ii) *Other tariff headings contained in the EC Schedule*

326. Subheading 8471.60 is part of heading 8471 which covers a number of HS subheadings relating to ADP machines and units thereof. Thus, we consider the tariff terms contained in heading 8471 and its subheadings other than subheading 8471.60 are relevant for interpreting the term “output units”.
327. In the EC Schedule, heading 8471 and its subheadings are as follows:

<b>Tariff item number</b>	<b>Description of Products</b>	<b>Final Bound Rate of Duty</b>
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	0.0
(...)		
8471 30 00	- 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	0.0
(...)		
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	0.0
(...)		
8471 49	-- Other, presented in the form of systems	0.0
(...)		
8471 50	- Digital processing units other than those of subheadings 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	0.0
(...)		
8471 60	- Input or output units, whether or not containing storage units in the same housing	0.0
(...)		
8471 60 40	-- Printers	0.0
8471 60 50	-- Keyboards	0.0
8471 60 90	-- Other	0.0

8471 70	- Storage units	0.0
(...)		
8471 80	- Other units of automatic data processing machines	0.0
(...)		
8471 90 00	- Other	0.0

328. The structure of heading 8471 contained in the EC Schedule confirms the broad scope of this heading. First of all, it is clear that it covers all types of ADP machines, i.e., analogue or hybrid ADP machines (subheading 8471.10) and digital ADP machines (subheadings 8471.30, 8471.41 and 8471.49). Second, heading 8471 also covers all forms of units of ADP machines: digital processing units (Subheading 8471.50), input or output units (Subheading 8471.60), storage units (Subheading 8471.70) and any other types of units (Subheading 8471.80).
329. The structure of heading 8471 clearly covers all types of data processing technologies. In addition, nothing in the description of the above-listed HS headings and subheadings suggests that only products capable of working exclusively with an ADP machine may be classified under them.
330. In light of this, TPKM submits that an FPD capable of receiving signals both from an ADP machine and other sources are covered by subheading 8471.60.

(3) The Harmonized System

- (i) *Note 5 to Chapter 84 confirms that heading 8471 covers FPDs even if they are capable of receiving signals from ADP machines and other sources*
331. The HS has been considered relevant in previous WTO disputes for purposes of interpreting the tariff terms contained in the WTO Member's schedules.<sup>175</sup> TPKM will thus analyse in the paragraphs below the HS in connection with the concession being examined. Since concessions have been made on the basis of the HS 1996, it is the HS 1996 that will be examined. More specifically, TPKM will analyse Note 5 to Chapter 84 which is an integral part of the HS. This Note clearly supports the interpretation according to which the products at issue are covered by the concession made by the EC with respect to FPDs.
332. Under the HS 1996, heading 8471 covers "Automatic data-processing machines and units thereof". Note 5 to Chapter 84 provides further information regarding products covered by heading 8471. After having defined ADP machines in Note 5(A), it addresses the issue of ADP systems that consist of separate units. More precisely, Note 5 (B) to Chapter 84 lays down the requirements to qualify as a unit of an ADP machine:

"(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:

<sup>175</sup> Appellate Body Report, *EC – Chicken Cuts* para. 199; Panel Report, *China-Auto parts*, paras. 7.663-7.667. Appellate Body Report, *China – Auto parts*, para. 149 and 151.

- (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.” [emphasis added]
333. Thus, among others, Note 5 (B) requires, in order for a unit to be regarded as being a part of an ADP system, that “it is of a kind *solely or principally* used in an automatic data-processing system.”
334. It is clear that in order to be regarded as a unit of an ADP machine and classified under heading 8471, it is only required to be solely or principally used in ADP system. In other words, in accordance with Note 5 (B)(a), it is 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.
335. According to the *New Shorter Oxford English Dictionary*, the word “**solely**” means “2. Only, merely, exclusively. Also (contextually), entirely, altogether.”<sup>176</sup> The word “**principally**” means “1. in the chief case; above all; pre-eminently. 3 For the most part; in most cases.”<sup>177</sup> In light of this dictionary definition, it is clear that “principally” thus does not exclude *other* uses.
336. FPDs cannot be excluded from the duty-free tariff treatment granted by the EC under heading 8471 on the ground that the FPD can also reproduce signals from a source other than ADP machines. It is sufficient that the FPD’s principal use is with an ADP machine.
337. Note 5(C) to Chapter 84 concerns the classification of separately presented unit. It provides that:
- “Separately presented units of an automatic data processing machine are to be classified in heading No. 84.71.”
338. Note 5(C) to Chapter 84 applies when the units of the ADP machine are presented separately. This Chapter Note does not require exclusive use with an ADP machine in order to be classified under heading 8471.
339. The HS therefore confirms the conclusion of the textual analysis above. A FPD cannot be excluded from the benefit of the zero tariff because it can also reproduce signals from sources other than an ADP machine.
340. If Note 5 to Chapter 84 requires sole or principal use to qualify as a unit of an ADP machine, this is even not required with respect to products falling within heading 8531 or heading 9013. In other words, none of the HS Section, Chapter, heading or subheading notes applicable to products of heading 8531 or heading 9013 requires any sole or

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<sup>176</sup> The *New Shorter Oxford English Dictionary*, 1993 (4<sup>th</sup> edition), Volume 2, page 2939.

<sup>177</sup> The *New Shorter Oxford English Dictionary*, 1993 (4<sup>th</sup> edition), Volume 2, page 2356.

principal use with an ADP machine in order to benefit from the zero tariff. The capability of the device to connect to an ADP machine is sufficient for it to come within the scope of the concession. At most, the Notes to Chapter 84 require that an FPD is *principally* for use with an ADP machine in order to be classified under subheading 8471.60.

341. The HS confirms that exclusive use with an ADP machine is not required for a classification under headings 8471 listed in the EC Schedule for FPDs. It is sufficient for a FPD to remain subject to a zero customs duty that it is for use at least principally with an ADP machine..

(4) Object and Purpose

342. The object and purpose with respect to “output units”, including the FPDs at issue, has been discussed in paras 281-290.

(5) Other Considerations

343. The HS 2007 confirms that it was the intention of the WCO’s parties to ensure that FPDs which can be used at least *principally* with an ADP machine *must remain* treated as output units of an ADP machine. It cannot be required that such FPD can be used *exclusively* with an ADP machine.

344. Under the HS 2007, products that were previously covered by subheading 8471.60 (CN subheading 8471.60.80) reserved for output units of an ADP machine are excluded from Heading 8471 pursuant to the application of Note 5(C) and Note 5(D) to Chapter 84:

“(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.”  
[emphasis added]

345. FPDs previously classified under sub-heading Heading 8471.60 identified by the EC as one of the subheadings covering FPDs are under the HS 2007 classified under new 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].

346. Thus, under the HS 2007, the requirement of “sole or principal” previously applicable to output units pursuant to Note 5 to Chapter 84 when the FPDs were classified under Heading 8471 has now been included in the wording itself of HS subheading 8528.51. This further supports the conclusion that the concession of the EC with respect to FPDs cannot be interpreted such as to exclude from its scope FPDs that are not for *exclusive* use with ADP machines. Indeed, 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 when Note 5 to Chapter 84 no longer applied as a result of a restructuring of the HS 2007.
347. The HS 2007 therefore confirms the conclusions reached through the examination of Note 5(B) to Chapter 84 under the HS 1996, which are now contained in the wording of the relevant sub-heading.

(6) Conclusion

348. The ordinary meaning and the context of the concession in respect of “input or output units” indicate that it covers “output units” of ADP machines under CN subheading 8471.60 that receive signals not only from ADP machines but also from other sources. This conclusion is supported by the Harmonized System, in particular Note 5 to Chapter 84 thereof, and consistent with the object and purpose as well as the consistent practice of the EC until 2004.

**5. As such, the measures at issue violate Articles II:1(a) and II:1(b) of the GATT 1994**

349. As demonstrated above, the EC Schedule incorporates duty-free treatment concessions with respect to “flat panel display devices” wherever classified and with respect to “output units” of ADP machines under CN subheading 8471.60. As explained above, these concessions clearly cover FPDs which are capable of receiving signals both from an ADP machine and other sources.
350. However, through the measures at issue, including Commission Regulation (EC) No. 634/2005, Commission Regulation (EC) No. 2171/2005 and EN 2008/C 133/01 as well as Council Regulation (EEC) No. 2658/87 as amended, and in particular by classifying the FPDs at issue under CN subheading 8528.21.90 (prior to 2007) and CN subheading 8528.59.90 (as of 2007), the EC does not provide duty-free treatment to FPDs capable of receiving signals both from an ADP machine and other sources. Thus, the EC accords treatment on the FPDs at issue that is less favourable than that provided for in the EC Schedule in violation of Article II:1(a) of the GATT 1994. More precisely, the EC by imposing a 14% customs duty on these FPDs, imposes a duty that is in excess of that provided for in the EC Schedule in violation of Article II:1(b) of the GATT 1994.
351. TPKM notes that the EC suspended from 1 January 2005 to 31 December 2008 duties on FPDs with a diagonal measurement of the screen of 48.5 cm or less and with an aspect ratio of 4:3 or 5:4.<sup>178</sup> Duties were suspended for FPDs classifiable under CN subheading

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<sup>178</sup> The duty suspension was introduced with Regulation (EC) No. 493/2005 for the period from 1 January 2005 to 31 December 2006. See Exhibit TPKM-25. The duty suspension was then extended for the time period from 1 January 2007 to 31 December 2008 by Regulation (EC) No. 301/2007. See Exhibit TPKM-26.

8528.21.90 (or CN subheading 8528.59.90 as of 1 January 2008).

352. However, the duty suspension has now expired and has not been renewed. This implies that, as of 1 January 2009, the FPDs that benefited from the above-mentioned duty suspension are now again subject to customs duties<sup>179</sup>.
353. Even if the duties were suspended again for certain types of FPDs, 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.
354. First, as illustrated by Council Regulation (EC) No. 493/2005 which provided for a duty suspension from 1 January 2005 to 31 December 2006 and by Council Regulation (EC) No. 301/2007 which provided for a duty suspension from 1 January 2007 to 31 December 2008, duty suspensions are temporary. In the present case, Council Regulation (EC) No. 301/2007 has expired and the EC has not issued any new regulation succeeding to Council Regulation (EC) No. 301/2007. As a result, the zero tariff granted to the products at issue by that Regulation has ceased to exist and those products are again subject to the 14% customs duty. In addition, duty suspensions may be terminated unilaterally as soon as the EC considers that the conditions for their continuation are no longer fulfilled.<sup>180</sup> It is therefore clear that even if a duty suspension applies on the imports of certain FPDs, the EC has granted to these products a treatment that is less favourable than that provided for in its Schedule, in violation of Article II:1(a) of the GATT 1994. Furthermore, the EC violates Article II:1(b) of the GATT 1994 since it makes the benefit of the zero customs duty dependent on a number of terms, conditions not set forth in its Schedule.
355. Second, the EC, through the measures at issue, imposes a 14% customs duty on FPDs capable of receiving signals both from an ADP machine and other sources. Given the fact that Council Regulation (EC) No. 493/2005 and Council Regulation (EC) No. 301/2007 only grant a duty suspension on LCD FPDs “with a diagonal measurement of the screen of 48.5 cm or less and with an aspect ratio of 4:3 or 5:4”, not all FPDs covered by the measures at issue benefit from the duty suspension. In other words, 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.
356. In conclusion, by imposing a 14 % customs duty on FPDs, the EC violates Articles II:1 (a) and (b) of the GATT 1994. TPKM submits that even if a new duty suspension was granted with respect to some types of FPDs, this would not remove the violation of Articles II:1 (a) and (b) of the GATT 1994 resulting from the challenged measures.

**C. By Imposing Customs Duties on Certain Set-top Boxes with a Communication Function, the EC is Violating Articles II:1(a) and II:1(b) of the GATT 1994**

357. This claim concerns the treatment given by the EC to imports of certain STBs with a communication function. Through the challenged measures which are described in paras. 90-106, the EC is imposing customs duties on certain STBs with a communication

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<sup>179</sup> See paragraph 89 concerning Commission proposal for a new duty suspension for LCD FPDs.

<sup>180</sup> Duty suspensions can only be granted for a limited period of time and only in case no or insufficient EC production exists.

function, instead of providing duty-free treatment as required by the EC Schedule.

358. In light of the above, TPKM considers that its commerce has been accorded treatment less favourable than that provided in the EC Schedule, and that ordinary customs duties, or other duties and charges, in excess of those set forth in the EC Schedule 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 of the GATT 1994, benefits accruing, directly or indirectly, to TPKM.

**1. Treatment of the product at issue**

(1) Treatment in the EC Schedule

359. The concession at stake, *i.e.*, that relating to set-top boxes (STBs) with a communication function, has been made by the EC in its Schedule in accordance with Attachment B to the ITA<sup>181</sup>, 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 ... shall be bound and eliminated, as set forth in paragraph 2(a) of the Annex to the Declaration, wherever the product is classified.”

360. The EC also listed in its modified Schedule three CN subheadings under which it at the time classified those devices.

Description	HS
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	85175090, 85178090, 85252099

361. The EC modified its Schedules in 2000 in order to include CN subheading 8528.12.91 that covers STBs with a communication function as described in Attachment B and which should be subject to 0% import duty.<sup>182</sup>

(2) Treatment under the measures at issue

362. Through the measures at issue, namely the CNEN as published on 7 May 2008<sup>183</sup> and Council Regulation (EEC) No. 2658/87 as amended, the EC is imposing customs duties on certain STBs with a communication function.

363. More precisely, the following duty treatment is provided under the CCT 2009 for STBs

<sup>181</sup> WT/Let/156. See TPKM-2.

<sup>182</sup> European Communities, Rectifications and Modifications, G/MA/TAR/RS/74 (December 15, 2000).

<sup>183</sup> CNEN of the European Communities, 2008/C 112/03, OJ C 112, 7.05.2008, pp. 8-9. See Exhibit TPKM-28.

imported into the EC:

- STBs classifiable under CN subheading 8528.71.13 as “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’)” enjoy duty-free treatment.
- STBs classifiable under CN subheading 8521.90.00 as “Video recording or reproducing apparatus, whether or not incorporating a video tuner – other” are subject to a customs duty of 13.9%.
- STBs classifiable under CN subheading 8528.71.19 as “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 – Other” are subject to a customs duty of 14%.
- STBs classifiable under CN subheading 8528.71.90 as “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 – Other” are subject to a customs duty of 14%.

364. The CNEN as published in the Official Journal of the European Union on 7 May 2008 set forth the criteria for not providing duty-free treatment to certain STBs with a communication function. In a relevant section, the CNEN states that:

- CN subheading 8528.71.13, entitled “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”, covers the following apparatus:

“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).<sup>184</sup>

- CN subheading 8528.71.13 applies to “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”. Moreover, “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”. In addition, “The modem must be built into the set-top box”.

As a result, an STB with a communication function but without a built-in modem or with a modem which does not satisfy the above definitions will be excluded from the duty-free treatment.

- Subheading 8521.90.00 “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).”

When reading this paragraph in conjunction with the last paragraph of

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<sup>184</sup> CNEN of the European Communities, 2008/C 112/03, OJ C 112, 7.05.2008, p. 8-9. See Exhibit TPKM-28.

the CNEN to subheading 8528.71.13<sup>185</sup>, classification of STBs with a communication function under this subheading, rather than under CN subheading 8528.71.13, appears to depend on whether STBs presented to customs authorities can perform functions – such as recording or reproducing – *in addition to* a communication function. Where this is the case, then the STBs at stake are to be classified under subheading 8521.90.00; thus attracting customs duties.

(3) Treatment under the measures at issue is less favourable than the treatment in the EC Schedule

365. By imposing a 14% or 13.9% customs duty on the STBs at issue, the EC accords to the products at issue treatment that is less favourable than that provided for in the EC Schedule, which is duty-free. This violates the EC's obligations under both Articles II:1(a) and II:1(b) of the GATT 1994.

**2. Background of the measures at issue**

366. The overview below explains the gradual process adopted by the EC to reclassify STBs under CN subheading subject to duties instead of under the zero tariff resulting from the relevant concessions of the EC contained in its Schedule.

367. In its Schedule, the EC committed to apply duty-free treatment on “set-top boxes which have a communication function: a micro-processor based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange”. The EC indicated the following CN subheading as covering the product at issue: 8517.50.90, 8517.80.90 and 8525.20.99.

368. In 2000, the EC amended its CCT in order to reflect the discussions that had taken place within the ITA Committee with respect to the classification of set-top boxes with a communication function. The EC introduced Taric code 8528.12.93.10 which covered “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 signal (“set-top boxes with communication function”) as of 1 October 2000. This code was subsequently changed into CN subheading 8528.12.91 as of 1 January 2002.

369. In 2005, the Office Européen de Lutte Anti-Fraude (“OLAF”), the anti-fraud body of the EC, stated in the framework of an investigation with respect to imports of STBs which had been declared under CN subheading 8528.12.91 (duty-free) on the basis of the German Customs' claim that classification under that CN subheading was not correct because the incorporated modem provided only a limited access to the World Wide Web and that the unlimited access to the Internet by an incorporated modem is one decisive requirement for products to be classified under CN subheading 8528.12.91. OLAF concluded that the products at issue had been incorrectly classified under CN subheading

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<sup>185</sup> This provides as follows: “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).”

- 8528.12.91 and that they should instead have been classified under CN subheading 8528.12.94 (14%).<sup>186</sup>
370. The issue of the tariff treatment of STBs was subsequently raised in the Customs Code Committee during its meeting in January 2005.<sup>187</sup> The discussion concerned the classification of a satellite receiver with built-in modem that enabled links to a server which provided reception of “pay-to-view” television programmes but could not be used to surf on the World Wide Web. The issue was discussed during several meetings of the Customs Code Committee in 2005 and 2006.
371. In 2006, the EC Commission proposed a draft CNEN for the classification of different types of STBs: “set-top boxes incorporating a video recorder or reproducer” under CN subheading 8528.12.20; “video tuners” under CN subheadings 8528.12.90 to 8528.12.95; “set-top boxes with communication function” under CN subheading 8528.12.91 and “other” under CN subheading 8528.12.98. The main purpose of this draft CNEN was to clarify the types of STBs with a communication function falling under the applicable duty-free heading 8528.12.91.
372. The text of the CNEN regarding STBs falling under CN subheading 8528.12.90 to 8528.12.95, under CN subheading 8528.12.91 and under CN subheading 8528.12.98 was adopted by the Customs Code Committee during its meeting of October 2006.<sup>188</sup> This is one of the measures challenged in this dispute. As no agreement could be reached on the draft text concerning STBs with a hard disk drive (“HDD”), the discussions regarding this type of STBs with a communication function were postponed until a later stage.
373. Even though (partly) adopted, it was still unclear when the CNEN would be published in the Official Journal of the European Union. Some EC member States raised questions in the January 2007 meeting about the effects of the CNEN before it had been published:
- “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”.<sup>189</sup> (emphasis in original)
374. The Customs Code Committee should have voted on the proposed CNEN concerning

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<sup>186</sup> European Commission, European Anti-Fraud Office (OLAF), Investigation and Operations, 26.04.2005. No. 003398. See Exhibit TPKM-56.

<sup>187</sup> Customs Code Committee – Tariff and Statistical Nomenclature Section (Mechanical/Miscellaneous Sector), *Conclusions of the 360<sup>th</sup> meeting of the Committee held from 26 to 28 January 2005*, point 3.4. See Exhibit TPKM-32.

<sup>188</sup> Customs Code Committee – Tariff and Statistical Nomenclature Section (Mechanical/Miscellaneous Sector), *Conclusions of the 407<sup>th</sup> meeting of the Committee held from 18 to 20 October 2006*, point 3.7. See Exhibit TPKM-30.

<sup>189</sup> Customs Code Committee – Tariff and Statistical Nomenclature Section (Mechanical/Miscellaneous Sector), *Conclusions of the 413<sup>rd</sup> meeting of the Committee held from 10 to 12 January 2007*, point 5 “Issuing BTIs”. See Exhibit TPKM-57.

- STBs with HDD during its April 2007 meeting.<sup>190</sup> The Customs Code Committee did not issue an opinion on the draft CNEN classifying STBs with HDD. In particular, the minutes record that the Committee delivered no opinion on the draft CNEN. However, since there was no qualified majority to oppose the draft CNEN, the CNEN was considered adopted by the EC Commission under the “management procedure”.<sup>191</sup> This is one of the measures challenged in the present dispute.
375. Some EC member States raised again the issue of whether the CNEN could be applied before it was published. This matter was discussed in the Customs Code Committee’s meeting of October 2007:

**“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 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.

One MS raised the question of the absence/presence of software (linked to camcorder issue, ECJ court rulings C-208/06 and C-209/06 - Medion/Canon). Chair concluded that the question of the absence/presence of software in this case needs further examination.”<sup>192</sup>

376. As shown by the above excerpt, the EC Commission stressed that EC member States should follow the text as agreed and voted upon, and should refrain from issuing contradictory BTIs, even if the CNEN had not yet been published. The EC Commission also reiterated that the publication of the CNEN was planned to be accompanied by the introduction of the autonomous duty suspension on these products.
377. During the February 2008 meeting of the Customs Code Committee<sup>193</sup>, the issue of STBs without HDD was again placed on the agenda in order to discuss the EC Commission’s proposal to delete the wording “by accessing any IP address” in the wording of the CNEN to CN subheading 8528.71.13 (CN subheading 8528.12.91 before HS 2007) which had been adopted in October 2006. As a result, the requirement that the STB should be connectable to “any” Internet address would no longer be applicable. Any Internet connectivity, even if only limited, is sufficient. The Customs Code Committee did not reach the qualified majority required to issue a favourable opinion on the

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<sup>190</sup> Customs Code Committee – Tariff and Statistical Nomenclature Section (Mechanical/Miscellaneous Sector), *Conclusions of the 420<sup>th</sup> meeting of the Committee held from 18 to 20 April 2007*, point 3.3. See Exhibit TPKM-31.

<sup>191</sup> Please see para. 65 above.

<sup>192</sup> Customs Code Committee – Tariff and Statistical Nomenclature Section (Mechanical/Miscellaneous Sector), *Conclusions of the 432<sup>nd</sup> meeting of the Committee held on 19 October 2007*, point 6. See Exhibit TPKM-58.

<sup>193</sup> Customs Code Committee – Tariff and Statistical Nomenclature Section (Mechanical/Miscellaneous Sector), *Conclusions of the 442<sup>nd</sup> meeting of the Committee held from 20 to 22 February 2008*, Item 3.2. See Exhibit TPKM-59.

proposed amendment. However, since there was no qualified majority against the amendment, the proposed amendment was adopted under the “management procedure”. This amendment was included in the text of the CNEN which was finally published in the Official Journal of the European Union in May 2008.

378. On 7 May 2008, the CNEN to CN subheading 8521.90.00; CN subheading 8528.71.13, CN subheading 8528.71.19 and CN subheading 8528.71.90 were finally published in the Official Journal.<sup>194</sup> The CNEN are one of the measures challenged in the present dispute.

**3. The EC Schedule incorporates Attachment B to the ITA which obliges the EC to grant duty-free treatment to Set-top Boxes with a Communication Function**

379. The question before the Panel in this dispute is whether the measures at issue are consistent with the obligations of the EC under Articles II:1(a) and Article II:1(b) of the GATT 1994. More specifically, the question is whether the measures at issue result in treatment of the products at issue – namely, certain STBs with a communication function – that is less favourable than that provided for in the relevant part of the EC Schedule, because these measures subject the product at issue to duties that are in excess of those provided for in the EC Schedule.

380. To resolve the above question will first require the Panel to interpret the text of the relevant concession included in the EC Schedule.<sup>195</sup> In so doing, the Panel will have to follow the general principles set forth in paras. 129-171.

381. In addition, to adjudicate the claim, the Panel needs to examine the reasons put forward by the EC to justify that certain STBs with a communication function would nonetheless be subject to payment of customs duties. TPKM understands these reasons to be those that motivated the reclassification of some STBs with a communication function under CN subheadings other than 8528.71.13, and that are contained in the CNEN published on 7 May 2008.

382. In conducting its assessment, the Panel must take into consideration and draw appropriate conclusions from the head-note in the EC’s Schedule that provides 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”.

383. 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. Therefore, it is not relevant to this dispute whether a STB which has a communication function is classified under a specific subheading in the EC’s Schedule or whether a specific subheading includes such a STB. In other words, the present dispute is *not* a dispute on how STBs must be classified.

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<sup>194</sup> CNEN of the European Communities, 2008/C 112/03, OJ 2008 C 112, 07.05.2008, p.8. See TPKM-28.

<sup>195</sup> The steps that the Panel is suggested to follow in the current dispute are similar to those applied by earlier panels examining similar type of claims (for instance *EC – Chicken Cuts (Brazil)*).

Rather, this dispute is about the coverage of the terms “set top boxes which have a communication function”, as set forth in the ITA and in the EC Schedule, and on whether the tariff treatment granted by the EC to the product at issue conforms to Articles II.1 (a) and (b) of the GATT 1994. In case a product falls within the definition of STBs as contained in the EC Schedule, that product must be granted zero tariff treatment regardless of its classification in the EC Schedule or in the EC’s Common Customs Tariff.

(1) Ordinary meaning

384. 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”.<sup>196</sup> TPKM will review first the text of the concession as defined before the colon, and then that as defined after the colon.

“Set-top boxes which have a communication function”

385. The ordinary meaning of the terms used for describing the product covered by the concession needs to be examined in the first place. The proper examination of the product coverage is of special importance because, as stated in the head-note to the EC’s table containing the above concession, for products in Attachment B of the ITA, such as STBs, customs duties must be eliminated *wherever* the product is classified.

386. Taking into account that STBs are modern, high-tech products, TPKM believes that beyond the definitions contained in a general dictionary, definitions available in certain dictionaries specialized in the IT sector, and which are most commonly referred to by IT product manufacturers, traders and users, might provide useful guidance to the Panel.

387. The product covered by the concession at stake is defined in the following terms: “Set top boxes which have a communication function”. Thus, there are essentially four words the ordinary meanings of which need to be examined: “set top box”, “communication”, “function” and “a”.

388. The term “set top box” is a high-tech neologism; hence its definition is not contained in ordinary dictionaries. However, general dictionaries shed light on the meaning of other terms contained in the concession.

389. The *New Shorter Oxford English Dictionary* defines “**communication**” as (noun): The action of communicating heat, feeling, motion, etc.; esp. the transmission or exchange of

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<sup>196</sup> Document WT/Let/156. After the colon, the concession at stake in the EC’s Schedule contains the following text: “a microprocessor-based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange”. In the view of TPKM, the colon breaks the sentence into two parts. In the first part, namely before the colon, the product covered by the concession is identified. This, as we have seen, is STBs with a communication function. In the subsequent part, *i.e.*, after the colon, a type of device (STB) that is able to perform a communication function is described. It must be noted that in Attachment B the words “Set top boxes which have a communication function” are marked in bold, as opposed to the rest of the text of the concession at stake. This reinforces TPKM’s argument that the negotiators of the ITA intended to stress the words “Set top boxes which have a communication function” over the rest of the text.

- information, news, etc.”<sup>197</sup>
390. The *New Shorter Oxford English Dictionary* defines “**function**” as (noun): The 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) ...”<sup>198</sup>
391. According to these definitions, STBs with a communication function are STBs which have an activity or operation of transmission or exchange of information, news, etc.
392. TPKM notes that the term “communication function” is preceded by the word “a”. This word is defined as follows in the *New Shorter Oxford English Dictionary*: “**a** (indefinite article): 1 One, some, any”.<sup>199</sup>
393. The use of the *indefinite* article “a” indicates that parties to the ITA intended to cover STBs which may perform *any type of* communication function, not a specific type of communication function. This is important as it tends to support the reading that the sentence after the colon is only an example of STBs with a communication function.
394. It is important to highlight that the concession only provides for “STBs with a communication function”. It does not include the term “solely” or a term conveying a similar meaning which could be interpreted as restricting the product coverage of the concession to STBs which are capable of performing *only* a communication function. In other words, the concession does not contain any term that would suggest that STBs which have in addition to a communication function another function, such as video recording for instance, would be excluded from the scope of that concession. In this regard, the Appellate Body has consistently held that a treaty interpreter cannot read into the text of a provision terms that are not contained therein. As a result, since the drafters did not include the term “solely” or any other similar terms in the text of the concession, the EC cannot now interpret the text of the concession as if that term were part of it.
395. The ordinary meaning of the text of the concession is clear. It covers STBs with any type of communication function. By not including any requirement that the STBs do not have any function additional to the communication function, it is therefore sufficient if the STB has a communication function, but it may have additional functions, such as a video recording function.
396. Certain technical dictionaries may be useful for defining the term “set-top box”.
397. The *Yourdictionary.com* defines a “STB” as: “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.”<sup>200</sup>

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<sup>197</sup> The *New Shorter Oxford English Dictionary*, 1993, 4th edition, p. 466.

<sup>198</sup> *Id.*, p. 1056.

<sup>199</sup> *Id.*, p. 1.

<sup>200</sup> <http://www.yourdictionary.com/set-top-box>, visited on 30 October 2008.

398. The *Foldoc, Free Online Dictionary of Computing*, defines set-top box as “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.”<sup>201</sup>
399. The *SearchNetworking.com* dictionary states that “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.”<sup>202</sup>
400. In light of these definitions, a STB consists of a device that interfaces a television set or computer with a network, enabling users to exchange information. In other words, a STB will provide users with the possibility of sending and receiving information or other facts or knowledge.
401. According to its ordinary meaning, “set-top boxes” are thus apparatus that interface a TV set or computer to a cable TV network, cable modem network, or satellite TV dish and, perhaps, telephone network. STBs may have a communication function and in such a case, their purpose or intended role is the transmission or exchange of information, news, etc.
402. The concession does not require that the STBs have solely a communication function in order for it to be covered by the EC concession at stake. In other words, the ordinary meaning of the terms of the concession makes it clear that the concession covers STBs which have a communication function even if they have additional functions.
403. In addition to the above, the placement of a colon after “Set top boxes which have a communication function” – and the bold type used to differentiate these words from the text after the colon – effectively breaks the sentence into two distinct parts, as discussed above. As a consequence, it is appropriate to analyse the terms set forth after the colon as part of the context.
404. Since the text of the concession concerns STBs which have a communication function, the EC has undertaken a commitment to treat STBs which, although not complying strictly with every aspect of the description after the colon, *but have a communication function*, as products covered by the EC’s concession. In levying customs duties on certain STBs with a communication function imported into the EC, the EC is therefore acting inconsistently with its obligations under Articles II:1 (a) and (b) of the GATT 1994.
405. Even if, *arguendo*, the text after the colon had to be taken into consideration in this part of our analysis, the conclusion arrived at above would still be valid. As TPKM will show in the next Section examining the text after the colon, this text does not support a

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<sup>201</sup> <http://foldoc.org/index.cgi?query=set+top+box>, visited on 30 October 2008.

<sup>202</sup> [http://searchnetworking.techtarget.com/sDefinition/0,,sid7\\_gci212971.00.html](http://searchnetworking.techtarget.com/sDefinition/0,,sid7_gci212971.00.html), visited on 30 October 2008.

proposition that STBs performing functions in addition to the communication function – such as STBs with a HDD – or STBs performing the communication function through certain devices other than “V.34-, V.90-, V.92-, DSL- or cable modems” fall outside the scope of the EC concession at dispute.

“a microprocessor-based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange”

406. In paras. 385-405, TPKM has examined the terms of the concession until the colon, *i.e.*, “Set top boxes which have a communication function”. In the view of TPKM, the colon breaks the sentence into two parts.<sup>203</sup> In the first part, namely before the colon, the product covered by the concession is identified. This, as we have seen, is STBs with a communication function. In the subsequent part, *i.e.*, after the colon, a type of device (STB) that is able to perform a communication function is described. This view is confirmed by the use of the indefinite article “a” in the concession. The product described after the colon is an STB with communication function. In other words, it describes one type of apparatus with a communication function. All are covered by the concession.
407. The above conclusion is confirmed by the fact that in Attachment B to the ITA the words “Set top boxes which have a communication function” are marked in bold, as opposed to the rest of the text of the concession at stake. In the view of TPKM, this shows that the negotiators of the ITA intended to stress the words “Set top boxes which have a communication function” over the rest of the text.
408. In sum, and considering the above arguments, TPKM considers that it is appropriate to analyse the other terms, namely “a microprocessor-based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange”.
409. According to commonly used dictionaries, the meanings of the relevant terms in the definition are as follows.
410. The *New Shorter Oxford English Dictionary* defines “**modem**” as (noun): 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.<sup>204</sup>
411. The *New Shorter Oxford English Dictionary* defines “**gain**” as (verb): Obtain, secure, or acquire (*esp.* something desired or advantageous).<sup>205</sup>
412. The *New Shorter Oxford English Dictionary* defines “**interactive**” as (adjective): 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.<sup>206</sup>

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<sup>203</sup> It must be noted that in Attachment B the words “Set top boxes which have a communication function” are marked in bold, as opposed to the rest of the text of the concession at stake. This reinforces TPKM’s argument that the negotiators of the ITA intended to stress the words “Set top boxes which have a communication function” over the rest of the text of the concession.

<sup>204</sup> The *New Shorter Oxford English Dictionary*, 1993, 4th edition, p. 1811.

<sup>205</sup> *Id.*, p. 1066.

<sup>206</sup> *Id.*, p. 1406.

413. The *New Shorter Oxford English Dictionary* defines “**information**” as (noun): 2. Communication of the knowledge of some fact or occurrence. 3. Knowledge or facts communicated about a particular subject, event, etc; intelligence, news.<sup>207</sup>
414. The *New Shorter Oxford English Dictionary* defines “**exchange**” as (noun): The action, or an act, of reciprocal giving and receiving<sup>208</sup>; (verb): Dispose of by exchange or barter; relinquish (something) and receive something else in return.<sup>209</sup>
415. The *New Shorter Oxford English Dictionary* defines “**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.”<sup>210</sup>
416. In view of these definitions, a type of STB with a communication function would be a microprocessor-based device incorporating a modem for gaining access to internet and allowing a two-way flow of information.
417. For some of the terms that are themselves IT products, it is useful to look in specialized dictionaries, in particular for the word “modem” given that it appears to be contentious in the framework of the present dispute.
418. According to the *IEEE Standard Dictionary of Electrical and Electronics Terms*, a “modem” is a piece of equipment that connects data terminal equipment to a communication line.<sup>211</sup>
419. Furthermore, 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 also 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.<sup>212</sup>
420. It is clear from the above-mentioned definitions that the term “modem” is a generic term used to describe an apparatus that accesses and interfaces with the Internet.
421. The broad definition of the term “modem” is further supported by the words following the term “modem” in the concession at stake. Indeed, it is clarified that it is the modem that is “for gaining access to the Internet”. What is essential is that the device enables one to gain access to the Internet. This is possible not only with DSL- or cable- modems, but

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<sup>207</sup> Id., p. 1379.

<sup>208</sup> Id., p. 886.

<sup>209</sup> Id., p. 886.

<sup>210</sup> Id., p. 1342.

<sup>211</sup> See the *IEEE Standard Dictionary of Electrical and Electronics Terms* (1996), p. 660. It defines modem as “[a] contraction of Modulator-DEModulator, an equipment that connects data terminal equipment to a communication line.”

<sup>212</sup> See the *Newton's Telecom Dictionary*, (2008, 24th ed.) p. 922 (“A Terminal Adaptor, also known as an ISDN Modem, is an interface device that essentially is a protocol converter that serves to interface non-ISDN devices (e.g., PCs, fax machines and telephone sets) to an ISDN BRI (Basic Rate Interface) circuit...”); See also the *Newton's Telecom Dictionary* (2004, 20th ed.), p. 532 (“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”).

also with modems such as ISDN- modems.

*Conclusions concerning the ordinary meaning*

422. TPKM has first examined the meaning of the terms after the colon: “a microprocessor-based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange”. TPKM considers that because of the placement of these terms after the colon, and because the terms “set top boxes which have a communication function” are marked in bold in the ITA, these terms provide the description of one type of STB which has a communication function.
423. 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.

(2) Context

424. Having examined the ordinary meaning, TPKM turns to examine the “context” for the concession at stake pursuant to Articles 31(1) and 31(2) of the *Vienna Convention*.
425. As indicated above, the “context” consists in the first place in the text of the treaty.<sup>213</sup> In light of the case-law of the Appellate Body in *EC – Chicken Cuts* which has distinguished between the immediate and broader context, TPKM will analyse the tariff headings indicated in the EC Schedule regarding its concession on STBs with a communication function.

*Tariff headings indicated in the EC Schedule regarding its concession on “set-top box with a communication function”*

426. The terms in the headings and subheadings listed in the EC Schedule need to be examined. It is recalled that the EC cites the following 3 subheadings next to STBs in the second list: 8517.50.90, 8517.80.90 and 8525.20.99. The titles of the relevant headings and subheadings, taken from the first list in the EC Schedule, are as follows:

HS96	Description
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 50	- Other apparatus, for carrier-current line systems or for digital line systems
8517 50 10	-- For carrier-current line systems
<b>8517 50 90</b>	<b>-- Other</b>
8517 80	- Other apparatus
8517 80 10	-- Entry-phone systems
<b>8517 80 90</b>	<b>-- Other</b>
8525	Transmission apparatus for radio-telephony, radio-telegraphy, radio-broadcasting or television, whether or not incorporating reception apparatus or sound recording or

<sup>213</sup> See Chapeau of Article 31(2) of the *Vienna Convention*.

	reproducing apparatus; still image video cameras and other video camera recorders:
8525 20	- Transmission apparatus incorporating reception apparatus
8525 20 10	-- Radio-telegraphic or radio-telephonic apparatus, for use in civil aircraft
	-- Other
8525 20 91	--- For cellular networks (mobile telephone)
<b>8525 20 99</b>	<b>--- Other</b>

427. The following CN subheading was also mentioned as of 2000:

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”)
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428. Heading 8517 covers “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.”.

429. In turn, CN subheading 8517.50.90 covers “Other apparatus, for carrier-current line systems or for digital line systems - Other” and CN subheading 8517.80.90 covers “Other apparatus - Other”.

430. Neither the terms contained in the title of the heading 8517, nor those in the titles of the two above-mentioned subheadings make any reference to the functions that may be performed by apparatuses classified under this heading and subheadings. The terms in those titles do not expressly or implicitly limit the functions of products classified under them to one or more functions. These terms therefore do not support the EC’s determination that STBs that perform functions in addition to the communication function cannot be treated as falling under the coverage of the concession at stake.

431. Next, the terms of heading 8517 and CN subheadings 8517.50.90 and 8517.80.90 also do not make any reference to any specific type of modems that would restrict the scope of the concession.

432. Heading 8525 covers “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 :” and subheading 8525.20 refers to “transmission apparatus incorporating reception apparatus”.

433. As is clear from the terms used in heading 8525, this heading covers “Transmission apparatus (...) whether or not incorporating reception apparatus or sound recording or reproducing apparatus;...”. The title of the heading makes it clear that apparatuses covered by this heading fall under it regardless of whether they incorporate reception apparatus or sound recording or reproducing apparatus. In fact, the title of subheading 8525.20 under which the EC stated in its Schedule that certain STBs with a communication function should be classified covers expressly transmission apparatuses

“incorporating reception apparatus”.

434. Heading 8525 is divided into four main subheadings: 8525.10 (“Transmission apparatus”), 8525.20 (“Transmission apparatus incorporating reception apparatus”), 8525.30 (“Television cameras”) and (“Still image video cameras and other video camera recorders”). Because the terms “recording” and “reproducing” are placed before the first semi-colon in the title of Heading 8525, they must refer to functions that transmission apparatus for radio-telephony, radio-telegraphy, radio-broadcasting or television – one of which is STBs classified under subheading 8525.20 – may perform. Therefore, apparatuses falling under subheading 8525.20 – including STBs with a communication function – may perform more than one function and still be classifiable under one of the two subheadings which the EC identified in its Schedule as covering the product at stake.
435. Neither the terms in the title of heading 8525 nor of subheading 8525.20 require that the transmission apparatus incorporating reception apparatus consists of a modem for the apparatus to be classifiable under that heading and subheading.
436. The fact that the EC did not implement this concession by including the same wording as the one included after the colon, i.e., “a micro-processor based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange” supports the position that this description is but only one type of STBs with a communication function that are covered by the concession. It was only as of the end of 2000 that the EC decided to implement the concession with the same wording as the one included after the colon through CN subheading 8528.21.91. However, such amendment does not affect the above analysis since the new CN subheading 8528.21.91 would necessarily include what had been identified by the EC in the initial CN subheadings.

#### *Conclusion on context*

437. TPKM has analysed the terms of the CN subheadings listed by the EC in its Schedule regarding the concession on STBs. These terms do not support the EC’s determination 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.

#### (3) Object and purpose

##### (i) *Expansion of trade in goods and substantial reduction of tariffs*

438. In *EC – Chicken Cuts (Brazil)*, the panel concluded 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” but that it is also clear that “such an interpretation is limited by the conditions that arrangements entered into by Members be reciprocal and mutually advantageous”.<sup>214</sup>

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<sup>214</sup> Panel Report, *EC – Chicken Cuts (Brazil)*, para. 7.320 confirmed on appeal by the Appellate Body, para. 243.

439. The concession concerning “set-top boxes which have a communication function” has been made by the EC pursuant to the ITA, i.e., in order to implement the ITA. Actually, all the participants to the ITA have made the same concession since, under the ITA, all participants committed themselves to bind and eliminate duties with respect to all products specified in Attachments A and B to the Annex to the Declaration, including with respect to “set-top boxes which have a communication function.” In that respect, the concession made by the EC is by definition reciprocal and mutually advantageous because the same concession has been made by all other participants to the ITA.
440. Since the concession has been made by the EC pursuant to the ITA, TPKM considers that it is essential to examine carefully the ITA in order to properly assess the “common intention” of the parties.
441. In this regard, the wording used in the ITA and in its Preamble is highly relevant. First, the Preamble to the ITA underlines the key role of trade in information technology products in the development of information industries and in the dynamic expansion of the world economy. Second, it emphasizes the participants’ desire “to achieve *maximum freedom* for world trade in information technology products.” (emphasis added) Paragraph 1 of the ITA further provides that “each party’s trade regime should *evolve in a manner that enhances market access opportunities* for information technology products.” (emphasis added)
442. It thus flows 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 with the ITA’s object and purpose. In particular, an interpretation that would result in excluding from the EC concession with respect to “set-top boxes which have a communication functions”, STBs that have an additional recording function (STBs including a HDD) or STBs that do not incorporate the types of modems that are listed in the CNEN, is contrary to the objective of substantial reduction of tariffs through reciprocal and mutually advantageous arrangements.
- (ii) *The security and predictability of the reciprocal and mutually advantageous arrangements*
443. As indicated above, one of the main objects and purposes of the WTO Agreement and of the GATT 1994 is the security and predictability of the reciprocal and mutually advantageous arrangements directed at the substantial reduction of tariffs and other barriers to trade.
444. In order to promote security and predictability, the interpretation of a concession is to be limited by the terms used in that concession. The wording used in the concession concerning “set-top boxes which have a communication function” does not in any way limit its scope to those STBs which do not have a HDD, or to those STBs that include the specific types of modems that are referred to in the CNEN that are challenged.
445. The objectives of security and predictability would thus strongly be undermined if the EC could unilaterally restrict the scope of the concession granted with respect to “set-top boxes which have a communication function” by excluding from it the

STBs at issue.

(4) Other Considerations

446. As we have seen, STBs meeting the requirements set forth in the EC Schedule should have been granted duty-free treatment since the year 2000. Such STBs were to fall under the three subheadings mentioned in document WT/Let/156, namely, 8517.50.90, 8517.80.90 and 8525.20.99.
447. In 2000, the EC amended its CCT in order to reflect the discussions that had taken place within the ITA Committee with respect to the classification of STBs which have a communication function. The EC introduced Taric code 8528.12.93.10 as of 1 October 2000 that covered “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”). As of 1 January 2002, that Taric code was changed into CN subheading 8528.12.91. STBs falling under this subheading received duty-free treatment.
448. Between 2000 and 2005, imports of different types of STBs increased very rapidly. Imports of STBs which have a communication function benefited from the duty-free treatment, as provided for in the EC Schedule.
449. Following an OLAF investigation, the Customs Code Committee started discussing in 2005 the coverage of the ITA as regards STBs and classification matters related thereto.
450. Summary reports of these initial meetings indicate that the discussion focused on the scope and coverage of the EC concession with respect to STBs. In the Report of the 360<sup>th</sup> meeting of the Customs Code Committee, there is an indication that a type of STB was not treated as covered by the EC’s concession: “MS would not classify a product under ... CN subheading [8528 12 91] if the internet connection is limited to certain WEB-addresses. In the report summarising the 375<sup>th</sup> meeting of the Committee it is stated that: “set-top boxes classified under code 8528 12 91 must incorporate a tuner and a modem. Set-top boxes with a tuner which are to be connected to an external modem are under code 8528 12 94.”
451. In the summary report of the 379<sup>th</sup> Committee meeting it is stated that:
- “- A set-top box needs to meet the requirements of the description of subheading 8528 12 91 in order to be classified there. It is essential that the following requirements are met:
    - an incorporated modem;
    - internet access, and
    - interactivity.
  - One can distinguish between an IP set-top box with browser function (point to point) and other (non-IP) set-top boxes where the modem is used for communication. In the latter group of set-top boxes a distinction can be made between the two-way communication boxes (with return signal) and the boxes which do not have this return signal capability.”

452. Up to the end of 2005 there was no indication that certain STBs which have a communication function would *not* benefit from the duty-free treatment under the EC Schedule, other than those whose internet connection is limited to certain WEB-addresses or those with an external modem.
453. In the 395<sup>th</sup> meeting of the Committee, in May 2006, EC member States examined the draft CNEN and discussed the issue of the treatment of STBs with a communication function incorporating a device performing a recording function. The proper classification of this STB was to be examined further by the EC Commission. While no decision was taken, the EC Commission asked EC member States to “wait to issue BTIs until the case is concluded.”
454. In the meetings of July and October 2006, the draft CNEN continued to be discussed. In October 2006, the CNEN to codes 8528.12.90 to 8528.12.95 and 8528.12.98 were approved by unanimity and a favourable opinion to code 8528.12.91 was given. The vote relating to STBs with a HDD was postponed. It was put up for voting in April 2007, being approved under the comitology procedure.
455. Until the issue was discussed in the Customs Code Committee and even until the CNEN was published in the Official Journal of the European Union, the STBs at issue benefited from duty-free treatment as evidenced by numerous BTIs that have been issued by the customs authorities of the EC member States under CN subheading 8528.12.91. Even when the issue was under discussion in the Customs Code Committee, some customs authorities of the EC member States continued to apply duty-free treatment on any types of STBs with a communication function, including those that incorporated a HDD. For instance, French customs authorities delivered a BTI as of 2 August 2005 for a STB including a HDD under CN subheading 8528.12.91<sup>215</sup>; the UK customs authorities delivered a similar BTI on 8 April 2005<sup>216</sup>; the Belgian customs authorities as well.<sup>217</sup>

**4. The measures at issue violate Articles II:1(a) and II:1(b) of the GATT 1994**

456. Pursuant to Article II of the GATT 1994, the EC cannot accord to the other WTO Members treatment which is less favourable than that provided in its Schedule (Article II:1(a) of the GATT 1994) and more precisely, cannot impose customs duties in excess of those set forth and provided in that Schedule (Article II:1(b) of the GATT 1994).
457. Since, through the measures at issue, the EC imposes a 13.9% or 14% customs duty on STBs with a communication function while they should be granted duty-free treatment pursuant to the concessions included in the EC Schedule, the EC violates Articles II:1(a) and Article II:1(b) of the GATT 1994.

**D. 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**

**1. Relevant facts**

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<sup>215</sup> BTI FR-E4-2005-003506. See Exhibit TPKM-60.

<sup>216</sup> BTI GB114068108. See Exhibit TPKM-60.

<sup>217</sup> BTI BED.T.235.330. See Exhibit TPKM-60.

458. One of the measures challenged in this dispute is the CNEN relating to STBs that were published in the Official Journal of the European Union on 7 May 2008.
459. As noted in the Section dealing with the factual background, a draft CNEN had initially been submitted by the EC Commission in 2006. The main objective of the draft CNEN was to clarify the types of STBs that could fall under CN subheading 8528.12.91 and thus exempted from import duty. CN subheading 8528.12.91 covered “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”)”. The draft CNEN listed the various criteria that STBs had to fulfil in order to be covered under CN subheading 8528.12.91. Among others, the draft CNEN provided that “access to Internet” under CN subheading 8528.12.91 required unlimited internet connectivity. Moreover, STBs had to incorporate particular types of modems. More specifically, devices such as ISDN-, WLAN- or Ethernet devices were not considered to be “modems” and STBs including such devices therefore excluded from the scope of CN subheading 8528.12.91. In addition, the draft CNEN required the modem to be “built into the STB”. Furthermore, the draft CNEN also excluded from the scope of the duty-free tariff treatment STBs with a HDD. As a result, STBs with limited internet connectivity, not incorporating a modem within the meaning of the CNEN or with a HDD were excluded from the scope of CN subheading 8528.12.91, not covered by the ITA and hence subject to a 14 % customs duty [or 13.9% as far as STBs with HDD are concerned].
460. During the meeting that was held in October 2006, the Customs Code Committee delivered a favourable opinion on the draft CNEN concerning STBs to CN subheadings 8528.12.90 to 8528.12.95 “video tuners”, to CN subheading 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” and CN subheading 8528.12.98 “other”. These CNEN were thus adopted. The Customs Code Committee could however not reach an agreement on the classification of STBs with a HDD during that meeting.<sup>218</sup> The issue of the classification of STBs with a HDD was thus again raised during the April 2007’s meeting. During that meeting, the Customs Code Committee was unable to reach a qualified majority in order to issue a favourable opinion with regard to the classification of STBs with a HDD. Since there was, however, no qualified majority to oppose the draft CNEN, the EC Commission adopted the latter according to the management procedure.<sup>219</sup> Thus, STBs with a HDD were thus classified under CN subheading 8521.12.20 (CN subheading 8521.90.00 as of 1 January 2007) as “other video recording apparatus” pursuant to the adopted CNEN and, as a

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<sup>218</sup> Customs Code Committee – Tariff and Statistical Nomenclature Section (Mechanical/Miscellaneous), *Conclusions of the 407<sup>th</sup> meeting of the Customs Code Committee held in Brussels from 18 to 20 October 2006*, point 3.7. See Exhibit TPKM-30.

<sup>219</sup> See Article 4 of Council Decision 1999/468/EC and Article 9 of Council Regulation (EEC) 2658/87. The Committee delivered no opinion on the classification of set-top boxes incorporating a hard disc. See Customs Code Committee – Tariff and Statistical Nomenclature Section (Mechanical/Miscellaneous), *Conclusions of the 420<sup>th</sup> meeting of the customs Code Committee held in Brussels from 18 to 20 April 2007*, point 3.3. See Exhibit TPKM-31.

- result, subject to a 13.9% customs duty.<sup>220</sup>
461. Although already fully adopted in April 2007, the CNEN were not published at that time. As a result, EC member States started to raise the issue of their legal status, i.e., whether they should be followed despite the fact that they had not been published yet. During the Customs Code Committee's meeting held in October 2007, the EC Commission requested the EC member States to follow the text of the CNEN even though they had not yet been published and to refrain from issuing any contradictory BTIs.<sup>221</sup>
462. The draft CNEN were eventually published in the Official Journal of the European Union on 7 May 2008,<sup>222</sup> i.e., more than one year after having been adopted.
- 2. The non-publication of the CNEN while already adopted is contrary to Article X:1 of the GATT 1994**
463. By failing to publish the CNEN once they had been adopted and therefore to publish them "promptly", the EC violated Article X:1 of the GATT 1994.
464. Article X:1 of the GATT 1994 reads as follows:
- "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 thereof, 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."
465. The CNEN relating to STBs as published in the Official Journal of the European Union on 7 May 2008 fall within the scope of Article X:1 of the GATT 1994 as administrative rulings. Indeed, they constitute "laws, regulations, judicial decisions and administrative rulings of general application [...] pertaining to the classification [...] of products for customs purposes, or to rates of duty, taxes or other charges".
- (1) The CNEN constitute "administrative rulings" within the meaning of Article X:1 of the GATT 1994
466. CNEN are issued by the EC in accordance with the management procedure provided for in Article 10 of Council Regulation (EEC) No. 2658/87.<sup>223</sup> CNEN must be followed by national customs administrations. In that respect, it should be noted that the ECJ has

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<sup>220</sup> Customs Code Committee – Tariff and Statistical Nomenclature Section (Mechanical/Miscellaneous), *Conclusions of the 420<sup>th</sup> meeting of the customs Code Committee held in Brussels from 18 to 20 April 2007, Annex IV*. See Exhibit TPKM-31.

<sup>221</sup> Customs Code Committee – Tariff and Statistical Nomenclature Section (Mechanical/Miscellaneous), *Conclusions of the 432<sup>nd</sup> meeting of the Customs Code Committee held in Brussels on 19 October 2007*, point 6. See Exhibit TPKM-58.

<sup>222</sup> CNEN of the European Communities, 2008/C 112/03, OJ 2008 C 112, 7.5.2008, p.8. See Exhibit TPKM-28.

<sup>223</sup> See Article 9(1)(a) of Council Regulation No. 2658/87.

consistently held that CNEN constitute an important means for ensuring the uniform application of the CCT by the customs authorities of the EC member States<sup>224</sup>. This implies that customs authorities are required to follow these CNEN.

(2) The CNEN constitute an administrative ruling of “general application”

467. The CNEN concerned are clearly “of general application”. As noted by the Panel in *EC – Selected Customs Matters*, “the laws, 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”.<sup>225</sup> In *US – Underwear*, the Panel noted that “If, for instance, the restraint was addressed to a specific company or applied to a specific shipment, it would not have qualified as a measure of general application. However, to the extent that the restraint affects an unidentified number of economic operators, including domestic and foreign producers, we find it to be a measure of general application”<sup>226</sup>. The CNEN relating to STBs apply to a range of situations or cases and affect an unidentified number of economic operators. They are thus of general application.

(3) The CNEN have not been published promptly

468. A broad interpretation of the terms “laws, regulations, judicial decisions and administrative rulings” as included in Article X:1 of the GATT 1994 is consistent with its context as contained in Article X of the GATT 1994. As noted by the Panel in *EC – Selected Customs Matters*, “the title as well as the content of the various provisions of Article X of the GATT 1994 indicates that that Article, at least in part, is aimed at ensuring that due process is accorded to traders when they import or export”<sup>227</sup>. The objective of Article X:1 is to enable governments and traders to acquire information as soon as possible so that they can adapt their trading activities accordingly without having to bear any detrimental effect caused by the adoption of new laws, regulations, judicial decisions or administrative rulings.

469. In the present case, although the CNEN were adopted in April 2007, they have only been published officially in May 2008, i.e., more than one year later while, in the meantime EC member States started and had to follow the CNEN which were thus “effective” within the meaning of Article X:1 of the GATT 1994. The fact that the CNEN were published only in May 2008 while already made effective, is clearly inconsistent with the requirement of “prompt” publication included in Article X:1 of the GATT 1994.

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<sup>224</sup> C-312/07 *JVC France*, para. 33, see Exhibit TPKM-11; C-229/06 *Sunshine Deutschland Handelsgesellschaft*, para. 26, see Exhibit TPKM-12; C-495/03 *Intermodal Transports BV*, para. 47, see Exhibit TPKM-13; C-445/04 *Possehl Erzkontor GmbH*, para. 19, C-500/04 *Proxxon*, para.21, see Exhibit TPKM-15.

<sup>225</sup> Panel Report, *EC- Selected Customs Matters*, para. 7.116. In that case, the Panel underlined that “the ordinary meaning of the term ‘general,’ which is of relevance in the context of Article X:1 of the GATT 1994, is ‘not specifically limited in application; related to a whole class of objects, cases, occasions, etc. (of a rule, law, etc.) true for all or nearly all cases coming under its terms’ and that ‘the ordinary meaning of the term ‘application’ of relevance for the purposes of Article X:1 of the GATT 1994 is: ‘the bringing of a general or figurative statement, a theory, principle, etc., to bear upon a matter’”, para. 7.116.

<sup>226</sup> Panel Report, *US – Underwear*, para. 7.65.

<sup>227</sup> Panel Report, *EC-Selected Customs Matters*, para. 7.107.

Therefore, the EC has violated Article X:1 of the GATT 1994.

**E. 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**

**1. Relevant facts**

470. As indicated above, the CNEN relating to STBs were voted by the Customs Code Committee in October 2006 and April 2007. As a result of these CNEN, some types of STBs such as STBs with a HDD which were previously subject to duty-free treatment upon importation became subject to a 13.9 % customs duty pursuant to the new classification imposed by these CNEN. The CNEN relating to STBs were officially published in the Official Journal of the European Union on 7 May 2008.<sup>228</sup>

471. However, before the official publication in May 2008 took place, several EC member States started to apply the adopted CNEN. For instance, Belgian Customs already imposed duties on STBs with a HDD with or without a modem in the first half of 2006. They further issued retroactive duty claims for STBs with a modem incorporating a HDD and for STBs without a modem whether including a HDD or not, imported during 2004-2005. In this case, duties were thus levied on imports which took place before the publication and even the adoption of the CNEN.

472. Similarly, the French authorities applied the CNEN almost one year before their publication by issuing in July 2007 BTIs that classified STBs with a HDD as “other video recording apparatus”.<sup>229</sup>

473. The enforcement of the CNEN by the EC member States prior to their official publication is consistent with the requirement of the EC Commission that EC member States follow the content of CNEN and do not issue BTIs that are contradictory to them as soon as their content has been voted by the Committee, i.e., even before the measure has been formally adopted by the EC Commission and published in the Official Journal.<sup>230</sup>

**2. By enforcing the CNEN relating to STBs before their official publication, the EC violated Article X:2 of the GATT 1994**

474. Article X:2 of the GATT 1994 reads as follows:

“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 prohibition on imports, or on the transfer of payments therefore, shall be enforced before such measure has been officially published.”

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<sup>228</sup> CNEN of the European Communities, 2008/C 112/03, OJ 2008 C 112, 7.5.2008, p. 8. See TPKM-28.

<sup>229</sup> FR-E4-2007-002839-R1,FR-E4-2007-001251, FR-E4\_2007-00261. See Exhibit TPKM-61.

<sup>230</sup> Customs Code Committee – Tariff and Statistical Nomenclature Section (Heads of Tariff), *Summary Report of the 433<sup>rd</sup> meeting of the Committee held on 22 October 2007*, point 5. See Exhibit TPKM-17.

475. The Appellate Body stated in *US – Underwear* that Article X:2 of the GATT 1994 embodies a principle of fundamental importance, i.e., the principle of transparency which has due process dimensions: “Article X:2 may be seen to embody a principle of fundamental importance - that of promoting full disclosure of governmental acts affecting Members and private persons and enterprise”<sup>231</sup>. The Appellate Body further clarified that the main purpose of Article X:2 is to ensure that Members or persons affected by governmental measures that impose restraints, requirements and other burdens have a reasonable opportunity to acquire all the needed information in order protect and adjust their activities or challenge such measures.<sup>232</sup>
476. The panel in *US - OCTG AD Measures* held that “obviously, since Article X:2 precludes retroactive application of a measure, compliance with this obligation, and thus questions of alleged violation, will depend on the timing of publication of a measure, and its enforcement in particular circumstances affecting the rights of WTO Members”<sup>233</sup>. It is thus essential to examine the time of publication of the CNEN and the time of its enforcement by certain EC member States.
477. Given that the enforcement of the CNEN relating to STBs started well before their publication in the Official Journal in May 2008, the EC acted inconsistently with Article X:2 of the GATT 1994.
478. The principles of transparency and due process were not respected during the adoption and enforcement of the CNEN relating to STBs. Some EC member States started to follow the content of the CNEN, thereby levying customs duties on STBs that had been imported duty-free before the CNEN were officially published in the Official Journal of the European Union. Some EC member States applied duties based on the new classification to imports that had occurred even before the CNEN’s adoption in 2007. Such actions are contrary to the principles of transparency and legal certainty.
479. The lack of transparency is also demonstrated by the fact that EC member States kept raising the issue of the legal status of the CNEN, especially concerning the classification of STBs incorporating a HDD in various meetings of the Customs Code Committee.<sup>234</sup>
480. In view of the foregoing, it is clear that the EC acted inconsistently with its obligations under Article X:2 of the GATT 1994.

**F. By Imposing Duties on Certain Multifunctional Machines, the EC is Violating Articles II:1(a) and II:1(b) of the GATT 1994**

481. This claim concerns the treatment given by the EC to imports of certain MFMs. Through the challenged measures which are described in paras. 107-121, the EC is imposing

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<sup>231</sup> Appellate Body Report, *US – Underwear*, page 21.

<sup>232</sup> *Ibid.*

<sup>233</sup> Panel Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 7.181.

<sup>234</sup> Customs Code Committee – Tariff and Statistical Nomenclature Section, *Report of Conclusions of the 413<sup>th</sup> meeting of the Customs Code Committee, held in Brussels from 10 to 12 January (TAXUD/0584/2007)*, point 5. See Exhibit TPKM-57; Customs Code Committee – Tariff and Statistical Nomenclature Section *Report of Conclusions of the 432<sup>nd</sup> meeting of the Customs Code Committee, held in Brussels on 19 October 2007*, point 6. See TPKM-58.

customs duties on certain MFMs, instead of providing duty-free treatment as required by the EC Schedule.

482. In light of the above, TPKM considers that its commerce has been accorded treatment less favourable than that provided in the EC Schedule, and that ordinary customs duties, or other duties and charges, in excess of those set forth in the EC Schedule have been applied to MFMs, 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 Article XXIII of the GATT 1994, benefits accruing, directly or indirectly, to TPKM.
483. As already stated, the MFMs at issue can be divided into two main product categories. The MFMs of the first category are connectable to an ADP machine or to a computer network. Products belonging to this category are sometimes referred to as multifunctional printers. The second category of MFMs cannot connect to an ADP machine and operates in connection with a phone line. These MFMs usually have a sheet feed scanner. Products belonging to this category are commercially referred to as facsimile machines.

## 1. Treatment of the product at issue

### (1) Treatment in the EC Schedule

484. The EC incorporated in its Schedule the commitments undertaken in the ITA. More specifically, the EC modified its Schedule such as to bind duty-free treatment on imports of “input or output units” of ADP machines (HS subheading 8471.60) including on printers (CN subheading 8471.60.40) and “others” (CN subheading 8471.60.90) and on imports of “facsimile machines” (CN subheading 8517.21.00<sup>235</sup>) as follows:

Tariff Item number	Description of products	Base rate	Bound rate	Implementation	Present concession established	INR	Concession first incorporated in a GATT Schedule	Earlier INRs	ODCs
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								

<sup>235</sup> We note that the terms of CN subheading 8517.21.00 are identical to the terms of HS subheading 8517.21. Throughout the present submission, we will refer to CN subheading 8517.21.00 since it is the concession as it appears in the EC Schedule of concession.

	storage units in the same housing								
(...)									
	-- Other								
8471 60 40	--- Printers	2	0.0	1999	WT/Let				0.0
8471 60 50	--- Keyboards	2	0.0	1999	WT/Let				0.0
8471 60 90	--- Other	2	0.0	1999	WT/Let				0.0

Tariff Item number	Description of products	Base rate	Bound rate	Implementation	Present concession established	INR	Concession first incorporated in a GATT Schedule	Earlier INRs	ODCs
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								
(...)									
	- Facsimile machines and teleprinters								
8517 21 00	-- Facsimile machines	7.5	0.0	2000	WT/Let				0.0

485. While, pursuant to the ITA, the EC modified its Schedule with respect to heading 9009 such as to bind duty-free treatment for items covered by CN subheading 9009.11.00 (“electrostatic photocopying apparatus, operating by reproducing the original image directly onto the copy (direct process)”) and CN subheading 9009.21.00 (“other photocopying apparatus, including an optical system”), no change was made with respect to CN subheading 9009.12.00<sup>236</sup> covering “electrostatic photocopying apparatus operating by reproducing the original image indirectly onto the copy (indirect process)”. This product is not covered by the ITA and remains subject to a bound tariff of 6%.

Tariff Item number	Description of products	Base rate	Bound rate (%)	Implementation	Present concession established	INR	Concession first incorporated in a GATT Schedule	Earlier INRs	ODCs
9009	Photocopying apparatus incorporating an optical system or of the contact								

<sup>236</sup> We note that the terms of CN subheading 9009.12.00 are identical to the terms of HS subheading 9009.12. Throughout the present submission, we will refer to CN subheading 9009.12.00 since it is the concession as it appears in the EC Schedule.

	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	2000	WT/Let				0.0
9009.12.00	-- Operating by reproducing the original image via an intermediate onto the copy (indirect process)		6						
	- Other photocopying apparatus								
9009.21.00	-- Incorporating an optical system	6.5	0	2000	WT/Let				0.0
9009.90	- Parts and accessories								
9009.90.10	-- Of electrostatic photocopying apparatus or other photocopying apparatus incorporating an optical system	6.5	0	2000	WT/Let				0.0
9009.90.90	-- Other		0	2000					

(2) Treatment under the measures at issue

486. Commission Regulation (EC) No. 517/1999, Commission Regulation (EC) No. 400/2006, the Customs Code Committee's Statement in the Report of Conclusions of its 360<sup>th</sup> Meeting and Council Regulation (EEC) No. 2658/87 as amended, classified the MFMs at issue under CN subheading 9009.12.00 (until 31 December 2006) and CN subheading 8443.31.91 (as of 1 January 2007). In adopting these measures, the EC has subjected the MFMs at issue to a customs duty of 6%.
487. With regard to Commission Regulation (EC) No. 517/1999, 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. Therefore, according to the EC, the classification is to take place automatically on the basis of GIR 3(c) under the heading which comes last in numerical order, i.e., under CN subheading 9009.12.00.
488. With regard to the Customs Code Committee's Statement in the Report of Conclusions of its 360<sup>th</sup> Meeting and Council Regulation (EEC) No. 2658/87 as amended, the criterion for the reclassification is that as soon as the above MFMs with a fax function are able to copy 12 pages or more per minute (for the first measure dated 2005) or more than 12 pages per minute (for the second measure dated 2006), such MFMs must be regarded as being photocopying machines and therefore be subject to a 6% customs duty. If the MFM with a fax function is capable of making less than 12 pages per minute (first measure) or 12 or less pages per minute (second measure), it will not be treated as a photocopier and will remain subject to 0% customs duty.

489. However, pursuant to Commission Regulation (EC) No. 400/2006, and Council Regulation (EEC) No. 2658/87 as amended, MFMs without a fax function will be automatically classified in all cases as photocopiers subject to 6% customs duty in application of GIR 3(c).
490. This results in excluding them from the scope of the concessions undertaken by the EC pursuant to the ITA with respect to “input or output units” of ADP machines (HS subheading 8471.60) and “facsimile machines” (CN subheading 8517.21.00).

(3) Treatment under the measures at issue is less favourable than the treatment in the EC Schedule

491. TPKM submits that the MFMs at issue fall within the scope of the concessions made by the EC with respect to subheading 8471.60 and CN subheading 8517.21.00 for which the EC committed to grant duty-free treatment. Thus, by imposing a 6% customs duty on the MFMs at issue, the EC accords treatment of the products at issue that is less favourable than that provided for in the EC Schedule in violation of Article II:1(a) of the GATT 1994. Those measures result in the imposition of duties on the products at issue that are in excess of those provided for in the EC Schedule in violation of Article II:1(b) of the GATT 1994. By imposing a 6% customs duty on imports of MFMs instead of duty-free treatment, the EC violates both Articles II:1(a) and (b) of the GATT 1994.
492. The key issue concerns the scope of the concessions made by the EC with respect to subheading 8471.60 and CN subheading 8517.21.00. In the following section, TPKM will examine and demonstrate, in the light of the principles of treaty interpretation, that the MFMs at issue are covered by the concessions of heading 8471.60 or CN subheading 8517.21.00 undertaken by the EC in accordance with the ITA.

**2. Background of the measures at issue**

493. The overview below first explains the process followed by the EC to reclassify MFMs under dutiable headings. Since the issue of the classification of MFMs has been extensively discussed in the framework of the WCO, the overview below also includes a summary of the discussions that have taken place within the WCO on this topic.

(1) Reclassification by the EC of MFMs under dutiable headings

494. This overview shows how, after having made concessions with respect to “input or output units” of ADP machines and facsimile machines pursuant to the ITA, the EC started to empty these concessions as far as MFMs are concerned. The approach followed by the EC is based on a reasoning which involves several fundamental errors: (i) the EC has considered that “photocopying” covers “digital copying” while these are fundamentally different technologies and (ii) the EC has ignored the ability of MFMs to connect to computers or computer networks as a central criterion to determine the scope of the concessions made with respect to HS subheading 8471.60.
495. Although the concessions made by the EC pursuant to the ITA became effective as of 1997, the EC started soon thereafter to subject certain MFMs to a duty of 6% by reclassifying them as “photocopying machines”.

496. On 9 October 1997, the ECJ delivered its judgment in the *Rank Xerox* case.<sup>237</sup> In that case, the ECJ had to deal with the tariff classification of a MFM that comprised a scanner, a digital memory and a laser printer. The MFM at issue could not connect to a computer or to a computer network. Therefore, classification in heading 8471 was not a classification option before the ECJ. The EC Commission argued that it should be classified as a photocopier machine under heading 9009, while Xerox argued that it should be classified under the residual heading 8472 applicable to “other office machines” given that the scanner did not display the features of an optical system falling within Chapter 90. Since the product also operated as a fax machine, heading 8517 was also a possible classification option.
497. The ECJ classified the MFM pursuant to GIR 3. The ECJ first held that Note 3 to Section XVI could not be applied since not all of the applicable headings, i.e., Heading 9009, belonged to Section XVI. The ECJ further held that GIR 3(b) was not applicable to the MFM concerned since there was “no feature” enabling their essential character to be determined. Consequently, GIR 3(c) which classifies a product under the heading which comes last in numerical order became applicable. The ECJ therefore classified the particular MFM concerned as a photocopier under heading 9009, since that was the last heading in numerical order. This decision is thus based on the fact that in that particular case, the residual classification method provided by GIR 3(c) was the only solution left.
498. As pointed out by the ECJ in the *Kip* case,<sup>238</sup> the relevance of this court decision is very limited when dealing with MFMs that can connect to a computer or a computer network. However, the EC Commission seems to have interpreted *Rank Xerox* as providing the basis for an automatic application of GIR 3(c) to MFMs including the ones at issue.
499. On 4 November 1997, Commission Regulation (EC) No. 2184/97 was published.<sup>239</sup> Item 3 of the Annex to this Commission Regulation classified a “multifunction facsimile machine” consisting of a modem, a scanner, and a printing device under CN subheading 8517.21.00. The legal basis for this classification was Note 3 to Section XVI because the facsimile function was its principal function. The apparatus could be used in autonomous form or in conjunction with a computer.
500. On 10 March 1999, Commission Regulation (EC) No. 517/1999 was published.<sup>240</sup> Item 1 of the Annex to this Commission Regulation classified a “multifunctional apparatus” capable of faxing, scanning, printing and copying under CN subheading 8517.21.00. The legal basis was Note 3 to Section XVI because the principal function of the apparatus was that of faxing. Item 2 of the Annex to this Commission Regulation classified a “multifunctional apparatus (so-called “digital copier”)” capable of scanning, printing, copying and faxing under CN subheading 9009.12.00, thereby subjecting it to a 6% customs duty. The legal reasoning was GIR 3(c) because the “apparatus has several

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<sup>237</sup> C-67/95 *Rank Xerox Manufacturing (Nederland) BV v Inspecteur der Invoerrechten en Accijnzen*, [1997] ECR I-05401. See TPKM-62.

<sup>238</sup> Joined cases C-362/07, *Kip Europe SA and Others*, and C-363/07, *Hewlett Packard International SARL v Administration des douanes - Direction générale des douanes et droits indirects*, judgment of 11 December 2008, at para. 53 to 55. See Exhibit TPKM-63.

<sup>239</sup> Commission Regulation (EC) No. 2184/97 of 3 November 1997, concerning the classification of certain goods in the Combined Nomenclature, OJ L 299, 4.11.1997, p.6. See Exhibit TPKM-64.

<sup>240</sup> Commission Regulation (EC) No. 517/1999 of 9 March 1999, concerning the classification of certain goods in the Combined Nomenclature, OJ L 61, 10.03.1999, p.23. See Exhibit TPKM-35.

- functions none of which are considered to give the product its essential character”. The apparatus could function in an autonomous form or in conjunction with a computer or network. This is one of the measures concerned by this dispute.
501. On 17 May 2001, the ECJ delivered its judgment in the *Hewlett Packard* case.<sup>241</sup> The ECJ held that a multifunctional machine is classified under heading 8517 if the telecommunication function (“facsimile”) is its principal function. The ruling was based on the criteria contained in Commission Regulation (EC) No. 2184/97 in force at the material time. However, the ECJ did not provide any indication as to how to determine the MFM’s principal function.
502. As shown above, the EC Commission’s practice was to classify MFMs as facsimile machines where the facsimile function was the principal function pursuant to Note 3 to Section XVI. All the other MFMs, and in particular those without a facsimile function, were classified as photocopiers under heading 9009 in application of GIR 3(c). In the absence of criteria to determine the essential character or the principal function, the EC could classify MFMs under dutiable headings by simply concluding that the essential character could not be determined.
503. The above discretionary approach which increasingly classified MFMs under dutiable headings caused the classification of “multifunctional digital copiers” to be put on the agenda of the Customs Code Committee meeting of February 2002.<sup>242</sup> The adoption of a criterion that distinguishes fax machines of heading 8517 from photocopiers of heading 9009 depending on the number of pages that the apparatus could copy per minute was suggested. However, most EC member States took the view that each apparatus should be examined on a case-by-case basis. Pursuant to this view, the principal function should be identified by reviewing all functions and compare the apparatus with machines specifically designed for that function, as suggested in the Opinion of the Advocate General in the *Hewlett Packard* case. If none of the functions clearly determined the classification, EC member States agreed to rely on the pages copied per minute to make a distinction between heading 8517 (fax machine) and heading 9009 (photocopier). The number of pages copied per minute remained therefore a matter of discussion for future meetings. However, it was clearly an arbitrary criterion since it was only to be used once it had been acknowledged that the principal function could not be identified.
504. The item was included again on the agenda of the January 2003 meeting where the relevance of a criterion based on the number of pages copied per minute was discussed again.<sup>243</sup> This criterion was favoured by some EC member States. It was however agreed that any decision should wait until the HS Committee had finalized a study on this issue.
505. In January 2005, the Customs Code Committee discussed a letter sent by the European Information, Communications and Consumer Electronics Technology Industry

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<sup>241</sup> C-119/99, *Hewlett Packard BV v Directeur général des douanes et droits indirects*, [2001] ECR I-03981. Exhibit TPKM-65.

<sup>242</sup> Customs Code Committee – Tariff and Statistical Nomenclature Section (Mechanical/Miscellaneous Sector), *Extract from the Minutes of the 274<sup>th</sup> Meeting of the Committee held from 25 to 26 February 2002*, point 3.3. See Exhibit TPKM-66.

<sup>243</sup> Customs Code Committee – Tariff and Statistical Nomenclature Section, *Extract from the Minutes of the 302<sup>nd</sup> meeting of the Committee held from 27 to 29 January 2003*, point 4.19. See Exhibit TPKM-67.

Association (“EICTA”) on the tariff classification of MFMs.<sup>244</sup> The letter expressed EICTA’s concerns that the number of pages copied per minute was apparently being discussed as a tariff classification criterion. The Chairman of the Customs Code Committee stated in the minutes of the meeting that the issue was not the classification of multifunctional devices. This debate was already closed with the adoption of Commission Regulation (EC) No. 517/99. Moreover, the discussions at the HSC were also closed. The Chairman also stated that “one needs to appreciate the products 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 EC member States agreed to have a clarification on the classification of MFMs as reflected in a Statement agreed by the Committee (“2005 NC Statement”) and included in the minutes of the meeting:

“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”.

506. The criterion of 12 pages per minute was incorporated by some EC member States into their national classification guidance. For instance, Germany included the criterion in its Explanatory Notes (“Erläuterungen zur Kombinierten Nomenklatur”), in particular under the title National Decisions (“Nationale Entscheidungen und Hinweise (NEH)”).<sup>245</sup> Similarly, the UK Customs Authorities also included the criterion of the number of pages per minute in their “Tariff Classification Guidance for Chapter 85 – Computers and Software”.<sup>246</sup>
507. In October 2005, the classification of MFMs was again placed on the agenda of the Customs Code Committee because tribunals in some EC member States had issued rulings which were apparently contrary to the *Hewlett Packard* case. In particular, the minutes record the following:

“3.10. Multifunctional devices (doc. TAXUD/671/2005)\*  
National court rulings are in conflict with the decision of the Court of Justice (C-119/99 *Hewlett Packard*). The Commission will prepare draft regulations in order to overrule the national court decisions. To be presented at the next meeting.”<sup>247</sup>

508. In December 2005, the Customs Code Committee voted on a new classification

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<sup>244</sup> Customs Code Committee – Tariff and Statistical Nomenclature Section (Mechanical/Miscellaneous Sector), *Report of conclusions of the 360<sup>th</sup> meeting of the Committee held from 26 January to 28 January 2005*, point 3.11 on “Multifunctional digital copiers”. See Exhibit TPKM-32.

<sup>245</sup> Nationale Entscheidungen und Hinweise (NEH) Zu Unterposition 9009 12 00. See Exhibit TPKM-68.

<sup>246</sup> HM revenue & Customs, Tariff Classification Guidance for Chapters 84 and 85 – Computers and Software, p. 10. See Exhibit TPKM-69.

<sup>247</sup> Customs Code Committee – Tariff and Statistical Nomenclature Section (Mechanical/Miscellaneous Sector), *Conclusions of the 379<sup>th</sup> meeting of the Committee held from 13 to 14 October 2005*, point 3.10. See Exhibit TPKM-70.

- regulation for MFMs.<sup>248</sup> It was published in March 2006 as Commission Regulation No. 400/2006.<sup>249</sup> Item 4 of the Annex to this Commission Regulation classified a “multifunctional apparatus” capable of scanning, printing and copying but without a fax under CN subheading 9009.12.00. The legal reason was GIR 3(c) because “the apparatus has several functions none of which are considered to give the product its essential character”. This regulation was necessary because the national rulings mentioned in the October 2005 meeting of the Customs Code Committee did not include a fax application while the MFM classified by Commission Regulation (EC) No. 517/1999 included a fax application. Commission Regulation (EC) No. 400/2006 is one of the measures challenged in the present dispute.
509. On 31 October 2006, Commission Regulation (EC) No. 1549/2006 of 17 October 2006 amending Annex I to Regulation (EEC) No. 2658/87 was published.<sup>250</sup> This Regulation contains the Common Customs Tariff for 2007 and incorporates the criterion of the copying speed in the wording of CN subheading 8443.31.10 (0% duty): “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”.
510. CN subheading 8443.31.10 (0% duty) applies to apparatus “...not exceeding 12 monochrome pages per minute” which perform at least the copying and facsimile function. However, the statement included in the minutes of the January 2005 NC meeting classified as multifunctional apparatus subject to 6% duty those apparatus that could photocopy in black and white “12 or more pages per minute”. There is therefore a discrepancy with regard to those apparatus that can copy “12” pages per minute which benefit from 0% customs duty under Commission Regulation (EC) No. 1549/2006 as of 1 January 2007 but were previously subject to a 6% tariff pursuant to the 2005 Customs Code Committee statement before 1 January 2007. This discrepancy is surprising and clearly underlines the arbitrary character of the criterion of the number of pages copied per minute to distinguish between MFMs that are subject to duty-free treatment and those to which a customs duty is being applied.
511. However arbitrary and unjustifiable the use of the 12 pages per minute criterion may be, it is still better than the treatment accorded to MFMs without a facsimile function which are in all cases subject to the 6% customs duty applicable to photocopiers.
512. Indeed, CN subheading 8443.31.91 (6%) applies to “Machines performing a copying function by scanning the original and printing the copies by means of an electrostatic print engine”. As a result, MFMs without facsimile function or those that are able to print at a speed of more than 12 pages per minute and rely on electrostatic technology will be classified under CN subheading 8443.31.91 subject to a 6 % customs duty.
513. The same structure of the CN appears in Commission Regulation (EC) No. 1214/2007 adopting the Community Customs Tariff for 2008 and in Commission Regulation (EC) No. 1031/2008 adopting the Community Customs Tariff for 2009.

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<sup>248</sup> Customs Code Committee - Tariff and Statistical Nomenclature Section (Mechanical/Miscellaneous Sector), *Conclusions of the 386<sup>th</sup> meeting of the Committee held on 16 December 2005*, point 2.5 and Annex IV. See Exhibit TPKM-71.

<sup>249</sup> Commission Regulation (EC) No. 400/2006, p.9. See Exhibit TPKM-36.

<sup>250</sup> Commission Regulation (EC) No. 1549/2006, p.1. See Exhibit TPKM-34.

514. The EC Commission published a consolidated version of the CNEN to the Combined Nomenclature in 2008.<sup>251</sup> The adoption of this consolidated version was used to also insert a new CNEN to heading 8443:

- 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**
- 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**
- To determine the copy speed, the maximum speed for pages with text only at the lowest resolution (dpi) is to be taken into account.
- 8443 31 91**      **Machines performing a copying function by scanning the original and printing the copies by means of an electrostatic print engine**
- See the HS Explanatory Notes to heading 8443, part (II), (A), (1).
- The scanning process can be performed either by a digital or optical system.
- An electrostatic print engine operates in the same way as an electrostatic printer.
- In addition to the copying function, the machines of this subheading perform the function of facsimile transmission or printing.
- This subheading excludes machines that print the copies by means of an inkjet or thermal print engine (subheading 8443 31 99).
- 8443 32 30**      **Facsimile machines**
- See the HS Explanatory Notes to heading 8443, part (II), (C).
- 8443 39 10**      **Machines performing a copying function by scanning the original and printing the copies by means of an electrostatic print engine**
- See the Explanatory Notes to subheading 8443 31 91.
- 8443 39 31**      **Incorporating an optical system**
- Machines of this subheading incorporate an optical system (comprising mainly a light source, a condenser, lenses, mirrors, prisms or an array of optical fibres or similar devices) for the scanning of the original.
- 8443 39 39**      **Other**
- This subheading includes blueprinters and diazocopiers which are used for copying translucent originals onto photosensitive paper. As a result of light passing through the translucent original, the diazo compound or the

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<sup>251</sup> CNEN of the European Communities, OJ C 133, 30.05.2008. See Exhibit TPKM-23.

photosensitive iron salts in the copying paper are broken down in the illuminated areas. The non-illuminated areas are rendered visible by developing. These apparatus normally provide bluish copies in which the individual lines are not quite as sharp as the original.

**8443 39 90 Other**

This subheading includes non-impact printers provided that they are not capable of connecting to an automatic data processing machine or to a network, such as:

1. thermal printers, in which an electrically heated thermal print head produces the desired characters on heat-sensitive paper by means of a dot matrix;
2. electrostatic printers, in which the moving, statically charged metal tips of the write head produce invisible characters made-up of small electrostatically charged dots on electrographic paper. Toner fluid is used to ink the charged dots and produce visible characters.

The printers listed above are controlled by data media (for example, CD ROM, diskettes, magnetic tapes or semiconductor media) or by machines other than automatic telephones for cellular networks)

515. The CNEN clarifies the following in relation to CN subheading 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”. The CNEN also clarifies how to measure the copying speed.
516. The above arbitrary classification of MFM under Heading 9009 based on a generalized and automatic application of GIR 3(c) by the EC Commission was finally rejected by the ECJ in the *Kip* case<sup>252</sup>. This was the first time that the ECJ had to deal with the tariff classification of MFMs which could connect to an ADP machine. The ECJ supported the tariff classification of the MFM at issue under Heading 8471 and rejected the EC Commission’s arguments in favour of the automatic and unconditional application of rule 3(c) to MFMs which could connect to an ADP machine or computer network.
517. The ECJ considered that the presence of printing and scanning functions which can be used only in connection with an automatic data-processing machine would already seem to be sufficient to consider that those machines are likely to be of a kind used principally in an automatic data-processing system. However, the ECJ further considered that even if the MFM were not for use “solely or principally” with an ADP machine pursuant to Note 5(B) to Chapter 84, it could still be classified under Heading 8471 pursuant to GIR 3(b).
518. According to the ECJ, the application of GIR 3(b) requires a review of the importance of the various components of the MFM, namely the printing module, the scanning module and the computer module. It must be noted that the MFM does not contain any components which can be identified as copying module. Therefore, a classification under

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<sup>252</sup> Joined cases C-362/07, *Kip Europe SA and Others*, and C-363/07, *Hewlett Packard International SARL v Administration des douanes - Direction générale des douanes et droits indirects*, judgment of 11 December 2008. See TPKM-63.

Heading 9009 pursuant to GIR 3(b) is simply not possible.

519. Pursuant to the application of GIR 3(b), the tariff classification of MFM will be determined by one of the above three units, each of which will in all cases lead to a classification under Heading 8471 either as a scanner, a printer or a computer.
520. Since the printing unit is clearly the most important component in terms of value and in relation to its role in the overall functioning of the apparatus, the printing unit will determine the essential character of the MFM leading to a classification under Heading 8471.
521. Essentially, the ECJ concluded in the *Kip* case that the reasoning consistently invoked by the EC Commission to justify the exclusion of MFMs from Heading 8471 was not supported by EC Customs law and contrary to the HS. GIR 3(c) may not be relied to automatically classify all MFMs having a copying function as a photocopier of heading 9009.

(2) Discussions in the WCO

522. The issue of the classification of MFMs was raised in the framework of the WCO. The classification of MFMs in heading 90.09 was actually put forward in 1998.<sup>253</sup> The issue focused initially on the classification of the “Xerox Document Centre 230 DC” which could perform the functions of printing, faxing, copying and scanning. At the outset, the WCO Secretariat underlined that headings other than 90.90 would merit consideration, more specifically heading 84.71, heading 84.72 and heading 85.17.
523. In order to move forward with this issue, the WCO Secretariat was requested to study the classification of multifunctional digital copiers on the basis of a number of machines that were selected in consultation with the industry and the contracting parties.<sup>254</sup> Four categories of machines were selected. The WCO Secretariat emphasized at the outset that “the key feature of these multifunction machines is their ability to connect, directly or indirectly, with the central processing unit of an ADP machine and to send and receive data in a form (code or signals) which can be recognized and used by the system. They are configured and designed to perform the functions of printing output in hard copy form, scanning of data into digital bit-streams facsimile transceiving and, when scanning and printing units are used in tandem “digital copying”.”<sup>255</sup>
524. The detailed analysis carried out by the WCO Secretariat is included in document NC0300E1 on the “Classification of Multifunctional Digital Copiers”.<sup>256</sup> In its analysis, the WCO Secretariat noted that there are a number of differences between the multifunctional machines which are being examined and the photocopying apparatus of heading 90.09 and concluded on that basis that “multifunction digital copiers do not meet

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<sup>253</sup> Possible amendment to heading 90.09, 42.498E. See Exhibit TPKM-72.

<sup>254</sup> Classification of Multifunctional Digital Copiers, HSC, 25<sup>th</sup> session, NC0211E1. See Exhibit TPKM-73. .

<sup>255</sup> Classification of Multifunctional Digital Copiers, HSC, 25<sup>th</sup> session, NC0211E1, para.8. See Exhibit TPKM-73.

<sup>256</sup> Classification of Multifunctional Digital Copiers, HSC, 26<sup>th</sup> session, NC0335E1. See Exhibit TPKM-74.

the terms of heading 90.09 and, as such, are not classifiable in that heading”.<sup>257</sup>

525. On the basis of the analysis prepared by the WCO Secretariat, the HSC was requested to vote. During its 27<sup>th</sup> session held in May 2001, the HSC concluded, by a vote of 22 to 14, that “photocopying” was limited to the projection of an image onto a photosensitive surface and that, therefore, heading 90.09 did not cover digital copying.<sup>258</sup> However, because of the use of the reservation procedure, the issue was brought back to the HSC and during its 30<sup>th</sup> session, the HSC voted by 24 to 22 to support the conclusion that “photocopying” was not limited to the projection of an image onto a photosensitive surface and that heading 90.09 did cover digital copying.<sup>259</sup> The issue was further discussed and in a third vote carried out in November 2003 during the 32<sup>nd</sup> session of the HSC, 33 delegates voted in favour while 33 delegates voted against the propositions that “photocopying” was not limited to the projection of an image onto a photosensitive surface and that heading 90.09 did not cover digital copying.<sup>260</sup> As a result of this unprecedented vote, the HSC considered that it was better to suspend its consideration of the question and to discuss it in the framework of the revision of the HS 2007.

526. In the HS 2007, all MFMs are classified in heading 8443 which covers “other printers, copying machines and facsimile machines”. As it will be explained in more details in paras. 639-642 below, the HSEN to heading 8443 make a clear distinction between, on the one hand, digital copiers and, on the other hand, photocopiers.

527. The above-mentioned discussions in the WCO highlight that, even though there has been no decision taken by the HSC as to the classification of MFMs in the HS 1996 (or HS 2002), the WCO Secretariat has always taken the view that photocopying does not include digital copying. This position is actually reflected in the HS 2007 which, in its HSEN, makes a clear distinction between photocopying and digital copying.

**3. 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”**

528. 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 subheading 8517.21. The EC has implemented its ITA obligations with respect to HS subheading 8471.60 by listing in its Schedule all eight digit tariff lines covered by the HS subheading, including in particular “printers” under CN subheading 8471.60.40 as well as the general residual category of CN subheading 8471.60.90 “Other”. With respect to “facsimile machines”, CN subheading 8517.21.00 has been listed. TPKM considers that the MFMs at issue are covered by these concessions. As a result, by imposing a 6% customs duty on the MFMs at issue, the EC is violating the obligations it undertook in its Schedule.

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<sup>257</sup> Classification of Multifunctional Digital Copiers, HSC, 26<sup>th</sup> session, NC0335E1, para. 27. See TPKM-74.

<sup>258</sup> Report to the CCC on the 27<sup>th</sup> session of the HSC, NC0430E2, Annex H/4. See Exhibit TPKM-75.

<sup>259</sup> Report to the CCC on the 30<sup>th</sup> session of the HSC, NC0655E2, Annex G/3. See Exhibit TPKM-76.

<sup>260</sup> Report to the CCC on the 32<sup>nd</sup> session of the HSC, NC0796E2, Annex F/4. See Exhibit TPKM-77.

529. According to the EC, the MFMs would not be covered by the above-mentioned concessions but rather by the concession granted by the EC with respect to “electrostatic photocopying apparatus operating by reproducing the original image indirectly onto the copy (indirect process)” under CN subheading 9009.12.00. In fact, the measures at issue (at least those which relate to the HS 1996) have considered the MFMs as being “photocopying apparatus” under CN subheading 9009.12.00.
530. The key issue for the Panel will therefore be to determine the scope of the concessions referred to above. In particular, the Panel will have to determine whether the MFMs at issue are properly covered by the concessions contained in HS subheading 8471.60 and in particular CN subheading 8471.60.40 or CN subheading 8517.21.00, as claimed by TPKM, or by the concession contained in CN subheading 9009.12.00, as stated by the EC. The Panel will need to reach conclusions on whether the EC is right in excluding all MFMs without fax function from its concession by assuming systematically that their essential character cannot be determined, and should therefore be classified under the heading with the highest number, i.e., Heading 9009. For MFMs with a fax function, the Panel will also need to examine whether it matters that the copying speed is above or below 12 pages per minute in order to determine the scope of the concessions covering subheadings 8471.60 and 8517.21.
531. TPKM submits that the fact that MFMs have several functions, among which a copying function, or the fact that MFMs with fax function are capable of copying 12 pages or more per minute or more than 12 pages per minute is not such as to exclude these apparatus from the scope of the concessions under HS subheading 8471.60 including in particular CN subheading 8471.60.40 or CN subheading 8517.21.00.
532. TPKM will demonstrate this by examining the concessions made by the EC with respect to “input or output units” of ADP machines in HS subheading 8471.60 including in particular CN subheading 8471.60.40 and “facsimile machines” in CN subheading 8517.21.00 in accordance with the principles of treaty interpretation of the *Vienna Convention*.
533. The EC has made duty-free concessions with respect to “input or output units, whether or not containing storage units in the same housing – Other – printers” (CN subheading 8471.60.40) and with respect to “input or output units, whether or not containing storage units in the same housing – Other – Other” (CN subheading 8471.60.90) that cover the MFMs of the first category. The EC has also made a duty-free concession with respect to “facsimile machines” (CN subheading 8517.21.00) that covers the MFMs of the second category. TPKM will analyse the scope of these concessions in the following paragraphs.
- (1) Ordinary Meaning
- (i) “Input or output units of ADP machines – Printers” and “Input or output units of ADP machines – Other”
- a) “Input or output units” of ADP machines
534. HS subheading 8471.60 covers “input or output units, whether or not containing storage units in the same housing”. For the purpose of our analysis, the following are the relevant terms: “input”, “output” and “units”.

535. HS subheading 8471.60 is included in HS heading 8471 which covers *inter alia* “automatic data processing machines and units thereof”. The “input or output units” to which HS heading 8471.60 refers are thus “input or output units” of “automatic data processing” machines. This element must be taken into account when analyzing the ordinary meaning of the terms “input or output units”.
536. The *New Shorter Oxford English Dictionary* defines “**output**” as: “1. (The amount of) what is produced by an industry or process, or by mental or artistic effort. b. 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”.<sup>261</sup>
537. The *New Shorter Oxford English Dictionary* defines “**input**” as: 4. Data or program instructions fed into or processed by a computer”.<sup>262</sup>
538. The *New Shorter Oxford English Dictionary* defines “**unit**” as: “3. An individual thing, person or group regarded as single and complete, esp. for the purposes of calculation; each of the (smallest) separate individuals or groups into which a complex whole may be analysed”.<sup>263</sup>
539. The *Merriam-Webster Online Dictionary*<sup>264</sup> defines “**output**” as: “1. something produced as a: mineral, agricultural or industrial production; b: mental or artistic production, c: the amount produced by a person in a given time, d: 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” (emphasis added).
540. The *Merriam-Webster Online Dictionary* defines “**input**” as: “information fed into a data processing system or computer”.<sup>265</sup>
541. The *Merriam-Webster Online Dictionary* defines “**unit**” as: “a piece or complex of apparatus serving to perform one particular function”.<sup>266</sup>
542. The *Sci-Tech Dictionary* defines “**output unit**” as: “a unit which delivers information from the computer to an external device or from internal storage to external storage”.<sup>267</sup>

- Conclusion

543. In the above-mentioned definitions, both in general dictionaries as well as dictionaries specialized in science and technology, the terms “input units” and “output units” are very broadly defined. Indeed, “output units” refer to any apparatus or thing which receives data

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<sup>261</sup> The *New Shorter Oxford English Dictionary*, 1993 (4<sup>th</sup> edition), p. 2040.

<sup>262</sup> Id., p. 1375.

<sup>263</sup> Id., p. 3491.

<sup>264</sup> <http://www.merriam-webster.com/dictionary>.

<sup>265</sup> <http://www.merriam-webster.com/dictionary>.

<sup>266</sup> <http://www.merriam-webster.com/dictionary>.

<sup>267</sup> The *McGraw-Hill Dictionary of Scientific and Technical Terms*, 1994, 5<sup>th</sup> edition, p. 1419.

or information from ADP machines and “input units” cover any apparatus or thing which provides data or information to ADP machines. The two elements which are central to the concepts of “output units” and “input units” are on the one hand the connectivity of the “units” to ADP machines and on the other hand the capacity of the “units” either to send (in case of input units) data to or to receive (in case of output units) data from the ADP machines.

544. The first category of MFMs at issue, as described in para. 483 above, clearly falls within these definitions. Indeed, these MFMs are all capable to connect to an ADP machine or to a network and can send data to, and receive data from ADP machines.
545. Thus, in accordance with the ordinary meaning of the terms “input units” and “output units” as reflected in the dictionaries, the MFMs at issue constitute “input units” and “output units” within the meaning of HS subheading 8471.60.

(b) “Printers”

546. Among the concessions made with respect to “input or output units” of ADP machines, one relates to “printers” (CN subheading 8471.60.40). TPKM submits that the MFMs at issue of the first category fall under that concession, i.e. that they are not only “input or output units” of ADP machines, but more specifically “printers”.
547. The *New Shorter Oxford Dictionary* defines “**printers**” as: “an output device which produces a printed record of data, text, etc.”<sup>268</sup>
548. The *Merriam-Webster Online Dictionary* defines “**printers**” as: “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”<sup>269</sup>.
549. It is important to underline the following further points. First, the information or data printed may come from a computer, but also from other sources, including from a scanning unit or a fax unit as it is the case in MFMs. The definition of “printer” in no way requires the information or data that are printed come exclusively from an ADP machine. In other words, the requirement in order for an apparatus to be covered by the concession contained in CN subheading 8471.60.40 is that it must be able to connect to an ADP machine and that it is capable of producing printouts of data received from an ADP machine.
550. Second, the definitions of “printer” never refer to a maximum or minimum number of pages that could be produced in order to be regarded or considered as a “printer”. This underlines the inappropriateness of the criterion of the number of pages copied per minute used by the EC in the third and fourth measures being challenged in order to exclude the MFMs at issue from the scope of HS subheading 8471.60.
551. The MFMs at issue mainly consist of two different units or components: a scanning unit and a printing unit. The scanning unit allows physical images to be digitized, i.e., captured in digital format and either be stored in the MFM or be sent to an ADP machine. The

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<sup>268</sup> The *New Shorter Oxford English Dictionary*, 1993 (4<sup>th</sup> edition), p.2357.

<sup>269</sup> <http://www.merriam-webster.com/dictionary>.

printing unit allows digital information which has been received from an ADP machine to be printed on paper. In case the scanning unit and the printing unit work “in tandem”, i.e., the digital image produced by the scanning unit is sent directly to the printing unit, one or more copies of the digitized image will be printed directly.

552. Both the scanning unit and the printing unit of an MFM are clearly input or output units of ADP machines. However, in the MFMs at issue the printing unit is clearly the more important unit or component from the viewpoint of its size, value and function.
553. In conclusion, in the light of the ordinary meaning of the words of the concession, the MFMs at issue undoubtedly constitute output units of ADP machines, and, in particular, “printers”.

(c) “Other”

554. The *New Shorter Oxford Dictionary* defines “other” as: “existing besides or distinct from that or those already specified or implied; further, additional”.<sup>270</sup>
555. In accordance with the ordinary meaning of “other”, all “input or output units” of ADP machines that are not specifically covered by one of the CN subheadings under HS subheading 8471.60 fall under CN subheading 8471.60.90 that constitutes the residual heading. In other words, any “input or output units” that is not “for use in civil aircraft” (CN subheading 8471.60.10) or that does not constitute a “printer” (CN subheading 8471.60.40) or a “keyboard” (CN subheading 8471.60.50) falls under this residual heading.
556. The existence of a residual subheading at CN level is important as it tends to underline the broad scope of the HS subheading in which it is included. This is further strengthened by the wording of heading 8471 which covers “automatic data processing machines and units thereof”. The reference in HS heading 8471 to “any” unit of ADP machines support the very broad scope and meaning of the concession which is being examined in HS subheading 8471.60. Indeed, it is clear from the terms of HS heading 8471 that “any” type of units of ADP machines are covered by that heading, all of which are subject to duty-free treatment pursuant to the ITA.
557. TPKM submits that even if the MFMs at issue were not to be regarded as “printers” within the meaning of the concession contained in CN subheading 8471.60.40, they nonetheless fall within the scope of the concession contained in CN subheading 8471.60.90 (“other”). Indeed, as underlined above, it is clear that the MFMs at issue constitute “input or output units” of ADP machines.
558. The MFMs consist mainly of a scanning unit and a printing unit. To the extent that they are connectable to ADP machine, the printing unit of the MFM or printer is an output unit of ADP machine. Similarly, the scanning unit of the MFM, on a stand-alone basis, constitutes an input unit of ADP machine.

(ii) Facsimile machines

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<sup>270</sup> The *New Shorter Oxford English Dictionary*, 1993 (4<sup>th</sup> edition), p. 2031.

559. The concession covering the second category of MFMs is the one granted under CN subheading 8517.21.00 “facsimile machines”.

(a) *Definitions*

560. The *New Shorter English Oxford Dictionary* defines “**facsimile**” as: “1. The marking of an exact copy, esp. of writing; imitation. 2. An exact copy, esp. of writing, printing, a picture, etc.; a reproduction. 3. A system for producing a copy by radio etc. transmission of signals from scanning an original”.<sup>271</sup>

561. The *New Shorter English Oxford Dictionary* defines “**machine**” as: “4. An apparatus, an appliance; a device for applying mechanical power and having a number of interconnected parts, each with a definite function, esp. one that does not utilize human strength; an apparatus of a particular kind (specified or understood) kind; a bicycle, a motor vehicle; an aircraft; a computer; a typewriter”.<sup>272</sup>

562. The *Merriam-Webster Online Dictionary* defines “**facsimile**” as: “1. an exact copy; 2. a system of transmitting and reproducing graphic matter (as printing or still pictures) by means of signals sent over telephone lines”.<sup>273</sup>

563. The *Merriam-Webster Online Dictionary* defines “**machine**” as: “1.f. a mechanically, electrically or electronically operated device for performing a task”.<sup>274</sup>

564. The *Techweb online dictionary* defines “**fax**” or “**facsimile**” as follows: “originally called “telecopying”, it is the communication of a printed page between remote locations. Fax machines scan a paper form and transmit a coded image over the telephone system. The receiving machine prints a copy (a facsimile) of the original. A fax machine is made up of a scanner, printer and modem with fax signalling”.<sup>275</sup>

• Conclusion

565. Under the above definitions, “facsimile machines” refer to apparatus which reproduce graphic matter by scanning an original and which then transmit the scanned data by means of signals sent over telephone lines.

566. The second category of MFMs at issue that cannot be connected to computers but operate in connection with a phone line to transmit data is clearly covered by the category of “facsimile machines”.

• (b) *The broad meaning of “facsimile machine” is confirmed by the factual context*

567. HS subheading 8517.21 which covers “facsimile machines” is included in HS heading 8517 which covers “electrical apparatus for line telephony or line telegraphy”. The key

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<sup>271</sup> Id., p. 903.

<sup>272</sup> Id., p. 1655.

<sup>273</sup> <http://www.merriam-webster.com/dictionary>.

<sup>274</sup> <http://www.merriam-webster.com/dictionary>.

<sup>275</sup> <http://www.techweb.com/encyclopedia?term=fax>.

feature of “facsimile machines” as well as of the other apparatus included in heading 8517 is their capacity of transmitting and receiving signals over telephone lines. This capacity is undoubtedly also the main feature of the second category of MFMs at issue.

(iii) Photocopier/photocopying process

568. Given that, in the measures at issue, the EC has considered that the MFMs were covered by CN subheading 9009.12.00, it appears appropriate to examine the concession contained in CN subheading 9009.12.00. Indeed, the three first measures at issue identified in paras 107-114 above considered that the MFMs at issue fall under CN subheading 9009.12.00. The fourth measure does not refer to that CN subheading since it has been removed from the HS and thus from the CN as of 1 January 2007.

569. The concession granted by the EC with respect to CN subheading 9009.12.00 covers “Electrostatic photocopying apparatus operating by reproducing the original image via an intermediate onto the copy (indirect process)” and is subject to a 6% customs duty. It is included in HS heading 9009 which covers “photo-copying apparatus incorporating an optical system or of the contact types and thermo-copying apparatus”.

<b>90.09</b>	<b>Photo-copying apparatus incorporating an optical system or of the contact type and thermo-copying apparatus</b>
	- Electrostatic photo-copying apparatus:
9009.11	-- Operating by reproducing the original image directly onto the copy (direct process)
<b>9009.12</b>	<b>-- Operating by reproducing the original image via an intermediate onto the copy (indirect process)</b>
	- Other photo-copying apparatus:
9009.21	-- Incorporating an optical system
9009.22	-- Of the contact type
9009.30	- Thermo-copying apparatus
9009.90	- Parts and accessories

570. The examination of the wording contained in the concession concerning CN subheading 9009.12.00 demonstrates that the MFMs at issue are not photocopying apparatus of HS heading 9009 as claimed by the EC. There are fundamental differences between the MFMs at issue and the photocopying apparatus of HS heading 9009.

571. The *New Shorter Oxford Dictionary* defines “**photocopier**” as: “1. An electrical machine for producing immediate, often full-size paper copies of text or graphic matter by a process usu. involving the electrical or chemical action of **light**”<sup>276</sup> (emphasis added).

572. The *Merriam-Webster online dictionary* defines “**photocopy**” as: “noun. A copy of usually printed material made with a process in which an image is formed by the action of **light** usually on an electrically charged surface”.<sup>277</sup>

573. The *Sci-Tech Dictionary* defines “**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

<sup>276</sup> The *New Shorter Oxford English Dictionary*, 1993 (4<sup>th</sup> edition), p. 2193.

<sup>277</sup> <http://www.merriam-webster.com/dictionary>.

action of radiant energy”<sup>278</sup>

574. In the light of the above-mentioned definitions, 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. This is reflected in the etymology of the term “**photo-copying**”. “Photo” refers to “light” and “copy” to “reproduction”. A copy which is being made by photo-copying process is thus a copy which is being produced by the direct action of light. 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.
575. The digital copying process which is used in the MFMs is completely different from the “photocopying” process. There are fundamental differences between the two.
576. First, in the photocopying process, there is a single operation to produce the copy. The light is reflected from the original document on a photosensitive material or surface to produce the copy. That’s why it is called “**photo-copy**”. In the digital copying process, there is a two-step action: the original document is converted through individual points of light into electrical signals (digital data). These data may either be stored in that form or be converted into a printed image.
577. Second, in the photocopying process, there is a direct link between the original document and the copy which is being made. In other words, in a photocopying apparatus, the optical system projects an optical image of an original document directly on a light-sensitive surface. This process can take place directly or indirectly. It takes place directly when the optical image is reproduced directly onto the copy. It takes place indirectly when the optical image is reproduced onto the paper by an intermediate, generally a drum. However, in both cases, there is a direct link between the optical image and the copy which is being produced.
578. By contrast, in the digital copying process, there is no such direct link. The optical image of the original document is actually first converted into digital data. The digital data can then be transmitted in order for such data to be printed.
579. Third, the photocopying process requires one exposure of the optical image of the original document for one copy. For each copy being made, an exposure of the optical image of the original document is required. In other words, the optical image cannot be stored by the photocopier.
580. By contrast, the digital copying process only requires the original document being digitized/scanned once. Then, it is possible to make as many prints as necessary from these digital data. In other words, in a digital copying process, the prints of the original document are produced from the digital data stored electronically in the controller’s image data storage device by a single scanning of the optical image of the original document.
581. Fourth, in the photocopying process, the copy is necessarily identical to the original document. At the most, an optical zoom can enlarge or reduce the image size. Instead, in the digital copying process, once the original document has been digitized, the digital data

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<sup>278</sup> The *McGraw-Hill Dictionary of Scientific and Technical Terms*, 1994, 5<sup>th</sup> edition, p. 1494.

can be modified, amended or further processed without any limitations.

582. Fifth, in the photocopying process, the optical image is being produced for one single purpose: that of creating a copy at that point in time. There is no possibility of sharing the optical image with other apparatus.
583. By contrast, in digital copying, the digital data obtained once the scanning unit has digitized the image, can be shared with any other/external digital apparatus. Typically, MFMs are connected to computers on which the digital data can be stored and further processed.
584. In sum, it flows from the above that “photo-copying” has a defined and precise meaning which does not cover the production of printouts from scanned data files as is done by MFMs. The ordinary meaning of photocopying refers to the process of projecting an optical image of an original document directly onto a light-sensitive surface. This process is different from the digital copying process used in MFMs. As a result, the ordinary meaning of the terms used in the concessions which are being examined clearly demonstrates that the MFMs at issue are either “input or output units” of automatic data processing machines or “facsimile machines”. They do not constitute “photocopying apparatus”.

(iv) *Conclusions*

585. The analysis of the ordinary meaning of the concessions at stake, namely “printers” under CN subheading 8471.60.40 and “facsimile machines” under CN subheading 8517.21.00 confirm that the MFMs at issue are covered by the concessions of the EC with respect to HS subheading 8471.60 as far as MFMs which are able to connect to an ADP machine are concerned and with respect to CN subheading 8517.21.00 as far as MFMs which are not able to connect to an ADP machine but operate in connection with a phone line are concerned.
586. TPKM submits that there is neither doubt nor uncertainty as to the fact that the MFMs at issue are covered by the concessions with respect to HS subheading 8471.60 or CN subheading 8517.21.00 in light of their ordinary meaning. The analysis of the “context” in the following section confirms this conclusion.

(2) Context

587. The analysis of the context with respect to MFMs will include the analysis of the following elements: (i) the structure of the relevant headings; (ii) the structure of the relevant chapters; (iii) the other parts of the EC Schedule.

(i) *Structure of headings 8471, 8517 and 9009*

588. HS heading 8471 is structured as follows:

<b>84.71</b>	<b>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</b>

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 subheadings 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
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

589. The structure of HS heading 8471 confirms the broad scope of this heading. First of all, it is clear that it covers all types of ADP machines, i.e., analogue or hybrid ADP machines (HS subheading 8471.10) and digital ADP machines (HS subheadings 8471.30, 8471.41 and 8471.49). Second, HS heading 8471 also covers all forms of units of ADP machines: digital processing units (8471.50), input or output units (8471.60), storage units (8471.70) and any other types of units (8471.80). Third, heading 8471 includes a residual subheading "Other" (8471.90) intended to cover all machines that would not have been covered by one of the other subheadings. The structure of HS heading 8471 thus clearly confirms the broad scope of heading 8471 as covering all types of data processing technologies.

590. HS heading 8517 is structured as follows:

85.17	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
	- Telephone sets; videophones:
8517.11	-- Line telephone sets with cordless handsets
8517.19	-- Other
	- Facsimile machines and teleprinters:
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
8517.90	- Parts

591. Similarly to heading 8471, the structure of heading 8517 supports its broad scope. In particular, it includes a residual subheading, i.e., "other apparatus" (subheading 8517.80) that supports the intent of that heading to cover all "electrical apparatus for line telephony or line telegraphy".

592. On the contrary, HS heading 9009 has a much more limited scope. HS heading 9009 is structured as follows:

<b>90.09</b>	<b>Photo-copying apparatus incorporating an optical system or of the contact type and</b>
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<b>thermo-copying apparatus</b>	
	- Electrostatic photo-copying apparatus:
9009.11	-- Operating by reproducing the original image directly onto the copy (direct process)
9009.12	-- Operating by reproducing the original image via an intermediate onto the copy (indirect process)
	- Other photo-copying apparatus:
9009.21	-- Incorporating an optical system
9009.22	-- Of the contact type
9009.30	- Thermo-copying apparatus
9009.90	- Parts and accessories

593. First, the wording of heading 9009, unlike headings 8471 and 8517, includes a very limited category of apparatus. Indeed, it only covers photo-copying apparatus and thermo-copying apparatus as well as their parts and accessories. Second, unlike headings 8471 and 8517, heading 9009 does not include a residual subheading.

594. In conclusion, the structure of the headings under analysis supports the broad scope of the concessions made with respect to headings 8471 and 8517.

(ii) *Structure of Chapters 84, 85 and 90*

595. Reflecting the HS, the EC Schedule covers Chapter 84 which include “Nuclear reactors, boilers, machinery and mechanical appliances; parts thereof”, Chapter 85 which includes “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” and Chapter 90 which includes “Optical, photographic, cinematographic, measuring, checking, precision, medical or surgical instruments and apparatus; parts and accessories thereof”.

596. It is clear from the wording of Chapters 84 and 85 that they intend to cover a broad range of apparatus. This flows from the general wording that is used. Indeed, 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.

(iii) *Other parts of the EC Schedule*

597. TPKM refers to headings 85.25 and 90.06 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.

598. This distinction is important and supports the interpretation that “photocopying apparatus” which are included in Chapter 90 do not cover digital copying. In fact, the exclusion of digital apparatus from Chapter 90 is in line with the overall economy of Chapters 84, 85

and 90. The HS is structured in a logical manner. Chapter 84 covers mechanical machines and Chapter 85 electrical machines whereas Chapter 90 covers instruments including optical instruments such as photographic and photocopying apparatus. There is a fundamental difference of nature between, on the one hand, the apparatuses in Chapters 84 and 85 and, on the other hand, the apparatuses falling under Chapter 90. As noted above, Chapter 90 exclusively covers certain specific types of instruments which are exhaustively and precisely defined as “optical, photographic, cinematographic, measuring, checking, precision, medical or surgical instruments”. In other words, for both photographic and photocopying apparatus, the use of digital technology is such as to exclude such apparatus from Chapter 90.

(iv) *Tariff concessions made with respect to HS heading 8471 and HS heading 8517*

599. As underlined above, the structure of headings 8471 and 8517 confirm the very broad scope of these headings. Moreover, all tariff lines covered by the concessions in the EC Schedule for headings 8471 and 8517 are duty-free in accordance with the commitments included in the ITA.
600. As far as HS subheading 8471.60 is concerned, it should be noted that Attachment A to the ITA includes the entire HS heading 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” as well as each HS subheading covered by that heading: HS subheading 8471.10, HS subheading 8471.30, HS subheading 8471.41, HS subheading 8471.49, HS subheading 8471.50, HS subheading 8471.60, HS subheading 8471.70, HS subheading 8471.80 and HS subheading 8471.90.
601. Similarly, as far as HS subheading 8517.21 is concerned, Attachment A to the ITA includes the entire HS heading 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” as well as each HS subheading covered by that heading: HS subheading 8517.11, HS subheading 8517.19, HS subheading 8517.21, HS subheading 8517.22, HS subheading 8517.30, HS subheading 8517.50, HS subheading 8517.80 and HS subheading 8517.90.
602. Obviously, the common intention of the Parties as reflected in the ITA was to have a scope as broad as possible, in particular with respect to items covered by HS heading 8471 and HS heading 8517.

(3) The Harmonized System

- (i) *Note 5 to Chapter 84 confirms the broad scope of the concessions granted with respect to HS subheading 8471.60*
603. Note 5 to Chapter 84 deals with various aspects of classification of ADP machines and related units within the meaning of HS heading 8471 and therefore provides useful guidance to properly interpret the concession granted by the EC under heading 8471 and in particular with respect to subheading 8471.60.
604. Note 5(A) to Chapter 84 primarily defines the expression “automatic data processing

machines”, as including:

(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 their execution, by logical decision during the processing run;”

605. Note 5(B) states that:

“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”.

606. Note 5 (B) thus confirms that the central element in order to be regarded as a “unit” of an ADP machine is the ability of being connectable to the ADP machine, more specifically to the central processing unit and the ability to accept or deliver data in a form that can be used by the system. In addition, it specifies that the unit must be of a kind solely or principally used in ADP systems.

607. Note 5(C) provides that “separately presented units of an ADP machine are to be classified in heading No. 84.71”.

608. Most of the functions of the MFMs at issue, which are 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.

609. However, such principal use is not even required for the MFMs at issue. According to Note 5(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. 84.71.” In other words, this Note emphasizes that any apparatus which can print from a computer is to be classified in heading 8471, even though it is not of a kind solely or principally used with an ADP machine (paragraph B(a)).

610. This Note is very important in the context of the present case. Indeed, it makes it clear that a printer remains covered by HS heading 8471 even if it is not used exclusively or even principally with an ADP system. It implies for the MFMs at issue, to the extent that they are regarded as “printers”, that they do not need to be used solely or principally with an ADP system in order to fall within HS heading 8471.

611. The above Notes confirm that MFMs which are connectable to an ADP machine either directly or through other units are to be classified under heading 8471 and this, irrespective of whether they are used solely or principally with an ADP machine.

(ii) *General Rules for the Interpretation of the Harmonized System (GIR)*

612. As noted above, the GIR of the HS constitute an integral part of the HS itself, together with the nomenclature comprising the headings and subheadings and their related numerical codes, the Section, Chapter and Headings Notes. These General Rules for the Interpretation of the HS are therefore binding on the Contracting Parties to the Convention of the HS<sup>279</sup>.

613. The HS comprises six General Rules of Interpretation. TPKM submits that, for the purpose of this dispute, GIR 1 may be useful in assessing the scope of the concessions.

614. 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 and Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions.”

615. As explained above, TPKM considers that the terms of headings 8471 and 8517 are very clear and cover the MFMs at issue while the terms of heading 9009 quite clearly exclude them from its scope given that they do not constitute “photo-copying” apparatus.

(iii) *Other elements relating to the HS which may be relevant*

616. As we noted above, the HS consists of the terms of the headings and subheadings, the Notes to Chapters and Sections as well as the GIR. Other instruments relating to the HS may be relevant for the interpretation exercise. However, they should be given less weight in the interpretative exercise and cannot overrule an interpretation arrived at on the basis of the ordinary meaning of the text of the concession read in its context. The following HSEN to Heading supports our conclusion above.

617. HS heading 9009 covers “photo-copying apparatus incorporating an optical system or of the contact type and thermo-copying apparatus”. More specifically, HS subheading 9009.12 covers “Electrostatic photo-copying apparatus operating by reproducing the original image via an intermediate onto the copy (indirect process)”. The HSEN to heading 9009 provides, with respect to “photo-copying apparatus incorporating an optical system”, that:<sup>280</sup>

“These apparatus incorporate an optical system (comprising mainly a light source, a condenser, lenses, mirrors, prisms or an array of optical fibres) which projects

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<sup>279</sup> In *EC – Chicken Cuts (Brazil)*, the Panel noted that “Given that the General Rules clearly form part of the HS [...] and that the HS is relevant to the interpretation of heading 02.10 of the EC Schedule, we will examine the General Rules to determine whether they can assist us in interpreting heading 02.10 of the EC Schedule.” (para. 7.236)

<sup>280</sup> HSEN to Heading 9009. See Exhibit TPKM-78.

the optical image of an original document on to a light-sensitive surface and components for the developing and printing of the image.

This group includes:

(1) Electrostatic photo-copying apparatus which operates either by reproducing the original image directly onto the copy (direct process) or by reproducing the original image via an intermediate onto the copy (indirect process).

(...)

In the indirect process, the optical image is projected into a drum (or plate) coated with selenium or other semi-conducting substance charged with static electricity. After the latent image has been developed by means of a powdered dye, it is transferred into ordinary paper by applying an electrostatic field and fixed to the paper by heat treatment”.

618. In accordance with the above-mentioned HSEN, a “photocopying process” has the limited meaning of an apparatus incorporating an optical system which projects the optical image of an original on a light sensitive surface. The apparatus is to be understood as transferring the optical image of the original document by light onto the photosensitive drum. The image is then transferred from the drum to paper. This is clearly a different process from the process used by MFMs including digital copiers which produce printouts from digital data files which may be obtained from an ADP machine or directly from the scanning unit of the apparatus. The above HSEN confirms our conclusion 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.
619. Furthermore, the HSEN also provides that the optical image of the original document must be projected onto a “light sensitive surface”.
620. As already stated above, a similar distinction is made in the HS with respect to cameras. Photographic cameras are classifiable in heading 9006 while digital cameras are classifiable in heading 8525. In other words, for both photographic and photocopying apparatus, the use of digital technology would be such as to exclude such apparatus from Chapter 90.

(4) Object and Purpose

(i) *Expansion of trade in goods and substantial reduction of tariffs*

621. In *EC – Chicken Cuts(Brazil)*, the Panel concluded 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” but that it is also clear that “such an interpretation is limited by the conditions that arrangements entered into by Members be reciprocal and mutually advantageous”.<sup>281</sup>

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<sup>281</sup> Panel Report, *EC – Chicken Cuts(Brazil)*, para. 7.320 confirmed on appeal by the Appellate Body, para. 243.

622. The concessions concerning “input or output units” of ADP machines and “facsimile machines” have been made by the EC pursuant to the ITA, i.e., in order to implement the ITA. Actually, all the participants to the ITA have made the same concessions since under the ITA, all participants committed themselves to bind and eliminate duties with respect to all products specified in Attachments A and B to the Annex to the Declaration, including with respect to “input or output units” of ADP machines and “facsimile machines”. In that respect, the concessions made by the EC are by definition reciprocal and mutually advantageous because the same concessions have been made by all other participants to the ITA.
623. Since the concessions have been made by the EC pursuant to the ITA, TPKM considers that it is essential to examine carefully the ITA in order to properly assess the “common intention” of the parties.
624. In that respect, the wording used in the ITA and in its Preamble is highly relevant. First, the Preamble to the ITA underlines the key role of trade in information technology products in the development of information industries and in the dynamic expansion of the world economy. Second, it emphasizes the participants’ desire “to achieve *maximum freedom* for world trade in information technology products” (emphasis added). Paragraph 1 of the ITA further provides that “each party’s trade regime should *evolve in a manner that enhances market access opportunities* for information technology products” (emphasis added).
625. It thus flows from the text of the ITA and from its Preamble that the manifest object and purpose of the ITA is to expand world trade in IT products by way of eliminating customs duties as well as any other duties and charges to the maximum extent possible. It is clear from the ITA that this object and purpose clearly prevents any interpretation of the concessions that have been made pursuant to the ITA and which cover very broadly defined product categories such as “output and input units” of heading 8471 in the manner proposed by the EC. The express statement in the ITA that participants desire to achieve the maximum freedom of world trade in IT products and declare that their trade regime should evolve such as to enhance market access opportunities for IT products clearly prevents any restrictive interpretation of the scope of the concessions that have been undertaken pursuant to the ITA.
626. As a result, the interpretation that would result in excluding from the concessions made by the EC with respect to “input or output units” of ADP machines and facsimile machines, MFMs since they also have a copying function, is contrary to the objective of expansion of trade in IT product and the substantial reduction of tariffs through reciprocal and mutually advantageous arrangements.
- (ii) *The security and predictability of the reciprocal and mutually advantageous arrangements*
627. With respect to MFMs, the EC is excluding from the scope of the concessions made with respect to HS subheading 8471.60 and CN subheading 8517.21.00 MFMs because they would not include a more specific function or would be able to copy 12 pages or more per minute. According to the EC, they should thus be regarded as being “photocopying apparatus” and be subject to a 6% customs duty.

628. As indicated above, one of the main objects and purposes of the WTO Agreement and of the GATT 1994 is the security and predictability of the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other trade barriers to trade.
629. In order to promote the security and predictability, in the first place, the interpretation of a concession is to be limited by the terms used in that concession. By assimilating digital copying, which is the technology used in MFMs as far as copying is concerned, with “photocopying”, the EC is modifying the scope of the concessions granted and this directly affects the objectives of security and predictability.
630. Furthermore, 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. In other words, it would run against the principles of security and predictability if the EC could exclude from the scope of its concessions some apparatuses because they are more complete or more developed than the products initially exist. In the present case, to the extent that the MFMs at issue are able to connect to ADP machines and constitute input or output units of ADP machines, they fall within the scope of the concession granted by the EC with respect to input or output unit of ADP machines even though their function of scanning and printing allows in addition a copying function.

(5) Other Considerations

(i) *Certain BTIs with respect to MFMs*

631. First, the classification of MFMs capable of connecting to ADP machines under headings 8517 or 8471 is confirmed by various BTIs adopted in 1996 and 1997.
632. CN subheading 8471.60.40 was applied by BTI UK 119109<sup>282</sup> and UK 119108<sup>283</sup> to MFMs defined as colour printer/copier and scanner. Similarly, BTI FR 82152<sup>284</sup> also classified a “machine combinant une imprimante et un copier informatique (scanner)” under CN subheading 8471.60.40.
633. CN subheading 8517.21.00 was applied by BTI UK 89218<sup>285</sup> to a “multifunctional unit which works both in conjunction with, and as an accessory to a PC” which can print, scan, fax and photocopy. Similarly, UK BTI 123587<sup>286</sup> classifies a “printer, scanner and fax machine designed for use with laptop and desktop computers” under CN subheading 8517.21.00.
634. Secondly, BTIs classifying MFMs capable of connecting to ADP machines under heading 8517 subject to a zero tariff were still issued in 2002 and 2003. This was the case of BTIs GB109574459, GB109574557, GB109636954, GB110132255, GB112099888, GB112100065; GB500013730, and GB500013828 all issued under CN subheading

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<sup>282</sup> See Exhibit TPKM-79.

<sup>283</sup> See Exhibit TPKM-79.

<sup>284</sup> See Exhibit TPKM-79.

<sup>285</sup> See Exhibit TPKM-79.

<sup>286</sup> See Exhibit TPKM-79.

8517.21.00.<sup>287</sup>

635. Thirdly, some BTIs were still issued in February 2005 classifying MFMs which connect to an ADP machine under duty-free heading 8517. Such BTIs concerned apparatus that could copy more than 12 pages. However, the MFMs were still classified under a duty-free heading. This was the case of BTI NL-RTD-2005-000460, NL-RTD-2005-000457 and NL-RTD-2005-000461.<sup>288</sup>

*(ii) Certain HS documents*

636. As noted above, the HS has been modified twice since 1996: once in 2002 and once in 2007. 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. Moreover, HS heading 9009 which, under HS 1996, covered photocopying apparatus has been removed from the HS 2007. Products previously classified under Heading 9009 are under the HS 2007 also included in Heading 8443. In other words, heading 8443 now includes all printers, facsimile machines, photocopiers and digital copiers as well as MFMs.
637. The modifications brought by the HS 2007 are subsequent to the HS 1996 on the basis of which participants agreed to make the ITA concessions and part of a convention to which TPKM is not a contracting party. However, the modifications brought by the HS 2007 can be used to confirm the above conclusions.
638. It is important to examine to which extent these modifications brought by the HS 2007 with respect to the products at issue supports the conclusion that under HS 1996, concessions granted under subheading 8471.60 and 8517.21 included MFMs.
639. First, the HSEN to heading 8443 makes a clear distinction for copying machines between, on the one hand, “digital copiers” and, on the other hand, “photocopiers”.<sup>289</sup>
640. The HSEN define “digital copiers” as copiers “in which the original document is scanned and a photosensitive surface (e.g. a charge-coupled device (CCD) or photo-diode sensing array) converts the optical image into digitally coded electrical signals that are stored in memory. The print engine, which operates in the same manner as the printers described in Part (II)(A) of this HSEN, then uses that data to produce the required number of copies. Original documents need only be scanned once to produce multiple copies, as the digital representation of the image is stored in memory.”
641. “Photocopiers” are defined in the HSEN in a very similar way as they were defined in the HSEN of the HS 96, i.e., as apparatus “in which the optical image of the original document must be projected into the photosensitive surface for each copy”.
642. The HSEN to the HS 2007 thus clearly emphasize the differences in process between digital copying and photocopying. Given that under HS 96, heading 9009 only covered “photocopying”, that heading could certainly not have included “digital copying” as it is confirmed by the HSEN to the HS 2007.

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<sup>287</sup> See Exhibit TPKM-79.

<sup>288</sup> See Exhibit TPKM-79.

<sup>289</sup> HSEN to Heading 8443. Exhibit TPKM-80.

643. Second, the part of Heading 8443 which includes all printers, facsimile machines, photocopiers, copiers and MFMs and therefore relevant for the current dispute has the following structure:

- <i>Other printers, copying machines and facsimile machines, whether or not combined</i>
8443.31 - <i>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</i>
8443.32 - <i>Other, capable of connecting to an automatic data processing machine or to a network</i>
8443.39 - <i>Other</i>

644. The structure is based on the distinction between apparatus capable of connecting to an automatic data processing machine and those that are not. This reflects the distinction existing under HS 96 between printers capable of connecting to an ADP machine which fell under HS heading 8471 and printers not capable of connecting to ADP machine which had to be classified under HS heading 8443. This distinction supports the position expressed above that MFMs, to the extent that they are capable of connecting to an automatic data processing machine, are properly classified under heading 8471. In other words, HS 2007 confirms that the capacity of connecting to an ADP machine is an important, even essential criterion, in order to be covered by heading 8471.
645. Third, new Chapter Note 5(D) to Chapter 84 further supports the interpretation put forward by TPKM. That Note now provides that heading 84.71 does not cover “printers, copying machines, facsimile machines, whether or not combined” when presented separately, even if they meet all of the conditions set forth in Note 5 (C) above, i.e., (i) it is of a kind solely or principally used in 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.
646. 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.
647. In conclusion, the modifications that have been brought by the HS 2007 confirm that under HS 96, concession concerning subheading 8471.60 covered MFMs which can connect to ADP machines.

**4. The measures at issue violate Articles II:1(a) and II:1(b) of the GATT 1994**

648. Pursuant to Article II of the GATT 1994, the EC cannot accord to the other WTO Members treatment which is less favourable than that provided in its Schedule of Concessions (Article II:1(a) of the GATT 1994) and more precisely, cannot impose customs duties in excess of those set forth and provided in that Schedule (Article II:1(b) of the GATT 1994).
649. Through the measures at issue, the EC imposes a 6% customs duty on MFMs while they should be granted duty-free treatment pursuant to the concessions included in the EC Schedule, the EC violates Articles II:1(a) and Article II:1(b) of the GATT 1994.

650. In the first three measures at issue, the EC imposes the 6% customs duty by classifying the MFMs under CN subheading 9009.12.00. In the fourth measure, the EC imposes the 6% duty by classifying the MFMs under CN subheading 8443.31.91 in accordance with the changes introduced into the CN by the HS 2007.
651. As noted above, the HS was modified in 2007. In the modified HS 2007, heading 8443 has been broadened such as to include all printers, copying machines and facsimile machines as well as combinations of copying machines, facsimile and printer machines. As a result, heading 9009 no longer exists and all printers, copying machines and facsimile machines, including MFMs that were classified previously in Chapter 84 or 85 are now all classified in heading 8443.
652. In the CN which is in force since 1 January 2007, MFMs with copying speeds of more than 12 monochrome pages per minute and with an electrostatic engine are classified under CN subheading 8443.31.91 with a 6% customs duty.
653. As demonstrated above, the MFMs at issue are either covered by concession under HS heading 8471.60 or by the concession under CN subheading 8517.21.00 for which the EC committed to apply duty-free treatment. By applying a 6% customs duty, the EC therefore violates its obligations under Articles II:1(a) and II:1(b) of the GATT 1994.
654. The fact that the HS has changed as of 2007 and that the products at issue now fall under a new heading, namely HS heading 8443, is not relevant in order to determine whether the EC is violating its obligations in its Schedule. The EC has committed to grant duty-free treatment to “input or output units” of ADP machines and to “facsimile machines”. Given that the MFMs at issue, including the ones described under CN subheading 8443.21.91 are covered by these concessions, by applying an import duty, the EC is violating Articles II:1(a) and II:1(b) of the GATT 1994.

#### **IV. CONCLUSIONS**

655. For all the above reasons, TPKM requests that the Panel find that:
- i. 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;
  - ii. 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;
  - iii. 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;
  - iv. 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.

**V. LIST of EXHIBITS**

TPKM-1	Ministerial Declaration on Trade in Information Technology Products, 13 December 1996 (WT/MIN(96)/16)
TPKM-2	Certification of Modifications to Schedule LXXX – European Communities, dated 2 July 1997, WT/Let/156 (15 August 1997)
TPKM-3	Council Decision 97/359 of 24 March 1997 concerning the elimination of duties on information technology products, OJ L 155, 12.06.1997
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