# ANNEX C

## SUBMISSIONS OF CHINESE TAIPEI

## ANNEX C-1

## EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION BY CHINESE TAIPEI

## I. INTRODUCTION

1. The *Ministerial Declaration on Trade in Information Technology Products* ("ITA", Information Technology Agreement) was signed during the WTO Ministerial Conference held in Singapore on 13 December 1996. Participants to the ITA agreed to bind and eliminate customs duties and other duties and charges of any kind within the meaning of Article II:1(b) of the GATT 1994 with respect to the products listed in the Attachments to the ITA.

2. As a participant in the ITA, the European Communities ("EC") modified its Schedule in order to undertake its commitments under the ITA. Specifically, the EC bound and eliminated all customs duties and other duties and charges on products listed in Attachment A and Attachment B to the ITA, including, *inter alia*, flat panel displays ("FPDs"), set-top boxes ("STBs") with a communication function, and certain "input or output units" of "automatic data processing machines" and "facsimile machines" ("MFMs").

3. However, as a result of certain EC measures challenged in this dispute, the EC and its member States apply customs duties on the aforementioned products, specifically, a 14% duty on FPDs, 13.9% and 14% duties on STBs and a 6% duty on MFMs. The EC and its member States therefore accord to the commerce of those products from *inter alia* the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu ("TPKM") treatment less favourable than that provided for in the EC Schedule. These customs duties are in excess of those set forth and provided in the EC Schedule and subject to terms, conditions and qualifications not set forth in the EC Schedule. The EC therefore violates Articles II:1(a) and II:1(b) of the GATT 1994.

4. In addition, by failing to publish certain classification measures with respect to STBs promptly and by applying duties prior to their publication, the EC and its member States acted inconsistently with their obligations under Articles X:1 and X:2 of the GATT 1994.

## II. FACTUAL BACKGROUND

### A. THE PRODUCTS AT ISSUE

5. FPDs are display devices capable of receiving signals from automatic data-processing ("ADP") machines only or from both ADP machines and other sources. They normally have a variety of connectors from the traditional VGA connector to Digital Video Interface ("DVI"), among other connectors. The common element to all FPDs concerned is that they can only be used with ADP machines, or with ADP machines and other apparatus.

6. STBs with a communication function are devices that enable a television set to receive and decode digital television ("DTV") signals. They include the capability to connect to the Internet through a modem. Sometimes they also include a hard disk drive (HDD) to record television programmes and to perform other ancillary applications enabled by the DTV provider.

7. MFMs are machines capable of performing two or more of the following functions: printing, scanning, copying and faxing. They can be further divided into two main categories of products. The first category includes MFMs that are connectable to an ADP machine or to a computer network. The

second category includes MFMs that cannot connect to an ADP machine but that operate in connection with a phone line. None of the MFMs at issue include a function using traditional photocopying technology.

## B. THE MEASURES AT ISSUE

### 1. FPDs

8. The EC published Commission Regulation (EC) No. 634/2005 on 26 April 2005 and Commission Regulation (EC) No. 2171/2005 on 29 December 2005. Pursuant to these Regulations, a monitor of the liquid crystal display (LCD) type with a DVI among other connectors was classified under 8528.21.90 and subject to 14% duty. Classification as an output unit of an ADP machine in heading 8471 is excluded because such monitor is not of the kind solely or principally used in an ADP machine system in view of its capabilities to display signals from sources other than an ADP machine, such as a closed circuit television system, a DVD player or a camcorder.

9. On 30 May 2008, the EC published a consolidated version of the Explanatory Notes to the Combined Nomenclature (CNEN), 2008/C 133/01, which confirms that any FPD which is not *exclusively* used with ADP machines or systems will be excluded from the classification subject to zero tariff treatment.

10. On 31 October 2008, the EC published Commission Regulation (EC) No. 1031/2008 amending Council Regulation (EEC) No. 2658/87 and establishing the 2009 CN through which FPDs for use solely or principally with ADP machines are classified under heading 8528. However, the applicable zero tariff was still reserved for FPDs solely or principally used with ADP systems pursuant to the above classification measures.

11. TPKM notes that, through Council Regulation (EC) No. 493/2005 on 16 March 2005, and Council Regulation (EC) No. 301/2007 on 22 March 2007, the EC suspends duties on certain LCD FPDs. The latter expired on 31 December 2008 although the EC Commission has introduced a proposal to expand and prolong the duty suspension.

### 2. STBs

12. In 2006, the EC Commission proposed a draft CNEN to clarify the type of STBs covered by CN subheading 8528.12.91 as STBs with a communication function, and the classification of STBs with HDD. The text of the CNEN was partly adopted by the Customs Code Committee during its meeting of October 2006. However, the vote on the draft CNEN concerning STBs with a HDD was not adopted until the meeting of April 2007.

13. Although the CNEN were adopted in October 2006 and April 2007, they were only published in the Official Journal of the European Union on 7 May 2008. However, they were already applied by EC member States before its publication.

14. As a result of the CNEN, STBs with a HDD are classified as video recorders under CN 8521.90.00 and are subject to a 13.9% customs duty rate. In addition, STBs that include devices that allow access to the Internet, such as ISDN- WLAN- or Ethernet devices, are excluded from duty-free tariff treatment and classified under CN subheading 8528.71.19 subject to a 14% customs duty on the ground that such devices are not considered to be "modems".

### 3. MFMs

15. On 9 March 1999, the EC published Commission Regulation (EC) No. 517/1999 which classifies certain MFMs with the functions of scanning, printing, faxing and photocopying under CN 9009.12.00 subject to a 6% customs duty. The reason is that none of the above functions are considered to give the product its essential character.

16. On 9 March 2006, the EC published Commission Regulation (EC) No. 400/2006 which classifies certain MFMs with the functions of scanning, printing and copying under CN 9009.12.00 subject to 6% customs duty. The reason is that none of the above functions are considered to give the product its essential character.

17. The Customs Code Committee held its 360th meeting in 2005. The Report of this meeting states that "The Committee agreed that if a multifunctional device (fax, printer, scanner, copier) has the capability of photocopying in black and white 12 or more pages per minute (A4 format) this indicates that the product is classifiable in heading 9009 as a photocopying apparatus."

18. On 31 October 2008, the EC published Commission Regulation (EC) No. 1031/2008 which provides that MFMs performing a fax function and capable of coping 12 or less monochrome pages per minute are subject to 0% customs duty. However, MFMs which do not incorporate a fax function or which incorporate a fax function but are capable of copying more than 12 monochrome pages per minute are subject to 6% customs duty.

## III. ARGUMENTS

### A. BY IMPOSING CUSTOMS DUTIES ON CERTAIN FPDS, THE EC IS VIOLATING ARTICLES II:1(A) AND ARTICLES II:1(B) OF THE GATT 1994

#### 1. The EC Schedule incorporates Attachment B to the ITA which obliges the EC to grant duty-free treatment to FPDs for products falling within the ITA

19. According to the EC Schedule, a product covered by the description "flat panel display devices (including LCD, Electro Luminescence, Plasma, Vacuum-Fluorescence and other technologies) for products falling within this agreement, and parts thereof" must be granted duty-free treatment, wherever this product is classified. Therefore, the question in this dispute is to determine the scope of the concession granted with respect to "flat panel display devices". In particular, the Panel must decide whether the EC is entitled to exclude from the scope of the relevant concession any FPDs which can receive signals from an ADP machine and from other sources due to the presence of a DVI, or any other connector. Those questions will be examined below in the light of Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("Vienna Convention").

(a) Ordinary meaning

20. The ordinary meaning of "flat panel display devices" indicates that they are thin screen devices to visualize data or signals. They have a variety of applications including reproduction of signals from ADP machines. However, they can also visualize data from other sources. It follows from the ordinary meaning that a flat panel display device is *not* limited to receiving signals from an ADP machine only.

(b) Context

21. The concession contained in the EC Schedule refers to "flat panel display devices (including LCD, Electro Luminescence, Plasma, Vacuum-Fluorescence and other technologies) *for products falling within this agreement*, and parts thereof" (emphasis added). It is clear that the concession only requires that flat panel display devices be "for" products falling within the ITA. It is therefore sufficient if the flat panel display device is inter alia used with products falling within the ITA and therefore at least with ADP machines. As a result, FPDs are covered by that concession even though they may be able to be connected to apparatus other than ADP machines.

22. Second, the EC Schedule grants duty-free treatment to a number of products even though they may be able to be connected to apparatus other than ADP machines. For instance, a concession is granted to "projection type flat panel display units used with automatic data processing machines which can display digital information generated by the central processing unit". It is sufficient that the flat panel display can display information from an ADP machine. There is no reason to apply a more restrictive interpretation to the FPDs at issue which also concern flat panel display technologies.

23. Finally, in connection with the concession of "flat panel display devices", the EC listed in its modified Schedule 14 CN subheadings under which those devices could be classified. Having analysed the 14 tariff subheadings, TPKM considers that they do not support the proposition that FPDs are excluded from those concessions if they are able to be connected to apparatus other than ADP machines.

(c) Object and purpose

24. TPKM submits that any interpretation that excludes from the broad EC concession any FPDs which are capable of receiving signals not only from ADP machines but also from other sources is contrary to the object and purpose of the GATT 1994 and the ITA.

(d) Other Considerations

25. In practice, the EC classified FPDs capable of receiving signals both from an ADP machine and other sources under heading 8471 or other headings subject to 0% customs duty. Such consistent classification under zero tariff headings was maintained until 2004 when the EC started to reclassify under dutiable headings first plasma FPDs and then LCD FPDs.

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

26. TPKM submits, independently from the concession made with respect to "flat panel display devices" in the EC Schedule, that the concession made with respect to subheading 8471.60 ("input or output units, whether or not containing storage units in the same housing") also covers certain FPDs capable of receiving signals both from an ADP machine and other sources.

(a) Ordinary meaning

27. The ordinary meaning of the term "output units" demonstrates that this term is very broad and covers any element or item capable of delivering information from the computer. It follows from the ordinary meaning that a FPD which can receive signals both from an ADP machine and from other sources shall fall within the scope of "output units". The ordinary meaning of "output unit" does not

support the proposition that a FPD covered by subheading 8471.60 must be capable of receiving signals *only* from a computer system.

(b) Context

28. The EC in its Schedule defines subheading 8471.60 as "input or output units, whether or not containing storage units in the same housing". Reading subheading 8471.60 in conjunction with heading 8471, the term "whether or not containing storage units in the same housing" does not suggest that a FPD capable of receiving signals both from an ADP machine and other sources would be excluded from the definition of this subheading.

29. The structure of heading 8471 contained in the EC Schedule also confirms the broad scope of this heading. It clearly covers all types of data processing technologies. In addition, nothing in the description of the subheadings under heading 8471 suggests that only products capable of working exclusively with an ADP machine may be classified under heading 8471. Therefore, TPKM submits that FPDs capable of receiving signals both from an ADP machine and other sources are covered by subheading 8471.60.

(c) The Harmonized System

30. Note 5 (B) to Chapter 84 lays down the requirements to qualify as a unit of an ADP machine. Among others, Note 5 (B) requires that such unit must be of a kind *solely or principally* used in an automatic data-processing system. It is therefore sufficient that a FPD is *principally* used with an ADP machine to be classified under heading 8471, regardless of whether it is also capable of receiving signals from other sources.

31. Further, Note 5(C) to Chapter 84 confirms a classification under heading 8471even when the units of the ADP machine are presented separately. This Chapter Note does not require exclusive use with an ADP machine.

(d) Other Considerations

32. Under the HS 2007, FPDs previously classified under HS subheading 8471.60 are classified under new HS subheading 8528.51 (CN subheading 8528.51.00) which has the following wording: "of a kind *solely or principally* used in an automatic data-processing system of heading 8471" (emphasis added). The HS 2007 has clearly rejected any requirement for exclusive use by inserting the "sole or principal" criteria in the wording of the subheading 8528.51 itself.

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

33. Through the challenged measures as described above, the EC and its member States are imposing customs duties on certain FPDs, which is inconsistent with their obligations under Articles II:1(a) and II:1(b) of the GATT 1994.

34. TPKM notes that the EC suspends duties on certain FPDs through the aforementioned Council Regulations. TPKM is of the view that the EC would still violate Articles II:1(a) and (b) of the GATT 1994 regardless of the duty suspension. The violation would exist because the benefit of the zero tariff is made dependent on a number of conditions and terms not set forth in the EC Schedule.

35. First, duty suspensions may be terminated unilaterally as soon as the EC considers that the conditions for their continuation are no longer fulfilled. Second, given the fact that the aforementioned Council Regulations only grant a duty suspension on some types of FPDs, there are various types of FPDs that fall outside the scope of the duty suspension at issue and remain subject to the 14 % customs duty.

B. BY IMPOSING CUSTOMS DUTIES ON CERTAIN STBS WITH A COMMUNICATION FUNCTION, THE EC IS VIOLATING ARTICLES II:1(A) AND II:1(B) OF THE GATT 1994

**1. The EC Schedule incorporates Attachment B to the ITA which obliges the EC to grant duty-free treatment to STBs with a communication function**

36. According to the EC Schedule, a product covered by the description "STBs which have a communication function" must be granted duty-free treatment, wherever this product is classified. Therefore, the question in this dispute is to determine the scope of the concession granted with respect to STBs. In particular, the Panel must decide whether the EC is entitled to exclude from the scope of the relevant concession any STBs with a HDD or STBs that include devices, such as ISDN- WLAN- or Ethernet modems, allowing access to the Internet on the ground that such devices are not "modems". Those questions will be examined below in the light of Articles 31 and 32 of the Vienna Convention.

(a) Ordinary meaning

37. As set forth in the EC Schedule, the product covered by the concession at stake is defined as "Set top boxes which have a communication function: a microprocessor-based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange". TPKM will review first the text of the concession as defined before the colon, and then that as defined after the colon.

*(i) "Set-top boxes which have a communication function"*

38. The ordinary meaning of the text of the concession is clear. It covers STBs with any type of communication function. The concession does not require that the STBs should have only a communication function. Therefore, it is sufficient if the STB has a communication function, although it may have additional functions, such as a video recording function.

*(ii) "a microprocessor-based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange"*

39. Examining the terms after the colon, TPKM has not found any ground that may justify excluding from the scope of the concession at stake STBs which *in addition to* the communication function, are able to perform a recording or reproducing function. Moreover, the analysis of the term "modem" has shown that this term has a very broad scope.

(b) Context

40. It is recalled that the EC in its Schedule cited the following 3 subheadings next to STBs in the second list: 8517.50.90, 8517.80.90 and 8525.20.99. In addition, 8528.12.91 was also mentioned as of 2000. Having analysed the terms of these CN subheadings, TPKM notes that these terms do not support that STBs that perform functions in addition to the communication function cannot be treated

as falling under the coverage of the concession at stake. Similarly, they do not require that the STBs include specific types of modems in order to fall under one of these CN subheadings.

(c) Object and purpose

41. TPKM submits that any interpretation which would exclude from the EC concession any STBs with other functions in addition to the communication function or STBs that do not incorporate the type of modems that are listed in the CNEN at issue is contrary to the object and purpose of the GATT 1994 and the ITA.

(d) Other Considerations

42. In practice, the treatment to be given to certain STBs which have a communication function was first discussed in 2005 and that a first decision regarding these matters was not taken until October 2006. Between year 2000 and 2006, exporters were benefiting from duty-free treatment, as forseen under the EC Schedule.

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

43. Through the challenged measures which are described above, the EC and its member States are imposing customs duties on certain STBs with a communication function, which is inconsistent with their obligations under Articles II:1(a) and II:1(b) of the GATT 1994.

C. BY NOT PUBLISHING THE AMENDED EXPLANATORY NOTES RELATED TO THE TARIFFICATION OF CERTAIN STBS FOR MORE THAN ONE YEAR, THE EC IS VIOLATING ARTICLE X:1 OF THE GATT 1994

44. Article X:1 of the GATT 1994 provides that "Laws, regulations, judicial decisions and administrative rulings of general application, …, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them".

45. In the present case, the fact that the CNEN at issue was adopted in October 2006 and April 2007 but not published until May 2008 is clearly inconsistent with the requirement of "prompt" publication included in Article X:1 of the GATT 1994.

D. BY APPLYING DUTIES ON CERTAIN STBS PRIOR TO THE OFFICIAL PUBLICATION OF THE MEASURES IMPOSING THE DUTIES, THE EC IS VIOLATING ARTICLE X:2 OF THE GATT 1994

46. Article X:2 of the GATT 1994 provides that "No measure of general application…, shall be enforced before such measure has been officially published."

47. Some EC member States applied the CNEN on STBs before it was officially published. As a result, customs duties were applied before publication of the CNEN. Therefore, the EC and its member States acted inconsistently with its obligations under Article X:2 of the GATT 1994.

E. BY IMPOSING CUSTOMS DUTIES ON CERTAIN MFMS, THE EC IS VIOLATING ARTICLES II:1(A) AND II:1(B) OF THE GATT 1994

**1. The EC Schedule incorporates Attachment A to the ITA which obliges the EC to grant duty-free treatment to "input or output units" and to "facsimile machines"**

48. The EC committed itself by accepting the ITA to eliminate all customs duties applicable to "input or output units" of ADP machines of HS subheading 8471.60 and facsimile machines of HS subheading 8517.21. The Panel must decide whether the EC is entitled to exclude from the scope of the relevant concession all MFMs connectable to an ADP machine or network and without a facsimile function; and those MFMs connectable to an ADP machine or network and including a facsimile function, when they are capable of copying more than 12 monochrome pages per minute. The Panel must also determine if certain MFMs which cannot connect to an ADP machine but operate in connection with a telephone network can be excluded from the concession. Those questions will be examined below in the light of Articles 31 and 32 of the Vienna Convention.

(a) Ordinary Meaning

*(i) "Input or output units" and "Printers"*

49. The terms "input units" and "output units" within the meaning of HS subheading 8471.60 are very broadly defined. Indeed, "output units" refer to any apparatus or thing which receives data or information from ADP machines and "input units" cover any apparatus or thing which provides data or information to ADP machines. Thus, the MFMs capable of connecting an ADP machine constitute "input units" and "output units" within the meaning of HS subheading 8471.60.

50. Among the concessions made with respect to "input or output units" of ADP machines, one relates to "printers" (CN subheading 8471.60.40). The term "printer" refers to an output device which produces a printed record of data, text, etc. TPKM notes that the term "printer" in no way requires the information or data that are printed to come exclusively from an ADP machine. It also never refers to a maximum or minimum number of pages that could be produced in order to be regarded or considered as a "printer". TPKM therefore submits that the MFMs connectable to an ADP machine fall under that concession, i.e. that they are not only "input or output units" of ADP machines, but more specifically "printers".

*(ii) Facsimile machines*

51. The term "facsimile machines" refers to apparatus which reproduce graphic matter by scanning an original and which then transmit the scanned data by means of signals sent over a telephone network. TPKM submits that MFMs at issue that cannot be connected to computers but operate in connection with a telephone network to transmit data are clearly covered by the category of "facsimile machines".

*(iii) Photocopier/photocopying process*

52. The EC through the measures at issue consistently considers the MFM at issue as photocopying apparatus. However, the photocopying process refers to a process whereby a copy is being produced by the action of light on a photo-sensitive surface. There is a direct link between the action of light and the copy being produced. The term "photocopy" thus does not cover the reproduction of originals by printing or transmitting a previously scanned data file as it is done by MFMs.

(b) Context

53. As stated above, the structure of HS heading 8471 clearly confirms the broad scope of heading 8471 as covering all types of data processing technologies. Similarly, the structure of heading 8517 also supports its broad scope. In particular, this heading includes a residual subheading, i.e., "other apparatus" (subheading 8517.80) that confirms the intent of that heading to cover all "electrical apparatus for line telephony or line telegraphy". On the contrary, the wording of heading 9009, unlike headings 8471 and 8517, includes a very limited category of apparatus. It only covers photo-copying apparatus and thermo-copying apparatus as well as their parts and accessories. Unlike headings 8471 and 8517, heading 9009 does not include a residual subheading.

54. Next, it is clear from the wording of Chapters 84 and 85 that they intend to cover a broad range of apparatus. Chapter 84 covers machinery and mechanical appliances and parts thereof while Chapter 85 covers electrical machinery and equipment and parts thereof. In contrast, Chapter 90 covers very specific instruments or apparatus which are exhaustively listed, namely optical, photographic, cinematographic, measuring, checking, precision, medical or surgical instruments or apparatus. Chapter 90 should therefore be restrictively interpreted, unlike Chapters 84 and 85.

55. Finally, TPKM refers to headings 8525 and 9006 of the EC Schedule which both include cameras in order to illustrate the distinction which is being made in the EC Schedule between digital and non-digital products. In the EC Schedule, digital cameras are classified in HS subheading 8525.40, and more precisely, under CN subheading 8525.40.11 as "still image video cameras – digital" while photographic cameras are classified in HS heading 9006. This distinction is important and supports the interpretation that "photocopying apparatus" which are included in Chapter 90 do not cover digital copying.

(c) The Harmonized System

56. As indicated above, pursuant to Note 5 (B) to Chapter 84, a "unit" of an ADP machine must be of a kind solely or principally used in ADP systems. Most of the functions of the MFMs at issue, i.e., printing and scanning, are designed to be used in connection with an ADP machine and are therefore functions of an apparatus principally used with an ADP machine.

57. TPKM notes that such principal use is actually not even required for the MFMs at issue. Note 5(D) to Chapter 84 clarifies that a printer remains covered by HS heading 8471 even if it is not used exclusively or even principally with an ADP system. Therefore, to the extent that the MFMs at issue are printers, they do not need to be used solely or principally with an ADP system in order to fall within HS heading 8471.

58. Finally, the HSEN to heading 9009 confirms that the term "photocopying" does not include the conversion of an image into digital data by a scanner and the printing of that data by the printer.

(d) Object and Purpose

59. TPKM submits that any interpretation which excludes from the EC concession MFMs which do not incorporate a fax function or which incorporate a fax function but are capable of copying more than 12 monochrome pages per minute is contrary to the object and purpose of the GATT 1994 and the ITA. The exclusion of certain MFMs with a facsimile function and which cannot connect to an ADP machine or computer network is also contrary to the object and purpose of the GATT 1994 and the ITA.

(e) Other Considerations

*(i) Certain BTIs with respect to MFMs*

60. In practice, the classification of MFMs capable of connecting to ADP machines under headings 8517 or 8471 is confirmed by various BTIs. The multifunctional nature of the device did not in any case justify the classification as copier unless the device could not be connected to an ADP machine or network and it did not have a fax connection.

*(ii) Certain HS documents*

61. Under the HS 2007, the scope of HS heading 8443 has been broadened in order to cover MFMs previously covered by HS headings 8471 and 8517. Heading 8443 now includes all printers, facsimile machines, photocopiers and digital copiers as well as MFMs. Both the structure of HS heading 8443 and the HSEN to this heading confirm the differences between digital copying and photocopying.

62. Furthermore, new Chapter Note 5(D) to Chapter 84 under HS 2007 states that heading 8471 does not cover "printers, copying machines, facsimile machines, whether or not combined" when presented separately. By finding it necessary to expressly exclude MFMs from the scope of heading 8471, this Note acknowledges that such MFMs were properly classified in heading 8471 under the HS 96.

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

63. Through the challenged measures as described above, the EC and its member States are imposing customs duties on certain MFMs, which is inconsistent with their obligations under Articles II:1(a) and II:1(b) of the GATT 1994.

## IV. CONCLUSIONS

64. For all the above reasons, TPKM requests that the Panel find that:

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

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

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

(d) the EC's measures concerning "input or output units" and facsimile machines are inconsistent with Articles II:1(a) and II:1(b) of the GATT 1994.

## ANNEX C-2

## EXECUTIVE SUMMARY OF THE ORAL STATEMENT BY CHINESE TAIPEI AT THE FIRST SUBSTANTIVE MEETING

1. For the first time in the history of its WTO membership, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu ("TPKM") has seen itself obliged to lodge a WTO complaint. It has taken this unprecedented step because of the importance of the trade flows concerned as well as the manifest nature of the violations committed by the EC.

2. As coordinated among complainants, TPKM in this opening statement will concentrate on one of these products, namely, FPD devices. As for MFMs and STBs, TPKM supports what has been said by the United States and Japan in their opening statements.

### I. PRELIMINARY REMARKS

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

4. The ECJ, the highest Court in the EC, in *Kamino* has held that the words "solely or principally" which determine whether a product can be considered to fall under HS subheading 8471.60 cannot be read as requiring the exclusive use with an ADP machine. The ECJ in *Kamino* therefore confirms that the EC has no legal basis to exclude FPD devices from classification under HS subheading 8471.60 simply because such apparatus may also be able to connect to a device other than an ADP machine, for instance, simply because the FPD device has a DVI connector.

5. The EC in its submission made some preliminary comments contending that TPKM failed to make a prima facie case with respect to FPD devices. None of these comments are correct.

6. First, the EC seems to argue that it is unaware of which product TPKM is precisely complaining about the treatment. As stated in its submission, TPKM's complaint relates to the treatment given by the EC to all FPD devices which are capable of receiving and reproducing signals from ADP machines only, and from both ADP machines and other apparatus. The FPD devices at issue may use various technologies, such as LCD, plasma, OLED, etc, other than CRT technology.

7. Secondly, TPKM has never alleged that the EC obligations flow directly from the ITA. It is clear from its submission that TPKM considers that the EC has violated its WTO obligations by according treatment to the products at issue which is less favourable than that provided for in its Schedule.

8. Thirdly, the fact that the EC has temporarily suspended its customs duties on part of the products concerned by this dispute does not remove its Article II GATT 1994 violation. Indeed, such suspension is temporary, and conditional upon a number of terms and conditions not included in the EC Schedule. The EC has failed even to respond to this argument.

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

## II. ARGUMENTS

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

11. The EC also incorporated the products listed in Attachment B to the ITA into its Schedule, including, among others, FPD devices. For FPD devices covered by Attachment B and incorporated in the EC Schedule, TPKM submits that the Panel's interpretation in this dispute should begin with the terms of the headnote contained in the EC Schedule. This is because, in the headnote, the EC made the commitment that with respect to any product described in Attachment B, to the extent not specifically provided for in the Schedule, the customs duties on such product shall be bound and eliminated, wherever the product is classified.

12. The meaning of the words "wherever the product is classified" is both crucial and self-explanatory. Regardless of the specific heading or subheading under which a particular product falls in the EC Schedule, any product meeting the description of FPD devices contained in the EC Schedule must be granted duty-free treatment, "wherever the product is classified".

13. There is therefore no doubt that the 14 CN subheadings next to the description of FPD devices in the headnote in the EC Schedule are only illustrative, rather than exhaustive. The EC's argument that its obligations with respect to FPD devices under Attachment B are only limited to those HS codes is incorrect. Furthermore, in doing so, the EC fails to give proper meaning to the words "*wherever the product is classified*".

### A. ATTACHMENT B

14. It follows from the ordinary meaning that an FPD device is not limited to receiving signals from an ADP machine only. The rest of the language in the concession as well as the context supports this conclusion.

15. The product at issue is described as "*for* products falling within this agreement", it is clear that the concession requires that FPD devices be "for" products falling within the ITA. The ordinary meaning of "for", as found in dictionaries, is extremely wide and covers many different possible situations. In light of this, TPKM concludes that FPD devices "for products falling within this agreement" should be interpreted as covering FPD devices which are capable of operating with or being incorporated in ITA products even though other uses may be possible.

16. This conclusion is further supported by other concessions contained in the EC Schedule. For instance, both the concession with respect to "projection type flat panel display units" and the 14 subheadings next to the description of FPD devices confirm that FPD devices are not excluded from

those concessions on the mere ground that they are able to be connected to apparatus other than ADP machines.

17. As required by the Panel and Appellate Body in previous disputes, the concessions at issue must be interpreted in the light of the object and purpose of the WTO Agreement and GATT 1994, which is, among other things, to further the expansion of trade in goods and the substantial reduction of tariffs.

18. In this regard, TPKM submits that any interpretation that excludes from the EC concession FPD devices which are capable of receiving signals from both ADP machines and other sources, for instance because the FPD devices have a DVI connector, is contrary to the objective of expanding world trade in IT products as shed light upon not only by the ITA, but also by the WTO Agreement and the GATT 1994.

19. Finally, the EC tries to construct an argument by relying on the negotiating history of the ITA. However, in the present case, references made by the EC to the alleged negotiating history are partial and unconvincing. TPKM does not see how those references can be used to clarify the scope of the concessions at issue.

B. ATTACHMENT A

20. TPKM notes that the EC has not addressed its argument on Attachment A in its first written submission.

21. TPKM submits, independently from the concession made with respect to "flat panel display devices" in the EC Schedule, that the concession made with respect to subheading 8471.60 also covers FPD devices capable of receiving signals both from an ADP machine and other sources.

22. The ordinary meaning of the term "output units" in subheading 8471.60 demonstrates that this term is very broad and does not support the proposition that an FPD device covered by subheading 8471.60 must be capable of receiving signals only from a computer system.

23. This conclusion is supported by the HS 1996. Note 5 (B) to Chapter 84 of this HS lays down the requirements to qualify as a unit of an ADP machine. Among others, Note 5 (B) requires that such unit must be of a kind solely or principally used in an ADP system. It is therefore sufficient that an FPD device is principally used with an ADP machine to be classified under heading 8471, regardless of whether it is also capable of receiving signals from other sources. Under the EC measures, however, any device capable of receiving signals from other sources (as well as some that cannot) is subject to duties.

## III. CONCLUSION

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

## ANNEX C-3

## CLOSING ORAL STATEMENT BY CHINESE TAIPEI AT THE FIRST SUBSTANTIVE MEETING

Mr. Chairman, distinguished Members of the Panel.

1. During the past three days, it has been obvious that the EC has failed to address the claims and arguments put forward by the co-complainants in this dispute.

2. The EC has continuously attempted to reframe the dispute as a dispute over the customs classification of products. It is not. The matter before this panel is to which extent the EC's contested measures necessarily result in violation of Article II of the GATT 1994. The difference is fundamental. If the issue was one of classification, the exercise would be to properly apply the relevant rules of classification. However, as this dispute concerns the question whether the tariff treatment resulting from the EC measures is consistent with the EC Schedule, it is necessary to examine the EC's concessions in accordance with the Vienna Convention on the Law of Treaties 1969. It is striking that while the complainants have analysed each of the concessions concerned starting from the ordinary meaning of the terms used, the EC simply fails to do so.

3. We would like to submit – once again – that the HS is clearly not relevant at all for the interpretation of those concessions that have been made by the EC pursuant to Attachment B to the ITA. Actually, these concessions have been defined not by the HS but by product descriptions phrased in commercial terms. And the EC Schedule provides that such products shall benefit from duty-free treatment "wherever [they] are classified".

4. We note that the EC has kept alleging that it does not know what it is accused of; claiming a lack of clarity as regards both the identification of the products and measures at issue. Yet, as underlined by the Appellate Body in *EC – Chicken Cuts*, "the identification of the products at issue must flow from the specific measures identified in the panel request.…In other words, it is the measure at issue that generally will define the product at issue."[1]

5. The co-complainants have clearly identified the contested measures in our panel request.

6. We would like to use one of the measures at issue, the CNEN, to demonstrate how products at issue are defined by the measures with respect to FPD devices. According to the EC Schedule, all FPD devices for ADP machines shall enjoy duty-free treatment. However, the CNEN excludes from duty-free treatment all FPD devices which are capable of receiving signals from apparatus other than an ADP machine or which can be connected to a video source other than an ADP machine or even simply because they have a DVI interface.

### I. FPDS

7. We would like to add a few more words on the issue of FPD devices, more precisely, on the EC Schedule concerning "flat panel display devices."

8. The EC argued that the CN codes listed next to the Attachment B product description are exhaustive and define the full scope of the Attachment B concessions. This interpretation is simply

[1] Appellate Body Report, *EC-Chicken Cuts*, para. 167.

not acceptable as it reduces to inutility the headnote that provides expressly duty-free treatment for this concession wherever the product is classified.

## II. MFMS

9. We agree with the closing statements made by the co-complainants on MFMs. I would, however, like to add the following comments.

10. Contrary to the EC submission and as already mentioned above, the question to be resolved is not one of classification. However, TPKM notes that insofar as classification rules are relevant as context, the EC errs in its presentation of the applicable classification rules, in some cases, even in flagrant contradiction with the rulings of the ECJ.

11. In the case of MFMs with ADP connectivity and with a facsimile function, the EC classifies them under Heading 9009.12 whenever the copying speed exceeds 12 ppm. Manifestly, the EC has provided no justification why an MFM with a copying speed which exceeds 12 ppm is automatically a photocopier.

12. Unfortunately, the EC has completely failed to address the above issues in either its First Written Submission or at the first substantive meeting.

## III. STBS

13. TPKM also agrees and fully supports the closing remarks made by its co-complainants with regard to STBs. TPKM would only like to add the following comment.

14. The EC argued that STBs must be reviewed on a "case-by-case basis". However, the EC does not carry out such case-by-case analysis. For instance, any STB with a hard disk is excluded from the duty-free treatment and this is regardless of the capacity of the hard disk. The submission from the EC that some STBs with a hard disk are subject to duty free treatment is clearly not in conformity with the measures at issue adopted by the EC itself.

Mr. Chairman, distinguished Members of the Panel, TPKM thanks you for your attention.

## ANNEX C-4

## EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION BY CHINESE TAIPEI

### I. HORIZONTAL ISSUES

#### A. THE ITA

1. The ITA is part of the "context" within the meaning of Article 31.2 (b) of the *Vienna Convention* for the purposes of interpreting the EC Schedule. Indeed, the ITA is an "instrument which was made by one or more parties in connection with the conclusion of the treaty" and has been "accepted" by all WTO Members as an instrument related to the Schedule of Concessions. Moreover, the ITA is also relevant to determine the object and purpose of the treaty for the purposes of this dispute.

2. The EC agrees with the above but claims that complainants have arbitrarily selected some parts of the ITA, taken them in isolation and "imported" them into the interpretative exercise concerning the EC Schedule.

3. The EC's claim is erroneous. The analysis of the ITA as a whole clearly supports the overarching importance for the interpretation that the ITA's purpose is to achieve maximum freedom for world trade in IT products. It is the EC's overemphasis on point 3 of the Annex to the ITA concerning future negotiations that constitutes in fact a selective reading of the ITA.

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

5. Indeed, these documents are informal documents exchanged among some of the participants to the ITA that have not been published or made available to all the parties. TPKM did not and does not have access to all the documents submitted by the EC as being part of the "negotiating history" and therefore requests the Panel to refrain from using them to determine the interpretation of the EC's concessions.

6. In any case, recourse to supplementary means of interpretation is only possible when "interpretation in the light of Article 31 leaves the meaning of a treaty provision ambiguous or obscure, or, in order to confirm the meaning resulting from the application of the interpretation methods listed in Article 31." This is not the case here. The meaning of the concession as established pursuant to Article 31 of the *Vienna Convention* is very clear, as it was detailed in TPKM's first written submission and second written submission.

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

7. That the present dispute deals with tariff treatment and not with customs classification has important practical effects.

8. First, it means that rules of classification, in particular the HS, are not central to this dispute and can at the most be relevant as part of the context only. Being part of the context, the HS is merely one element among others and is neither decisive nor dispositive of the interpretative exercise.

Moreover, it implies that the Panel should refrain from applying these rules automatically, for instance, GIR3(c).

9. Second, it means that rules of customs classification do not have equal relevance when interpreting the concessions. Their relevance varies depending on the concession concerned. In that respect, the HS is not relevant for the interpretation of the concessions made by the EC pursuant to Attachment B to the ITA, given that such concessions are based on product descriptions and not on HS headings.

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

10. First, when making an "as such" claim, the complaining party does not have to bring evidence concerning *the application* of the measures being challenged, as underlined by the Appellate Body in *US – Carbon Steel*. The evidence will in the first place take the form of the relevant legislation. It may, but need not, be supported by evidence of the application of such legislation.

11. Second, in order to succeed with an "as such" claim, it is not necessary to demonstrate that the measures at issue will lead *in all cases* or *always* to a WTO inconsistent result. As underlined by the Panel in *China – Auto Parts*, it is sufficient that a specific *aspect* or an *element* of the criteria set out in the measures at issue necessarily leads to a violation of the WTO Agreements.

D. ALL MEASURES BEING CHALLENGED ARE IN FORCE AND RELEVANT

12. First, with respect to certain measures challenged, the EC is claiming that they have lost their relevance since the CN codes indicated in these measures have changed with the entry into force of the CN 2007.

13. This is not correct. Each of these measures is valid and has legal effect, and will only disappear from the EC legal order when they are expressly revoked by the EC Commission or expressly annulled by the ECJ. This is supported by the way in which the EC has dealt with modifications resulted from past changes to the HS or the CN, for instance, the Commission Regulation (EC) No. 705/2205 that has expressly amended and repealed certain regulations on the classification of goods in the CN. Furthermore, this is consistent with the principle of legal certainty as acknowledged by the EC itself.

14. Second, the EC seems to have argued that measures which are incompatible with the interpretation by the ECJ in the *Kamino* and *Kip* cases have become invalid. However, in these cases, the ECJ has not annulled any measure and such measures are thus, as a matter of law, still in force and applicable. The measures will only disappear from the EC legal system when they are expressly revoked by the EC Commission or expressly annulled by the ECJ. There is no such thing as implied annulment or annulment by analogy under EC Community law.

15. Third, TPKM would like to clarify that, contrary to what the EC claims, CNEN are legally binding. The statement of the ECJ that "CNEN do not have legally binding force" refers to the fact that they cannot alter the scope of the CN but certainly not that customs authorities are free to disregard them. This is supported by the following facts: first, BTIs cease to be valid where they are no longer compatible with the interpretation of the CN by reason of an amendment to the CNEN (Article 12(5) of the CCC); second, the Chairman of the Nomenclature Committee stated that "as soon as an opinion has been voted, member States can issue BTIs for the products concerned, even before the measure has been adopted by the Commission and published in the Official Journal"; third, if member States do not follow CNEN and collect less customs duties as a result, the EC Commission

is entitled to claim the difference in the member States' budget and retains the option of instituting proceedings against that member State for infringement of Article 10 of the EC Treaty. As underlined by the EC in *EC – Selected Customs Matters*, CNEN are part of the "tools for ensuring a uniform classification practice within the EC". Finally, it must be emphasized that the fact that CNEN cannot contradict the wording of the CN does not mean that, as the EC appears to claim, customs authorities would be free to disregard a CNEN at its own initiative when they consider that it contradicts the wording of the heading. A national authority will not disregard a CNEN, though contrary to the wording of a heading, until it has been amended by the EC Commission.

16. Furthermore, TPKM would like to underline that, in light of the clarifications made by the Appellate Body in *US – Corrosion-Resistant Steel*, CNEN necessarily constitute "measures" that can be challenged "as such".

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

17. First, through the headnote included in its Schedule, the EC committed to grant duty-free treatment to all products described in or for Attachment B, wherever they are classified. The various CN codes identified by the EC at the time of implementing the ITA merely indicate where the EC thought the products concerned were falling in the CN. However, they do not "exhaust" the definitions included in the EC Schedule. The EC's interpretation is contradicted by the text of the headnote, reducing it to inutility and further contradicted by the text of the ITA.

18. Second, technological development does not have an impact on tariff treatment. It is TPKM's view that, while concessions are made at one point in time, they are not restricted, as the EC appears to submit it, to the products existing at that time. What is relevant is to determine whether a product, on the basis of its objective characteristics, falls within the scope of the concessions interpreted on the basis of its ordinary meaning, context and object and purpose. As long as the product at issue meets the description of the product covered by the concession, it does not matter whether this product is technologically more advanced than the products existing at the time the concession was made. That product must receive the treatment offered by the concession. This is consistent with the position expressed by the panel in the GATT dispute concerning "Greek Increase in Bound Duty."

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

### A. GENERAL ISSUES

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

19. The EC complains about the alleged lack of precise definition of the products at issue. In addition to the fact that TPKM has provided a precise definition of the product at issue, TPKM would like to underline that the Appellate Body clarified in *EC – Chicken Cuts* that it is the measure at issue that will generally define the product at issue. In this dispute, the complainants have clearly identified the contested measures that accordingly have defined the products at issue.

20. The EC's confusion seems to flow from a wrong understanding of the claims being made in this dispute. The products at issue are not limited to those mentioned as examples such as LCD monitors with DVI. The products at issue are those defined by the measures at issue and the claims are being made with respect to certain aspects of the measures that necessarily lead to a WTO inconsistent outcome.

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

21. The EC's claim about TPKM's failure to identify the concession concerned and where it is provided for is incorrect. TPKM's first written submission has clearly identified the precise content of the concession. Moreover, contrary to the EC's claim, TPKM has also made clear that the CN codes indicated by the EC are illustrative only. They may be used as "context" but in no way determine the scope of the concession that is based on the product description. Finally, TPKM disagrees with the EC's arguments that when the EC concession is in its Schedule and identified with a given HS/CN code, some differences in its interpretation may be allowed. This position amounts to stating that WTO Members have agreed that there could be difference between WTO Members in the scope of concessions which are identically worded, depending on the codes listed alongside the product description. This is contrary to the wording of the ITA and the EC's concession.

**3. The EC has misrepresented the complainants' claim**

22. The EC has misrepresented the complainants' claim. TPKM has not submitted that the presence of a DVI connector determines whether an LCD monitor must benefit from duty-free treatment. On the contrary, TPKM has argued that the presence of a DVI cannot automatically exclude any FPD device from duty-free treatment. This is actually the effect of the measures at issue.

23. The EC argues that it is incorrect to claim that the EC will impose duties based on the mere fact that the FPD device "might" be used with something other than an ADP machine or the fact that it is merely capable of being connected to a non-ADP machine. The EC refers to item 1 in Regulation (EC) No. 2171/2005 to support its argument. However, item 1 in the said Regulation is not subject to this dispute. Furthermore, the product described in item 1 can only be used together with an ADP machine. It is not able to reproduce correctly signals received from any external source other than an ADP machine.

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

24. TPKM's complaint is not limited to "multifunctional monitors" but covers all FPD devices which can receive and reproduce signals from an ADP machine and this is so regardless of whether the FPD device can also receive and reproduce signals from other sources.

25. The fact that a product with additional or enhanced features that did not exist at the time the concession was made does not make that product a "new" product, and is not a reason to exclude that product from the scope of the concession.

**5. The measures at issue**

26. There are five measures at issue. It should be noted that (i) Council Regulation (EC) No. 179/2009 referred to by the EC as replacing Council Regulation (EC) No. 493/2005 merely establishes a new duty suspension which remains at the discretion of the EC and is limited in time; (ii) Commission Regulations (EC) No. 634/2005 and No. 2171/2005 have not lost their relevance as claimed by the EC since they have not been repealed or amended by any other regulation or annulled by the ECJ; (iii) the EC's statement that Council Regulation (EC) No. 2658/87 as last amended applies a zero duty to monitors of the "kind solely or principally used in an automatic data processing system of heading 8471" fails to take into account that FPD devices are subject to a zero percent duty regardless of the sole or principal use with an ADP machine pursuant to the EC concession based on Attachment B of the ITA; and (iv) CNEN are in fact legally binding.

B. INTERPRETATION OF THE CONCESSIONS

**1. Ordinary meaning**

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

27. TPKM has made a *prima facie* case that the products at issue meet the ordinary meaning of the concession concerning heading 8471.60 with respect to input or output units of ADP machines. It is thus up to the EC to demonstrate that the products at issue do not fall within that concession as it claims. However, the EC has simply failed to demonstrate this.

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

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

29. Contrary to the EC that failed to review any definition of the words of the concession, TPKM has carefully reviewed the ordinary meaning of the concession, and in particular of the term "flat panel display devices… for products falling within this agreement." There is nothing in the ordinary meaning of these terms that would imply a limitation such as receiving signals from ADP machines only.

30. Contrary to the EC's suggestion, the use of technical dictionaries from this decade does not necessarily invalidate its relevance. Indeed, the descriptions of "display" and "panel display" in both editions of 1993 and 2003 of the *McGraw-Hill Dictionary of Scientific and Technical Terms* are exactly identical.

**2. Context**

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

31. The CN codes identified by the EC next to the product description of "flat panel display devices for products falling within this agreement" may be analyzed as part of the "context." Contrary to the EC's approach that focuses on a single CN code among the 14 identified in the list, a proper analysis should examine all 14 CN codes. By focusing on one CN code, the EC has conveniently avoided examining the reference to subheading 8531.20 where certain FPD devices can also be classified.

32. The EC submits that the definition of "monitors" in another product description is "by far the most important contextual relevance" and seeks to strengthen its position by referring to the fact that the definition of "monitors" expressly states that "the agreement does not, therefore, cover televisions." However, this statement is tied to the CRT monitor only and cannot be read into other concessions concerning, in particular, "flat panel display devices."

33. Regarding the "exclusion of video monitors and televisions," whether a device on which one can watch television or video is covered by a particular concession depends on the terms of that concession. If a device is a "flat panel display device for products falling within the ITA," it is covered irrespective of whether or not it incorporates a TV tuner. There is simply no basis to read

additional limitations into the concession for flat panel display devices that do not exist in the text of that concession, and doing so would be utterly contrary to the principles of treaty interpretation reflected in the *Vienna Convention*.

(b) Schedules of other ITA participants

34. As part of the "context," the EC also refers to the Schedules of other participants. However, it is not the tariff classification of the FPD devices under the subheadings identified in the list that is relevant but the duty treatment. Moreover, the EC ignores that heading 8531 is also identified by a large number of participants and that subheading covers FPD devices, whether or not they can be connected to a source other than an ADP machine.

**3. The Harmonized System**

35. The EC elaborated on the HS at length and concluded that the HSEN to headings 8471 and 8528 require both the exclusive use with an ADP machine and the sole presence of connectors characteristic of data-processing systems to classify FPD devices under heading 8471. The EC alleges that these were precisely the requirements that the EC used to classify FPD devices under heading 8471. TPKM would like to make the following comments regarding the EC's analysis of the HS in this regard.

36. First, the HS may be used as "context" only for the analysis of the EC concessions made by the EC pursuant to Attachment A to the ITA. Indeed, for the concession made with respect to "flat panel display devices for products falling within this agreement" pursuant to Attachment B to the ITA, the duty-free treatment must apply regardless of whether the flat panel display devices are solely or principally for use with an ADP machine and regardless of their "principal function."

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

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

**4. The *Kamino* case**

39. The *Kamino* judgment indirectly clarifies that the EC has violated its concession covering input or output units of subheading 8471.60. Indeed, it confirms that the EC incorrectly excludes FPD devices from the scope of subheading 8471.60 on the sole ground that they can be connected to a source other than an ADP machine, or due to the presence of a particular type of connector. It is therefore surprising that the EC still tries to support its positions with this ruling. The conclusions drawn by the EC from the *Kamino* case are incorrect.

40. It is not necessary for the EC to explain how it will proceed to classify FPD devices following *Kamino*. Since FPD devices must be subject to duty-free treatment wherever they are classified, such classification exercise is not relevant. Moreover, if the EC intends to implement the *Kamino* judgment on the basis of the criteria in the HSEN, it is likely to continue infringing the obligations undertaken

in its Schedule with respect to FPD devices. Finally, for "multifunctional monitors," the EC's position that, it is impossible to determine the principal use or function and GIR3(c) is to be applied in all cases, will similarly lead to a violation of the EC obligations under its Schedule. In any case, the EC's position ignores that it should lead to a classification under heading 8531 or 9013 which are duty-free.

**5. Object and purpose**

41. TPKM's arguments focus on the object and purpose of the GATT 1994. First, concessions should be interpreted "so as to further the general objective of the expansion of trade in goods and the substantial reduction of tariffs" even if "such an interpretation is limited by the condition that arrangements entered into by Members be reciprocal and mutually advantageous." That the concessions are to be interpreted so as to further the general objective of the expansion of trade is supported by the object and purpose of the ITA itself. Second, concessions should be interpreted so as to promote the objective of security and predictability. In that respect, the EC's interpretation that results in excluding products from the scope of the concession because they would be "new" runs against the objectives of security and predictability. Likewise, the argument that the EC's duty suspension, which is temporary and uncertain, could "save" the measures at issue from violating Article II of the GATT also contradicts the objects of security and predictability.

**6. Supplementary means of interpretation**

(a) The classification practice of ITA participants is irrelevant

42. The "classification" practice of the other ITA participants regarding "flat panel display devices for products falling within this agreement" is irrelevant since the concession has been made "wherever the product is classified."

(b) The negotiating history is irrelevant

43. The documents submitted by the EC as being the "negotiations" do not constitute "supplementary means" of interpretation and can therefore not be used in the framework of this dispute. In addition, recourse to Article 32 of the Vienna Convention is not necessary in this dispute since the scope of the concession is clear pursuant to the sole use of the interpretative tools of Article 31 of the Vienna Convention.

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

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

45. Although the EC has been providing duty suspension for certain FPD devices, it does not "save" the measures at issue from being inconsistent with Article II:1(a) and II:1(b) of the GATT 1994, as the EC submits it.

46. First, duty suspension is temporary. Whether a duty suspension will be renewed depends on a number of factors including economic factors. The EC thus necessarily violates Article II:1(b) of the GATT 1994 since it makes the benefit of a zero customs duty dependent on a number of terms and conditions not set forth in its Schedule.

47. Second, not all FPD devices that should have received duty-free treatment benefit from the duty suspension. Under Regulation (EC) No. 179/2009, the duty suspension is not applicable to colour monitors having a screen size of more than 22 inches or an aspect ratio different from 1:1, 4:3, 5:4 or 16:10.

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

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

### A. GENERAL ISSUES

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

49. Contrary to the EC's claim, TPKM has clearly identified the EC concession at stake and noted that such concession is included in the EC Schedule itself and not in the ITA. Furthermore, the headnote is central since it expressly provides that duty-free treatment is to be granted to all products described in Attachment B wherever the product is classified. The codes that the EC notified to the WTO in accordance with paragraph 2 of the Annex to the ITA only indicate where in the CN the EC considered the product was classified at that time. These codes thus in no way limit the scope of the concession made with respect to a specific product description.

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

50. The EC argues that the complainants failed to describe the products at issue. However, let along that TPKM has clearly identified the products at issue, the EC has missed the point. The claim is not about tariff treatment of a specific model of STBs but about several criteria used by the EC to determine the tariff treatment of a category of products, namely STBs which have a communication function. TPKM has underlined that several aspects of the measures at issue are inconsistent with the EC's obligations under the WTO. In other words, the EC excludes the following STBs which have a communication function from duty-free treatment through the measures at issue: (i) STBs which incorporate a device performing a recording or reproducing function (for example, a hard disk or DVD drive); (ii) STBs incorporating a device "performing a similar function to that of a modem but which do not modulate or demodulate signals" such as "ISDN-, WLAN- or Ethernet devices"; (iii) STBs that do not have a "built-in modem" but an external modem; and (iv) STBs which do not incorporate a video tuner.

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

B. INTERPRETATION OF THE CONCESSION

**1. Ordinary meaning**

(a) STBs incorporating a hard disk or DVD recorder

52. The analysis of the ordinary meaning of the terms of the concession demonstrates that it covers STBs which have a communication function even if they have additional functions. Actually, the EC also acknowledged this when stating that the product covered by the concession "cannot *endlessly* assume other features or technical elements." The EC thereby recognizes that the coverage of the concession permits products with additional features or functionalities. As long as the product meets the description of a "set top box which has a communication function," it must receive duty-free treatment, regardless of any additional feature or functionalities it may have.

53. The EC seems to be aware of the weakness of its position and tries to strengthen it by developing a rather farfetched theory about the meaning of the words "which have" instead of "with." However, if the drafters of the ITA intended to limit the functions of the product covered by the concession to communication functions only, they would have added the word "solely" or the equivalent in the text of that concession rather than using the word "which" instead of "with." It is a well-established principle of treaty interpretation that the interpreters cannot read into the text words that are not there.

(b) Set top boxes and modems

54. In accordance with the definition of "modem" as included in the relevant dictionaries, the Ethernet, ISDN and WLAN modems all modulate and demodulate. They connect a set top box to a communication line and convert signals produced by one type of device to a form compatible with another. Devices that operate through an Ethernet or network connection, a WLAN connection or an ISDN modem are modems. STBs equipped with such modems therefore fall within the scope of the concession concerning "set top boxes which have a communication function."

**2. Surrounding circumstances**

55. In an attempt to strengthen its position, the EC has imported the analysis of "the set top boxes available on the market in 1996" and "the descriptions used during the negotiations" as "surrounding circumstances" into its analysis of the ordinary meaning of its concession concerning "set top boxes which have a communication function." However, these elements could at most be examined as "supplementary means" of interpretation within the meaning of Article 32 of the Vienna Convention. It is actually very doubtful whether these elements qualify as "supplementary means of interpretation."

**3. Context**

(a) Tariff lines

56. The CN codes notified by the EC to the WTO do not determine the scope of the concessions. They are merely indications of where in the CN the EC viewed the STBs which have a communication function were included at that time.

(b) Schedules of other ITA participants

57. The table showing the codes notified by the ITA participants as to where they classify STBs which have a communication function is irrelevant in determining the scope of the EC concession. It merely supports the view that when the ITA negotiations concluded, there were no universally agreed classification headings for STBs which have a communication function. That is precisely the reason why the commitment has been made with respect to a product description wherever classified and regardless of its classification by individual participants.

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

58. The EC repeatedly claims that "it does not exclude any STBs from duty-free treatment due to the presence of a hard disk or other apparatus." Yet, the EC has not provided any evidence of instances where an STB with a hard disk has been accorded duty-free treatment by the EC. In other words, as expressly stated in the CNEN, the mere presence of a hard disk or DVD drive in an STB which has a communication function leads to the exclusion of that STB from duty-free treatment. By doing so, the EC violates its obligations under Article II:1(a) and II:1(b) of the GATT 1994.

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

A. ARTICLE X:1 OF THE GATT 1994

59. Contrary to the EC's claim, the CNEN constitute "laws, regulations, judicial decision or administrative rulings of general application" and therefore fall within the scope of Article X:1 of the GATT 1994. Indeed, CNEN are legally binding. In any case, Article X:1 of the GATT 1994 has a broad scope that would cover CNEN even if the CNEN were not found to be legally binding.

60. Article X:1 of the GATT does not refer to acts that have been "adopted" but acts that are "made effective". From the moment the measure, i.e., the CNEN, was voted upon by the Customs Code Committee in April 2007, it began to be applied by the customs authorities of the member States. It was then that CNEN were "made effective." It was also then that the EC should have promptly published the CNEN accordingly. The fact that the CNEN was made effective since the vote of the Customs Code Committee in April 2007 but not published until May 2008 is clearly inconsistent with the requirement of prompt publication as provided in Article X:1 of the GATT 1994.

B. ARTICLE X:2 OF THE GATT 1994

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

62. Contrary to the EC's claim, CNEN constitute "measures" within the meaning of Article X:2 as they constitute "acts setting forth rules or norms that are intended to have general and prospective application." CNEN constitute "measures" even if they have not been "formally" adopted.

63. The EC simply ignores the evidence brought by TPKM and the United States which shows that customs authorities started applying the CNEN that had been voted upon by the Customs Code Committee but not yet officially published. The sole defence of the EC is that the reference to the not-yet published CNEN in the BTIs is "for information" only since the "member States base their classification decisions on CN and the interpretative rules thereto." However, the EC's argument amounts to deprive CNEN of any existence. The EC appears to argue that CNEN do not constitute "measures." Nonetheless, as TPKM noted above, the issue is not to determine what the exact status of the CNEN is within the EC legal system. The fact that customs authorities of the member States have relied on CNEN either to issue BTIs or to take other customs decisions shows that the CNEN had been enforced and affected traders.

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

### A. GENERAL ISSUES

### 1. The products at issue

64. The EC has had no difficulties in identifying the products at issue as comprising the so-called "ADP MFMs" and "NON-ADP MFMs," even though the EC has made a number of statements about the product at issue that are factually incorrect.

### 2. The measures at issue

65. Contrary to what the EC claims, with the exception of the CCCE statement, the measures at issue are all still valid and continue to form part of the EC legal system.

### 3. The issue

66. The EC erroneously presents the issue as being one about customs classification while it is a tariff treatment dispute. It is sufficient for the complainants to demonstrate that the EC measures necessarily result in certain MFMs being subject to customs duties when they are actually entitled to a zero tariff under the applicable concessions. The Panel will thus first have to determine whether the MFMs at issue are properly covered by the concessions contained in HS subheading 8471.60 or 8517.21. TPKM notes that the EC failed to examine anywhere the ordinary meaning of the wording of the concessions covering subheadings 8471.60 or 8517.21. Instead, the EC embarked immediately on a classification exercise, applying the rules of the HS in order to demonstrate that the MFMs are correctly classified under heading 9009 instead of under heading 8471 or 8517. TPKM submits that in doing so the EC skipped the most important step in the interpretative exercise, i.e., to analyze, in the light of the principles set out in the *Vienna Convention*, the ordinary meaning of the wording of the concessions covering subheading 8471.60 and subheading 8517.21 and whether such wording covers the MFMs at issue.

### B. ADP MFMS

67. The EC has not examined the wording or even the scope of the concessions under Subheading 8471.60 for "printers" (CN code 8471 60 40) and "others" (CN code 8471 60 90) or for "facsimile machines" (CN code 8517 21 00) but immediately argues that digital copying is a form of photocopying. According to the EC, "*unless it can be shown that the copying function was 'secondary,*'" ADP MFMs would fall outside the concession for subheading 8471.60. "*If the copying*

*function was equivalent*," they would fall under subheading 9009 12 pursuant to GIR 3. The EC refers to the judgment of the ECJ in *Kip*. However, it is puzzling how the EC can base its entire defence on a ruling from its own highest court, which actually concluded that the automatic exclusion of MFMs with a copying function from the scope of subheading 8471 and their classification under heading 9009 violates EC customs law.

68. First, an ADP MFM will fall under subheading 8471.60 provided it is "of a kind solely or principally used in an ADP system." Given that ADP MFMs are by definition connectable to an ADP system and consist of a scanner module and a printing module, it is clear that as a general rule such apparatus will be of a kind solely or principally used in an ADP system and would therefore generally fall under heading 8471.

69. Second, in the rare cases where the copying function is equivalent to the printing and the scanning functions, classification cannot take place on the basis of Note 5(B) to Chapter 84. It is necessary to examine whether the ADP MFM cannot be classified on the basis of GIR 3(b) which classifies products on the basis of the component which confers the essential character to the product. Since printer, scanner and computer modules are clearly classifiable under heading 8471, it is manifest that the exercise will necessarily result in a classification under heading 8471 unless the value and role of the various components would be so similar that no component can be identified conferring the essential character to the apparatus. Needless to say, given the preponderance of the printer module consisting of the print engine and the print controller in the overall value and functioning of an ADP MFM, it will only be in very rare cases that the printer module will not confer the essential character to the MFM.

**1. Digital copying is not a form of photocopying**

70. The EC has avoided analyzing the wording of the concession covering subheading 8471 and has focused instead on the concession covering heading 9009. This approach presupposes that digital copying is actually a form of photocopying.

71. TPKM submits that such reasoning is not supported by the facts: (i) analogue photocopying and digital copying are different even if light is used in both processes; (ii) although both systems use an "indirect process," in the case of digital copying, it is the printing process that is "indirect," not a "photocopying process." To qualify as an indirect photocopying process, it is necessary that the original image is projected on the light sensitive surface of the drum and that afterwards the projected original image is transferred from the drum to the paper. That is not the case with digital copying; (iii) the indiscriminate use in commercial literature of the terms "copier" and "photocopier" is not an acceptable interpretative tool under Article 31 or 32 of the *Vienna Convention*; (iv) the EC ignores that analogue photocopier and digital copier are fundamentally different technologies; (v) the reference to Regulation (EC) No. 1165/95 and the *Rank Xerox* ruling is not convincing as the apparatus concerned by these measures cannot connect to an ADP machine or to a network; and (vi) in Council Regulation (EC) No. 2380/95 of 2 October 1995 that imposed a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan, the EC distinguished "digital copying" from "photocopying" as being two completely different processes.

72. As for the alleged US practice of classifying stand alone digital copiers under heading 9009, TPKM fails to see how this can support the EC position. TPKM considers that the HS2007 and its negotiating history are equally of minimal relevance in this dispute.

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

73. The main argument submitted by the EC to justify the exclusion of ADP MFMs from the concession covering subheading 8471.60 relies on Note 5 to Chapter 84. The EC claims that the requirement of sole or principal use in Note 5(B) is not met and that Note 5(D) is not applicable since the MFM are not "printers". However, the following should be noted. First, ADP MFMs fulfill the requirements in Note 5(B)(a) since they are of a kind principally used in an ADP system. The fact that the MFMs may operate independently from an ADP system as a stand alone digital copier does not invalidate its principal use with ADP machines. Second, Note 5(D) confirms that ADP MFMs fall under the scope of the concession for "output units" and "printers" under subheading 8471.60. Such would be the case regardless of whether the sole or principal use test is met. The meaning of "printer" is not limited to single function machines only. Third, the broad scope of the concession for 8471.60 actually confirms that the MFMs at issue are included within the scope of the concession.

C. NON-ADP MFMS

74. The EC claims that these MFMs correctly fall under the scope of the concession in subheading 9009.12 since their copying functionality is similar to that of stand alone digital copiers, and their copying function also qualifies as photocopying.

75. However, the EC's claim is without merit for the following reasons: (i) "photocopying" is different from "digital copying"; (ii) correct application of GIR 3(b) would actually result in a classification under another heading different from 9009; (iii) it is incorrect that the criterion of pages-per-minute copying speed was already used in Commission Regulations (EC) No. 2184/97 and No. 517/99; and (iv) the duty-free treatment granted to some non-ADP MFMs with a copying speed not exceeding 12 pages per minute (8443 31 10) is simply a fulfillment of the EC's obligation. It is the EC that has arbitrarily excluded from the duty-free treatment those MFMs with a facsimile function and a copying speed exceeding 12 pages per minute.

**VI. CONCLUSIONS**

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

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

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

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

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

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

## ANNEX C-5

## EXECUTIVE SUMMARY OF THE ORAL STATEMENT BY CHINESE TAIPEI AT THE SECOND SUBSTANTIVE MEETING

1. Mr. Chairman, distinguished members of the Panel, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu ("TPKM") would like to thank you and the Secretariat for your hard works that have already been done and for your ongoing efforts in connection with this dispute.

2. TPKM is pleased to have this opportunity today to address some new arguments developed by the EC in its second written submission. In this oral statement, TPKM will first address the issues with respect to the tariff treatment accorded by the EC to Flat Panel Display devices (FPD devices). TPKM will then address the main concerns raised by the EC's arguments with respect to Set-top Boxes (STBs) and Multifunctional Machines (MFMs).

3. At the outset, we would like to respectfully remind the Panel that the crux of this dispute is about tariff treatment rather than customs classification or something else. The core question awaiting the Panel is whether the EC's measures at issue in regard to three ITA products have resulted in tariff treatment that is inconsistent with its Schedule of Concessions and Articles II:1(a) and II:1(b) of the GATT 1994. By applying the principles of treaty interpretation as reflected in the Vienna Convention, TPKM has demonstrated how the three products at issue fall within the ordinary meaning of the terms of the EC's concessions when read in context and in the light of the object and purpose of the GATT 1994. TPKM has shown, and will show the Panel again that, because of the EC's measures at issue, those products have been denied duty-free treatment that they are entitled to.

### I. FLAT PANEL DISPLAY DEVICES

4. On the FPD issues, it is striking how the EC has tried to distract the Panel's attention from the core issues involved throughout this dispute. Instead of addressing the core issues, the EC has chosen to mount its defense almost exclusively based on procedural arguments. In particular, the EC has continuously claimed that the complainants have failed to make a prima facie case because they have failed to identify with sufficient precision the products at issue, the concessions at issue and now, in its second written submission, also the claims at issue and the scope of those claims.

5. In this oral statement, TPKM would like to systematically address the arguments put forward by the EC and demonstrate why they are without merit.

#### A. THE CLAIMS AT ISSUE HAVE BEEN PRECISELY IDENTIFIED BY THE COMPLAINANTS

6. It has always been clear since the very beginning of this dispute that all the complainants have made two different claims with respect to FPD devices. Both claims relate to a breach of Article II:1(a) and II:1(b) of the GATT 1994 but concern the EC's two different concessions that were made in its Schedule in order to implement the ITA. The first one is the concession made by the EC pursuant to Attachment B to the ITA with respect to "flat panel display devices for products falling within the ITA." The second one is the concession made by the EC pursuant to Attachment A to the ITA with respect to "input or output units" of ADP machines under the heading 8471.60.

7. The EC appears to be surprised by the fact that the two concessions have different scopes. However, this is how the EC Schedule is structured, and this structure reflects the two different commitments undertaken by the EC pursuant to Attachment A and Attachment B to the ITA. We

have already highlighted that each concession has a different scope in separate sections of our First Written Submission and, in particular, in the analysis of the scope of each of the concessions.[1]

8. The concession concerning heading 8471.60 that covers "input or output units" of ADP machines must be read in its context and in particular in accordance with Note 5(B) to Chapter 84 which prescribes that "input or output units" must be "of a kind solely or principally used in an [ADP] system." However, there is no such limitation as "sole or principal use" in the concession concerning "flat panel display devices for products falling within the ITA." In fact, this latter concession, as properly interpreted on the basis of its ordinary meaning, in its context, and in light of the object and purpose of the GATT 1994, does not contain any limitation that the FPD devices, in order to be covered, must be for use "principally" or "solely" with ADP machines.

9. The fact that both concessions have different scopes is another reason why both claims must be examined in turn by the panel in this dispute and make its rulings accordingly. Indeed, for example, an FPD device that falls under one of the measures at issue may not be covered by the concession concerning "input or output unit" of ADP machines but nonetheless be covered by the concession concerning "flat panel display devices for products falling within this Agreement."

10. In the following paragraphs, we will analyze in more detail the scope of each concession made by the EC with respect to FPD devices.

11. The first concession has been made by the EC pursuant to Attachment B with respect to "flat panel display devices for products falling within the ITA." This concession has been granted "wherever the product is classified." Thus, it is totally irrelevant how the EC or other participants classify FPD devices for products falling within the ITA. To the extent that they are "for products falling within this Agreement," they are entitled to duty-free treatment. For an FPD device to qualify as one that is "for products falling within the ITA," it must be capable of operating with an ADP machine. "Capable of operating" does not mean, however, "simply connected". The FPD devices must be capable of receiving and properly reproducing signals received from an ADP machine in order to fall within that concession.

12. The EC claims that the conclusion of the complainants that it impermissibly subjects to duties any flat panel display device that is capable of operating with a device other than an ADP machine is contradicted by the express exclusion of "televisions" from the concession concerning CRT "monitors."[2] According to the EC, televisions are excluded from the scope of the whole agreement.

13. However, the exclusion of "televisions" is found only in the concession concerning CRT "monitors" and that exclusion cannot be imported into the concession of "flat panel display devices." The fact that there is no express exclusion in the concession concerning "flat panel display devices" must actually mean something. As the Appellate Body underlined in *Japan – Alcoholic Beverages*, "omission must have some meaning."[3] In *EC – Bed Linen*,[4] the Appellate Body considered that the presence of exclusion in the chapeau to Article 2.2.2 of the Anti-Dumping Agreement led it to believe that where there is no such express exclusion elsewhere in the same Article, no such exclusion should be implied. Similarly, the absence of an express exclusion in the concession concerning "flat panel display devices" while an express exclusion is provided in the concession concerning CRT "monitors" means that in the first concession, no such exclusion should be implied. If the authors wanted to

[1] See TPKM first written submission, paras. 216 – 306 and paras. 307 – 348.
[2] EC second written submission, para. 30.
[3] Appellate Body Report, *Japan – Alcoholic Beverages*, p. 19.
[4] Appellate Body Report, *EC – Bed Linen*, para. 83.

apply such exclusion to FPD devices, they would have expressly included it in that product description.

14. Furthermore, it should be emphasized that the description in the list of products under the concession for "computers" expressly mentions that those products cover ADP machines irrespective of "whether or not they are able to receive and process with the assistance of central processing unit telephony signals, television signals, or other analogue or digitally processed audio or video signals." Thus, the fact that an apparatus can receive and process television signals is not in itself a criterion that would exclude it from the scope of the concessions made pursuant to the ITA.

15. The EC has repeatedly questioned whether, in the complainants' view, flat panel televisions are covered by the concessions. First, TPKM believes that in order to answer this question, the EC will need to first clarify what it considers to be a "television". Indeed, what really matters is the criterion that the FPD devices are "for" products falling within the ITA and thus including FPD devices for ADP machines. To the extent that the FPD devices can receive and reproduce signals from an ADP machine properly, they are covered by the EC's concessions.

16. The second concession has been made by the EC with respect to HS heading 8471.60 as "input or output units" of ADP machines. The ordinary meaning of "input or output units" of ADP machines does not support the proposition that an FPD covered by subheading 8471.60 must be capable of receiving signals "only from" a computer system in order to be covered. In accordance with the existing jurisprudence of the Appellate Body, it appears that the Harmonized System may be relevant as part of the context to interpret the concession. Note 5(B) to Chapter 84, which is an integral part of the HS, refers to input or output units that are "of a kind solely or principally used in an ADP system." In light of the foregoing, it is clear that FPD devices cannot be excluded from the scope of the concession concerning "input or output units" of ADP machines on the sole ground that the FPD devices can also reproduce signals from a source other than an ADP machine. Note 5(B) to Chapter 84 does not require "exclusive" use. A principal use in an ADP system is sufficient for an FPD device to be classified under Heading 8471. However, by requiring that the FPD devices must be for "sole" use with ADP machines to receive duty-free treatment, the measures at issue violate the EC's concessions with respect to "input or output units" of ADP machines.

17. The EC has attempted to rely on the Explanatory Notes ("EN") to the HS to Chapter 84, in particular Point I(D), to justify the criteria used in the measures challenged in this dispute.[5] The HSEN provides that "separately presented units" falling under heading 8471 differ from video monitors and television receivers under heading 8528 in different ways. Such differences include the notion that "they are capable of accepting a signal *only* from the central processing unit of an ADP machine," the notion that they "are not able to reproduce a colour image from a composite video signal," and so on. According to the EC, it has simply been applying the criteria contained in the HSEN to distinguish between display units of ADP machines and video monitors.

18. However, the EN of the HS do not form part of the HS and therefore cannot be part of the "context" for the purpose of determining the scope of the concession concerning subheading 8471.60. Moreover, to the extent that the EN contradict the wording of the HS itself, including its section and chapter notes, they must be disregarded. In the present dispute, by referring to ADP monitors as "accepting a signal ***only*** from an ADP machine," the EN manifestly contradicts the wording of Note 5(B) to Chapter 84 that refers to input or output units "of a kind *principally or solely* for use in an ADP system" and therefore must be ignored.

[5] EC first written submission, paras. 156 – 159.

19. Finally, TPKM would like to address the remark of the EC that the wide scope of the concession concerning flat panel display devices for *products falling within the ITA* "leads to a situation where it is entirely unclear how the challenged measures come within the scope of each of the two claims."[6]

20. TPKM does not understand the EC's assertion of the alleged lack of clarity. There are five measures at issue which have been precisely identified in the Panel Request and in the first written submission.[7] All these measures are in breach of the EC's concessions made pursuant to Attachment A and Attachment B to the ITA with respect to FPD devices.

## B. THE PRODUCTS AT ISSUE AS DEFINED BY THE MEASURES AT ISSUE HAVE BEEN CLEARLY IDENTIFIED

21. Now we would like to turn to the issue of the "products". The EC has continuously claimed that there is a lack of precision in the definition of the products at issue. However, the products at issue are those subject to duties under the measures at issue. They have been clearly identified by TPKM as "any flat panel display device capable of receiving and reproducing signals from ADP machines only or from ADP machines and other apparatus."[8] The products at issue are therefore not limited to, as the EC claims, the "LCD monitors with DVI."[9] This point had also been precisely made in TPKM's First Written Submission when it was clarifying that "the FPDs most affected by the EC measures are LCD displays with a DVI connector" "although not limited to such types of FPDs."[10]

22. Claims are made not with respect to products but with respect to specific measures. We have repeatedly and clearly identified the measures at issue with precision. The Panel's task is to determine whether or not the measures at issue are inconsistent with Article II:1(a) and II:1(b) of the GATT 1994. The Panel has to assess whether by excluding from duty-free treatment flat panel display devices on the basis of a number of criteria the EC has breached the concessions it has made pursuant to the ITA. The focus for the Panel is the criteria as listed in the measures at issue that are used by the EC to determine the classification and, as a result, the duty treatment, for FPD devices.

23. The EN to CN code 8528.59.90 specifies, by reference to the EN to CN code 8528.41.00, a list of characteristics that, if present, would exclude the FPD device from the scope of the duty-free CN code. The presence of a DVI is just one of the criteria listed there. There are other criteria such as the "connection to a video source," the presence of an "HDMI connector," and so forth. To the extent that these criteria lead to the exclusion from duty-free treatment of FPD devices that are for products falling within the ITA, they are inconsistent with the concessions made by the EC.

24. The EC has tried to create confusion by stating that the products at issue must somehow be different depending on the claim concerned. Indeed, the EC is asking what products come within the scope of each claim.[11] In fact, the products at issue are the products falling within the measures at issue. However, since both concessions have a different scope whereby the scope of the concession concerning "flat panel display devices for products falling within the ITA" is wider than the more limited scope of the concession covering subheading 8471.60, the finding of inconsistency may be different with respect to each concession. In other words, the mere fact that an FPD does not fall

[6] EC second written submission, para. 31.
[7] TPKM first written submission, paras .66 – 89.
[8] TPKM oral statement at the first substantive meeting of the Panel, para. 13.
[9] EC second written submission, para. 35.
[10] TPKM first written submission, para. 12.
[11] EC second written submission, para. 33 *et seq*.

within the scope of the concession covering input or output units of ADP machines of subheading 8471.60, does not mean that it is also excluded from the concession relating to "flat panel display devices for products falling within the ITA."

C. THE MEASURES AT ISSUE HAVE BEEN CLEARLY IDENTIFIED

25. Among the five measures at issue, there is in the first place the Combined Nomenclature. It is correct that, at the first glance, the CN2009 seems to respect the concession made by the EC with regard to Attachment A's "input or output unit" of ADP machines given that there is a specific heading, namely CN code 8528.51.00 that covers "other monitors – of a kind solely or principally used in automatic data processing system of heading 8471."

26. However, if read in combination with the CNEN, it leads to an interpretation of the CN2009 that would exclude FPD devices of a kind principally used in ADP systems under heading 8471 from duty-free treatment. Such exclusion would be so simply because the CNEN requires exclusive use in an ADP system and the absence of a DVI connector. This is inconsistent with the concessions made by the EC pursuant to Attachment A to the ITA.

27. Furthermore, FPD devices which are of a kind principally used in ADP systems are clearly also "flat panel display devices for products falling within the ITA." Since the duty-free treatment shall be granted to such FPD devices "wherever they are classified," it is irrelevant where such products are classified in the CN.

28. As far as the CNEN are concerned, the EN to codes 8528.51.00, 8528.59.10 and 8528.59.90 require the Panel's attention as well as the EN to codes 8528.41.00 and from 8528.49.35 to 8528.49.99. The EN to code 8528.51.00 that covers monitors provides that "the explanatory notes to subheading 8528.41.00 apply *mutatis mutandis*." The EC is now claiming that the word "mutatis mutandis" "do not incorporate all of the CNEN to heading 8528.41.00 into the CNEN to heading 8528.51.00."[12] However, except the paragraph that expressly refers to the specific characteristics of monitors of the CRT type, the rest of the CNEN are directly applicable to the flat monitors, in particular, the list of the criteria that exclude monitors from the scope of the headings with duty-free treatment.

29. Again, the EC is trying to create confusion by alleging that it is not clear whether the CNEN fall within the scope of the claim made pursuant to Attachment B. There is no ambiguity on this issue: the criteria listed in the CNEN must be reviewed by the Panel with respect to both concessions.

30. Finally, there are two Classification Regulations of the EC that are being challenged. Again, the WTO consistency of these regulations has been challenged with respect to both concessions.

D. THE *KAMINO* JUDGMENT DOES NOT REMOVE WTO INCONSISTENCY OF THE EC'S MEASURES

31. TPKM has referred to and continues to refer to *Kamino* only to show how the highest court in the EC, the ECJ, has interpreted the CN with regard to flat monitors and how the ECJ came to the conclusion that monitors cannot be excluded from the scope of CN code 8471.60.90 solely because they are capable of displaying signals coming both from an ADP machine and from other sources or solely because they are equipped with certain types of connectors such as a DVI connector.

[12] EC second written submission, para. 51.

32. The findings in *Kamino* may be informative since the judgment underlines that some aspects of the measures being challenged in the present dispute are contradictory to the CN. In other words, the judgment in *Kamino* confirms that, even if only from an EC classification perspective, the EC incorrectly excludes FPD devices from the scope of subheading 8471.60 solely because they can be connected to a source other than an ADP machine or due to the presence of a particular type of connector.

### 1. The *Kamino* judgment has not modified the measures at issue and has not removed the WTO inconsistency of the EC measures

33. The *Kamino* judgment has neither modified nor annulled the measures at issue. Those measures at issue were all published after the facts concerned in the *Kamino* dispute, and thus were not reviewed by the court in that case. Therefore, the *Kamino* judgment has not removed the WTO inconsistency of the EC measures. At most, the *Kamino* judgment has made it clear that the EC measures requiring exclusive use in an ADP system before an FPD can be classified under subheading 8471.60 are legally wrong under EC customs law. By logical reasoning, the EC's measures requiring exclusive use of the FPD devices in ADP systems have resulted in an illegal exclusion of these FPD devices from the scope of the concession under subheading 8471.60. *Kamino* has not resulted in any automatic substitution of the illegal EC measures with new WTO-consistent measures.

34. The ECJ has only dealt with the interpretation of the CN that existed in 2004. It has not ruled on the validity of any of the Classification Regulations. For such regulations to disappear from the EC legal order, they must either be amended or repealed by the EC Commission or expressly annulled by the ECJ. Under the current circumstances, these Classification Regulations are still valid and legally applicable despite the judgment of the ECJ in *Kamino*.

35. The same holds true for the CNEN which was not examined by the ECJ in *Kamino* and therefore remains in existence. As acknowledged by the EC itself, the CNEN must be amended or repealed following *Kamino*.[13]

36. Unlike what the EC seems to want others to believe, *Kamino* has not solved the issues before this Panel. It is also clear from the EC member States' repeated requests for guidance addressed directly to the EC Commission. Recent meetings of the EC's Customs Code Committee confirmed that member States are still waiting for common guidance on correct interpretation and application of the principles contained in *Kamino*.[14] The EC itself also acknowledged this when stating that "in order to ensure legal certainty, the EC has already initiated a review process for identifying whether some adjustments to the notes may be needed."[15] While what the EC will do remains uncertain, one thing is for sure, i.e., the Kamino has not saved the EC from breaching its concessions and relevant WTO obligations.

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[13] EC first written submission, para. 168.

[14] *See* Exhibit TPKM-88. In the Customs Code Committee's meeting of 22 to 29 April 2009, the following was reported with respect to the ruling in *Kamino*: "some Member States asked for guidance on the correct interpretation and application of the principles established by the ruling. They further asked whether issuance of BTI and replies to requests for reimbursement should be suspended awaiting the above clarification. The Chair explained that the Commission services are currently reflecting on the way to implement the Court judgment and that a debate is expected to take place at the next Committee meeting." Interestingly, no debate took place on which amendment to the CNEN would be necessary at the subsequent meeting of the Customs Code Committee, contrary to what was announced in the minutes quoted above.

[15] EC first written submission, para. 168.

### 2. The criteria to be used in the alleged case-by-case analysis of the EC would not necessarily remove the WTO inconsistency

37. The EC claims that, following *Kamino*, "to decide whether a given monitor is or is not used 'principally' in an ADP system requires inherently a case-by-case analysis."[16] Even if this were the case, the so-called "case-by-case analysis" is currently being made on the basis of the criteria contained in the HSEN, the CNEN and in the Classification Regulations. This practice has not changed even after the *Kamino* judgment. The EC has also failed to bring evidence of BTIs or customs decisions issued after *Kamino* that can demonstrate the application of duty-free treatment to, e.g., FPD devices equipped with a DVI.

38. Even if the EC modifies the CNEN and the classification regulations in order to implement *Kamino*, it remains uncertain how it will apply its "case-by–case" analysis." *Kamino* provides certain criteria to be used in such a case-by-case analysis in its paragraphs 59 and 60. In case the EC would use these criteria[17] and would require these criteria to be met cumulatively, a case-by-case analysis is unlikely to remove the WTO violation. Indeed, such an approach would again lead to the exclusion from duty-free treatment of FPD devices that are covered by the concessions of the EC as examined above.

## II. SET-TOP BOXES WHICH HAVE A COMMUNICATION FUNCTION

39. Now we would like to turn to issues with respect to Set-top boxes. According to the EC, in order to succeed with an "as such" claim, it is necessary to demonstrate that the measures in question result in the imposition of duties with respect to a given product model or a certain category of products.[18] Under the EC's theory,[19] complainants must identify the product category by identifying the "totality of the objective characteristics" of those products[20] somehow similarly to a product description included in a classification regulation.

40. The EC simply missed the point. The measure at issue, i.e., the CNEN, contains certain criteria that, if present in a STB, would automatically exclude an STB covered by the EC's concession from the scope of duty-free treatment. To the extent that complainants have demonstrated that the application of these criteria necessarily leads to a WTO-inconsistent outcome, they have succeeded with their "as such" claims. As the complainants have successfully demonstrated that STBs which have a communication function would be automatically excluded from the scope of duty-free heading because they include, *inter alia*, a hard disk or DVD drive is inconsistent with the EC Schedule, they have made their case.

41. Once again, in its second written submission, the EC claims that in any case CNEN are not binding and that the criteria used in the CNEN do not have the mandatory power that the complainants ascribed to them.[21] This is not correct. Has the EC given any example in which

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[16] EC first written submission, para. 166.

[17] *See* EC first written submission, para 166. The EC may use these criteria in order to consider as decisive "the objective technical characteristics as laid down in the Explanatory Notes relating to heading 8471 of the HS, in particular in points 1 to 5 of Part One Chapter I(D)." The criteria contained in the HSEN to heading 8471 stipulate for instance that an ADP monitor may not incorporate an audio circuit. *See* Exhibit TPKM-89.

[18] EC second written submission, para. 66.

[19] See EC second written submission, para. 68, for an example, according to the EC's theory, it is not sufficient to describe a category of products such as STBs with a hard disk or DVD drive.

[20] EC second written submission, para. 67.

[21] EC second written submission, para. 69.

customs authorities have given duty-free treatment to an STB which has a hard disk? No! Indeed, customs authorities have consistently classified STBs in accordance with the mandatory criteria contained in the CNEN since the vote of the Customs Code Committee on this issue.

42. As to the interpretation of the concession, the only textual argument the EC continues to assert relates to the use of the words "which have" in the concession. According to the EC, the phrase "which have" differs from the term "with" and means "which only have." However, "which have" and "with" do not have the different meanings the EC ascribes to them. TPKM does not understand why the words "which have" should somehow be interpreted as "which *only* have."

43. Furthermore, the EC also used the same word "with" when modifying its own Schedule in 2000. The EC added in the list of codes indicated next to the product description concerning STBs which have a communication function, a CN code that covers "[a]pparatus with a microprocessor-based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange, capable of receiving television signals ('set-top boxes *with* communication function')."[22] If there were a difference between the terms "which have" and "with", why would the EC have used the word "with" in its CN code 8528.12.91? This simply shows that there is no difference of meaning as alleged by the EC between the two terms.

44. The EC defends itself by arguing that the wording "set top boxes with a communication function" does not form part of its Schedule. Allegedly, only the code itself would be part of the Schedule. This argument is unacceptable. As a general rule, when a concession is defined in a Schedule by reference to a specific CN code, the description attached to this code also forms part of the concession. In the present dispute, however, where concessions have been granted pursuant to Attachment B, TPKM considers the concession as being defined by the product description alone.

45. The EC's arguments are self-contradictory. Indeed, by stating that "the notification neither introduced a separate narrative description into its Schedule nor modified the existing narrative description,"[23] the EC simply admits that the concession is determined by the product description and not by the codes listed next to it.

46. Furthermore, the EC notes that the CN codes indicated next to the product description constitute "context" for the interpretation of the narrative description. As previously noted, TPKM agrees with this view to a certain degree, but does not agree that this context can be used to "exhaust" the narrative description.

47. On the basis of the principles of treaty interpretation as reflected in the Vienna Convention, it is necessary to interpret the concession on the basis of its ordinary meaning in the light of its context and of the object and purpose of the treaty. The ordinary meaning of the concession, namely "set top boxes which have a communication function," is clear and does not exclude from its scope set top boxes because they have an additional function such as a recording or a reproducing function or because they are equipped with certain types of modems. The analysis of the context, in particular of the CN codes indicated by the EC next to the product description, confirms this conclusion.[24]

48. In its analysis of the CN codes as "context," the EC merely notes that three CN codes have been initially notified by the EC: 8517.50.90, 8517.80.90 and 8525.20.99 and that no codes under heading 8521 or 8528 were notified. The EC appears to argue that STBs which have a recording or

[22] CN code 8528.12.91.
[23] EC second written submission, para. 80.
[24] EC first written submission, paras. 239 – 241.

reproducing function must necessarily be classified under heading 8521 or 8528. Therefore, the EC further argues that since these headings were not indicated among the codes listed next to the product description, the EC did not intend such products to be covered by the concession.

49. With respect to the EC's arguments, TPKM would like to provide the Panel with the following observations. First, the EC's argument suggests that the concession is limited to the codes, when in fact it covers products "wherever classified." Even as a matter of classification, it fails to take into account that heading 8525, which is one of the codes listed, covers transmission apparatus "whether or not incorporating reception apparatus or sound recording or reproducing apparatus." Second, the EC intentionally ignored in its analysis the fourth CN code notified by the EC to the WTO in 2000, namely CN code 8528.12.91, and which is one of the codes listed next to the product description. Third, these codes do not contain any wording which would support the EC's position that STBs including certain types of modems would be excluded from the scope of the concession. Thus, a careful analysis of the CN codes, as requested by the EC itself, actually supports the complainants' view in this case.

## III. CLAIMS RELATING TO ARTICLE X OF THE GATT 1994

50. Finally, TPKM would like to add a few words on the EC's defense regarding its Article X claims.

51. The entire EC's defense consists of arguments that the CNEN do not constitute "measures" either under EC law or under WTO law because they have not *officially* been adopted by the EC Commission. However, even if the CNEN has not been formally adopted within the EC legal system, this is not relevant for WTO dispute purposes. As the Appellate Body noted in *US – OCTG* regarding the status of the Special Policy Bulletin (SPB), the fact "that the SPB is not a legal instrument under US law" "is not relevant to the question before us."[25] "The issue is not whether the SPB is a legal instrument within the domestic legal system of the US, but rather, whether the SPB is a measure that may be challenged within the WTO."[26] As the Appellate Body emphasized in that case, if it provides administrative guidance and creates expectations among the public and among private actors, it constitutes a "measure". This is also the case of CNEN which have been voted upon by the Customs Code Committee even if they have not yet been formally adopted by the EC Commission. To the extent that they already have been enforced before being published officially, this is inconsistent with Article X:2 of the GATT.

## IV. THE EC CONTINUES TO IGNORE THE WORDING OF THE CONCESSION COVERING MULTIFUNCTIONAL MACHINES

52. In its second written submission, the EC once again erroneously approached the question of whether the tariff treatment applied to MFMs is consistent with the concession covering HS subheading 8471.60 as a classification dispute. The EC started by saying that ADP MFMs are "*prima facie* classifiable under both HS96 9009 12 and HS96 8471 60" (emphasis added). Therefore, the EC further argued that it is necessary "to determine, on a case-by-case basis and having regard to the applicable HS rules addressing specifically this type of situation (i.e., GIR 3) whether each kind of ADP MFMs is covered by the concession for HS 9009 12 or by the concession for HS96 8471 60."[27]

[25] Appellate Body Report, *US – OCTG*, para. 187
[26] *Id.*
[27] EC second written submission, para. 101.

The EC asserted that "in accordance with GIR 1, the classification analysis must begin by looking at the terms of the HS96 heading 9009"[28] and blames the complainants for having failed to do so.

53. The EC – once again – disregards the nature of the current dispute. This is not a classification exercise. The issue is not to determine whether ADP MFMs are properly classified in Heading 8471 or 9009. The issue is whether the tariff treatment currently applied is consistent with the concession made by the EC, in particular with respect to the concession covering HS subheading 8471 60. The EC continues to avoid the meaning of the wording of the concession covering subheading 8471 60. Instead, the EC began its analysis with the wording of subheading 9009 12, which it considers as an equally relevant classification option.

54. In order to justify that Heading 9009 is an option, the EC needs to demonstrate that digital copiers are in fact "photocopying apparatus". TPKM has already developed several arguments proving the contrary and will not repeat them here. TPKM will limit its comments to the following issues raised by the EC.

55. The EC argues that the technical differences between digital copiers and traditional photocopiers are not relevant and that the issue "is not whether both types of photocopier operate in identical fashion."[29] TPKM strongly disagrees with this view. TPKM believes that, in view of the clear wording of the subheading, the technical differences are relevant and important to determine the scope of the concession concerning photocopiers under subheading 9009.12. The analysis of the ordinary meaning of the words of that concession clearly excludes from its scope digital copiers. This is further supported by the HSEN which the EC tries to put aside by claiming that there are "non-binding" and "obsolete."[30] It is strange that the EC claims the HSEN are "obsolete" while part of it has been included in the revised EN to the HS2007 that clearly distinguishes between "photocopiers" and "digital copiers." Should WCO Members have considered digital copiers as being equal to photocopiers, why didn't they use the word "digital photocopiers"?

56. Finally, TPKM would like to address the EC's remarks on how the complainants classify MFMs. TPKM would like to respectfully remind the Panel that it is irrelevant to this dispute how TPKM or other Members classify certain products that deserve duty-free treatment. In any event, TPKM has granted duty-free treatment to ADP MFMs wherever they are classified.

57. Last but not the least, TPKM would like to respond to what the EC asserted this morning that we made an alleged "new claim" with respect to MFMs. That was simply not true. Contrary to the EC's assertion, TPKM did not raise a new claim in relation to the products allegedly covered by CN code 8443.32.91, and TPKM did not ask the Panel to rule with respect to this specific CN code or make specific findings with respect to products classified thereunder. The EC's assertion was unfortunately a misleading statement.

58. TPKM's and the other complainants' claim regarding MFMs was set out in the panel request. This request covers the treatment given to MFMs under the EC measures as defined in the panel request. The CCT (Council Regulation (EEC) No. 2658/87, as amended) is one of the measures listed in the panel request. MFMs are defined in footnote 15 of the request which provides:

> "machines which perform two or more of the functions of printing, copying, or facsimile transmission, capable of connecting to an automatic data processing

[28] EC second written submission, para. 104 (emphasis added).
[29] EC second written submission, para. 107.
[30] EC second written submission, para. 116.

> machine or to a network (including devices commercially known as MFPs (multifunctional printers), other 'input or output units' of 'automatic data processing machines' and 'facsimile machines')."[31]

59. The products described by CN code 8443.32.91 are described in identical terms as those described in CN code 8443.31.91, namely, *"[m]achines performing a copying function by scanning the original and printing the copies by means of an electrostatic print engine*" and they are equally "*capable of connecting to an automatic data-processing machine or to a network.*"

60. Products of CN code 8443 31.91 and 8443.32.91, on the basis of their product description, would therefore appear to have identical physical characteristics: a scanner, a printing module and computer connectivity.

61. The description in CN code 8443.32.91 covers, in TPKM's view, input units for an automatic data processing machine, such as scanners, which also have a copying function. Since other "input units of automatic data processing machines" are specifically mentioned in the panel request, TPKM considers that products of CN code 8443.32.91 are clearly included in the scope of the claim. They are multifunctional input units for an ADP machine and are different from the so-called stand-alone digital copiers of CN code 8443.39.10 which have no computer connectivity. They also do not have a facsimile function.

62. We take note that the EC considers that no products meeting this description actually exist and would therefore invite the EC to clarify why this tariff line was included in the CCT and which products it intends to cover. Manifestly, there would be no need for ADP connectivity if this heading would only relate to single function digital copiers.

## V. CONCLUSIONS

63. In conclusion, throughout this dispute, the EC appears to have tried to evading from engaging the main issues raised by the complainants, i.e., a proper analysis of the scope of each concession concerned on the basis of the principles of treaty interpretation as reflected in the Vienna Convention. As far as FPDs and STBs are concerned, the EC has focused instead on developing procedural arguments alleging confusions about the claims, the concessions, and so on. With respect to MFMs, the EC has attempted to deviate from the core issues by addressing the complainants' claim as a pure classification exercise. TPKM is confident that the Panel will ignore these procedural tactics and confirm that the EC's measures at issue are inconsistent with its Schedule of Concessions and Articles II:1(a), II:1(b) as well as Article X of the GATT 1994, and recommend that the EC and its member States bring their measures into conformity.

64. Mr. Chairman, distinguished members of the Panel, TPKM would like to thank you and the Secretariat again and would be pleased to answer your questions.

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[31] Request for the Establishment of a Panel, *EC and Its Member States – Tariff Treatment of Certain Information Technology Products*, WT/DS375/8, WT/DS376/8 and WT/DS377/6.