

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

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

**ORAL STATEMENT
OF
THE SEPARATE CUSTOMS TERRITORY OF TAIWAN,
PENGHU, KINMEN AND MATSU
AT
THE FIRST SUBSTANTIVE MEETING OF THE PANEL**

12 MAY 2009

GENEVA

I. INTRODUCTION

1. Mr. Chairman, distinguished Members of the Panel, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (“TPKM”) is very pleased that this Panel has accepted to examine this dispute and would like to thank the Panelists and the Secretariat for the work already done in preparing for this meeting as well as for their ongoing efforts in connection with this dispute.

2. For the first time in the history of its WTO membership, TPKM has seen itself obliged to lodge a WTO complaint. It has taken this unprecedented step because of the importance of the trade flows concerned as well as the manifest nature of the violations committed by the EC.

3. Trade in IT products is very important for TPKM. Such products make up a significant part of its international trade. The potential exclusion of important categories of IT products from the tariff concessions agreed in the ITA is therefore of fundamental concern for its economy and its trade operators.

4. TPKM and its co-complainants, the United States and Japan, have presented in their first written submissions arguments with regard to the infringements committed by the EC in connection to the three products under dispute. As coordinated among complainants, TPKM in this opening statement will concentrate on one of these products, namely FPD devices. As for MFMs and STBs, TPKM supports what has been said by the United States and Japan in their opening statements.

II. PRELIMINARY REMARKS

5. On its face, the case is quite simple. The question before this Panel is whether the EC is entitled to exclude from the scope of the concession FPD devices merely because they are capable of receiving and reproducing signals from both ADP machines and other sources and even some FPD devices that can only reproduce signals from an ADP machine. Indeed, under the contested measures, the mere capability of an FPD device being connected to an apparatus other than an ADP machine, for instance because it has a DVI connector, will lead to the automatic exclusion of that

FPD device from the scope of the concession covering FPD devices for use with ITA products.

6. It is important to stress that the EC does not carry out an analysis of whether such additional capability is actually intended to be used, commercially viable, or used in practice. The mere existence of such capability is sufficient to exclude FPD devices from the duty free treatment they would otherwise be entitled to pursuant to the WTO obligations undertaken by the EC.

7. It is manifest that the EC measures imposing customs duties on FPD devices violate as such the EC's WTO obligations. Indeed, even the ECJ, the highest Court in the EC found that the EC's actions are inconsistent with its own domestic law in the recent *Kamino* case. Obviously, the *Kamino* case is merely the interpretation by one WTO Member of how a product should be classified under its domestic law. The analysis made and reasoning followed by the ECJ, however, shed light on how to interpret the scope of the EC Schedule with respect to FPD devices.

8. In *Kamino*, the ECJ has held that the words for use “solely or principally” which determine whether a product can be considered to fall under HS subheading 8471.60 (and thus benefit from the concession covering this HS subheading in the EC Schedule) cannot be read as requiring the exclusive use with an ADP machine.

9. More specifically, the ECJ in that case, basically reached the conclusion that the words “solely or principally” cannot be interpreted in such a way as to exclude from the concession covering subheading 8471.60 FPD devices which can also receive signals from apparatus other than ADP machines. The ECJ in *Kamino* therefore confirms that the EC has no legal basis to exclude FPD devices from classification under HS subheading 8471.60 simply because such apparatus may also be able to connect to a device other than an ADP machine, for instance, because it has DVI.

10. Yet, one of the measures in dispute¹ automatically excludes from duty free treatment all FPD devices which can be connected to non-

¹ CNEN

ADP apparatus, even though their principal or even sole use is with an ADP machine.

11. TPKM takes note that the EC has announced in its first written submission that it will amend the measures in dispute to bring them in line with the findings of the ECJ in *Kamino*. TPKM hopes that such amendment will also remove the WTO violation. However, as long as these revised measures have not been adopted and TPKM has not been able to convince itself that such successor measures actually remove the violation and do not merely reproduce “in its essence” the amended measures, TPKM maintains, as required by its terms of reference, that this Panel should adopt findings and issue recommendations on the matter before it.²

12. With respect to FPD devices, the EC in its submission made some preliminary comments contending that TPKM failed to make a *prima facie* case. None of these comments are correct.

² See, AB report in *Chile – Price Band Systems*, at para. 139, and para 144

13. First, the EC seems to argue that it is unaware for which precise product TPKM is complaining about the treatment. As stated in its submission,³ TPKM's complaint relates to the treatment given by the EC to all FPD devices which are capable of receiving and reproducing signals from ADP machines only, and from both ADP machines and other apparatus. Such FPD devices may be for exclusive use with an ADP machine or may have multiple functions. However, TPKM's complaint is not limited to so-called *multifunctional monitors* as suggested by the EC. Indeed, FPD devices which are theoretically capable of receiving signals from a non-ADP machine through, e.g. a DVI connector often do not have as a function the reproduction of such signals and would certainly not be used for this. In other words, they are not "multifunctional". The FPD devices at issue may use various technologies, such as LCD, plasma, OLED, etc, other than CRT technology. Moreover, the FPD devices covered by the EC concessions include both finished and semi-finished products.

³ Paragraphs 11 – 14 of TPKM first written submission.

14. Secondly, TPKM has never alleged that the EC obligations flow directly from the ITA. It is clear from its submission that TPKM considers that the EC has violated its WTO obligations by according treatment to the products at issue which is less favourable than that provided for in its Schedule.⁴ The precise obligations set out in the EC Schedule have moreover been quoted *in extenso* in TPKM submission.⁵ The statements in the EC submission that TPKM has failed to identify the relevant obligations seems therefore based on a misunderstanding.
15. Thirdly, the fact that the EC has temporarily suspended its customs duties on part of the products concerned by this dispute, mainly FPD devices having a screen size of 19 inch or less between 2005 and 2008 and 22 inch or less from 2009 does not remove its Article II GATT 1994 violation. Indeed, such suspension is temporary, and conditional on a number of factual elements, such as, for instance, the absence of production in the EC. However, the concession for FPD devices in the EC Schedule was not made subject to any “other terms and conditions”. Since under the EC’s duty suspensions

⁴ Paragraphs 122 – 124 of TPKM first written submission.

⁵ Paragraphs 28 – 43 of TPKM first written submission.

system, the benefit of the zero tariff is conditional upon a number of terms and conditions not included in the EC Schedule, the violation of Article II of the GATT 1994 remains. The EC has failed even to respond to this argument.

16. Finally, the EC argues that FPD devices which are capable of receiving signals from ADP machines and other sources are not automatically excluded from the zero tariff treatment. The EC therefore proposes that TPKM's claim cannot extend to challenging the measures of the EC as such. However, the evidence provided for this proposition is unconvincing. Furthermore, in order to substantiate an "as such" claim, it is not necessary for the complainants to demonstrate that the measure at issue "always" leads to a violation of the WTO covered agreements. It is sufficient to demonstrate that at least in some respects the measure at issue will necessarily lead to such violation.⁶

⁶ Panel Report, China-Auto Parts, para. 7.540.

III. ARGUMENTS

17. TPKM will go on to address specifically the scope of the concessions relating to FPD devices and how the treatment given by the EC to certain types of FPD devices violates the EC's WTO obligations. TPKM submits that a correct reading of the EC Schedule clearly demonstrates that the scope of the EC concession also covers FPD devices which are capable of receiving signals from both ITA products (and most notably ADP machines) and other apparatus.

18. In order to implement its commitments under the ITA, the EC modified its Schedule and bound at a zero duty the products of Attachments A and B to the ITA into its Schedule.

19. The concession in the EC Schedule covering FPD devices is twofold. The first part of the concession is based on Attachment A to the ITA and provides for a zero tariff for a number of HS subheadings under which FPD devices could be classified, in particular, input or output units of ADP machines of subheading 8471.60.

20. The EC also incorporated the products listed in Attachment B to the ITA into its Schedule, including, among others, FPD devices. For FPD devices covered by Attachment B and incorporated in the EC Schedule, TPKM submits that the Panel's interpretation in this dispute should begin with the terms of the headnote contained in the EC Schedule. This is because, in the headnote, the EC made the commitment that with respect to any product described in Attachment B, to the extent not specifically provided for in the Schedule, the customs duties on such product shall be bound and eliminated, wherever the product is classified.
21. The meaning of the words "wherever the product is classified" is both crucial and self-explanatory. Regardless of the specific heading or subheading under which a particular product falls in the EC Schedule, any product meeting the description of FPD devices contained in the EC Schedule must be granted duty-free treatment, "wherever the product is classified".
22. There can therefore be no doubt that the 14 CN subheadings next to the description of FPD devices in the second headnote in the EC

Schedule are only illustrative, rather than exhaustive. The EC's argument that its obligations with respect to FPD devices under Attachment B are only limited to those HS codes is incorrect. However, in doing so, the EC fails to give proper meaning to the words "*wherever the product is classified*".

23. TPKM would like to explain this in more detail and will begin with Attachment B.

Attachment B

24. TPKM first recalls that the FPD devices on which the EC is obliged to provide duty free treatment in the EC Schedule are: "flat panel display devices (including LCD, Electro Luminescence, Plasma, Vacuum-Fluorescence and other technologies) for products falling within this agreement, and parts thereof".
25. The ordinary meaning of "flat panel display devices" indicates that they are thin screen devices to visualize data or signals. They have a variety of applications including reproduction of signals from ADP

machines. However, some can also visualize data from other sources. It follows from the ordinary meaning that an FPD device is not limited to receiving signals from an ADP machine only. Moreover, the ordinary meaning of the word “devices” makes it clear that “FPD devices” covers both finished and semi-finished products, and the EC’s own statements in the ITA Committee on this issue confirm that it does not dispute that finished products are covered.

26. The rest of the language in the concession as well as the context supports the conclusion reached from the ordinary meaning of this phrase.
27. The product at issue is described as “*for* products falling within this agreement”, it is clear that the concession requires that FPD devices be “for” products falling within the ITA.
28. The real interpretative issue is the meaning of “for”. Is it possible to read into “for” a limitation such as “solely for” or “exclusively for”? TPKM submits that no such limitation may be read into the terms of

the concession. The ordinary meaning of “for”, as found in dictionaries, is extremely wide and covers many different possible situations. The dictionary meanings do therefore not support an interpretation which would require reading a limitation into the word “for”.

29. In light of this, TPKM concludes that FPD devices “for products falling within this agreement” should be interpreted as covering FPD devices which are capable of operating with or being incorporated in ITA products even though other uses may be possible.

30. This conclusion is further supported by the wording of other concessions contained in the EC Schedule which grant duty-free treatment to products even though they may be able to operate with apparatus other than ADP machines. For instance, a concession is granted to “projection type flat panel display units used with automatic data processing machines which can display digital information generated by the central processing unit”. It is sufficient that the projection type flat panel display can display

information from an ADP machine. There is no reason to apply a more restrictive interpretation to the FPD devices at issue which also concern flat panel display technologies.

31. Moreover, in connection with the concession for FPD devices, the EC listed in its modified Schedule 14 CN subheadings next to this product. Having analysed these 14 tariff subheadings, TPKM considers that they do not support the proposition that FPD devices are excluded from those concessions on the mere ground that they are able to be connected to apparatus other than ADP machines, for instance due to the presence of a DVI connector. On the contrary, some of the CN codes listed by the EC as covering FPD devices are even of a residual nature such as Heading 9013.

32. Also, whenever the ITA drafters wanted to limit the scope they made such limitation clear, such as for the concession in relation to CRT monitors. The EC's argument that the scope of the concession regarding FPD devices should be similarly limited as the concession for CRT monitors does not find support in either wording or context.

33. In sum, the ordinary meaning and context of the concessions are clear and straightforward: it covers FPD devices which can be connected to or incorporated to an ITA product and can reproduce signals from such ITA products. Such an interpretation is moreover supported by the object and purpose of the WTO Agreement and GATT 1994.
34. As required by the Panel and Appellate Body in previous disputes, the concessions at issue must be interpreted in the light of the object and purpose of the WTO Agreement and GATT 1994, which is, among other things, to further the expansion of trade in goods and the substantial reduction of tariffs.
35. In this regard, TPKM is of the view that the provisions of the ITA are relevant for interpreting the object and purpose of the WTO Agreement and GATT 1994. First, the concessions at issue included in the EC Schedule were made to reflect the EC's commitment under the ITA. Secondly, various WTO Members representing over 90 percent of world trade in IT products entered into the arrangements in the framework of the ITA, so such arrangements

must be deemed to be reciprocal and mutually advantageous.

Finally, the objectives of the ITA echo the object and purpose of the WTO Agreement and the GATT 1994. In light of this, TPKM submits that the provisions of the ITA are useful to confirm the scope of the FPD devices in the EC Schedule.

36. First, the ITA in its Preamble emphasizes the participants' desire "to achieve *maximum freedom* for world trade in IT products" and encourages the continued technological development of the IT industry on a world-wide basis. In particular, the Annex points out explicitly that the trade regimes of the participants "should evolve in a manner that enhances market access opportunities for IT products." Furthermore, we note that the dual approach to product coverage by Attachment A and Attachment B underscores the participants' intention to ensure that the duty-free treatment would be maintained as far as possible.

37. For these reasons, TPKM submits that any interpretation that excludes from the EC concession FPD devices which are capable of receiving signals from both ADP machines and other sources, for

instance because they have a DVI connector, is contrary to the objective of expanding world trade in IT products shed light not only by the ITA, but also by the WTO Agreement and the GATT 1994.

38. Before moving to Attachment A, TPKM takes note that the EC tries to construct an argument by relying on the negotiating history of the ITA. Obviously, even if the text of the concessions were unclear or ambiguous – which they are not - such that the ITA negotiating history were to be used to interpret the ITA and, indirectly, the EC Schedule, such history could only be considered as a supplementary means of interpretation under Article 32 of the Vienna Convention.

39. However, in the present case, references made by the EC to the alleged negotiating history are partial and unconvincing. Furthermore, as admitted by the EC in its submission, multilateral negotiations are a very dynamic process in which it is usually quite difficult to capture the collective will of the negotiators in any given document. Different versions of draft texts were often circulated in a very short period of time and no implicit “common intention” can

be deduced from those partial drafts. TPKM fails to see how those drafts can be used to clarify the scope of the concessions at issue.

Attachment A

40. TPKM notes that the EC has not addressed its argument on Attachment A in its first written submission. Apparently, the EC considers this useless since FPD devices may also be classified according to their different characteristics as video monitors of subheading 8528.21/22, or televisions of subheading 8528.12/13 in addition to output units of subheading 8471.60.

41. TPKM is pleased that the EC at least does not dispute that FPD devices may be classified as output units of subheading 8471.60. Contrary to the EC, however, TPKM considers that a discussion of the ordinary meaning of the tariff terms, within their context, is highly relevant to determine what kind of FPD devices fall under subheading 8471.60. On this point, TPKM wants to make the following three preliminary comments.

42. First, FPD devices for use solely or principally with an ADP machine do not fall under the scope of subheading 8528.12/13 as televisions.
43. Secondly, FPD devices for use solely or principally with an ADP machine undoubtedly fall under subheading 8471.60 as an output unit of an ADP machine. This is confirmed by Note 5(B) to Chapter 84 of HS 1996.
44. Thirdly, FPD devices for use solely or principally with an ADP machine cannot fall under subheading 8528.21/23 as a video monitors. Indeed, such FPD devices are excluded from heading 8528, as confirmed by the HS 1996 heading note to the heading covering video monitors which states: “The heading excludes, inter alia : (a) Display units of automatic data processing machines, whether or not presented separately (heading 84.71).”
45. TPKM submits, independently from the concession made with respect to “flat panel display devices” in the EC Schedule, that the concession made with respect to subheading 8471.60 (“input or output units, whether or not containing storage units in the same

housing”) also covers FPD devices capable of receiving signals both from an ADP machine and other sources.

46. The ordinary meaning of the term “output units” demonstrates that this term is very broad and covers any element or item capable of delivering information from the computer. The ordinary meaning of “output unit” does not support the proposition that an FPD device covered by subheading 8471.60 must be capable of receiving signals only from a computer system.
47. This conclusion is supported by the HS 1996. Note 5 (B) to Chapter 84 of this HS lays down the requirements to qualify as a unit of an ADP machine. Among others, Note 5 (B) requires that such unit must be of a kind solely or principally used in an ADP system. It is therefore sufficient that an FPD device is principally used with an ADP machine to be classified under heading 8471, regardless of whether it is also capable of receiving signals from other sources. Under the EC measures, however, any device capable of receiving signals from other sources (as well as some that cannot) is subject to duties.

IV. CONCLUSION

48. In conclusion, TPKM considers that there can be no legal justification for the EC not to grant duty-free treatment to FPD devices which are capable of receiving signals from an ADP machine only or from both ADP machines and other apparatus. TPKM therefore maintains that, as such, the measures at issue violate Articles II:1(a) and II:1(b) of the GATT 1994.
49. Mr. Chairman, distinguished Members of the Panel, TPKM thanks you for your attention.