BEFORE THE PANEL
OF THE
WORLD TRADE ORGANIZATION

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

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

SECOND WRITTEN SUBMISSION

OF

THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU

Geneva, 16 June 2009

TABLE OF CONTENTS

TABLE OF CASES CITED IN THIS SUBMISSION

Short Title	Full case Title and Citation
China – Auto Parts	Panel Reports, *China – Measures affecting Imports of Automobile Parts*, WT/DS339/R, WT/DS340R, 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 the Appellate Body Report WT/DS339/AB/R, WT/DS340/AB/R and WT/DS342/AB/R
Dominican Republic – Import and sale of Cigarettes	Panel Report, Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes, WT/DS302/R, adopted 19 May 2005, as modified by the Appellate Body Report, WT/DS302/AB/R
EC – Chicken Cuts	Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1
EC – Chicken Cuts	Panel Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts, Complaint by Brazil*, WT/DS269/R, adopted 27 September 2005, as modified by Appellate Body Report WT/DS269/AB/R, WT/DS286/AB/R,
EC - Selected Customs Matters	Panel Report, *European Communities – Selected Customs Matters*, WT/DS315/R, adopted 11 December 2006, as modified by Appellate Body Report WT/DS315/AB/R
Greek Increase in Bound Duty	GATT Report, *Greek Increase in Bound Duty*, L/580, adopted 9 November 1956
US – Carbon Steel	Appellate Body Report, *United States - Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from German*, WT/DS213/AB/R, adopted 19 December 2002
US – Corrosion-Resistant Steel	Appellate Body Report, *US - Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R adopted 9 January 2004

US – Oil Country Tubular Goods (OCTG) Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Tubular Goods from Argentina*, WT/DS268/R, adopted 17 December 2004
US – Underwear	Appellate Body Report, *US – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/AB/R, adopted 25 February 1997

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
FWS	First Written Submission
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
MFMs	Multifunctional Machines
OJEU	Official Journal of the European Union
OLAF	European Anti-Fraud Office (*Office Européen de Lutte Anti-Fraude)*
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. In this Second Written Submission, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (hereafter "TPKM") will rebut key points that have been made by the European Communities (hereafter "EC") in its First Written Submission as well as its oral statement and responses to questions following the first substantive meeting with the Panel.

2. TPKM will start by addressing in the first section a number of horizontal issues that concern the dispute in general. First, TPKM will examine the content and negotiations of the ITA, and its role and weight in the present dispute. Second, TPKM will explain why the present dispute is a tariff treatment dispute rather than a customs classification dispute. Third, TPKM will address the requirements of making a successful "as such" claim. Fourth, TPKM will make a number of clarifications concerning the "measures" at issue. Fifth, TPKM will address a number of interpretative issues concerning the interpretation of the EC Schedule.

3. In the second section, TPKM will address the specific arguments raised by the EC in relation to the products at issue.

II. HORIZONTAL ISSUES

A. THE ITA

1. The ITA is part of the "context" for the purposes of interpreting the EC Schedule and is relevant to interpret the "object and purpose" of the GATT 1994

4. The Vienna Convention on the Law of Treaties (hereinafter the "*Vienna Convention*") provides that "a treaty shall be interpreted 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."[1]

5. In the present dispute, the treaty to be interpreted is the GATT 1994 that includes the EC Schedule of Concessions, an integral part of the GATT 1994 by way of Article II:7 of the GATT 1994.

6. TPKM considers that the ITA properly qualifies as "context" within the meaning of Article 31.2(b) of the *Vienna Convention*, i.e., as "an instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty."

[1] *Vienna Convention*, Article 31.

7. The ITA is an "instrument which was made by one or more parties in connection with the conclusion of the treaty" since the ITA was made by the EC and various other WTO Members and states or separate customs territories in the process of acceding to the WTO which, pursuant to the entry into force of the ITA, modified their Schedules in order to implement the commitments they had undertaken in the ITA.

8. The ITA has been "accepted" by all WTO Members as an instrument related to the Schedule of Concessions as demonstrated by the following elements. First, the ITA was negotiated and agreed upon within the framework of the WTO during the Ministerial Conference in Singapore on 13 December 1996. The Ministerial Declaration at Singapore provides in that respect the following:

> "taking note that a number of Members have agreed on a Declaration on Trade in Information Technology Products, we welcome the initiative taken by a number of WTO Members and other States or separate customs territories which have applied to accede to the WTO, who have agreed to tariff elimination for trade in information technology products on an MFN basis …."[2]

Furthermore, the reference in the headnote to the ITA is an additional element that shows that all WTO Members have accepted the ITA as being related to the concessions made in their Schedules. Finally, the modifications to the Schedule of Concessions as requested in the ITA for all participants to the ITA that were WTO Members had to be implemented in accordance with the "Procedure for Modification and Rectification of Schedules of Tariff Concessions"[3] to which all WTO Members were parties.[4]

9. The fact that the ITA is part of the "context" within the meaning of Article 31.2(b) of the *Vienna Convention* is not disputed by the EC.[5] The EC also agrees that the ITA is relevant to determine the object and purpose of the Treaty for the purposes of this dispute.[6]

10. The EC however emphasizes that, in order to be used as context, the provisions of the ITA "themselves must be interpreted in accordance with the *Vienna Convention*"[7] and that "before using any portion of a text of the ITA as context for the interpretation of

[2] WT/MIN(96)/DEC, para. 18.

[3] Decision of 26 March 1980 on Procedures for Modification and Rectification of Schedules of Tariff Concessions (BISD 27S/25).

[4] *See* Annex to the ITA, para. 2.

[5] See EC Replies to Questions 1 and 2 of the Panel after the First Substantive Meeting, para. 1 – 14.

[6] See EC Reply to Question 1 of the Panel, paras. 1 – 3.

[7] EC Replies to the Questions of the Panel after the First Meeting, para. 5.

EC Schedule, one must first determine the meaning of that text under the ITA. In the course of such an exercise, it is the task of a treaty interpreter to consider all the parts of the ITA (text, preamble and annexes)."[8] The EC claims that, contrary to these principles, participants would have arbitrarily selected some parts of the text of the ITA, taken them in isolation and "imported" them into the interpretative exercise concerning the EC Schedule.[9]

11. The EC claim is simply erroneous. Complainants have not made a selective reading of the ITA. The complainants' analysis clearly supports their interpretation of the ITA as will be detailed in the next section. The overemphasis the EC placed on point 3 of the Annex to the ITA[10] concerning future negotiations would itself more likely be, in its own words, a selective reading of the ITA.

2. The ITA seeks to achieve maximum freedom for world trade in IT products

12. The ITA takes the form of a Ministerial Declaration that consists of the Declaration text preceded by a Preamble and followed by an Annex setting out the "Modalities and Product Coverage" and two Attachments (Attachment A and Attachment B) listing the products covered by the ITA.

13. The Declaration and its Preamble contain the core principles of the ITA. The main obligation provided by its Article 2 requires that "each party shall bind and eliminate customs duties and other duties and charges of any kind" with respect to all products classified (or classifiable) with HS 1996 headings listed in Attachment A and all products specified in Attachment B to the Annex to this Declaration, whether or not they are included in Attachment A.

14. The other elements give essential information on the object and purpose of the ITA. In particular, the Preamble underlines the desire "to achieve maximum freedom of world trade in information technology products." In the Declaration, Ministers also stated that "each party's trade regime should evolve in a manner that enhances market access opportunities for information technology products"[11] and underlined their satisfaction about the "*large* product coverage outlined in the Attachments to the annex to this Declaration."[12]

[8] EC Replies to the Questions of the Panel after the First Substantive Meeting, para. 10.

[9] EC Replies to the Questions of the Panel after the First Substantive Meeting, para. 10.

[10] EC FWS, para. 16.

[11] ITA Declaration, Article 1.

[12] ITA Declaration, Article 3, (emphasis added).

15. It appears from the foregoing analysis of the Preamble and the text of the Declaration itself that the object and purpose of the ITA is to achieve maximum freedom of world trade in information technology products. Participants did not agree on granting tariff free treatment for an unlimited number of IT products. The products that must receive tariff free treatment are listed in Attachment A or specified in Attachment B. However, the elements of the Declaration and its Preamble clearly indicate that this list of products should not be restrictively or strictly interpreted.

16. Contrary to what the EC argues, there is nothing that would imply that Article 1 of the Declaration would "be limited to the procedures provided in the ITA for liberalization and future expansion of trade in IT (including through future negotiations)."[13] On the contrary, as Article 1 provides that "each party's trade regime should evolve in a manner that enhances market access opportunities for information technology products," it is a very general statement that must be interpreted in light of the other elements of the Declaration, such as the fact that the products covered include all products classified *or classifiable*, that Ministers are satisfied about the "*large* product coverage," …etc. All these elements do not support the restrictive interpretation put forward by the EC that seeks to exclude from the scope of the ITA any product that is more technologically advanced than those existed at the time the ITA was negotiated.

17. The EC appears to have given too much significance and weight to the procedure for future negotiations envisaged in Point 3 of the Annex to the ITA. However, that procedure only deals with "additional products" and is therefore largely irrelevant to the determination of the existing product coverage of the ITA. Point 3 only, and logically, envisages a procedure to extend the scope of the ITA that does not impose or ask for a restrictive interpretation of the products covered by the ITA.

3. The documents submitted by the EC as constituting the "negotiation of the ITA" do not qualify either as "preparatory work" or as any other forms of "supplementary means of interpretation" within the meaning of Article 32 of the *Vienna Convention*

18. The EC has placed much emphasis on the ITA negotiations. First, at a general level, the EC referred to the negotiations of the ITA in order to argue that the product coverage is a central issue of the ITA. Such an argument implies the need for a restrictive interpretation of the product scope of the ITA.[14] Second, at the level of

[13] See EC Replies to the Questions of the Panel after the First Meeting, para. 14.

[14] EC FWS, para. 23 – 27.

each product category, the EC has referred to the ITA negotiations in order to support its position.[15]

19. However, the EC erred in referring to the "negotiations of the ITA" because the documents submitted by the EC do not qualify either as "preparatory work" or as any other forms of "supplementary means of interpretation" within the meaning of Article 32 of the *Vienna Convention.*

20. As underlined by the EC itself, the negotiating process of the ITA was informal. In other words, the ITA does not have any formal "negotiating history." In fact, the documents submitted by the EC in this dispute as reflecting the "negotiations" of the ITA, while in writing, have not been accessible to all participants to the ITA. In particular, TPKM, as original participant to the ITA, did not and does not have access to all these documents. They can therefore not qualify as "preparatory work" within the meaning of Article 32 of the *Vienna Convention* since they have not been available to *all* participants in the ITA. Indeed, as underlined in the Young Loan Arbitration, "it must first be stressed that the term [*travaux préparatoires*] must normally be restricted to material set down in writing - and thereby actually available at a later date. A further prerequisite if material is to be considered as a component of *travaux préparatoires* is that it was actually accessible and known to *all* the original parties."[16]

21. Similarly, Ian Sinclair underlined that "[r]ecourse to *travaux préparatoires* does not depend on the participation in the drafting of the text of the State against whom the travaux are invoked. To hold otherwise would disrupt the unity of a multilateral treaty, since it would imply that two different methods of interpretation should be employed, the one for States who participated in the *travaux prèparatoires* and the other for States who did not so participate. <u>One qualification should, however, be made. The *travaux préparatoires* should be in the public domain so that States which have not participated in the drafting of the text should have the possibility of consulting them</u>. *Travaux préparatoires* which are kept secret by negotiating States should not be capable of being invoked …."[17]

22. The EC itself acknowledged that the negotiations primarily took place among the Quad.[18] However, the EC claims that even if the documents submitted "could not be

[15] EC FWS, para. 181 – 188, 225 – 236 and 400 – 403.

[16] 59 I.L.R 495 (1980) (emphasis added).

[17] Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed (Manchester University Press, 1984 quoted by the Panel in *EC – Chicken Cuts*: Panel Report, footnote 574 (emphasis added).

[18] EC Replies to the Questions of the Panel after the First Meeting, para. 41.

considered as preparatory work, they would still be relevant as other supplementary means of interpretation."[19] According to the EC, it is irrelevant in this respect whether the document has been circulated to all WTO Members.

23. Yet, the Appellate Body in *EC – Chicken Cuts* found that "as far as an act or instrument originating from an individual party may be considered to be a circumstance under Article 32 for ascertaining the parties' common intention, we consider that *the fact that this act or instrument was officially published, and has been publicly available so that any interested party could have acquired knowledge of it appears to be enough.*"[20] This implies that publication or some kind of publicity is necessary to qualify as "supplementary means of interpretation." Proof of actual knowledge may then have an impact on ascertaining the degree of relevance of a circumstance for the interpretation of the treaty. But, at a minimum, availability to the public or interested party is necessary to qualify as supplementary means of interpretation.

24. In the framework of this dispute, the documents submitted by the EC as part of the negotiations of the ITA have not been published or made available to all parties. Therefore, they cannot constitute supplementary means of interpretation on the basis of which the common intention of the parties could be ascertained. TPKM did not and does not have any access to all the documents alleged by the EC as part of the "negotiating history." TPKM therefore requests the Panel to refrain from using them to determine the interpretation of the EC's concessions that are being examined in this dispute.

25. Furthermore, Article 32 of the *Vienna Convention* refers to the preparatory work of "the treaty." The treaty that we are interpreting here is the GATT 1994 including the EC Schedule of Concessions, but not the ITA. Legally speaking, it is therefore doubtful whether the documents submitted by the EC that it has alleged as "negotiating history" can properly be taken into account as "preparatory work" of the GATT 1994.

26. Finally, it is clear that recourse to supplementary means of interpretation is only possible when "interpretation in the light of Article 31 leaves the meaning of a treaty provision ambiguous or obscure, or, in order to confirm the meaning resulting from the application of the interpretation methods listed in Article 31."[21] TPKM believes that this is not the case and that the meaning of the concession as established pursuant

[19] EC Replies to the Questions of the Panel after the First Meeting, para. 42.

[20] Appellate Body Report, *EC – Chicken Cuts*, para. 297.

[21] Appellate Body Report, *EC – Chicken Cuts*, para. 282.

to Article 31 of the *Vienna Convention* is very clear, as detailed in TPKM's FWS and further in the present submission. TPKM therefore urges the Panel to disregard the documents submitted by the EC.

B. THE PRESENT DISPUTE IS ABOUT TARIFF TREATMENT AND NOT ABOUT CUSTOMS CLASSIFICATION

27. In the present dispute, TPKM *inter alia* claims that, through the measures at issue, the EC accords treatment to the products at issue that is less favourable than that provided for in the EC Schedule and thus violates Articles II:1(a) and II:1(b) of the GATT 1994. More precisely, the EC currently imposes customs duties on certain FPDs, STBs and MFMs through the measures at issue while they should grant duty-free treatment to these products in accordance with the EC Schedule.

28. Despite the very clear terms of the title of this dispute, i.e., "Tariff Treatment of Certain IT Products", the EC repeatedly presents this dispute as being one on customs classification. This is misleading. The present dispute deals with tariff treatment and not with customs classification. The difference is not a purely theoretical distinction but has important practical effects that TPKM would like to underline in the following paragraphs.

29. First, that the dispute is not about customs classification but about tariff treatment means that rules of classification, in particular the Harmonized System, are not central in this dispute and can only be at most relevant as part of the "context." Indeed, what is central in the first place is the ordinary meaning of the tariff concessions at stake. The Panel thus must first focus on the language of the concessions. Clearly, the context is also relevant. While the Harmonized System may, as part of the context, be useful to the interpretation of some of the concessions, it remains merely one element among many. It implies that the rules of the HS are neither decisive nor dispositive of the interpretative exercise. It further implies that when the Panel refers to rules of classification, in particular the Harmonized System, it should be very cautious and should refrain from applying all the rules automatically without taking into account the different objectives pursued by rules of classification and rules of tariff treatment.

30. For instance, GIR 3(c) provides for classification of the products under the heading with the highest heading number among those potentially applicable. The purpose of this rule is to make sure that even if it is not possible to determine the appropriate heading on the basis of the preceding rules, a harmonized classification is nonetheless achieved. However, this rule is arbitrary in the sense that it could well have provided for a classification under the heading with the lowest heading number. This artificial rule is made without economic, commercial, scientific, or logical basis. Such a rule is therefore to be treated with special circumspection when interpreting tariff

concessions. TPKM considers that this rule should not be regarded as dispositive for the purposes of addressing a tariff treatment issue.

31. Second, since this dispute is about tariff treatment, it means that rules of classification may not have equal relevance when interpreting tariff concessions depending on the concessions concerned. In particular, for all concessions that the EC has made pursuant to Attachment B. The EC has argued that the ITA explicitly requires the parties to identify the detailed HS headings involved for products specified in Attachment B.[22] However, since the concessions made pursuant to Attachment B are based on a product description and not on HS headings, TPKM submits that the HS is not relevant. The HS headings indicated by each Member next to the product description that constitutes the relevant concession are for illustration or indication only. The scope of the concessions concerned should therefore be determined without reference to the HS.

C. REQUIREMENTS TO SUCCEED WITH AN "AS SUCH" CLAIM

1. When bringing an "as such" claim, the claiming party is not required to bring evidence of the *application* of the measures being challenged

32. In its FWS, the EC claims with respect to STBs that the complainants failed to show violation of Articles II:1(a) and II:1(b) of the GATT 1994 by avoiding "presenting any evidence showing that in <u>any given case</u>, the EC incorrectly considered the totality of the product as a whole and that it incorrectly concluded that it was not entitled to ITA treatment."[23] The EC further noted that "since the narrative description is about a certain type of products and not about minimum requirements, the complainants have yet to show that in <u>any given case</u> the EC acted inconsistently with its obligations."[24] In its Oral Statement, the EC further claimed that "'complainants' advancing an 'as such' claim have to establish that the challenged measures, in their *every* <u>application</u> in relation to a given product model *always* and *necessarily* lead to a violation of the GATT 1994. The EC submits that this has not been shown. Nor have the complainants shown a violation of GATT 1994 <u>in any individual case.</u>"[25]

33. It is important to clarify that when making an "as such" claim, a WTO Member does not have to bring evidence concerning the "application" of the measures challenged. As the Appellate Body underlined in *US – Carbon Steel*,

[22] See EC Replies to the Questions of the Panel after the First Meeting, para. 82.

[23] EC FWS, para. 287, (emphasis added).

[24] EC FWS, para. 287, (emphasis added).

[25] EC Oral Statement at the First Substantive Meeting of the Panel, para. 37.

> "the party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations, bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion. Such evidence, will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinion of legal experts and the writings of recognized scholars." [26]

34. In other words, the evidence will in the first place take the form of the relevant legislation. It may, but need not, be supported by evidence of the application of such legislation.

35. In the present dispute, the text of the measures being challenged is clear and leaves no ambiguity as to the way it mandates a WTO-inconsistent result. The complainants have explained in detail how the relevant measures being challenged are WTO inconsistent. They have even supported their statements by submitting evidence of the consistent application of such measures, e.g. relevant BTIs.

36. A similar argument to that of the EC was put forward by China in *China – Auto Parts*. However, the Panel rejected China's argument by the following findings:

> "China also argues that the complainants have not demonstrated a consistent application of the challenged measures that has resulted in a misapplication of the essential character test to parts and components of motor vehicles. As China itself noticed, however, the complainants have brought a claim on the measures as such, not as applied to specific facts. In proving their as such claim, the complainants may resort to evidence of the consistent application of the concerned measures. However, we do not consider that this is necessarily required to establish a prima facie case for the as such claim brought by the complainants because what the complainants are required to show in order to prove their claim is the inconsistency of "norms or rules" underlying China's legislation at issue with the WTO Agreement."[27]

37. In accordance with the rules as affirmed by the findings of the Panel in *China – Auto Parts*, TPKM submits that to establish a *prima facie* case for an as such claim, it is not necessary to bring evidence of the consistent application of the measure concerned.

[26] Appellate Body Report, *US – Carbon Steel*, para. 157, (emphasis added).

[27] Panel Report, *China – Auto Parts*, para. 7.554.

2. Complainants do not have to demonstrate that the measures will *in all cases* lead to a WTO inconsistent outcome

38. The EC appears to claim that, in order to succeed with an "as such" claim, the complainants have to demonstrate that the measures at issue lead in ***all cases*** to a WTO inconsistent result. In order to support its claim, the EC refers to the findings of the Panel in paragraphs 7.584 and 7.588 of its Report in *China – Auto Parts*.[28]

39. However, the EC's statement is misleading and distorts the Panel's finding in *China – Auto Parts*. In fact, that Panel merely examined "whether *any aspect* of the criteria set out in the measures will necessarily lead to a violation of China's obligations under its Schedule and consequently Article II:1(a) and (b) of the GATT 1994."[29] With respect to Article 21(2) of Decree 125 that it was reviewing, the Panel concluded that the provision "has *an element* that would necessarily lead to a result that "a chassis fitted with engines" within the scope of tariff heading 87.06 classified as a complete motor vehicle and consequently assessing them at the tariff rate applicable to a motor vehicle inconsistently with China's concessions contained in the tariff headings of China's Schedule."[30]

40. The Panel has thus clarified that in order to establish "as such" claims, it is not necessary that the measure at issue *in all cases* or *always* leads to a result that is inconsistent with the obligations of the WTO Member under the WTO Agreement. Rather, it has underlined that it is sufficient if a specific aspect of the criteria set out in the measures necessarily lead to a violation of the WTO Agreements. It is "any aspect" or "an element," not "every application" of the measure that has to be examined.

41. This has even been noted by the EC itself in *China – Auto Parts* when saying that "the mere fact that in some exceptional circumstances the deeming or classification of a large collection of auto parts as the complete vehicle under the substantive criteria of Article 21(1) and 21(2) of Decree 125 would be consistent with the rules of the Harmonised System is irrelevant for a finding of an 'as such' inconsistency under Article II of the GATT 1994."[31]

42. As the US also noted in its replies to the questions of the Panel, "the mere fact that in some instances a mandatory measure might result in the correct duty treatment for a given model of a product did not in the EC's view save a measures from an adverse

[28] EC Oral Statement at the First Substantive Meeting of the Panel, para. 37.

[29] Panel Report, *China – Auto Parts*, para.7.540.

[30] Panel Report, *China – Auto Parts*, para. 7.588.

[31] EC Comments on China's response to Question 228 from the Panel in *China – Auto Parts*, para. 8.

WTO finding – the fact that a measure necessarily results in incorrect duty treatment for other models of that product renders it 'as such' inconsistent with Article II."[32]

43. Furthermore, in order to make a *prima facie* case, it is not necessary to put forward the boundaries of the concessions by listing all products with all features and characteristics that would fall within those concessions. It is sufficient for TPKM to demonstrate how the criteria set out in the measures at issue are inconsistent with the EC's relevant concessions. For instance, regarding STBs, in order to make a *prima facie* case, it is sufficient for TPKM to demonstrate that the EC excludes an STB from duty-free treatment merely on the ground that it is equipped with a hard disk.

D. CLARIFICATION CONCERNING THE MEASURES BEING CHALLENGED "AS SUCH": ALL MEASURES BEING CHALLENGED ARE IN FORCE AND ARE RELEVANT

1. Changes in the CN codes pursuant to the entry into force of the CN 2007 do not render the measures at issue invalid or without legal effect

44. With respect to a number of measures at issue, the EC is claiming that they have lost their relevance because the CN codes indicated in these measures have changed with the entry into force of the CN 2007.

45. With respect to LCD, the EC is claiming that Regulations (EC) No. 634/2005 and No. 2171/2005 have lost their relevance since the CN codes indicated for certain LCD monitors, i.e., CN codes 8471.60.80 and 8528.21.90, have been replaced in 2007 by codes 8528.41.00 and 8528.59.90.[33]

46. With respect to MFM, the EC similarly claims that while Commission Regulations (EC) No. 517/1999 and No. 400/2006 provided for the classification of certain MFMs under code 9009.12.00, that code was removed from the CCT effective from 1 January 2007 and as a result "became effectively inapplicable from that date and remained so as of the date of establishment of this Panel."[34]

47. On the ground that these regulations would have lost "their relevance" or "became effectively inapplicable," the EC is actually claiming that they cannot be part of the measures at issue.

48. However, as it will be explained in detail below, each of these measures is valid and has legal effect. Indeed, regulations in the EC legal order "disappear" only if they are

[32] US Answers to the Panel's Questions in connection with the First Panel Meeting, para. 56.

[33] EC FWS para. 95

[34] EC FWS, para. 340 – 341.

expressly revoked by the EC Commission or expressly annulled by the ECJ.[35] There is no implied annulment under EC Community law or annulment by analogy. None of these measures has been revoked or annulled.

49. This conclusion is further supported by the way in which the EC has dealt with modifications resulting from past changes to the HS or to the CN.

50. When the HS or the CN is amended, the EC generally updates its classification regulations following the adoption of the new HS or CN. For instance, Commission Regulation (EC) No. 705/2005 has amended and repealed certain regulations on the classification of goods in the CN.[36] In its Preamble, the above-mentioned Regulation notes that:

> (1) Certain Commission Regulations concerning the classification of goods, adopted in order to ensure the uniform application of the CN established by Regulation (EEC) No 26587/87, refer to codes which no longer exist. They should therefore be updated by way of amendments which take into account the appropriate codes in force.
>
> (2) Other Regulations have become redundant owing to changes to the descriptions of products and their related codes in the Harmonised System or in the Combined Nomenclature. They should therefore be repealed.

51. The above-mentioned Regulation confirms that a Regulation must expressly be enacted and must enter into force in order to update or repeal a Classification Regulation. This is a matter of legal certainty. Actually, the EC has acknowledged this since, with respect to LCD monitors, it stated that "the classification regulations No 634/2005 and 2171/2005 have lost their relevance and *the EC is in the process of repealing or replacing them as appropriate for reasons of legal certainty*".[37] As long as the said classification regulations have not been repealed or updated, they remain in

[35] For instance, the ECJ had ruled in Case C-339/98 (*Peacock*) that network cards designed to be installed in ADP machines were to be classified under Heading 8471. The ruling of the ECJ concerned imports which took place before Commission Regulation 1638/94 and 1165/95, which classified network equipment under Heading 8517 (subject to a higher duty), had entered into force. The ECJ could not therefore in the *Peacock case* review the validity of such regulations. The ECJ had to confirm expressly in a separate ruling in case C-463/98, (*Cabletron*) that Regulation 1638/94 and Regulation 1165/95 were invalid, since they classified network equipment under Heading 8517 and the EC Commission has not annulled them following the Peacock ruling. Although such invalidity followed from the legal findings in the *Peacock case*, the ECJ still had to expressly annul the Commission regulation in the context of a dispute where the classification regulations were in force at the time of the imports concerned.

[36] Commission Regulation (EC) No 705/2005 of 4 May 2005 amending or repealing certain regulations on the classification of goods in the Combined Nomenclature, OJ L 118, 5.5.2005, p.18. *See* Exhibit TPKM-83.

[37] EC FWS, para. 95.

force and continue to have legal effect. Thus, all these classification regulations, even if they refer to codes that no longer exist in the currently applicable CN, are still in force and thus properly before this Panel.

52. It should be added that, in most cases, the classification regulations are only updated, i.e., the old CN code is replaced by the new CN code. The reasoning for the classification as well as the applicable tariff is identical. Before such update is expressly made through a regulation, customs authorities will simply use the coordinating table of equivalence in order to determine the appropriate customs classification.[38]

53. Thus, for instance, an authority can review the classification of an MFM in the light of Commission Regulation (EC) No. 517/1999 or No. 400/2006 and conclude that the product is classified under CN code 9009.12.00. When the table of equivalences is consulted, the authority will classify the product under CN code 8443.31.91, CN code 8443.32.91 or CN code 8443.39.10 all subject to 6% import duty. [39]

2. The judgments of the ECJ in *Kamino* and *Kip* have not modified the rules

54. The European Court of Justice has recently issued judgments in the *Kamino* and *Kip* cases where it has concluded that certain regulations and CNEN had to be amended or revoked.[40] However, these instruments have not been annulled by the ECJ. The measures are therefore still valid and continue to have legal effects.

55. The EC seems to have argued that measures which are incompatible with the interpretation by the ECJ in these judgments would become invalid.[41] However, as a matter of EC law, all disputed measures are still in force and therefore applicable. The measures will "disappear" from the EC legal system only when they are expressly revoked by the EC Commission or expressly annulled by the ECJ. There is no implied annulment under EC Community law or annulment by analogy.

56. The fact that the measures remain valid is also clear from the text of both above-mentioned judgments. *Kip* even expressly states that one of the measures at issue, i.e.,

[38] *See, e.g.*, the table of equivalences available from the following United Kingdom website supported by HM Revenue & Customs, <https://www.uktradeinfo.com/index.cfm?task=correlation>

[39] *See*, e.g., BTI FR-E4-2007-002262-R issued by the French customs authorities for the classification of a multifunctional machine in CN code 8443.31.91 in 2007 by reference to the classification regulation No 517/1999. Exhibit TPKM-84.

[40] C-376/07, *Staatssecretaris van Financiën v Kamino International Logistics BV*, judgment of 19 February 2009 Exhibit TPKM-52 and C-362/07, *Kip Europe SA and Others v Adminstration des douanes – Direction générale des douanes et droits indirects*, judgment of 11 December 2008, Exhibit TPKM-63.

[41] EC Oral Statement to the First Meeting of the Panel, para. 27.

Commission Regulation (EC) No. 400/62, is valid while *Kamino* did not deal with any of the specific measures in dispute since they were all dated after the imports which gave rise to the *Kamino* dispute.

3. Legal status of the CNEN

57. In various places of its FWS and of its oral statements before the Panel, the EC has claimed that CNEN are "not legally binding."[42]

58. With respect to claims concerning Article X of the GATT, the EC submitted that because CNEN are not legally binding, they therefore do not constitute "laws, regulations, judicial decisions or administrative rulings of general application" within the meaning of Article X:1 of the GATT[43] and do not constitute "measures" within the meaning of Article X:2 of the GATT.[44] TPKM disagrees with the EC's assertions, and will come back to these issues later in this Submission[45].

59. Regarding Article II claims, the EC has also repeatedly claimed that CNEN are not legally binding even if it is not entirely clear to us what kind of legal effects the EC is trying to attach to this allegedly non-legally binding nature in the framework of Article II claims.

60. In the following paragraphs, TPKM would like to address two points: (i) contrary to the EC claim, CNEN are legally binding and (ii) CNEN constitute "measures" that can be challenged "as such."

(a) <u>CNEN are legally binding</u>

61. Despite the repeated claims of the EC that CNEN are not legally binding, an examination of the CNEN and their legal status confirms that they are legally binding.

62. As a preliminary remark, it is essential to understand the statement of the ECJ repeatedly quoted by the EC that the "CNENs do not have legally binding force" in its context. This statement means, in the ECJ's language, that the CNEN "must accordingly be compatible with [the] provisions [of the CN] and may not alter the scope of those provisions".[46] In other words, the statement that the CNEN are not legally binding refers to the fact that they cannot alter the scope of the CN. This

[42] EC FWS, para. 98, 289, 311, 312, 323, and EC Replies to the Questions of the Panel after the First Meeting, para. 250 – 251.

[43] EC FWS, para. 310.

[44] EC FWS, para. 312 – 317.

[45] *See* para. 258 – 268 and 276 – 282.

[46] Case C-376/07, *Kamino*, para. 48. Exhibit TPKM-52.

statement certainly does not mean that customs authorities would be free to disregard the CNEN. The CNEN are legally binding flows from the following elements.

63. First, Article 12(5) of the CCC expressly provides that BTI shall cease to be valid "(ii) where it is no longer compatible with the interpretation of one of the nomenclatures referred to in Article 20(6): at Community level, by reason of amendments to the explanatory notes to the combined nomenclature."[47] As BTIs are undoubtedly legally binding, the fact that they cease to exist if they are not consistent with subsequent CNENs is a clear demonstration that CNENs are mandatory instruments with legal binding force.

64. Second, during its meeting of 22 October 2007, the Nomenclature Committee discussed the "use of statements in the minutes of the Committee and the application of voted measures before their publication."[48] The Chairman noted that "as soon as the Committee has rendered an opinion on the classification of a specific type of product, no BTI should be issued contrary to that opinion and that this opinion should be respected by all member States. It follows from the above that as soon as an opinion has been voted, member States can issue BTIs for the products concerned, even before the measures has been adopted by the Commission and published in the Official Journal."[49] This statement shows that EC customs authorities must follow CNEN not only when they have been published in the Official Journal *but, even before the CNEN's publication, as soon as* the Committee has voted on them.

65. Third, if member States deviate from the content of CNEN and collect less import duties as a result thereof, the EC Commission is entitled to claim the difference in duty out of the member States' budget.[50] Furthermore, where a national administration violates the interpretation set out in a CNEN, the EC Commission retains the option of instituting proceedings against that member State for infringement of Article 10 of the EC Treaty.[51]

66. The above-mentioned evidence thus clearly demonstrates that CNEN do have legally binding force on the member States and the member States must comply with the CNEN. The EC itself acknowledged it in *EC – Selected Customs Matters*, when

[47] Council Regulation (EEC) No. 2913/92 which establishes the Community Customs Code ("CCC").

[48] Customs Code Committee – Tariff and Statistical Nomenclature Section (Heads of Tariff), *Summary Report of the 433rd meeting of the Committee held on 22 October 2007*. See Exhibit TPKM-17.

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

[50] EC FWS in *EC – Selected Customs Matters*, para. 160.

[51] See Customs Code Committee – Section for General Customs Rules, *Nature and Legal value of Guidelines*, 5.4.06, point 13. See Exhibit TPKM-85.

underlying that the CNEN are part of the "tools for ensuring a uniform classification practice within the EC."[52] Indeed, how could CNEN ensure a uniform classification practice if member States would be free to decide whether to apply them or not?[53]

67. The EC refers to footnote 638 of the Panel Report in *EC – Selected Customs Matters* to support that even if CNEN are legally binding, they will be inapplicable if they are in conflict with the wording of the heading.[54]

68. It is correct that a CNEN is invalid where it is found to conflict with the wording of the headings, section notes, or chapter notes. However, this principle is equally applicable to classification regulations which also cannot alter the scope of the CN,[55] and the EC clearly considers that classification regulations are binding instruments.

69. The fact that CNEN cannot contradict the wording of the CN does not mean, as the EC appears to claim, that customs authorities would be free to disregard a CNEN at its own initiative when they consider that it contradicts the wording of the heading.

70. A national authority will not disregard a CNEN, though contrary to the wording of the heading, until it has been amended by the EC Commission to avoid such contradiction. Even in the case where ECJ rulings have clearly and expressly concluded on the contradiction, the national authorities would wait for the CNEN to be amended in accordance with the ECJ ruling to avoid divergent interpretations by the various authorities of the member States. Indeed, despite the ECJ ruling, national authorities could interpret differently which parts of the CNEN would be inapplicable. A different approach would undermine the uniform application of the CN which the CNEN must ensure[56].

(b) <u>CNEN constitute "measures" that can be challenged "as such"</u>

[52] EC FWS, para. 262.

[53] See Customs Code Committee – Section for General Customs Rules, *Nature and Legal value of Guidelines*, 5.4.06, point 4: "the purpose of such explanatory notes/guidelines is to ensure the uniform interpretation of Community customs law at Community level." See Exhibit TPKM-85.

[54] EC FWS, para. 98.

[55] *See*, for instance, Case C-15/05 *Kawasaki*: "the Council has conferred upon the Commission, acting in cooperation with the customs experts of the member States, a broad discretion to define the subject-matter of tariff headings falling to be considered for the classification of particular goods. However, the Commission's power to adopt the measures mentioned in Article 9(1)(a), (b), (d) and (e) of Regulation No 2658/87 does not authorise it to alter the subject-matter of the tariff headings which have been defined on the basis of the HS established by the Convention whose scope the Community has undertaken, under Article 3 thereof, not to modify" (para. 35). See Exhibit TPKM-86. This has been underlined by the EC itself in its FWS in *EC – Selected Customs Matters*, para. 94.

[56] *See*, para. 66 above.

71. In *US – Corrosion-Resistant Steel*, the Appellate Body clarified that "in principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings."[57] The Appellate Body also noted that measures that can be the subject to WTO dispute settlement can include not only acts applying a law in a specific situation, but also "acts setting forth rules or norms that are intended to have general and prospective application. In other words, instruments of a Member containing rules or norms could constitute a "measure" irrespective of how or whether those rules or norms are applied in a particular instance. This is so because the disciplines of the GATT and the WTO, as well as the dispute settlement system, are intended to protect not only existing trade but also the security and predictability needed to conduct future trade. This objective would be frustrated if instruments setting out rules or norms inconsistent with a Member's obligations could not be brought before a panel once they have been adopted and irrespective of any particular instance of application of such rules or norms."[58]

72. The Appellate Body further underlined that a measure may be any act of a Member, whether or not legally binding, and it can include even non-binding administrative guidance.[59] In that case, the Appellate Body concluded that it sees "no reason for concluding that, in principle, non-mandatory measures cannot be challenged 'as such.'"[60]

73. In light of this well-established jurisprudence and the above-mentioned analysis, the CNEN necessarily constitute "measures" that can be challenged "as such."

E. INTERPRETATIVE ISSUES CONCERNING THE CONCESSIONS INCLUDED IN THE EC SCHEDULE

1. Relevance and significance of the "headnote" in the EC Schedule

74. In order to implement the obligations undertaken pursuant to Attachment B of the ITA, the EC has modified its Schedule and has included a "headnote" that reads as follows:

> "[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 (WT/MIN'96)/16), to the extent not specifically provided for in this Schedule, the customs duties on such product, as well as any other duties and charges of any kind (within the meaning of Article II:1(b) of the General Agreement on

[57] Appellate Body Report, *US – Corrosion-Resistant Steel*, para. 81.

[58] Appellate Body Repot, *US – Corrosion-Resistant Steel*, para. 82.

[59] Appellate Body Report, *US – Corrosion-Resistant Steel*, para. 85.

[60] Appellate Body Report, *US – Corrosion-Resistant Steel*, para. 88.

Tariffs and Trade 1994) shall be bound and eliminated as set forth in paragraph 2(a) of the Annex to the Declaration, wherever the product is classified."[61]

75. Through the headnote, the EC committed to grant duty-free treatment to all products described in or for Attachment B, wherever they are classified. The commitment is clear: the EC must grant duty-free treatment to all products described in or for Attachment B, no matter where they are classified.

76. The headnote is followed by a list of the product descriptions included in Attachment A-2 and B. It specifies various CN codes that had been identified by the EC at the time as covering the products included in Attachment A-2 and Attachment B. This list of codes has been made in order to comply with the requirement agreed upon by all ITA participants to "provide a list of the detailed HS headings involved for products specified in Attachment B."[62]

77. The EC has been trying to restrict the scope of its concessions by claiming that the codes indicated in that list exhaustively describe the scope of the concessions for the products. This position is, however, flatly contradicted by the text of the headnote and of the ITA itself. In any event, these codes were included for illustration purposes only.

78. The text of the headnote is clear: "duty-free treatment is to be granted to all products described in or for Attachment B, wherever classified."

79. The EC acknowledged this in principle since the EC has repeated that it could accept that "the headnote provides for a 'safety net' in respect of products defined in Attachment B whereby there could, at least, in principle, be other products than those identified with headings in the EC Schedule that fulfil a given product definition."[63] However, the EC considers that the headings indicated next to the product descriptions would "exhaust the definitions within the EC Schedule."[64] This view makes no sense since, while accepting the principle, the EC actually denies any effect in practice. The EC's position simply reduces the "headnote" to inutility. The EC's view is also contradictory to the principles of treaty interpretation and well-established Appellate Body jurisprudence.

80. The ITA text further denies the EC's view that the list of codes would limit the scope of the concessions. According to the ITA text, ITA participants agreed that,

[61] WT/Let/156.

[62] ITA, Annex, paragraph 2.

[63] EC Replies to the Questions of the Panel after the First Meeting, para. 18.

[64] EC Replies to the Questions of the Panel after the First Meeting, para. 31.

notwithstanding their differences in classification under national law, they wanted to ensure duty-free treatment to these Attachment B products wherever they are classified.

2. Technological development does not have an impact on tariff treatment

81. In its reply to Question 3 of the Panel, the EC states that "technological development often leads to situations where a given product, […] may fulfil two or more tariff headings in a Member's Schedule. In such situations the correct heading must be allocated according to the interpretative rules designed for such a purpose, most notably the General Interpretative Rules of the Harmonized System."[65]

82. The EC's position is legally incorrect.

83. The EC is legally wrong when presenting the interpretative issue as one of classification. Actually, the issue is not whether a product is to be *classified* in one heading or another, but whether it is covered by the wording of a specific concession. In that respect, it is legally incorrect to claim that the issue is to be solved by applying the GIR. Furthermore, the EC's assertion that one would have to choose between two headings is also legally invalid. Concessions that were made with respect to Attachment B are only based on product descriptions but not on HS headings. For these concessions, there is simply no such issue as having to choose among multiple headings in order to determine whether the products would receive duty-free treatment.

84. Furthermore, the EC claims that the products at issue constitute "new products" and because they are technologically more advanced than the products existing at the time the ITA was negotiated and concluded, they fall outside of the concessions made by the EC pursuant to the ITA.[66] The EC seems to claim that, since the ITA was negotiated in light of the technological circumstances existing in 1996, the scope of the concessions is defined by the circumstances prevailing at that time.

85. This is simply not true. While concessions are made at one point in time, they are not restricted to products existing at that time. In accordance with the principles of treaty interpretation of the *Vienna Convention*, what is relevant to determine the scope of the concessions is the ordinary meaning of the terms together with its context and the object and purpose of the GATT 1994. The central issue is whether a product, on the basis of its objective characteristics, falls within the scope of a concession interpreted on the basis of its ordinary meaning, context, and object and purpose. In this exercise,

[65] EC Replies to the Questions of the Panel, para. 15.

[66] See, e.g., EC FWS, para. 71 – 81.

technological development is not an issue. In other words, as long as the product at issue fulfils the description of product covered by the concession, it does not matter whether this product is technologically more advanced than the products existing at the time the concession was made. The product shall receive the treatment offered by the concession accordingly.

86. This is consistent with the position expressed by the Panel in the GATT dispute concerning "Greek increase in Bound Duty" where it clearly expressed that the ordinary meaning of a tariff concession is not limited to products then in existence. Rather, it applies to any product that meets the specific description agreed upon. [67]

87. In sum, in TPKM's view, the issue is not to determine whether the products at issue are "new" or have additional functionalities or characteristics, but whether they are covered by the wording of the concession. The scope of the concessions cannot vary depending on changes in technology.

III. BY IMPOSING CUSTOMS DUTIES ON CERTAIN FLAT PANEL DISPLAY DEVICES, THE EC VIOLATES ARTICLES II:1(A) AND II:1(B) OF THE GATT 1994

A. GENERAL ISSUES

1. The product at issue has been defined in a sufficiently precise manner

88. The EC argues that TPKM failed to establish a *prima facie* case since the product at issue is not defined in sufficient detail. The EC complains at length about the alleged lack of precise definition of the products at issue.[68]

89. First of all, it must be recalled that TPKM has given a description of the product at issue in its FWS as "FPD devices capable of receiving and reproducing signals from both ADP machines and other sources" as well as "FPD devices capable of receiving and reproducing signals from an ADP machine only."[69]

90. The EC however claims that "beyond these characterisations, TPKM does not provide more detailed explanation of the products concerned."[70]

91. It should be recalled that the Appellate Body emphasized in *EC – Chicken Cuts* that

[67] In that dispute, the Group concluded that long-playing records were covered by the tariff treatment granted to "gramophone record" since the concession had not been made subject to any limitation regarding the length of the recording that could be made. GATT Panel Report, *Greek Increase in Bound Duty*, L/580, adopted 9 November 1956.

[68] EC FWS, para. 34 – 49.

[69] TPKM FWS, para. 11 – 14.

[70] EC FWS, para. 37

> "the identification of the product at issue is generally not a separate and distinct element of a panel's terms of reference; rather, it is a consequence of the scope of application of the specific measures at issue. In other words, it is the *measure* at issue that will generally define the *product* at issue."[71]

92. In the present dispute, the contested measures have been clearly identified by the complainants.[72] It is therefore not necessary to identify the product at issue in order to identify the measure at issue. Rather, it is the measures at issue that define the products at issue.

93. One can distinguish between two types of measures among the measures concerning FPD devices that are being challenged in this case. On the one hand, there are classification regulations that apply to products that have a number of specific features or characteristics as described in the regulation. On the other hand, there are broader legal instruments (i.e., the CN and CNEN) that apply to a category of products that is more largely defined.

94. The EC admits that the products have been identified with sufficient clarity as far as the classification regulations are concerned, namely, item 4 in the annex to Regulation (EC) No. 634/2005 and items 2, 3, and 4 in Regulation (EC) No. 2171/2005.[73]

95. The EC's claim concerning the lack of a sufficiently precise definition of the products at issue appears to be limited to the CN and CNEN. In its FWS, TPKM has identified the relevant parts of the CN and CNEN concerning FPD devices that are being challenged.[74] As far as the CNEN are concerned, it concerns the EN to CN codes 8528.51.00, 8528.59.10 and 8528.59.90. It is these measures at issue that define the products at issue.

96. The EC's confusion seems to flow from a wrong understanding of the claims made by the complainants in this dispute. The EC seems to limit the claims to those products which have been expressly mentioned as examples of the products at issue, such as LCD monitors with DVI.[75] However, the products at issue are those defined by the measures at issue and the claims are being made with respect to certain aspects of the measures that necessarily lead to a WTO inconsistent outcome. For example, the

[71] Appellate Body Report, *EC – Chicken Cuts*, para. 165.

[72] See TPKM FWS, para. 66 – 89.

[73] EC FWS, para. 48.

[74] TPKM FWS, para. 78 – 84.

[75] See, e.g. EC's statement that "the scope of Japan's claim is limited to LCD monitors with DVI irrespective of any other technical specification, such as size, resolution, aspect ratio, the inclusion of a tuner." EC FWS, para. 40.

mere presence of a DVI that excludes any flat panel display devices from duty-free treatment.

97. The EC's section dealing with the alleged "lack of definition of the products subject to dispute" is also inaccurate as far as it concerns TPKM's position.

98. For instance, the EC claims that TPKM has decided to limit the challenge to LCD monitors. This is not correct. TPKM has clearly indicated that "the FPD types most affected by the EC measures are LCD displays with a DVI connector," "*although not limited to such types of FPDs.*" [76]

99. Second, the EC claims that there is no dispute among the parties that "a monitor that is capable to accept a signal only from the central processing unit of an ADP machine is to be classified in heading CN 8471 60 90 as an output unit of an ADP machine."[77] This appears to be contradicted by the contested measures. Indeed, FPD devices are automatically excluded from duty-free treatment if they are equipped with a DVI connector. Since certain FPD devices with a DVI can only be used with an ADP machine, FPD devices which can only receive and reproduce signals from an ADP machine are within the scope of the products at issue.

2. The obligations in the EC Schedule have been precisely identified

100. The EC further claims that complainants have not established a *prima facie* case since they failed to identify the precise concession that is allegedly breached both in terms of its substantive content and where precisely it is provided for in the EC Schedule.[78]

101. EC's claim about TPKM's failure to identify the concession and where it is provided for is incorrect on the face of TPKM's FWS. TPKM has clearly identified the precise content of the concession[79] and, as noted by the EC itself, also made it clear that the concessions are in the EC Schedule.[80]

102. The EC further argues that TPKM ignores that the EC Schedule also contains a list of HS/CN codes and that TPKM is silent on whether or not they are part of the concession and does not explain the relevance of the "headnote" in the EC Schedule for Attachment B.[81] TPKM would like to submit the following comments.

[76] TPKM FWS, para. 12

[77] EC FWS, para. 49.

[78] EC FWS, at para. 51.

[79] TPKM FWS, para. 174 – 178.

[80] TPKM FWS, para. 174 – 178 and EC FWS, para. 55 – 56.

[81] EC FWS, para. 57.

103. As to the relevance of the headnote, TPKM refers to its discussion on the issue in paragraphs 74 – 80 above. Since no common HS heading could be agreed upon by ITA participants for the products described in Attachment B, they agreed to determine the scope of the commitments by product description rather than by the HS codes. Each ITA participant was required, pursuant to paragraph 2 of the Annex to the ITA, to indicate which HS headings it considered to be relevant. By doing so, the ITA participants also agreed that the scope of the concession defined by the relevant product description shall not be determined by HS headings.

104. The foregoing clearly flows from the headnote included in the EC Schedule. The headnote provides that with respect to all products described in or for Attachment B duties shall be bound and eliminated wherever the product is classified. The meaning of the words "wherever the product is classified" is both crucial and self-explanatory. Regardless of the specific heading or subheading under which a particular product falls in the EC Schedule, any product described in Attachment B shall be granted duty-free treatment.

105. Therefore, the HS/CN codes indicated next to the product descriptions can only be illustrative. In other words, they do not exhaust the product description. They may be used as "context" in the interpretative exercise of the scope of the concession. Nonetheless, they do not determine the scope of the concession that is based on the product description. If the CN codes indicated in the EC list would have circumscribed the scope of the concession, *quod non*, it would have been unnecessary to add the words "wherever the product is classified."

106. Finally, the EC has tried to justify its argument that WTO members' obligations pursuant to Attachment B to the ITA will be different depending on whether the concession is in the ITA. The EC's rationale was that if the concessions were in the ITA, the interpretation will be identical for all members; and "if […] the concessions were in the EC Schedule and identified with a given HS/CN code," WTO members would have agreed that some differences are allowed.[82]

107. TPKM disagrees with the EC's arguments that when the EC concession is in its Schedule, some differences in its interpretation may be allowed.

108. This position amounts to stating that the WTO Members have agreed that there could be differences between WTO members in the scope of concessions which are identically worded, depending on the HS/CN codes listed alongside the product description. According to EC's allegation, WTO Members agreed that some differences were an inherent part of the concessions made pursuant to Attachment B

[82] EC FWS, para. 60.

depending on which HS/CN codes are listed. This is contrary to the wording of the ITA and the EC's concessions.

109. The text of the ITA is crystal clear. All participants to the ITA have undertaken to apply duty-free treatment to all products described in Attachment B "wherever the product is classified." The fact that WTO Members were requested to specify the detailed HS headings for the products listed in Attachment B cannot therefore limit the scope of the concessions that is defined by the product descriptions.

110. Furthermore, the EC Schedule itself includes a "headnote" with respect to the products covered by Attachment B to the ITA that clearly provides that duty-free treatment is to be granted to all listed products "wherever classified."

111. Therefore, TPKM submits that it has clearly indicated the scope of the EC concessions concerned in its FWS and the relevance of the headnote.

3. The EC has misrepresented the complainants' claims

112. The EC claims that the complainants' claims are erroneous since they are based on the view that the mere presence of a DVI connector makes an LCD monitor an ADP monitor.[83]

113. TPKM has not submitted that, contrary to the EC's suggestion, the presence of the DVI connector determines whether an LCD monitor must *benefit* from duty-free treatment. On the contrary, TPKM has argued that the presence of a DVI cannot automatically *exclude* any FPD device from duty-free treatment. This is actually the effect of the measures at issue, i.e., the CNEN, that excludes any FPD with a DVI from duty-free treatment. The EC has therefore misrepresented TPKM's arguments and tried to distort the correct description of the issue for the panel's consideration.

114. TPKM would like to emphasise once again that the type of connector cannot be dispositive of whether or not an FPD device is covered by the concession. An FPD device cannot be automatically excluded from duty-free treatment simply because it has a particular type of connector. Therefore, the argument is not limited to DVI connectors but applies to any type of connector.

115. The EC further argues that it is not correct that the EC will impose duties on the basis of the mere fact that the FPD "might" be used with something else than an ADP machine or that it is merely capable of being connected to a non–ADP machine.[84] As an example, the EC refers to item 1 in Regulation (EC) No. 2171/2005 where a

[83] EC FWS, para. 65.

[84] EC FWS, para. 66.

monitor capable of reproducing video signals from a source other than an ADP machine is subject to a zero percent duty.[85]

116. First of all, item 1 of Regulation (EC) No. 2171/2005 is not subject to this dispute. Second, the product described in item 1 of Regulation (EC) No. 2171/2005 can only be used together with an ADP machine. Indeed, its ability to receive signals from other sources is purely hypothetical given that the product only has a VGA connector (D-sub 15), and has no audio processing capabilities. It would therefore not be able of reproducing correctly signals received from any *external* source other than an ADP machine.

117. Moreover, even if that were not the case, in order to substantiate an "as such" claim, it is not necessary for the complainants to show that the contested measures "always" lead to a violation of the EC's commitments under its Schedule of concessions. It is sufficient to show that at least in some respects the contested measure necessarily leads to such violation.

118. In *China – Auto Parts*, the Panel stated that

> "the scope of our review in respect of the complainants' claim against China's measures, in particular the essential character determination, under Article II:1(a) and (b) of the GATT 1994 is limited to a very narrow question whether any aspect of the criteria set out in the measures will necessarily lead to a violation of China's obligations under its Schedule and consequently Article II:1(a) and (b) of the GATT 1994."[86]

119. The Panel has thus clarified that it is sufficient that "any" aspect of the criteria in the measures lead to a violation of the WTO Agreements. In *China – Auto Parts*, the Panel has, for instance, concluded with respect to Article 21(2) of Decree 125 that the provision

> "has an element that would necessarily lead to a result that 'a chassis fitted with engines' within the scope of tariff heading 87.06 classified as a complete motor vehicle and consequently assessing them at the tariff rate applicable to a motor vehicle inconsistently with China's concessions contained in the tariff headings of China's Schedule."[87]

[85] EC FWS, para. 67.

[86] Panel Report, *China – Auto Parts*, para.7.540 (emphasis added).

[87] Panel Report, *China – Auto Parts*, para. 7.587.

120. The Panel has thus clarified that in order to establish "as such" claims, it is not necessary that the measure at issue in all cases or always lead to a result that is inconsistent with the obligations of the WTO Member under the WTO Agreement. Rather, it has underlined that it is sufficient if a specific aspect of the criteria set out in the measures necessarily lead to a violation of the WTO Agreements.

121. Therefore, the EC's attempt to find an example where an FPD device could still be subject to duty-free treatment despite its capability to reproduce signals from a source other than an ADP machine are irrelevant. TPKM has proved that the application of the criteria contained in the measures at issue necessarily leads to a breach of the EC concession. For example, it clearly follows from the CNEN that any FPD device which can reproduce signals from a source other than an ADP machine or which is equipped with a DVI connector will necessarily be excluded from the duty-free treatment.

122. In view of the above, the conclusions of the EC at paragraph 69 of its FWS are incorrect.

123. Finally, as misrepresented by the EC, TPKM does not claim that the two above-mentioned criteria should "*not be used at all.*"[88] What TPKM claims is that an FPD should not be automatically excluded from duty-free treatment simply because it has a DVI or because it can reproduce signals from a source other than an ADP machine. TPKM does not claim that if the above two criteria were not used, "*LCD monitors presumably at issue in this case would never be subject to duties.*"[89] TPKM claims that certain FPD devices must be subject to duty-free treatment regardless of the presence of the DVI or the capability to reproduce signals from a source other than an ADP machine.

4. The FPD devices at issue are neither multifunctional LCD monitors nor new products

124. TPKM fails to understand what the EC precisely means with "multifunctional monitors." TPKM's complaint is not limited to such monitors but covers all FPD devices which can receive and reproduce signals from an ADP machine, and this is so regardless of whether the FPD device can also receive and reproduce signals from other sources. As demonstrated by the EC's measures, the EC has imposed customs duties on FPD devices where the ability to receive and reproduce signals from other sources was only a marginal or even purely theoretical possibility.

[88] EC FWS, para. 69.

[89] EC FWS, para. 69.

125. Finally, contrary to what the EC seems to argue, the fact that a product with additional or enhanced features did not exist at the time the concession has been made is not a reason to exclude that product from the scope of the concession. Therefore, the fact that FPDs existed in 1998 did not have a DVI should not be a reason at a later time to exclude FPD devices with DVI from the scope of the concession concerning FPD devices.

5. The measures at issue

126. There are five measures identified by TPKM in its request for establishment of the Panel.[90]

127. First, the EC states that Regulation (EC) No. 493/2005 has been replaced by Regulation (EC) No. 179/2009 which suspends duties on certain flat panel video monitors as of 1 January 2009.[91] It is not correct however to consider Regulation (EC) No. 179/2009 as "replacing" Regulation (EC) No. 493/2005. It rather establishes a new duty suspension and the scope of which is actually different from the scope of the duty suspension established by Regulation No. 493/2005. Although Council Regulation No 179/2009 suspends the duties from 1 January 2009, the EC conveniently omitted that this duty suspension will expire again on 31 December 2010. The concession granted by the EC in its Schedule is not subject to any conditions or additional requirements such as the adoption of a duty suspension. Such suspension itself remains a discretionary decision of the EC and is limited in time.[92]

128. Second, the EC claims that Commission Regulations (EC) No. 634/2005 and No. 2171/2005 that constitute classification regulations have lost their relevance as a result of the implementation of the HS2007, i.e., because the CN codes indicated in these regulations no longer exist with the entry into force of the CN 2007.[93]

129. This claim is simply incorrect. As a matter of EC law, regulations remain valid and have legal effects as long as they have not been either repealed by another regulation or annulled by the European Court of Justice. TPKM refers the Panel to the long discussion on this issue above in paragraphs 44 -53. This is actually acknowledged by the EC's note that the EC "is in the process of repealing or replacing them for reasons of legal certainty."[94]

[90] See Request for establishment of the Panel, WT/DS375/8, 376/8, 377/6 and TPKM FWS, para. 66 – 89.

[91] EC FWS, para. 94.

[92] For further discussion on the duty suspension, please refer to para. 211 – 216.

[93] EC FWS, para. 95.

[94] EC FWS, para. 95

130. Third, the EC argues that Council Regulation (EC) No. 2658/87 as last amended applies a zero duty to monitors of the "kind solely or principally used in an automatic data processing system of heading 8471."[95] However, this fails to take into account that FPD devices are subject to a zero percent duty regardless of the sole or principal use with an ADP machine pursuant to the EC concession based on Attachment B of the ITA. Moreover, even pursuant to the concession based on Attachment A, the EC fails to acknowledge that duty-free treatment is excluded when the FPD device is not for use "exclusively" with an ADP system as required by the CNEN, one of the measures at issue.

131. Fourth, the EC claims that the CNEN are not legally binding and to the extent there is a conflict between the wording of the headings and the EN, the latter will be inapplicable.[96]

132. Contrary to what the EC claims, CNEN are in fact legally binding. As long as the EC Commission has not expressly amended the CNEN or the ECJ has not declared the CNEN contrary to the wording of the heading or Chapter or Section Notes, national customs authorities are legally obliged to follow the CNEN. They do not have any discretion. The legally binding nature of the CNEN is evidenced by the various elements that TPKM has addressed above in paragraphs 61 - 70.

133. It is correct that a CNEN cannot contradict the wording of the headings, section or chapter notes. However, this does not mean that, as the EC appears to claim, customs authorities would be free to disregard a CNEN at its own initiative when they consider that it contradicts the wording of the heading.

134. A national authority will not disregard a CNEN even if it is contrary to the wording of the heading until it has been amended by the EC Commission, or until an ECJ ruling clearly and expressly concluded on the contradiction of the CNEN. Even in the case of an ECJ ruling, national authorities would wait for an amendment of the CNEN following the ECJ ruling to avoid divergent interpretations by the various authorities of the member States.

135. It suffices to note that the conflict between the wording of the CNEN at issue ("exclusive" use with an ADP machine) and the wording of the headings or chapter note ("solely or principally" use with an ADP machine) was clear even before the *Kamino* ruling was rendered. However, no customs authority refused to apply the CNEN.

[95] EC FWS, para. 97.

[96] EC FWS, para. 98.

136. The *Kamino* case did not deal expressly with the CNEN. As a result, national customs authorities will not disregard the CNEN until the ECJ has expressly declared that the CNEN contradict the wording of the heading or chapter note in a separate ruling or until the EC Commission has amended it following the *Kamino* case. Although TPKM acknowledges that it can be implied from the *Kamino* ruling that certain parts of the CNEN are contrary to the wording of the heading or chapter note, national authorities cannot be sure of the extent to which the CNEN will be affected until the EC has amended it. If a national customs authority were to act on its own, it would have compromised the uniform application of the Combined Nomenclature and the role of the CNEN to ensure such uniform interpretation.

137. Therefore, national authorities will follow the CNEN at issue even if it is contrary to the wording of the heading due not only to the above legally binding effects of the CNEN, but also to the role of the CNEN to ensure the uniform interpretation of the CN. Until it has been amended by the EC Commission, the CNEN at issue in this dispute remains therefore relevant even if the finding of the *Kamino* ruling on the HSEN can be extrapolated to the CNEN.

138. In view of the above, TPKM maintains that all the measures at issue remain relevant for the current dispute despite the introduction of the HS2007 and the attempts from the EC to disregard the importance of the CNEN.

B. INTERPRETATION OF THE CONCESSIONS

1. Ordinary meaning

(a) EC concessions for "input or output units" of ADP machines

139. The Appellate Body has repeatedly affirmed that, pursuant to Article 3.2 of the DSU, the GATT 1994 including Schedules of concessions must be clarified and interpreted in line with the customary rules of interpretation of public international law, and in particular pursuant to Articles 31 and 32 of the *Vienna Convention*.

140. Accordingly, TPKM started in its FWS by precisely examining the ordinary meaning of the terms of the concession concerning "input or output units" of ADP machines. It then also analysed its context as well as the object and purpose.

141. In reply to these arguments, the EC does not dispute "that a genuine ADP monitor would fall within the scope of the ordinary meaning of this heading [i.e. 8471.60.90]" but raised the fictional issue that "a wholly different question is whether a given multifunctional LCD monitor falls within the scope of the concession." According to the EC, there is no need to examine this issue since the so-called multifunctional monitors "may fulfil also the ordinary meaning" of *video monitors* under heading

8528.21 and 8528.22 or even *reception apparatus for television* under headings 8528.12 and 8528.13.[97]

142. The concession at issue is the one concerning heading 8471.60.90. Thus, the EC is required to analyse the ordinary meaning of the terms of that concession and to demonstrate that, contrary to TPKM's claim, the products at issue are not covered by the words of the concession. However, the EC simply fails to analyse the ordinary meaning of the concession concerning input or output units of ADP machines.

143. TPKM has made a *prima facie* case that the products at issue meet the ordinary meaning of the concession concerning heading 8471.60 made by the EC with respect to input or output units of ADP machines and must therefore receive duty-free treatment. It is up to the EC, to the extent it claims that the products at issue do not fall within that concession, to demonstrate it.

144. Furthermore, the EC is also wrong when saying that the products at issue could also fall within subheading 8528.21/22 or subheading 8528.12/13. An FPD for use solely or principally with an ADP machine undoubtedly falls under CN code 8471.60.90 as an output unit of an ADP machine. This is confirmed by Chapter Note 5(B).

145. However, once it is concluded that the FPD device falls under the scope of CN code 8471.60.90 because it is for use solely or principally with an ADP machine, it will not "*also*" fall under subheading 8528.21/23 as a video monitor or under subheading 8528.13/12 as reception apparatus for television. Indeed, such FPD devices are excluded from heading 8528, as confirmed by the following 1996 HS heading 8528 note:

> "*The heading **excludes**, inter alia :*
>
> (a) Display units of automatic data processing machines, whether or not presented separately (**heading 84.71**)."

146. Therefore, TPKM submits that the EC has breached its concession for subheading 8471.60 covering "output and input units" of ADP machines.

147. However, TPKM considers that it is not sufficient for the Panel to review whether the requirement of sole or exclusive use with an ADP machine violates the EC concession covering input and output units of subheading 8471.60. The Panel should also examine whether this requirement infringes the EC concession for FPD devices pursuant to Attachment B of the ITA. Although both concessions partially overlap, they are not identical.

[97] EC FWS, para. 101.

(b) Concessions made with respect to "flat panel display devices"

148. The EC acknowledges that it can agree with the conclusion put forward by TPKM with respect to the ordinary meaning of "flat panel display devices" as being "a thin display screen employing plasma, LCDs and other technologies for use with computers or other apparatus." The EC, however, submits that this definition is too broad because it ignores the words "for products falling within this agreement and parts thereof."[98]

149. Contrary to the EC's claim, TPKM has carefully reviewed the ordinary meaning of the concession and in particular of the term "flat panel display devices … for products falling with this agreement."[99] It is the EC itself that fails to carry out a complete analysis of the ordinary meaning of the terms of the concession that would point to a conclusion different from the one submitted by TPKM. Indeed, the EC fails to propose any definition of the words of the concession. Instead, the EC merely makes some statements and comments to which TPKM would like to respond as follows.

150. Contrary to the EC's suggestion, the use of technical dictionaries from this decade does not necessarily invalidate its relevance. TPKM refers for example to the technical dictionary "*McGraw-Hill Dictionary of Scientific and Technical Terms*" in its fifth edition dated 1993.[100]

151. "***display***": 1. a visible representation of information, in words, numbers, or drawings, as on the cathode-ray tube screen of a radar set, navigation system, or computer console. 2 *The device on which the information is projected. Also knows as display device*. 3. The image of the information.[101]

152. "**panel display**": an electronic display in which a large orthogonal array of display devices, such as electro-luminescent devices or light-emitting diodes, form a flat screen. Also known as flat-panel display.[102]

153. The description of the above terms in the sixth edition (2003)[103] of the same dictionary is exactly the same as in the 1993 edition despite the 10-year difference.

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[98] EC FWS, para. 111 - 112.

[99] TPKM FWS, para. 221 – 246.

[100] *McGraw-Hill Dictionary of Scientific and Technical Terms*, (1993 fifth edition), McGraw-Hill.

[101] *McGraw-Hill Dictionary of Scientific and Technical Terms*, (1993 fifth edition), McGraw-Hill, at page 593.

[102] *McGraw-Hill Dictionary of Scientific and Technical Terms*, (1993 fifth edition), McGraw-Hill, at page 1437.

[103] *McGraw-Hill Dictionary of Scientific and Technical Terms, (2003, sixth edition),* McGraw-Hill, at page 629 (display) and page 1522 (panel display).

154. As already pointed out in its FWS, TPKM notes that the above definition confirms that flat panel display devices are for use with computers or for any other apparatus since no limitation is included in the definitions. TPKM also notes that the terms "display" and "display device," as well as "panel display" and "flat panel display" are synonymous. In other words, there is nothing in the ordinary meaning of the terms "flat panel display devices" that would imply a limitation such as receiving signals from ADP machines only.

155. Furthermore, TPKM disagrees with a number of statements made by the EC under the allegation that the complainants are "*missing some very important points.*"[104] TPKM disagrees with the allegation that some points were missed and in any event doubts the alleged importance of those points for the present dispute.

156. First, the EC refers to the use of plural in "flat panel display devices" to argue that it covers many different types of FPD devices, some of which will have nothing to do with ADP machines and cannot be synonymous with "computer flat monitors."

157. TPKM has clearly stated that the term "FPD devices" includes devices for products covered by the ITA and therefore also for ADP machines. However, TPKM has neither limited the scope of FPD devices to those for ADP machine only, nor limited the scope of FPD devices to the so-called "computer flat monitors." It is therefore correct that some of the FPD devices covered by the EC concession will not necessarily be used with ADP machine as suggested by the EC. However, TPKM fails to see how this supports the EC's position.

158. Moreover, TPKM fails to see how the use of the plural "devices" rather than the singular "device" could change the ordinary meaning of the term "FPD devices." In this respect, all products included in Attachment B have been listed in the plural, e.g., computers, projection type flat panel display units, and monitors. It is therefore clearly erroneous for the EC to try reading into the use of the plural the intention of limiting the scope of the concession to certain types of devices only.

159. On the contrary, the use of the plural makes clear that any FPD devices are covered provided they are for "any" product falling within the ITA agreement rather than just for certain products covered by the ITA.

160. Second, the EC argues that the qualification "*for products falling within this agreement, and parts thereof*" means that not all FPD devices are covered.

[104] EC FWS, para. 113.

161. TPKM submits that the wording is self explanatory, and it is only FPD devices *for products falling within this agreement* that benefit from the duty-free treatment. Therefore, TPKM fails to see again the relevance of this statement to support the the EC's position.

162. Third, the EC argues that the use of the plural makes the ordinary meaning of limited importance, and that, as a result, no argument can be based on the ordinary meaning of "for" in isolation. The ordinary meaning could denote "only for", "mainly for" or "also for" and a choice can only be made on the basis of a contextual analysis.

163. TPKM notes that the ordinary meaning of "for" is clear and no limitation can be read into it and certainly not on the basis of the use of the plural.

164. As a result, TPKM maintains that the ordinary meaning confirms that the FPD devices covered by the concession are not limited to so-called "computer monitors." The EC has not submitted any evidence to the contrary.

2. Context

165. As a preliminary remark, it is important to recall that TPKM has made two different claims with respect to flat panel display devices: the first is based on the concession made with respect to heading 8471.60 (pursuant to Attachment A to the ITA) and the other is based on the concession made with respect to "flat panel display devices" (pursuant to Attachment B to the ITA). For each of the concessions, TPKM has made a separate analysis not only of the ordinary meaning but also of the context. Indeed, since the concessions are of a different nature, the analysis of the context must also be distinct. In particular, the concession concerning "flat panel display devices" has been made on the basis of a product description without reference to any HS heading or subheading. For the determination of the scope of that concession, the HS is irrelevant.

(a) <u>Tariff headings indicated in the EC Schedule regarding its concession on "flat panel display devices"</u>

166. The EC starts analyzing the context of its concessions with respect to flat panel display devices by examining the CN codes that are listed next to the product description.[105]

167. As a preliminary remark, it must be emphasized that by analyzing these codes as part of the context, the EC appears to agree with TPKM that they are not part of the

[105] EC FWS, para. 122 – 141.

concession itself. Therefore, they cannot, as claimed by the EC, exhaust the headnote. TPKM refers the Panel for an analysis of this issue to paragraphs 74 - 80 above.

168. The EC identifies CN code 8471.60.90 among the 14 CN codes listed in the EC concession as the only relevant CN code "because that is where the complainants claim all multifunctional LCD monitors belong in the EC schedule."[106] First of all, TPKM has never claimed that all products that the EC calls "multifunctional LCD monitors" have to fall under CN code 8471.60.90. Actually, where they fall is not a relevant issue since the concession has been made with respect to a specific product description regardless of where the product is classified in the nomenclature. Moreover, the EC is actually trying to mix two claims: the first one was made with respect to heading 8471.60 and in particular CN code 8471.60.90, and the second one, with respect to "flat panel display devices."

169. To the extent that the CN codes provide relevant context to examine the scope of the concession concerning "flat panel display devices," all of them should be examined as part of the context. In focusing on one CN code, the EC has conveniently avoided any reference to subheading 8531.20 which covers indicator or signalling apparatus and where certain FPD devices can also be classified.[107] Products classified under this subheading and benefiting from duty-free treatment are not subject to any limitation with regard to whether they can reproduce signals from only an APD machine or also from other sources.

170. The EC then refers to the fact that CN code 8471.60.90 was also identified next to the product description of "network equipment", "monitors", "plotters whether input or output units", and "projection type flat panel display units" and that these product definitions thus provide context for the scope and meaning of the commitment concerning "flat panel display devices."[108] However, CN code 8471.60.90 is a residual category covering all input/output units for ADP machines not specifically mentioned in previous CN codes. Attachment B lists a number of specific products which may be used as an input/output unit of an ADP machine. Clearly, the scope of CN code 84.71.60.90 may be wider than only those products which have been specifically identified as output/input units of ADP machines. Conversely, the EC concession does not only cover the Attachment B products to the extent that they are to be used as input/output units of CN code 8471.60.90. For instance, FPDs of heading 8531 are similarly covered.

[106] EC FWS, para. 126.

[107] *See*, e.g., BTI GB116400026. Exhibit TPKM-87.

[108] EC FWS, para. 127 – 128.

171. Arbitrarily, the EC submits that the definition of "monitors" in another product description has "by far the most important contextual relevance."[109] The EC seeks to support its position on the ground that this definition of "monitors" expressly states that "[t]he agreement, does not, therefore, cover televisions." However, this statement is expressly tied to the CRT monitors concession only, and cannot be read into other concessions included in the EC Schedule, in particular in the concession concerning "flat panel display devices."

172. Regarding the "exclusion of video monitors and televisions," whether a device on which one can watch television or video is covered by a particular concession depends on the terms of that concession. If a device is a "flat panel display device for products falling within" the ITA, it is covered, irrespective of whether or not it incorporates a TV tuner. There is simply no basis to read additional limitations into the concession for flat panel display devices that do not exist in the text of that concession, and doing so would be utterly contrary to the principles of treaty interpretation reflected in the *Vienna Convention*.

173. Moreover, the EC position is based on the wrong assumption that the CRT technology was the only technology available for ADP monitors and televisions at the time of the concession. This is factually incorrect.

174. Finally, the EC tries to reduce the importance of the example of "projection type flat panel displays" as not relevant because it is also in the plural.[110] TPKM can only conclude that the reasoning is unclear and it fails to see how the use of the plural reduces the relevance of the example as context. The EC also includes a discussion on FPD devices as "parts" of the projection type flat panel displays. However, since the current dispute concerns only finished products, TPKM also fails to see the relevance of this comment about parts.

175. In conclusion, TPKM submits that the context provided by the other concessions made by the EC pursuant to the ITA does not support the EC position that FPD devices that may be able to connect to an apparatus other than an ADP machine are excluded from the concession covering FPD devices.

(b) Schedules of other ITA participants

176. The EC describes in its FWS a table with the classification of FPD devices by other ITA members in 1997.[111] The EC concludes from the table that a majority of ITA

[109] EC FWS, para. 128.

[110] EC FWS, para. 137.

[111] EC FWS, para. 143.

members identified subheading 8471.60. No ITA participant identified the subheadings for televisions. Among the complainants, only Japan (together with Macao and Iceland) identified the subheading for video monitors. The EC seems to use this table to conclude that only products classified under subheading 8471.60 should benefit from zero duty treatment.

177. TPKM submits that the EC offers an incomplete reading of the table.

178. First, the EC has focused only on subheading 8471.60 which according to the EC is the most relevant one. However, as stated above, TPKM has never agreed that a particular subheading is relevant for the purposes of defining the EC concession for FPD devices. As repeatedly stated, the present dispute is not about the correct tariff classification of FPD devices, but whether the EC is entitled to exclude FPD devices from duty-free treatment because they can be used with a source other than an ADP machine. This analysis applies regardless of the tariff classification finally chosen by the EC. Indeed, the concession on FPD devices applies wherever the products are classified pursuant to the headnote.

179. Second, it is not the tariff classification of the FPD devices under the subheadings identified in the list which is relevant but the duty treatment. ITA members may well choose to classify FPD devices under the subheadings for video monitors provided products imported under that subheading are duty free.

180. Third, the EC ignores that one of the headings identified for FPD is heading 8531. This heading is also identified by a large number of ITA participants. As discussed above, FPD devices can also be classified under heading 8531, whether or not they can be connected to a source other than an ADP machine.

181. Therefore, TPKM submits that the conclusions drawn by the EC from the table are at least incomplete. A full review of the table confirms that there is no ground to exclude from the concession covering FPD devices products which can be connected to a source other than an ADP machine.

3. The Harmonized System

182. The EC provides a long explanation on the HS to finally conclude that the HSEN to headings 8471 and 8528 require the exclusive use with an ADP machine and the sole presence of connectors characteristics of data-processing systems before a FPD device can be classified under heading 8471.[112] The EC alleges that these were precisely the requirements that the EC was using to classify FPD devices under heading 8471. The

[112] EC FWS, para. 146 – 159.

EC also claims that even if the HSEN were not applicable, classification should take place under heading 8528 pursuant to GIR 3(c) since in "*most individual cases,*" it will not be possible to identify the principal function pursuant to Note 3 to Section XVI.[113]

183. TPKM would like to make the following comments with regard to the analysis of the HS as context by the EC.

184. First, TPKM would like to emphasise once again that HS may be used as "context" only for the analysis of the EC concessions pursuant to Attachment A to the ITA. In other words, TPKM fails to see the relevance of the HS1996 for the analysis of the concession for FPD devices made by the EC pursuant to Attachment B to the ITA. The duty-free treatment must apply to FPD devices for products falling within the ITA, regardless of whether they are "solely or principally" for use with an ADP machine or regardless of their "principal function." The analysis of the HS1996 by the EC is therefore entirely misplaced.

185. Second, even if the HS1996 were to have any relevance as context for the analysis of the EC concession for FPD devices, TPKM notes that, in any event, the HSEN are not part of the HS1996. Contrary to HS section and chapter notes, HSENs do not form part of the HS and are not legally binding. They must be ignored and cannot be given any interpretative value where they are in direct conflict with binding HS section or chapter notes or with the wording of the HS headings.

186. Third, even if the tariff classification of FPD devices had any relevance for the current dispute, the EC is incorrectly applying GIR 3(c). Indeed, the application of this GIR does not lead to the classification of FPD under heading 8528 as the EC claims but under heading 8531. The EC has conveniently ignored that Heading 8531 is also applicable and if classification had to take place under the last heading in numerical order, heading 8531 would apply.

187. In conclusion, TPKM submits that the HS1996 is not relevant as context for the analysis of the EC concession for FPD devices. To the extent that the Panel would nonetheless attribute any relevance to the HS in its analysis of the concession for FPD devices, it should disregard the HSEN since they are not part of the HS and in any case directly contradict the text of the HS (including HS section or chapter notes). Moreover, the EC has incorrectly applied GIR 3(c) to justify a classification under heading 8528.

4. The *Kamino* case

[113] EC FWS, para. 159.

188. The EC refers to the ruling of the European Court of Justice in the *Kamino* case.[114] Although the *Kamino* ruling is merely a finding by the EC's highest municipal court that the customs classification practice followed by the EC with regard to FPD devices is contrary to EC customs law, the *Kamino* ruling indirectly clarifies that the EC has violated the EC concession covering input or output units of subheading 8471.60 which was made pursuant to Attachment A of the ITA. It is therefore surprising that the EC still tries to draw support for its position from this ruling. The findings of the *Kamino* case are correctly stated by the EC.[115] However, the conclusions drawn by the EC from the case are incorrect.

189. The *Kamino* case confirms that the EC incorrectly excludes FPD devices from the scope of subheading 8471.60 on the sole ground that they can be connected to a source other than an ADP machine, or due to the presence of a particular type of connector. Although the EC tries to draw some support to its position from the *Kamino* ruling, such attempts can only fail.

190. First, as stated above at paragraphs 128 - 129, as a matter of EC law, Regulations (EC) No. 634/2004 and No. 2171/2005 are still valid and effective. The same holds true for the CNEN. All these measures must be amended or repealed following the *Kamino* case as acknowledged by the EC itself which has stated that such process has apparently already started.[116]

191. Second, it is not necessary for the EC to explain how it will proceed to classify FPD devices following the ruling in the *Kamino* case. Since FPD devices must be subject to duty-free treatment wherever they are classified, such classification exercise is not relevant. However, TPKM wishes to note its concern about some of the comments made by the EC with regard to how the EC plans to implement the *Kamino* case to classify FPD devices.

192. According to the EC, classification will allegedly take place on a case-by-case basis. In particular, the other criteria in HSEN will be applied except for the one that the Court of Justice found inapplicable. Alternatively, classification will take place pursuant to GIR 3(c).

193. TPKM notes that if any of the other criteria in the HSEN will place FPD devices under a classification subject to duty, i.e. CN code 8528.59.10, the EC will also be failing to comply with its concession for this product. The requirements for the classification under that CN code as contained in the HSEN cannot limit the scope of

[114] EC FWS, para. 160 – 169.

[115] EC FWS, para. 163.

[116] EC FWS, para. 168.

the EC concession for FPD devices under Attachment B. Indeed, there is nothing that requires the EC to choose between a classification of FPD devices under CN code 8528.51.00 applicable to monitors of a kind solely or principally used in ADP system of heading 8471 (duty free) or under CN code 8528.59.10 applicable to other monitors (subject to duty) to comply with its concession. The EC may consider creating a specific CN code for FPD devices as it did for projection type flat panel displays.

194. Moreover, TPKM notes that according to the EC, it has classified FPD devices under the CN codes subject to import duty by applying the criteria in the HSEN. If the EC intends to continue classifying also in the future FPD devices on the basis of the criteria in the HSEN, it is likely to continue infringing the obligations undertaken in its schedule with respect to FPD devices. For instance, the HSEN states that FPD monitors for ADP machines cannot have audio circuits or loudspeakers. Such limitation is obviously not contained in the wording of the EC concessions.

195. Moreover, the EC is suggesting that for "multifunctional monitors" (which for the EC apparently covers all monitors which can be used both with ADP machines and other apparatus) it will never be possible to determine a principal use or function since it would be impossible to determine at the time of importation for which function the monitor will actually be used. Therefore, the EC argues that in all cases GIR 3(c) will need to decide eventually the tariff classification of FPD devices. Not surprisingly, this approach results in classifying the FPD devices under a CN code subject to duty, i.e. heading 8528. TPKM considers that the automatic application of GIR 3(c) to all FPD devices able to reproduce signals from different sources would equally violate the EC obligations under its schedule in the same way as the automatic exclusion of FPD devices from duty-free treatment merely because they have a DVI connector.

196. In addition, the EC ignores that the application of GIR 3(c) in the context of FPD would lead to the classification of FPD devices under heading 8531 (or even heading 9013), which is the heading occurring last in numerical order, and not under heading 8528. Products classified under headings 8531 or 9013 are duty-free.

197. In conclusion, the TPKM submits that the *Kamino* case indirectly confirms the infringement by the EC of its concession for input and output unit under subheading 8471.60. Moreover, the EC's statement seems to suggest that the EC plans to implement the *Kamino* case in a manner which would still infringe the EC's WTO obligations.

5. Object and Purpose

198. The EC is wrong when stating that TPKM has based its arguments "to a very large extent" on the ITA itself.[117] As TPKM clearly stated in its FWS, its arguments focused on the object and purpose of the GATT 1994, in particular, and in accordance with an established WTO jurisprudence, on the objective of expansion of trade in goods and substantial reduction of tariffs and on the objective of security and predictability of the reciprocal and mutually advantageous arrangements.[118] However, for the purposes of clarifying the meaning of these objectives in the context of the present dispute, TPKM has considered it useful to refer to the ITA.

(a) <u>The expansion of trade in goods and the substantial reduction of tariffs</u>

199. As agreed among the parties, concessions should be interpreted "so as to further the general objective of the expansion of trade in goods and the substantial reduction of tariffs" even if "such an interpretation is limited by the condition that arrangements entered into by Members be reciprocal and mutually advantageous."[119]

200. The present dispute is specific in the sense that the concessions at issue have been made by the EC pursuant to the ITA. That the concessions flow from the ITA is very important to examine the condition that "arrangements entered into by Members be reciprocal and mutually advantageous". Indeed, since participants to the ITA have all made the same concessions, the concession made by the EC is therefore by definition reciprocal and mutually advantageous.

201. The EC argues that the concession does not only benefit the ITA participants but all WTO Members.[120] It should be noted that ITA participants voluntarily agreed to bind their ITA commitments within the framework of the WTO without waiting for concessions in return from the other WTO Members non-ITA participants. Actually, the condition imposed in the ITA for its entry into force that ITA participants represent at least 90% of the trade in IT products was the guarantee of a real mutual benefit.[121]

202. That the concessions are to be interpreted so as to further the general objective of the expansion of trade is supported by the object and purpose of the ITA itself. As

[117] EC FWS, para. 170.

[118] TPKM FWS, para. 281 - 290

[119] Panel Report, *EC – Chicken Cuts*, para. 7.320.

[120] EC FWS, para. 172.

[121] Annex to the ITA, point 4.

analysed above,[122] the ITA generally supports this. Indeed, this is not merely supported by a "few phrases of the ITA taken out of context" as the EC describes it.[123]

(b) Security and predictability of the reciprocal and mutually advantageous arrangements

203. The EC claims that the complainants failed to show that their interpretation of the concessions at issue results in greater security and predictability.[124] This is not correct. Security and predictability require that the scope of the concession does not vary over time. An interpretation such as the one proposed by the EC that results in excluding from the scope of the concession products on the ground that they are "new" or "technologically more advanced" runs contrary to the objective of security and predictability.

204. Moreover, the position of the EC that in any case, the duty suspension "saves" the measures at issue from a violation of Article II of the GATT is contrary to the objective of security and predictability. Indeed, the duty suspension that is currently applied entered into force on 7 March 2009 but with retroactive effect as of 1 January 2009. It means that during the period 1 January – 6 March 2009, the economic operators did not benefit from a duty suspension and did not know they would be able to benefit from it later. Moreover, the duty suspension is temporary. An interpretation that would consider that the duty suspension makes the measures at issue consistent with Article II is, in light of the temporary and uncertain nature of the duty suspension, manifestly contrary to the objective of security and predictability of the GATT 1994.

6. Supplementary means of interpretation

(a) The classification practice of ITA participants is irrelevant

205. The EC is trying to find support to its position by referring to the practice of ITA participants. Actually, the EC does not even refer to the "practice" of these other countries, but rather to the codes that these other ITA participants have identified with respect to "flat panel display devices".[125]

206. However, the "classification" is totally irrelevant with respect to the concession concerning "flat panel display devices" that has been made regardless of where that product is classified. In other words, the sole conclusion that can be drawn from the so-called "practice of ITA parties" is that ITA participants did not share a common classification and that is precisely the reason why the commitment has been made on

[122] *See* para. 12 - 17.

[123] EC FWS, para. 170.

[124] EC FWS, para. 173.

[125] EC FWS, para. 176 – 177.

the basis of the product description rather than of an HS heading. Therefore, these codes are totally irrelevant to determine the scope of the concession.

(b) The negotiating history is irrelevant

207. The EC refers to a number of documents that would constitute the negotiating material of the ITA.[126]

208. As TPKM has underlined in the section of horizontal issues, the documents submitted by the EC as constituting the negotiations do not qualify as either "preparatory works" or other "supplementary means" of interpretation within the meaning of Article 32 of the *Vienna Convention*. Indeed, they are informal documents exchanged among a number of participants that were not made available to other participants. In particular, TPKM did not and still does not have access to these documents. As a result, this material cannot be used as "supplementary means" of interpretation in the framework of this dispute.

209. In any case, recourse to Article 32 of the *Vienna Convention* appears unnecessary since the scope of the concession is clear pursuant to the sole use of the interpretative tools of Article 31 of the *Vienna Convention*.

C. THE EC'S MEASURES VIOLATE ARTICLE II:1(A) AND II:1(B) OF THE GATT 1994

210. Through the measures at issue, the EC is imposing customs duties on certain FPDs instead of providing duty-free treatment as required by the concessions made by the EC with respect to "flat panel display devices for products falling within the ITA" and with respect to HS heading 8471.60 "input or output units" of ADP machines. Thereby, the EC violates Article II:1(a) and II:1(b) of the GATT 1994.

211. That a duty suspension is currently in force for certain FPD devices does not "save" the measures at issue from being inconsistent with Article II:1(a) and II:1(b) of the GATT 1994, as the EC submits it.[127]

212. First, duty suspensions are temporary. Council Regulation (EC) No. 493/2005 provided for a duty suspension from 1 January 2005 to 31 December 2006. Similarly, Council Regulation (EC) No. 301/2007 was in force from 1 January 2007 to 31 December 2008. Finally, the duty suspension provided for by Council Regulation No. 179/2009 is to be applicable until 31 December 2010. It is important to note that whether a duty suspension is to be renewed depends on a number of factors, in particular economic factors that must prevail. The EC thus necessarily violates

[126] EC FWS, para. 181 – 188.

[127] EC FWS, para. 62 – 63.

Article II:1(b) of the GATT 1994 since it makes the benefit of a zero customs duty dependent on a number of terms, conditions not set forth in its Schedule, which is contrary to Article II:1(b) of the GATT 1994.

213. Second, not all FPD devices benefit from a duty suspension. Before 1 January 2009, FPD devices with a size larger than 19 inches or an aspect ratio different from 4:3 or 5:3 were excluded from the duty-free treatment.[128] Even now under the new regulation, no duty suspension is applicable to colour monitors having a screen size of more than 22 inches or an aspect ratio different from 1:1, 4:3, 5:4 or 16:10.[129] Since neither the size nor the aspect ratio determine the scope of the EC concession for FPD devices, it seems undisputable that there are numerous FPD devices that are still subject to duties despite the existence of the duty suspension. For instance, a 23 inches FPD or an FPD with an aspect ratio of 16:9 will be excluded from the duty-free treatment. The EC has not brought any evidence to the contrary.

214. Finally, Regulation (EC) No. 179/2009 that provides for a duty suspension on certain FPD devices until 31 December 2010 was published on 7 March 2009 and entered into force on that date. Since the previous duty suspension expired on 31 December 2008, it means that between 1 January 2009 and 6 March 2009, there was no duty suspension in force until the new Regulation was published and provided for its retroactive application as of 1 January 2009. This system therefore creates considerable uncertainty for traders.

215. In conclusion, a duty suspension which needs to be renewed at regular intervals and is made dependent on various factors can hardly be considered to be equivalent to a permanently bound zero tariff. There is no guarantee that the duty suspension will be renewed once it expires on 31 December 2010 or whether its scope will not be reduced. Moreover, although the new duty suspension was given retroactive application as of 1 January 2009, it is clear that this kind of system creates considerable uncertainty for traders, and constitutes in itself an obstacle to trade.

216. In view of the foregoing, the duty suspension granted with respect to some types of FPDs could not remove the EC's violation of Articles II:1(a) and II:1(b) of the GATT 1994 resulting from the challenged measures.

IV. BY IMPOSING CUSTOMS DUTIES ON CERTAIN SET-TOP BOXES WHICH HAVE A COMMUNICATION FUNCTION, THE EC VIOLATES ARTICLE II:1(A) AND II:1(B) OF THE GATT 1994

[128] Council Regulation (EC) No. 301/2007. See Exhibit TPKM-26.

[129] Council Regulation (EC) No. 179/2009.

A. GENERAL ISSUES

1. The obligations in the EC Schedule have been well identified

217. The EC claims that the complainants "fail to explain what constitutes the EC concession and where it is provided for."[130] The EC appears to argue that it is not clear whether the concession is in the ITA itself or in the EC Schedule.

218. The EC's claim is hardly understandable in view of the fact that TPKM has clearly identified what constitutes the EC concession, in particular in para. 359 to 361 of its FWS and clearly stated that the concession is included in the EC Schedule itself and not in the ITA. Actually, the EC's argument that the concessions would be made or included in the ITA is absurd as the complainants' claims are based on the inconsistency of the measures with Article II of the GATT that includes Schedules of concessions, but not the ITA.

219. TPKM has referred to the ITA in some parts of its FWS because of the facts that the concessions were made by the EC to implement the ITA and that the headnote included in the EC Schedule directly refers to the ITA.

220. The EC further claims that the complainants refer to the "headnote" but do not explain "what the headnote means for the rest of the EC Schedule, including the codes that were notified to WTO".[131]

221. As underlined by TPKM in its FWS and in its replies to the questions of the Panel,[132] the "headnote" is central in the EC Schedule since through the headnote the EC committed to grant duty-free treatment to all products described in or for Attachment B to the ITA, wherever the product is classified. The codes that the EC notified to the WTO in accordance with paragraph 2 of the Annex to the ITA only indicate where in the CN the EC considered the product was classified at that time. These codes thus in no way limit the scope of the concession made with respect to a specific product description, namely "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". For the purposes of interpreting the scope of that concession, the codes that were notified to the WTO may solely be used as part of the "context" but in no way exhaust the scope of the product description. We refer the Panel for a more detailed analysis of the legal relevance of the headnote to paragraphs 74 - 80 of this submission.

[130] EC FWS, para. 190.

[131] EC FWS, para. 194.

[132] See TPKM's Responses to the Panel's Questions No 7 and 10.

222. Finally, it should be noted that the EC's claim that complainants "pick and choose" the textual arguments in the ITA or in the Schedule[133] is difficult to understand given that the product description concerning set-top boxes appears to be identical in both the ITA and the list included in the EC Schedule.

2. Identification of the product at issue and "as such" claims

223. The EC repeatedly complains about the complainants' alleged failure to describe the products at issue. For instance, in its oral statement, the EC argued that "the complainants did not specifically identify any product at issue or even any specific and closed category of products."[134] In its Replies to the Questions of the Panel, the EC similarly submits that "the EC is ready – in fact, it is almost calling for it – to engage in a substantive discussion with the complainants. But for such a discussion, one needs to know what products the complainants actually want to discuss."[135]

224. It seems that, according to the EC, identification of a specific category of STBs which have a communication function or even a specific model of STBs which have a communication function would be necessary.

225. The EC however simply misses the point. This claim is not about the tariff treatment of a specific model of STBs but about a number of criteria used by the EC to determine the tariff treatment of a category of products, namely, STBs which have a communication function. In that framework, TPKM has underlined that several aspects of the measures at issue are inconsistent with the EC's obligations under the WTO:

> first, the fact that the EC excludes from duty-free treatment through the measures at issue all "set-top boxes which incorporate a device performing a recording or reproducing function (for example, a hard disk or DVD drive);"
>
> second, the fact that the EC excludes from duty-free treatment all STBs incorporating a device "performing a similar function to that of a modem but which do not modulate or demodulate signals" such as "ISDN-, WLAN- or Ethernet devices";
>
> third, the fact that the EC excludes form duty-free treatment STBs which have a communication function that do not have a "built-in modem" but an external modem; and

[133] EC FWS, para. 195.

[134] EC First Oral Statement, para. 35.

[135] EC Replies to the Questions of the Panel after the First Meeting, para. 197.

> fourth, the fact that the EC excludes from duty-free treatment set-op boxes because they do not incorporate a video tuner.

These aspects render the measures at issue WTO-inconsistent.

226. Furthermore, TPKM would like to emphasize that it is irrelevant whether in some cases the application of the measures may lead to an outcome that is WTO consistent. Indeed, in order to succeed with an "as such" claim, it is sufficient to demonstrate that *any aspect* of the criteria set out in the measures challenged will necessarily lead to a violation of the EC's obligations under its Schedule, and consequently Article II of the GATT 1994.

B. INTERPRETATION OF THE CONCESSION

227. The concession concerning set-top boxes which have a communication function has been made by the EC in its Schedule through the headnote that provides:

> "[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 (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."[136]

228. The relevant product description reads "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."

1. Ordinary meaning

229. In accordance with Article 31 of the *Vienna Convention*, the analysis must start with the ordinary meaning of the words of the concession.

(a) <u>STBs incorporating a hard disk or DVD recorder</u>

230. As analysed in detail in our FWS,[137] the ordinary meaning of the terms of the concession does not imply the exclusion from the scope of the concession of "STBs which have a communication function" merely because they have a recording or reproducing function. In other words, the analysis of the ordinary meaning of the terms of the concession demonstrates that it covers STBs which have a communication function even if they have additional functions.

[136] WT/Let/156.

[137] TPKM FWS, para. 384 – 423.

231. In its section entitled "ordinary meaning of the narrative description"[138], the EC simply fails to examine the ordinary meaning of the concession. Actually, the EC does not even analyse the definitions of the terms of the concession. The EC's analysis of the ordinary meaning only focuses on the structure of the sentence and on the presence of a colon. According to the EC, to the extent that the description after the colon is a definition of "set top boxes which have a communication function", the product covered by the concession is limited in its features and functionalities to those described in that definition. According to the EC, the product covered by the concession "cannot endlessly assume other additional features and technical elements while remaining a "set top box which has a communication function".[139]

232. However, even if assuming that the text after the colon provides a definition of what is a "set top box which has a communication function," it contains nothing to imply that additional features or functionalities would exclude a set top box from the scope of the concession. Actually, the EC even acknowledges this when stating that the product covered by the concession "cannot *endlessly* assume other features or technical elements."[140] The EC thereby recognizes that the coverage of the concession permits products with additional features or functionalities. Thus, this underlines that there is *a priori* no exclusion from the scope of the concession of STBs which have features or functionalities other than, or in addition to, a "communication function." As long as the product meets the description of a "set top box which has a communication function", it must receive duty-free treatment, regardless of any additional feature or functionalities it may have.

233. The EC is wrong when stating that the complainants argue that the concession is "open-ended".[141] It is not so. The concession has a scope which is limited. The limits are determined by the terms of the concession. However, the terms of the concession do not in any way prohibit the presence of additional functions to that of a communication function in order to be covered by the concession. In other words, the scope of the concession does not exclude STBs which have a communication function merely because they also have a recording or reproducing function.

234. The EC seems to be aware of the weakness of its position and tries to strengthen it by developing a rather farfetched theory about the meaning of the words "which have" instead of "with".[142] First of all, it must be clarified that if TPKM has used in some

[138] EC FWS, para. 210 – 218.

[139] EC FWS, para. 214.

[140] EC FWS, para. 214.

[141] EC FWS, par. 285.

[142] EC FWS, para. 215 – 218.

places of its FWS, the word "with" instead of "which have", it is in order to paraphrase the "which have" that appears in the concession. As TPKM has clarified in its replies to the questions of the Panel, it does not consider that there is any difference of meaning between "set top box with a communication function" and "set top box which has a communication function".[143] This is acknowledged by the EC itself when it added a tariff line to its Schedule in 2000, the product being described in CN code 8528.12.91 as "set top boxes *with* a communication function". The use of the words "which have" instead of "with" does not imply any kind of limitation, as the EC is trying to argue. If the drafters of the ITA intended to limit the functions of the product covered by the concession to communication functions only, they would have added the word "solely" or the equivalent in the text of that concession. It is a well-established principle of treaty interpretation that the interpreters cannot read into the text words that are not there.

235. In conclusion, the analysis of the ordinary meaning of the concession clearly demonstrates that the concession does not exclude set top boxes which have a communication function because they have other features or functionalities. As noted above, this is actually acknowledged by the EC itself when it used the word "endlessly". As long as the product meets the description of a set top box which has a communication function, it is entitled to duty-free treatment.

236. The EC also submits that the complainants' view of the concession as setting forth minimal requirements is arbitrary and illogical because any apparatus satisfying these elements would fall within the scope of the concession regardless of what else the apparatus contains, e.g., even if an STB performs 1% communication function and 99% other functions.[144] The EC's claim is erroneous in this regard. The issue is not about examining the percentage of the functions performed by the apparatus. The issue is to determine whether a product, on the basis of its objective characteristics, is a "set top box which has a communication function." If indeed the product qualifies as such, it must receive duty-free treatment regardless whether it has additional features and functionalities. The fact that a product performs 99% other functions is really not an issue here. In other words, the issue in this dispute is not whether a product performing a 1% communication function and 99% recording function must receive duty-free treatment, but whether the presence of a hard disk in an STB which has a communication function makes it another product that cannot be covered by the concessions benefiting duty-free treatment.

(b) <u>Set top boxes and modems</u>

[143] TPKM's Reponse to Panel's Question No 80.

[144] EC FWS, para. 258 – 259.

237. According to the EC, STBs which have a communication function but have a "device performing a similar function to that of a modem but which do not modulate or demodulate signals are not considered to be modems."[145] In particular, an STB which has a communication function is excluded from the scope of the duty-free tariff concession simply because it gains access to the Internet with a device that operates through an Ethernet or network connection, a wireless based (WLAN) connection or a digital communication network (ISDN). In other words, the EC takes the view that a device that operates through an Ethernet connection, a wireless based connection or a digital communication network is not a "modem." This, however, contradicts the definition of a "modem."

238. TPKM has given definitions of "modem" in its FWS, contrary to what the EC has alleged. [146] TPKM started with the definition in the New Shorter Oxford Dictionary that defines a "modem" as "*a combined modulator and demodulator, used esp. to connect a computer to a telephone line, for converting digital electrical signals to analogue or audio ones and vice versa.*"[147] As a technical dictionary, the *IEEE Standard Dictionary of Electrical and Electronics Terms* further defines modem as a "contraction of Modulator – DEModulator, an equipment that connects data terminal equipment to a communication line."[148] In accordance with that definition, the Ethernet, ISDN- and WLAN- modems all modulate and demodulate. 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.

239. As far as WLAN and Ethernet modems are concerned, the EC is trying to argue that they are excluded because "the device connecting to the telephone line, i.e. the modem, is simply not incorporated in the set top boxes communicating through Ethernet or WLAN devices."[149] It must be noted that the reference in the definition of the Oxford Dictionary to "connect a computer to a telephone line" is an example as shown by the use of the words "used esp." The definition is not self-restrictive. As noted in the definition of the technical dictionary referred to above, a modem is a "piece of equipment that connects data terminal equipment to *a communication line*."[150] Devices that operate through an Ethernet or network connection, a WLAN

[145] CNEN of the EC, 2008/C 112/03, OJ C 112, 7.5.2008, pp.8-9. See Exhibit TPKM-28.

[146] The EC alleged that the complainants "instead of quoting from the Oxford dictionary," TPKM "suddenly resort to other dictionary". EC's Oral Statement at the First Substantive Meeting of the Panel, para. 43.

[147] TPKM FWS, para. 410.

[148] *See* TPKM FWS, footnote 211 and the accompanying text.

[149] EC First Oral Statement, para. 44.

[150] See TPKM FWS, para. 418.

connection or an ISDN are modems: they connect the STB to a communication line and convert signals produced by one type of device to a form compatible with another.

2. Surrounding circumstances

240. As part of its analysis of the ordinary meaning, the EC includes a section dealing with the "surrounding circumstances" on the basis of the Appellate Body's findings in *EC – Chicken Cuts*. There the Appellate Body found that:

241. "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."[151]

242. The Appellate Body in *EC – Chicken Cuts*, however, did not elaborate the concept of "surrounding circumstances" in further detail.

243. In an attempt to strengthen its position, the EC has imported in its analysis of the ordinary meaning elements that would however at most qualify as "supplementary means" of interpretation pursuant to the *Vienna Convention*. Indeed, the "set top boxes available on the market in 1996"[152] and "the descriptions used during the negotiations"[153] identified by the EC as being "surrounding circumstances" could at most be examined as "supplementary means" of interpretation. These elements can therefore certainly not be reviewed as part of the ordinary meaning analysis. These arguments might at most be part of the analysis of "supplementary means" of interpretation. However, as noted above in paragraphs 18 - 26, it is even doubtful whether "the descriptions used during the negotiations" qualify as "supplementary means" of interpretation, given the lack of publicity of the documents submitted by the EC as constituting the ITA negotiations. In any case, recourse to "supplementary means" of interpretation can only take place either to confirm the ordinary meaning or where the ordinary meaning is ambiguous or leads to a manifestly abused or unreasonable result.[154] The EC failed to demonstrate that this is the case here and therefore this material is irrelevant.

244. Furthermore, the EC's claim that only two types of STBs existed in the 1996 market is not accurate. There were a number of different types of STBs in the market. In particular, STBs existed in 1996 that permitted both TV programming and Internet

[151] Appellate Body Report, *EC – Chicken Cuts*, para. 175.

[152] EC FWS, para. 221 – 224.

[153] EC FWS, para. 225 – 236.

[154] Vienna Convention on the Law of Treaties, Article 32.

access via TV. Such products existed in the marketplace and are clearly distinguishable from "Internet on TV" devices such as WebTV.[155] The "Internet on TV" devices referred to by the EC are not, and never have been, the only devices within the terms of the concession for STBs with a communication function.

3. Context

(a) Tariff lines

245. As emphasized in TPKM's FWS, the CN codes notified by the EC to the WTO in accordance with paragraph 2 of the Annex to the ITA do not determine the scope of the concessions. Rather, they are indications of where in the CN the EC viewed the STBs which have a communication function were included at that time. The CN codes may, in the interpretative exercise, only qualify as part of the "context." The EC also agrees with this position when it stated that "the EC does not suggest that these tariff lines modify the narrative description of the product at issue."[156]

246. The CN codes provide certain information for the interpretation of the scope of the concession. Analysis of this information clearly does not support the EC's position that STBs which have a communication and include a hard disk are excluded from the scope of the concession.[157]

247. In any case, the EC's attempt to draw conclusions from the fact that no CN code under heading 8521 and 8528 was notified amounts to submitting that the tariff lines define the scope of the commitments. However, if CN codes were intended to define the scope of the concession, it would have been unnecessary to include the headnote that clearly provides for duty-free treatment wherever the product is classified.

(b) Schedules of other ITA participants

248. The table included in paragraph 243 of the EC FWS showing the codes notified by the ITA participants as to where they classify STBs which have a communication function is in any way irrelevant in determining the scope of the concession.

249. It is clear that for all products described in or for Attachment B, the ITA participants agreed to apply duty-free treatment wherever those products are classified in the HS. The intention of the Participants is very clear: STBs which have a communication function should be granted duty-free treatment regardless of where they are classified.

[155] See TPKM's Response to Panel's Question No. 81.

[156] EC FWS, para. 239.

[157] TPKM FWS, para. 426 – 436.

250. The table merely supports the view that when the ITA negotiations concluded, there were no universally agreed classification headings for STBs which have a communication function. That is precisely the reason why the commitment has been made with respect to a product description wherever classified and regardless of its classification by individual participants.

C. THE EC'S MEASURES AT ISSUE VIOLATE ARTICLES II:1(A) AND II:1(B) OF THE GATT 1994

251. The EC repeatedly claims that "it does not exclude any STBs from duty-free treatment due to the presence of a hard disk or other apparatus."[158] According to the EC, it takes into account *all* the objective characteristics of the product in order to determine the relevant classification and as a result, the applicable tariff treatment. Yet, the EC does not provide any evidence of instances where an STB with a hard disk has been accorded duty-free treatment by the EC.

252. In fact, customs authorities follow the CNEN, one of the measures being challenged in this dispute, which expressly states that "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)."[159] In other words, the CNEN clearly provides for an exclusion from the duty-free treatment of STBs which include a hard disk or DVD drive.

253. The EC is claiming that it is the *recording or reproducing function* and not the presence of hard disk that would be the criterion.[160] However, the text of the CNEN clearly refers to a "*device* performing a recording or reproducing function" as a criterion and gives the example of a "hard disk or DVD drive."[161] The only evidence submitted by the EC to support its claim was the description of models of STBs that contain hard disks of 1.1 and 5.1 GBs.[162] But this alleged evidence fails to show that these products effectively receive duty-free treatment. In other words, the EC simply fails to demonstrate that the presence of a hard disk or DVD drive in an STB which has a communication function does not lead to the automatic exclusion of that STB from the scope of duty-free treatment.

254. When the Panel requested the EC to explain how the CNEN allow for a case-by-case analysis, the EC merely repeated that classification is to take place taking into account

[158] E.g. EC FWS, para. 286.

[159] CNEN of the EC, 2008/C 112/03, OJ C 112, 7.5.2008, PP.8-9. See Exhibit TPKM-28.

[160] EC First Oral Statement, para. 30.

[161] CNEN of the EC, 2008/C 112/03, OJ C 112, 7.5.2008, PP.8-9. See Exhibit TPKM-28

[162] EC First Oral Statement, para. 30.

all relevant features and technical characteristics.[163] However, the EC fails to bring any evidence to show that there are cases in which STBs with a hard disk or a DVD drive benefit from duty-free treatment.

255. In other words, as expressly stated in the CNEN, the mere presence of a hard disk or DVD drive in an STB which has a communication function leads to the exclusion of that STB from duty-free treatment. By doing so, the EC violates its obligations under Article II:1(a) and II:1(b) of the GATT 1994.

256. Incidentally, it is appropriate to note the irrelevance of the EC's arguments about the correct classification of the products at issue in the CN. The EC even claims that "the EC classifies correctly and, as a result, cannot be seen as violating its WTO obligations on the grounds of misclassification."[164]

257. As TPKM has emphasized repeatedly, the issue here is not an issue of classification. The issue here is really about tariff treatment. It is actually irrelevant where the EC classifies STBs which have a communication function in the CN. In other words, the EC may well classify STBs which have a communication in heading 8528 or 8521 as long as it grants duty-free treatment to STBs which have a communication function in accordance with its Schedule of Concessions. The fact that the concession has been made with respect to a specific product description but not on the basis of the HS headings further confirms that the HS is simply irrelevant in determining the scope of the concession.

V. BY NOT PUBLISHING THE AMENDED EXPLANATORY NOTES RELATED TO THE TARIFFS OF CERTAIN STBS FOR MORE THAN ONE YEAR AND BY APPLYING CUSTOMS DUTIES ON CERTAIN STBS PRIOR TO THE OFFICIAL PUBLICATION OF THE MEASURES, THE EC VIOLATES ARTICLE X:1 AND X:2 OF THE GATT 1994

A. ARTICLE X :1 OF THE GATT 1994

1. CNEN constitute "laws, regulations, judicial decisions or administrative rulings of general application" within the meaning of Article X:1 of the GATT

258. The EC has contested that the CNEN constitute "laws, regulations, judicial decisions or administrative rulings of general application" within the meaning of Article X:1 of the GATT 1994."[165] The EC's position is based on the alleged "non-binding nature"

[163] EC Replies to the Questions of the Panel After the First Meeting, Question 89, para. 243 – 246.

[164] EC FWS, para. 284.

[165] EC FWS, para. 310 and EC Replies to the Questions of the Panel after the First Meeting, para. 252.

of the CNEN "combined with their essentially and inherently informative character."[166]

259. In *US – Corrosion-Resistant Steel*, while examining the phrase "laws, regulations and administrative procedures" contained in Article 18.4 of the Anti-Dumping Agreement, the Appellate Body clarified that :

> "the scope of each element of this phrase must be determined for purposes of WTO law and not simply by reference to the label given to various instruments under the domestic law of each WTO Member. This determination must be based on the content and substance of the instrument, and nor merely on its form or nomenclature."[167]

260. This observation is equally applicable in the present case. The fact that CNEN are not formally called "regulations" or "administrative rulings" does not exclude them from virtually being "regulations" or "administrative rulings" under Article X:1 of the GATT 1994. Furthermore, the fact that the ECJ has stated that the CNEN are "not legally binding" is not dispositive on the issue whether they constitute "laws, regulations, judicial decision or administrative rulings of general application" and thus fall within the scope of Article X:1 of the GATT 1994. The title of an instrument does not determine whether that instrument qualifies as a law, a regulation, a judicial decision or an administrative ruling. What matters here is the content and the substance of the CNEN.

261. It is essential to understand the statement of the ECJ repeatedly quoted by the EC that the "CNEN do not have legally binding force" in its context, that is that CNEN "must accordingly be compatible with [the] provisions [of the CN] and may not alter the scope of those provisions."[168] In other words, the statement that the CNEN are not legally binding refers to the fact that they cannot alter the scope of the CN but certainly not that customs authorities would be free to disregard them. In that respect, contrary to what the EC has indicated, they are "like" regulations.[169] Indeed, both regulations and CNEN are adopted by the EC Commission in accordance with the management procedure referred to in Articles 9 and 10 of Council Regulation No. 2658/87. Both regulations and CNEN cannot alter the scope of the CN.[170]

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[166] EC FWS, para. 310

[167] Appellate Body Report, *US – Corrosion-Resistant Steel*, footnote 87.

[168] Case C-376/07, *Kamino*, para. 48. See Exhibit TPKM-52.

[169] EC FWS, para. 98.

[170] See, for instance, Case C-15/05, *Kawasaki*: "the Council has conferred upon the Commission, acting in cooperation with the customs experts of the member States, a broad discretion to define the subject-matter of tariff headings falling to be considered for the classification of particular goods.

262. The fact that CNEN are binding on customs authorities can be clearly demonstrated by the following analysis:

263. First, Article 12(5) of the CCC expressly provides that BTI shall cease to be valid "(ii) where it is not longer compatible with the interpretation of one of the nomenclatures referred to in Article 20(6): at Community level, by reason of amendments to the explanatory notes to the combined nomenclature." As BTIs are undoubtedly legally binding, the fact that they cease to exist if they are not consistent with subsequent CNEN is a clear demonstration that CNEN are of a mandatory nature.

264. Second, during its meeting of 22 October 2007, the Nomenclature Committee discussed the "use of statements in the minutes of the Committee and the application of voted measures before their publication."[171] The Chairman noted that "as soon as the Committee has rendered an opinion on the classification of a specific type of product, no BTI should be issued contrary to that opinion and that this opinion should be respected by all member States. It follows from the above that as soon as an opinion has been voted, member States can issue BTIs for the products concerned, even before the measures has been adopted by the Commission and published in the Official Journal."[172] This statement shows that EC customs authorities must follow CNEN not only when the CNEN have been published in the Official Journal but *as soon as* the Committee has voted on them, which is long before the CNEN have been published.

265. Third, if member States deviate from the content of CNEN and collect less import duties as a result thereof, the EC Commission is entitled to claim the difference in duty collected out of the member States' budget.[173] Furthermore, where a national administration violates the interpretation set out in a CNEN, the EC Commission retains the option of instituting proceedings against that member State for infringement of Article 10 of the EC Treaty.[174]

However, the Commission's power to adopt the measures mentioned in Article 9(1)(a), (b), (d) and (e) of Regulation No 2658/87 does not authorise it to alter the subject-matter of the tariff headings which have been defined on the basis of the HS established by the Convention whose scope the Community has undertaken, under Article 3 thereof, not to modify" (para. 35). See Exhibit TPKM-84. This has been underlined by the EC itself in *EC – Selected Customs Matters*, EC FWS, para. 94.

[171] Customs Code Committee – Tariff and Statistical Nomenclature Section (Heads of Tariff), *Summary Report of the 433rd meeting of the Committee held on 22 October 2007*. See Exhibit TPKM-17.

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

[173] EC FWS in *EC – Selected Customs Matters*, para. 160.

[174] See Customs Code Committee – Section for General Customs Rules, *Nature and Legal value of Guidelines*, 5.4.06, point 13. See Exhibit TPKM-85**.**

266. The above-mentioned evidence has clearly demonstrated that CNEN do have legally binding force on the member States and the member States must comply with them. The EC itself acknowledged this point in *EC – Selected Customs Matters* when it underlined that CNEN are part of the "tools for ensuring a uniform classification practice within the EC."[175] Indeed, how would CNEN ensure a uniform classification practice if the EC's member States have the discretion in applying the CNEN?

267. In any case, Article X:1 of the GATT 1994 has a broad scope that would cover CNEN even if the CNEN were not found to be legally binding.[176] The object and purpose of Article X:1 further supports the above statement as this provision requires "prompt publication" so as "to enable governments and traders to become acquainted with them." As the Panel underlined 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."[177] The due process objective would not be met if CNEN were to fall out of the scope of Article X:1 of the GATT 1994. Indeed, traders would have to face classification decisions based on the CNEN of which they do not have any knowledge.

268. Article X:1 of the GATT 1994 has a very broad scope as reaffirmed by the Panel in *Dominican Republic – Cigarettes*.[178] In that dispute, the Panel had to determine whether average-price surveys conducted by the Dominican Republic's Central Bank were inconsistent with Article X:1 of the GATT 1994. The Panel noted that "laws and regulations are general acts with a legal content issued by state authorities invested with normative powers" and that "the Central Bank surveys would not fit in any of these categories."[179] However, the panel considered that although the price surveys conducted by the Central Bank, were not themselves administrative rulings of general application, they constituted an essential element of an administrative ruling, i.e. the determination of the tax base of cigarettes, "and as such were covered by the scope of "administrative rulings of general application" described in Article X:1 of the GATT.[180]

[175] EC FWS, *EC – Selected Customs Matters*, para. 262.

[176] As the Appellate Body noted with respect to Article 18.4 of the ADA: "taken as a whole, the phrase "laws, regulations and administrative procedures" seems to us to encompass the entire body of generally applicable rules, norms and standards adopted by Members in connection with the anti-dumping proceedings" in Appellate Body Report, *US – Corrosion-Resistant Steel*, para. 87.

[177] Panel Report, *EC – Selected Customs Matters*, para. 7.107.

[178] Panel Report, *Dominican Republic – Import and Sale of Cigarettes*.

[179] Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.404.

[180] Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.408.

2. CNEN have not been published "promptly" and thus violated Article X:1 of the GATT 1994

269. The EC's contention that it has not violated Article X:1 of the GATT rests on the premise that the CNEN concerning STB have been formally "adopted" by the Commission on 29 April 2008 and published in the OJ on 7 May 2008. The EC alleged that CNEN has thus been published "promptly" in accordance with Article X:1 of the GATT 1994.[181]

270. However, as noted by TPKM in its FWS, decisions and BTIs have been issued with respect to the classification of STBs in accordance with the not-yet published CNEN.

271. The statement by the Chairman of the Common Customs Code Committee on "the application of voted measures before their publication" supports TPKM's observation. According to that statement,

> "as soon as the Committee has rendered an opinion on the classification of a specific type of product, no BTI should be issued contrary to that opinion and that this opinion should be respected by all member States. It follows from the above that as soon as an opinion has been voted, member States can issue BTIs for the products concerned even before the measure has been adopted by the Commission and published in the Official Journal."[182]

272. Article X:1 of the GATT does not refer to acts that have been "adopted" but acts that are "made effective." The difference is significant. How a WTO member make its measure effective is not the concern of this provision. Rather, this provision aims to ensure that once the measures become effective, they should be promptly published.

273. Article X:1 does not require the formal adoption of the CNEN by the Commission under EC law. From the moment the measure, i.e., the CNEN, has been voted upon by the Customs Code Committee in April 2007, CNEN began to be applied by the customs authorities of the member States. It was then that CNEN were made effective. It was also then that the EC should have promptly published the CNEN accordingly.

274. The EC's position is not tenable. The fact that the CNEN were published only in May 2008 while already made effective since the vote of the Customs Code Committee in April 2007 is clearly inconsistent with the requirement of prompt publication included in Article X:1 of the GATT 1994. .

[181] EC FWS, para. 309.

[182] Customs Code Committee – Tariff and Statistical Nomenclature Section (Heads of Tariff), Summary *Report of the 433rd meeting of the Committee*, point 5.

275. It may also be noteworthy that the minutes of the Committee's meetings are placed on the website of the EC Commission does not amount to a "publication" within the meaning of Article X:1 of the GATT. In fact, the minutes do not contain the text of the measures and thus would not allow traders to know precisely what measures are in effect.

B. ARTICLE X:2 OF THE GATT 1994

1. CNEN constitute "measures" within the meaning of Article X:2 of the GATT 1994

276. The EC first tries to confuse the panel by reframing the dispute as one concerning not the CNEN but "the votes and discussions in the CCCE."[183] However, TPKM's claim is about the CNEN that have been "enforced" while having not yet been published. Thus, the measure within the meaning of Article X:2 of the GATT is the CNEN as voted upon by the Customs Code Committee. The fact that the CNEN concerned have not been "adopted" is not relevant for the purposes of this provision as soon as they have been "enforced."

277. The EC appears to argue that CNEN do not constitute "measures" within the meaning of Article X:2 of the GATT because of their "legal status and effect."[184]

278. However, it is clear that CNEN constitute "measures" within the meaning of Article X:2. The word "measure" has a very broad scope. This is supported by the analysis of the Appellate Body with respect to that same concept of "measures" in Article 3.3 of the DSU: "in principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings."[185] The Appellate Body then clarified that what constitute "measures" are not only particular acts applied to specific situations, but also "acts setting forth rules or norms that are intended to have general and prospective application."[186] The Appellate Body also recalled that a "measure" may be any act of a Member, whether or not legally binding, and it can include even non-binding administrative guidance by a government.[187]

279. CNEN thus constitute "measures" even if they have not been "formally" adopted. It is totally irrelevant whether they are "legally binding" or not.

280. In *US – OCTG*, the Appellate Body stated that:

[183] EC FWS, para. 317.

[184] EC FWS, para. 316 – 317.

[185] Appellate Body Report, *US – Corrosion-Resistant Steel*, para. 81.

[186] Appellate Body Report, *US – Corrosion-Resistant Steel*, para. 82

[187] Appellate Body Report, *US – Corrosion-Resistant Steel*, para. 85.

> "[w]e note the argument of the United States that the SPB is not a legal instrument under United States law. This argument, however, is not relevant to the question before us. The issue is not whether the SPB is a legal instrument within the domestic legal system of the United States, but rather, whether the SPB is a measure that may be challenged within the WTO system. The United States has explained that, within the domestic legal system of the United States, the SPB does not bind the USDOC and that the USDOC "is entirely free to depart from [the] SPB at any time". However, it is not for us to opine on matters of United States domestic law. Our mandate is confined to clarifying the provisions of the *WTO Agreement* and to determining whether the challenged measures are consistent with those provisions. As noted by the United States, in *US – Corrosion- Resistant Steel Sunset Review*, the Appellate Body indicated that "acts setting forth rules or norms that are intended to have general and prospective application" are measures subject to WTO dispute settlement. We disagree with the United States' application of these criteria to the SPB. In our view, the SPB has normative value, as it provides administrative guidance and creates expectations among the public and among private actors. It is intended to have general application, as it is to apply to all the sunset reviews conducted in the United States. It is also intended to have prospective application, as it is intended to apply to sunset reviews taking place after its issuance. Thus, we confirm - once again - that the SPB, as such, is subject to WTO dispute settlement."[188]

281. TPKM submits that the CNEN have normative value as they provide administrative guidance and create expectations among the public and among private actors. Therefore, they constitute "measures" within the meaning of Article X:2 of the GATT 1994.

282. As already underlined in TPKM's FWS,[189] the Appellate Body found in *US – Underwear* that Article X:2 of the GATT 1994 embodies a principle of fundamental importance, i.e., the principle of transparency with due process dimensions: "[a]rticle 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."[190] 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

[188] Appellate Body Report, *US – OCTG Sunset Reviews*, para. 187.

[189] TPKM FWS, para. 475.

[190] Appellate Body Report, *US – Underwear*, page 21.

to acquire all the needed information in order to protect their interests by adjusting their activities or challenging such measures.[191]

2. The CNEN had been enforced before being officially published

283. The EC simply ignores the evidence brought by TPKM and the United States, which shows that customs authorities started applying the CNEN that had been voted upon by the Customs Code Committee but not yet officially published.

284. The sole defence of the EC is that the reference to the not-yet published CNEN in the BTIs is "for information" only since the "member States base their classification decisions on CN and the interpretative rules thereto."[192] However, the EC's argument amounts to deprive CNEN of any existence. The EC appears to argue that CNEN do not constitute "measures." Nonetheless, as TPKM noted above, the issue is not to determine what the exact status of the CNEN is within the EC legal system. The fact that customs authorities of the member States have relied on CNEN either to issue BTIs or to take other customs decisions shows that the CNEN had been enforced and affected traders.

285. The evidence put forward by TPKM is sufficient to demonstrate that the CNEN had been enforced before being officially published, i.e. in May 2008. By enforcing the CNEN before their official publication, the EC violated Article X:2 of the GATT 1994.

VI. BY IMPOSING CUSTOMS DUTIES ON CERTAIN MULTIFUNCTIONAL MACHINES, THE EC VIOLATES ARTICLE II:1(A) AND II:1(B) OF THE GATT 1994

A. GENERAL ISSUES

1. The products at issue

286. TPKM understands that, at least for MFMs, the EC has had no difficulties in identifying the products at issue and that the EC has correctly understood that the MFMs at issue consist of so-called "ADP MFMs," which are connectable to an ADP machine, either directly or indirectly, and non-ADP MFMs which are not connectable to an ADP machine but are capable of sending and receiving facsimile messages over a telephone network. However, the EC uses this apparent consensus to make several statements about the product at issue which are factually incorrect.

[191] *Ibid.*

[192] EC FWS, para. 323.

287. First, the EC has listed the essential components of an ADP MFM as follows: a print engine, a scanning device, a modem, and a print controller.[193] TPKM notes that the print controller necessarily works in conjunction with the printer engine and constitutes a print module. The relevant functional component is the print module, and a separation between both parts of the printing module is artificial. The same applies to non-ADP MFMs.

288. Second, TPKM also wishes to clarify that not all ADP MFMs have a modem. This element is only required by those ADP MFMs which also have a fax function. While ADP MFMs without a modem/fax function are in all cases subject to customs duties under the measures at issue, ADP MFMs with a modem/fax are subject to duty only if they can copy more than 12 pages per minute.

289. Third, the EC has developed a lengthy argument that copying and printing are different functions. This is not the focus of this dispute. What TPKM has submitted is that the MFMs at issue do not incorporate any essential component which would be specific for the copying function. Looking at the physical characteristics of an MFM, it is undeniable that the copying function is merely the result of a combination of the scanning function and the printing function. In this sense, the copying function is merely ancillary since all essential components of the MFMs perform either a scanning function or a printing function. The copying function only results from a combined use of both functions and is therefore dependent on the components performing the scanning and printing function. An MFM does not need a specific copying component to operate either its printing function or its scanning function. In other words, the fact that MFMs are capable of copying is not the result of technological convergence of printers and photocopiers. MFMs are simply technologically advanced versions of a combined input (scanner) and output unit (printer) of an ADP machine.

290. The EC's emphasis on the "function" of the apparatus rather than the "physical characteristics of the product at the time it is imported" is obvious and works to mislead the analysis. Its argument that MFMs are correctly classified under heading 9009 (now 8443.31.91) that entails a 6 percent customs duty, rests heavily on the alleged equivalence of the functions performed by MFMs at issue. This line of argument conveniently overlooks a fundamental rule in determining whether a product falls within the scope of a concession, i.e., the first step in determining whether a product falls within the scope of the concession starts with an analysis of the physical characteristics of a product and whether such features are covered by the wording of that concession.

[193] EC FWS, para. 334.

2. The measures at issue

291. The EC submits that the only measure at issue concerning MFMs in this dispute is the current version of the CCT and that the classification regulations and the CCCE statement became effectively inapplicable after the implementation of the HS2007 on 1 January 2007.

292. TPKM maintains that, with the exception of the CCCE statement, the measures at issue are still valid and continue to form part of the EC legal system. Therefore, for the reasons also explained above,[194] TPKM disagrees with the submission from the EC that all measures at issue except the CCT are no longer valid.

293. Moreover, TPKM does not agree with the EC's statement that the complainants' claim is limited to the tariff treatment given to imports of MFMs falling within code 8443.31.91. TPKM would like to point out that ADP MFMs which perform a scanning and a copying function but not a facsimile function would be classified automatically under CN code 8443.32.91 even though it is actually an input unit of an ADP machine.

3. The issue

294. The EC claims that the issue under consideration is whether the MFMs currently covered by CN code 8443 31 91 fall within the concession provided in the EC schedule for the various CN codes of subheading 8471 60 00 and for the CN code 8517 21 00, or instead within the concession for CN code 9009 12 00.[195]

295. TPKM disagrees with the above formulation of the issue as it erroneously presents this dispute as a mere customs classification dispute rather than what this dispute really is, i.e., a tariff treatment dispute. This dispute, on the part of MFMs, concerns whether or not the MFMs at issue are entitled to a zero tariff treatment. The EC seems to argue that the complainants must first identify the precise scope of HS headings 8471, 8517 and 9009 before they can make their case about whether or not the MFMs at issue can benefit from a zero tariff.

296. The EC's argument cannot be accepted. The complainants cannot be asked to identify which products currently classified under CN code 8443 31 91 were previously covered by the concessions relating to CN subheading 8471 60 or 8517 21. To begin the analysis with this point is illogical, incorrect and misleading. It is not the complainants' burden to identify the precise boundaries of the concession and how these differ from the way the EC interprets the scope of current CN code 8443 31 91.

[194] *See* para. 44 – 53.

[195] EC FWS, para. 356.

It is sufficient for the complainants to demonstrate that the EC measures necessarily result in certain MFMs being subject to customs duties when they are actually entitled to a zero tariff under the applicable concessions.

297. The Panel will thus first have to determine whether the MFMs at issue are properly covered by the concessions contained in HS subheading 8471.60 or 8517.21. The Panel will thus need to make findings on whether the EC is right in automatically excluding all MFMs without fax function from its concession. For MFMs with a fax function, the Panel will also need to examine whether the EC may automatically exclude from duty-free treatment all MFMs with a fax function having a copying speed above 12 pages per minute. Should the Panel find that the EC has, by the measures at issue, violated its WTO obligations in automatically excluding the MFMs at issue from the concession, the actual classification choices operated by the EC become irrelevant

298. In this respect, TPKM also notes that the EC does not even attempt to carry out the above interpretative exercise. In its FWS, the EC fails to examine anywhere the ordinary meaning of the wording of the concessions covering subheadings 8471 60 or 8517 21. Instead, the EC embarks immediately on a classification exercise, applying the rules of the HS in order to demonstrate that the MFMs are correctly classified under heading 9009 instead of under heading 8471 or 8517. TPKM submits that in doing so the EC skipped the most important step in the interpretative exercise, i.e., to analyse, in the light of the principles set out in the *Vienna Convention*, the ordinary meaning of the wording of the concessions covering subheading 8471.60 and subheading 8517 and whether such wording covers the MFMs at issue. The EC goes immediately to the HS classification rules arguing that several classification options merit consideration, and then concludes that it is unable to choose among the various options. Citing its inability to choose among those classification options, the EC then applies the most residual classification rule possible, i.e., GIR 3(c), which classifies products under the heading which comes last in numerical order.

B. ADP MFMs

299. TPKM will review the three main submissions made by the EC with regard to ADP MFMs, noting again that the EC has not examined the wording or even scope of the concessions under Subheading 8471 60 for "printers" (CN code 8471 60 40) and "others" (CN code 8471 60 90) or for "facsimile machines" (CN code 8517 21 00).

300. Having ignored the wording of the above concession, the EC argues that digital copying is a form of photocopying, that ADP MFMs fall outside the concession for subheading 8471 60 "*unless it can be shown that the copying function was secondary*",

and that if the "*copying function was equivalent*", it will fall under the scope of the concession for CN 9009 12 pursuant to GIR 3."[196]

301. However, before dealing with the above arguments, TPKM notes that the EC has based its submissions entirely on the ruling by the ECJ in the *Kip* case, as acknowledged by the EC itself.[197] TPKM fails to understand how the EC can base its entire defence on a ruling from its own highest court, which actually concluded that the automatic exclusion of MFMs with a copying function from the scope of subheading 8471 and their classification under heading 9009 violates EC customs law.

302. Indeed, the EC can only draw support from the *Kip* case to the extent it misquotes the findings from the ECJ. For instance, the EC cited the *Kip* case to argue that an ADP MFM will fall outside the scope of subheading 8471 60, "*unless it can be shown that their copying function is secondary*" and that in case of an "*equivalent copying function*", the MFM will fall "*within the scope of Subheading 9009 12*" pursuant to GIR 3.[198]

303. TPKM submits that the *Kip* case, being a decision by a national court dealing with the EC's customs classification practice, has no direct authoritative value regarding the issue before the Panel. However, this being said, the *Kip* case does not even say what the EC alleges it says. On the contrary, the EC is actually rewriting the wording of the *Kip* ruling. For example, it suffices to simply look at paragraph 50:

> "It follows that each of the machines at issue in the main proceedings should be classified under heading 9009 only if it is apparent, on the basis of its objective characteristics, that it is not of a kind used principally in an automatic data-processing system, since the copying function is of an importance equivalent to that of the other two functions, and that it proves impossible to determine which, of the printing module or the scanner module or even, if applicable, the computer module, gives it its essential character."[199]

304. TPKM submits that the above paragraph is self-explanatory of the manner in which the EC has misquoted the *Kip* judgment.

305. First, an ADP MFM will fall under subheading 8471.60 provided it is "of a kind solely or principally used in an ADP system." Given that ADP MFMs are by

[196] EC FWS, para. 359, 364 and 365, (emphasis added).

[197] EC FWS, para. 360.

[198] EC FWS, para. 359.

[199] [199] 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. 50. See Exhibit TPKM-63

definition connectable to an ADP system and consist of a scanner module and a printing module, it is clear that as a general rule such apparatus will be of a kind solely or principally used in an ADP system and would therefore generally fall under heading 8471. Its physical characteristics, i.e., computer connectivity, scanning and printing functions which can only be used when connected to an ADP system, demonstrate that such apparatus has been designed to form part of an ADP system even though it may also be used for copying documents either without being physically connected to an ADP system or, more likely, as part of an ADP system. In other words, the *Kip* judgment comes to a conclusion that 8471.60 is *prima facie* the most appropriate classification[200].

306. Second, in the rare cases where the copying function is equivalent to the printing and the scanning functions, classification cannot take place on the basis of Note 5(B) to Chapter 84. However, contrary to what the EC implies, the possibility of classifying the ADP MFMs under heading 9009 as photocopiers will not yet come into play at this stage. Indeed, *Kip* stresses that it should first be examined whether the ADP MFM cannot be classified on the basis of GIR 3(b) which classifies products on the basis of the component which confers the essential character to the product. As stated by the ECJ in paragraph 49 of the *Kip* judgment:

> "[i]n such a case, machines made up of different components, that is to say either a printer module and a scanner module, or a printer module, a scanner module and a computer module, should be classified, by application of General Rule 3(b), according to the module which, of those two or three modules, is identified as determining their essential character, provided such identification is possible. If that is not the case, in accordance with General Rule 3(c), they are to be classified under the heading which occurs last in numerical order among those which equally merit consideration."[201]

307. The ECJ correctly points out that an ADP MFM does not incorporate a "copying module" and that a classification under heading 9009 is impossible pursuant to GIR

[200] See 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. 44: "[i]n the present case, it is apparent from the description of the characteristics of those machines that most of the functions which they perform, that is to say, printing and electronic scanning, can be used only in connection with an automatic data-processing machine. Accordingly, those machines are likely to be of a kind used principally in an automatic data-processing system." (Exhibit TPKM-63)

[201] 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. 49. (Exhibit TPKM-63)

3(b).[202] Since printer, scanner and computer modules are clearly classifiable under heading 8471, it is manifest that the exercise will necessarily result in a classification under heading 8471 unless the value and role of the various components would be so similar that no component can be identified conferring the essential character to the apparatus. Needless to say, given the preponderance of the printer module consisting of the print engine and the print controller in the overall value and functioning of an ADP MFM, it will only be in very rare cases that the printer module will not confer the essential character to the MFM.

308. The above reasoning by the ECJ clearly demonstrates the exceptional nature of a classification of an ADP MFM under heading 9009. According to *Kip*, only when the use of the ADP MFM as a stand alone copier is treated as equivalent to the use of the ADP MFM for printing or scanning would a direct classification not be possible under heading 8471 on the basis of Note 5(B) to Chapter 84. Nevertheless, even then, classification under heading 9009 would not be an option. Only if in the next step in the classification exercise, i.e., the application of GIR 3(b), neither the printer module nor the scanning module or the computer module could confer the essential character to the ADP MFM, can one have recourse to the most residual of classification rules, i.e., GIR 3(c), which classifies products under the heading which occurs last in numerical order.

309. The above correct reading of the *Kip* ruling can only lead to the conclusion that the EC is trying to convert an absolutely exceptional and subsidiary classification result into a general rule. The EC's statements in its FWS based on the *Kip* ruling such as

> "the products at issue could not be classified directly under subheading 8471 60 unless it was shown that the copying function was "secondary" in relation to the functions involving the use of an ADP. If the copying function was "equivalent", the products had to be classified in accordance with GIR 3"[203] and
>
> "[i]t follows that, as ruled by the ECJ in the Kip case, the MFMs at issue in this section fall outside the scope of heading HS96 8471, unless it can be shown that their copying function is "secondary" in relation to those functions which involve the use of the ADP system such as printing"[204]

are at best misleading. In most cases, they are simply incorrect.

[202] 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. 40 and 49. (Exhibit TPKM-63)

[203] EC FWS, para. 359.

[204] EC FWS, para. 417.

310. In view of the above, TPKM submits that to the extent that the vast majority of the EC's reasoning is actually based on a misinterpretation of the *Kip* judgment, the EC's arguments on the parts concerning MFMs in its FWS are thus equally flawed.

311. TPKM will review below the other arguments submitted by the EC, even though they often rely on the same or similar misinterpretation of the *Kip* ruling as described above.

1. Digital copying is not a form of photocopying

312. The EC has been avoiding analyzing the wording of the concession covering subheading 8471 and has focused instead on the concession covering heading 9009. This approach presupposes that digital copying is actually a form of photocopying. TPKM submits that such reasoning is not supported by the facts.

313. First, TPPK maintains that it provided the correct definition of photocopying as "process whereby a copy is being produced by the action of light on a photo-sensitive surface."[205] TPKM notes that the EC agrees with this definition although it claims that it applies equally to analogue photocopying and digital copying.[206]

314. TPKM submits that analogue photocopying and digital copying are essentially different even if light is used in both processes. The light in a photocopier is used to create a duplicate image of the original by projecting an optical image of the original document onto the light sensitive surface of the electrostatic drum. In a digital copier, light is converted into digital data by means of a semiconductor device, i.e., a Charge Coupled Device (CCD) which scans the original. There is therefore no single "surface" on which the original image is projected. In fact, the difference between both technologies is similar to the difference between the way a digital camera of heading 8525 takes a picture, i.e. by converting light signals into digital data by means of a CCD, and the way in a traditional photographic camera of heading 9006 light is used to expose a light sensitive film surface. The argument that the use of a CCD to convert images into digital data makes digital copying a photographic or photocopying process cannot therefore be accepted without nullifying the obvious difference between digital and analogue processes, as has been reflected in the HS.

315. Second, the EC claims that both analogue photocopying and digital copying processes use the "indirect process," i.e., they reproduce the image via an intermediate.[207] According to the EC, the intermediate is the drum in the case of analogue

[205] TPKM FWS, para. 574.

[206] EC FWS, para. 370.

[207] EC FWS, para. 374.

photocopying, and "various devices operating together (e.g., a scanning device, a laser beam and an electrostatic drum)" in the case of digital copying.[208]

316. TPKM submits that the photocopying process based on "indirect process" makes reference to a specific type of technology whereby the photocopy is created by means of transferring the original image directly onto a light sensitive drum. The EC claims that digital copying is merely "*more indirect than analogue photocopying.*"[209] TPKM does not deny that the MFMs at issue use an electrostatic print engine whereby printouts are obtained by forming an image on an electrostatic drum by means of a laser beam and transferring this image by means of toner to a carrier media such as paper. TPKM agrees that, to the extent the MFMs rely on an electrostatic process, the printing process is indirect. However, it is a printing process and not a "photocopying process." To qualify as an indirect photocopying process, it is necessary that the original image is projected on the light sensitive surface of the drum, and afterwards, the image is transferred from the drum to the paper. A digital copier creates an image on the light sensitive surface starting from a digital data file rather than from the original.

317. Third, the EC tries to make an argument out of the indiscriminate use in commercial literature of the terms "copier" and "photocopier."[210] Obviously, language used by marketing departments is not an acceptable interpretative tool under the *Vienna Convention*. It may safely be assumed that negotiators which agreed on different concessions covering particular types of photocopying technology, i.e., depending on whether they were based on the direct or indirect process, or incorporated an electrostatic print engine, were also aware of the difference between digital copying and photocopying when drafting the scope of the concession. It is the wording of the concession but not the manner in which the marketing department of a company uses the words that should be reviewed by this Panel.

318. Fourth, the EC draws support from the HS[211] and other positions of the EC Schedule[212] to conclude that machines with a copying function cannot be excluded from photocopying of heading 9009. The EC seems have considered that digital copiers have much more in common with analogue photocopiers of heading 9009 than with machines of heading 8472[213].

[208] EC FWS, para. 374.

[209] EC FWS, para. 372.

[210] EC FWS, para. 375.

[211] EC FWS, para. 381 – 384.

[212] EC FWS, para. 376 – 380.

[213] EC FWS, para. 379.

319. As TPKM has submitted, analogue photocopier and digital copiers are fundamentally different technologies. It is therefore incorrect to assume, as the EC does, that a digital copier would have more in common with apparatus of heading 9009. This is all the more true now as it appears that the EC's classification of MFMs under heading 9009 is actually based on GIR 3(c).

320. Fifth, the EC claims that it has consistently considered that digital copying is a form of photocopying. It refers to Regulation (EC) No. 1165/95 which classified MFMs with digital copying function under CN code 9009 12 00 which the complainants have not mentioned, as well as to the *Rank Xerox* ruling[214] from the ECJ which also stated that digital copying is a form of photocopying.[215] The EC also refers to the measures at issue which are apparently consistent with this approach.

321. As for Regulation (EC) No. 1165/95, this is not one of the measures at issue. Indeed, since the apparatus concerned by this regulation cannot connect to an ADP machine or network, it is not a product at issue in the present dispute. Moreover, its multifunctional nature is unclear. The same applies to the apparatus concerned by the *Rank Xerox* ruling.[216]

322. TPKM would also like to refer to the statements made by the EC in Council Regulation (EC) No. 2380/95 of 2 October 1995 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan.[217] In that regulation, the EC Council clearly distinguished "digital copying" from "photocopying" as being two completely different processes.[218] The EC can therefore hardly allege that it has consistently considered digital copying as a form of photocopying.

323. As for the alleged US practice of classifying stand alone digital copiers under heading 9009, TPKM fails to see how this can support the EC position. To the extent that the EC invokes certain rulings from the US classifying stand alone digital copiers under subheading 9009 12,[219] TPKM understands from the explanations given by the US that such rulings were incorrectly issued by the NY customs office, and were

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

[215] EC FWS, para. 387.

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

[217] Council Regulation (EC) No 2380/95 of 2 October 1995 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, OJ 1995 L 244, para. 12 -13; Exhibit JPN-24. Japan's Answers to Panel Questions to the Parties from the First Substantive Meeting, para. 99.

[218] *Id.*

[219] EC FWS, para. 394 .

subsequently corrected by the central customs office into a classification under heading 8472.[220]

324. TPKM recalls that only a "common" and "concordant" practice can be taken into account as a subsequent practice.[221] Moreover, as the Appellate Body has found in *EC-Chicken Cuts*, it is not possible to establish such "*a practice by one, or very few parties to a multilateral treaty, such as the WTO Agreement.*"[222] The EC has clearly not met this standard, which is necessary to demonstrate a "subsequent practice" supporting its arguments.

325. Finally, TPKM refers to paragraphs 18 - 26 above on the limited relevance of the negotiating history of the ITA. TPKM considers that the HS2007 and its negotiating history are equally of minimal relevance in this dispute. TPKM has only referred to the HS2007 as constituting other interpretative material which might be helpful in shedding light on the interpretative issue before the panel. Obviously, it is up to the panel to decide whether such documents have any interpretative weight at all. It is, however, clear that the fact that the adoption of the HS2007 was a "hard-fought compromise" cannot invalidate the outcome of such negotiations and the conclusions drawn by TPKM from the actual wording as reflected in the final version of the HS2007.

2. ADP MFMs fall within the scope of the concession for subheading 8471.60

326. The EC submits that MFMs only fall within subheading 8471 60 when it can be shown on a case-by-case basis that the copying function of each MFM is secondary in relation to its ADP functions.[223] According to the EC, this is consistent with the contextual elements, the negotiating history of the ITA and the classification practice of the European Communities.[224]

327. TPKM refers to its comments above at paragraphs 302 - 309 on how the EC has arrived at the above "test" as a result of a fundamental misinterpretation of the *Kip* ruling. *Kip* does not state that an MFM can only fall under subheading 8471 60 "if the copying function is secondary."

[220] US Replies to the EC's Questions at the First Substantive Meeting of the Panel, para. 8.

[221] Appellate Body Report, *EC – Chicken Cuts*, para. 259.

[222] Appellate Body Report, *EC – Chicken Cuts*, para. 259.

[223] EC FWS, para. 410.

[224] EC FWS, para. 412 – 426 and 428 – 430.

328. The main argument submitted by the EC to justify the exclusion of ADP MFMs from the concession covering subheading 8471 60 relies on Note 5 to Chapter 84.[225] The EC claims that the requirement of sole or principal use in Note 5(B) is not met and that Note 5(D) is not applicable since the MFM are not "printers,"[226] In response, TPKM would like to submit the following comments.

329. First, ADP MFMs fulfill the requirements in Note 5(B)(a) since they are of a kind principally used in an ADP system. The fact that the MFMs may operate independently from an ADP system as a stand alone digital copier does not invalidate its principal use with ADP machines. Indeed, the MFM's connectivity to an ADP machine and the presence of scanning and printing functions makes the MFM an apparatus of a kind principally used in an ADP system and its physical characteristics are such that its use in an ADP system is inherent in the MFM. The stand-alone copying function is merely incidental.

330. The above reasoning is actually supported by the *Kip* ruling invoked by the EC where the ECJ states:

> "[a]ccordingly, those machines are likely simultaneously to meet the three requirements laid down in Note 5(B)(a) to (c) to Chapter 84 of the CN for them to be considered units forming part of an automatic data-processing system, that is to say to be of a kind used solely or principally in an automatic data-processing system, capable of connection to the central processing unit and receiving or supplying data in a form usable by that system"[227].

331. In other words, ADP MFMs are apparatus of a kind which would generally be for use solely or principally in an ADP system.

332. Second, Note 5(D) confirms that ADP MFMs fall under the scope of the concession for "output units" and "printers" under subheading 8471.60. Such would be the case regardless of whether the sole or principal use test is met. The meaning of "printer" is not limited to single function machines only. Classification of an MFM as a printer could, for instance, result from a classification on the basis of GIR 3(b) where the print module confers the essential character to the apparatus.

333. Third, TPKM maintains that, contrary to the EC position, the broad scope of the concession for 8471 60 actually confirms that the MFMs at issue are included within

[225] EC FWS, para. 412 – 422.

[226] EC FWS, para. 416 – 421.

[227] 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. 41. See Exhibit TPKM-63,

the scope of the concession. TPKM fails to understand how the EC can argue that the presence of "others" subheading "within" the heading 8471 cannot have the effect of expanding the coverage of that heading "*beyond its own terms*," when the EC has not even reviewed those terms. TPKM maintains therefore that the structure of the heading and the analysis thereunder confirms the broad scope of the concession as has been explained in its FWS.

C. NON-ADP MFMS

334. The EC claims that these MFMs correctly fall under the scope of the concession in subheading 9009 12 since its copying functionality is similar to that of stand alone digital copiers, and its copying function also qualifies as photocopying. Since these MFMs can also fall under the scope of the concession covering subheading 9009.12 in addition to the concession covering subheading 8517 21, the application of GIR 3(c) would result in a classification under subheading 9009 12.[228] The EC also claims that although it is not obliged to do so, it grants duty-free treatment to the non-ADP MFMs with a copying speed not exceeding 12 pages per minute.[229] TPKM would like to briefly respond with the following comments.

335. First, TPKM submits that for the reasons explained above, it is incorrect to conclude that "photocopying" also covers "digital copying."

336. Second, as discussed above for ADP MFMs, the correct application of GIR 3(b) would actually confirm the classification under a heading different from 9009. Indeed, there is no component of an MFM at issue which performs specifically a copying function. The non-ADP MFMs basically contain a modem, a scanner, and a print module. Classification under heading 9009 would therefore also be excluded under GIR 3(b).

337. Third, it is incorrect that the criterion of pages-per-minute copying speed was actually already used in Commission Regulations (EC) No. 2184/97 and No. 517/99. Although the product description in column (1) of the annex to these regulations includes the copying speed as part of the description of the product, there is no indication that the copying speed was actually a decisive factor in the classification decision. In fact, the legal reasoning in column (3) of the annex to the regulation makes no reference to the copying speed. Since the legal reasoning can be applied by analogy to other products, if the copying speed had been one of the classification criterion concerned, it would have been mentioned directly or indirectly in the legal reasoning. As the EC must know, this criterion was discussed for the first time in the

[228] EC FWS, para. 451.

[229] EC FWS, para. 452.

February 2002 meeting of the Customs Code Committee as a possible criterion and not as an update of an already existing criterion.[230] The copying speed was only expressly included in a classification measure for the first time through the Statement of the Customs Code Committee, one of the measures at issue in this dispute.

338. Finally, the EC attempts to justify the arbitrary nature of the 12 pages per minute criterion by arguing that it has *of its own initiative* decided to grant duty-free treatment to some non-ADP MFMs with a copying speed not exceeding 12 pages per minute and classify them under CN code 8443 31 10.[231] However, the EC is actually distorting the cause-and-effect relation of this circumstance. The MFMs that the EC classifies under CN code 8443 31 10 actually fall under the scope of the concession at issue in this dispute. Therefore, the EC is merely applying a duty-free treatment to such MFMs as it is obliged to do. However, the EC has arbitrarily decided to exclude from the duty-free treatment those MFMs with a facsimile function with a copying speed exceeding 12 pages per minute. There is simply no justification whatsoever for such an exclusion.

339. TPKM therefore maintains that non-ADP MFMs correctly fall under the scope of the concession covering subheading 8517 21, and that the EC violates Articles II:1(a) and (b) of the GATT 1994 by imposing customs duties on non-ADP MFMs as set forth in the EC Schedule.

VII. CONCLUSIONS

340. For all the reasons set forth in its First Written Submission and for all the reasons set forth above in this Submission, TPKM respectfully requests the Panel to find that:

a. the EC's measures concerning flat panel display devices are inconsistent with the EC's obligations under Articles II:1(a) and II:1(b) of the GATT 1994;

b. the EC's measures concerning set-top boxes which have a communication function are inconsistent with the EC's obligations under Articles II:1(a) and II:1(b) of the GATT 1994;

c. the EC's measures concerning set-top boxes which have a communication function are inconsistent with Articles X:1 and X:2 of the GATT 1994;

[230] TPKM FWS, para. 503 - 504.

[231] EC FWS, para. 452.

d. the EC's measures concerning multifunctional machines are inconsistent with the EC's obligations under Article II:1(a) and II:1(b) of the GATT 1994.

341. Accordingly, TPKM respectfully requests that the Panel recommend, pursuant to Article 19.1 of the DSU, that the EC and its member States bring the measures into conformity with the covered agreements.

LIST OF EXHIBITS

TPKM-81	Rulings of the US customs authorities concerning MFMs: HQ 958348, NY 897540 and NY 892321
TPKM-82	WCO document NC0300E1
TPKM-83	Commission Regulation (EC) No. 705/2005 amending or repealing certain regulations on the classification of goods in the Combined Nomenclature, OJ L 118, 5.5.2005
TPKM-84	BTI FR-E4-2007-002262-R classifying a multifunctional machine in CN code 8443.3191
TPKM-85	Customs Code Committee – Section for General Customs Rules, *Nature and Legal value of Guidelines*, 5.4.2006.
TPKM-86	C-15/05, *Kawasaki Motors Europe NV v Inspecteur van de Belastingdienst/Douane District Rotterdam*, judgment of 27 April 2006
TPKM-87	BTI GB116400026 classifying a large scale video display under CN code 8531.20.20.90