ANNEX E

ARGUMENTS OF THE THIRD PARTIES

ANNEX E-1

ORAL STATEMENT BY AUSTRALIA AT THE FIRST SUBSTANTIVE MEETING

I. INTRODUCTION

1. Chair, Members of the Panel, Parties and Third Parties, Australia welcomes this opportunity to present its oral statement today in open hearing.

2. This dispute centres on the interpretation of the European Communities (EC) WTO Schedule of Concessions, as modified pursuant to the *Ministerial Declaration on Trade in Information Technology Products* (ITA).[1]

3. As a general remark, Australia emphasises that the correct interpretation of Members' Schedules of Concessions (Schedules) is fundamental to the maintenance of the security and predictability of the multilateral trading system.

II. AUSTRALIA'S VIEWS ON THE CORRECT INTERPRETATION OF THE EC'S SCHEDULE

4. In accordance with Article II of the GATT 1994, WTO Members have an obligation to grant "treatment no less favourable than that provided" in their Schedules. Specifically, subject to the terms, conditions or qualifications set forth in Schedules, products are to "be exempt from ordinary customs duties in excess of those set forth" in those Schedules.[2] The relevant Schedule establishing the obligations of the EC in the present dispute is the EC Schedule as modified by the "Certification of Modifications to Schedule LXXX – European Communities" of 2 July 1997.[3] Pursuant to GATT Article II:7, a Member's Schedule of concessions is made an integral part of GATT 1994. Hence, the correct approach for the Panel to adopt in examining the EC's Schedule is set out in Article 3.2 of the DSU,[4] which states that the clarification of provisions under the covered agreements is to be done "in accordance with customary rules of interpretation of public international law."

5. The ITA is clearly an important element in this dispute. The ITA adopted a dual approach to the identification of products and the subsequent scheduling of commitments. Products were identified both through a list of World Customs Organization (WCO) HS 1996[5] product codes and descriptions in Attachment A to the Annex to the ITA, as well as through a list of specific products to be covered regardless of where they were classified, included in Attachment B to the Annex to the ITA.

6. When scheduling these commitments, WTO Members party to the ITA maintained this dual approach to product coverage. The EC listed HS tariff headings in Attachment A directly into their Schedule. For Attachment B a "headnote"[6] was also incorporated, which explicitly provided that any

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[1] WT/MIN(96)/16 signed at the WTO Ministerial Conference, Singapore, 13 December 1996.
[2] Art II:1(b) to the GATT 1994.
[3] WT/LET/156, 15 August 1997.
[4] *Understanding on Rules and Procedures Governing the Settlement of Disputes*.
[5] World Customs Organization Harmonized Commodity Description and Coding System (Harmonized System).
[6] The headnote to the EC Schedules states:
"With respect to any product described in or for Attachment B to the Annex to the Ministerial Declaration on Trade in Information Technology Products (WT/MIN(96)/16), to the extent

product described "in or for Attachment B" had a bound tariff rate of zero. The text of the headnote, as part of the Schedule, must be interpreted in accordance with customary rules of interpretation of public international law, as codified in the *Vienna Convention on the Law of Treaties (Vienna Convention).*

7. Article 31 of the *Vienna Convention* provides that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." Article 31(2) sets out what can be considered "context" in treaty interpretation.

8. In Australia's view, in accordance with Article 31, the operation of the headnote requires that concessions relating to the product descriptions in Attachment B are not limited to tariff headings solely identified by the EC. The headnote is a concession that operates in addition to the EC's tariff headings through the inclusion of the words "wherever the product is classified". Accordingly, the scope of this concession is only limited by the scope of the product descriptions as set out in Attachment B and not by individual tariff headings. This view is supported by the ordinary meaning of the text of the headnote. Such an interpretation gives meaning to the headnote and does not reduce it to "inutility."[7]

9. Turning to the question of context, Australia recognises that both the Harmonized System and the ITA can be relevant "context" when interpreting Members' Schedules.

10. In *EC – Chicken Cuts*[8], the Appellate Body said that the Harmonized System was relevant "context" in the interpretation of tariff commitments in Members' Schedules within the meaning of Article 31(2)(a) of the *Vienna Convention*. The Appellate Body formed this view after noting that there was broad consensus to use the Harmonized System as a basis for Members' Schedules at the time of the Uruguay Round negotiations. Australia agrees with this view.

11. In the present dispute Australia considers that the Harmonized System is the starting point, but not the end point, for the identification of the correct context to interpret Schedules. Interpretation of Schedules must also take account of other relevant context and, ultimately, of the actual terms of those Schedules. This view is supported by the statement of the Appellate Body in the *China – Auto Parts* dispute where it said that the Harmonized System and its product categories had limits and "cannot trump the criteria contained in Article II:1(b) (of the GATT 1994)."[9]

12. Australia considers that the ITA provides important "context" for interpreting the EC Schedule, the headnote and product descriptions under the headnote that accompany tariff headings in that Schedule. Article 31(2)(b) of the *Vienna Convention* provides that context relevant to treaty interpretation includes "[a]ny instrument made by one or more parties in connexion with the

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> not specifically provided for in this Schedule, the customs duties on such product, as well any other duties and charges of any kind (within the meaning of Article II:1(b) of the General Agreement on Tariffs and Trade 1994), shall be bound and eliminated, as set forth in paragraph 2(a) of the Annex to the Declaration, wherever the product is classified."

[7] Appellate Body reports in *US – Gasoline*, WT/DS2/AB/R, at p. 23 and *EC – Chicken Cuts*, WT/DS269/AB/R, at para. 214.

[8] *EC – Chicken Cuts* para. 199. See also, *China – Auto Parts*, WT/DS339/AB/R, WT/DS340/AB/R and WT/DS342/AB/R, para. 149 where the Appellate Body said "[i]t follows that the Harmonized System is context for purposes of interpreting the covered agreements, in particular for the classification of products under Schedules of Concessions…".

[9] *China – Auto Parts* para. 164.

conclusion of the treaty and accepted by the other parties as an instrument related to the treaty." The ITA was adopted by participating Members during the Singapore Ministerial Conference of the WTO, a declaration expressly welcomed by all Members.[10] Australia notes that pursuant to the ITA, parties agreed to modify their Schedules to incorporate ITA commitments. Members accepted the ITA as an instrument related to the EC Schedule by agreeing to modifications made to the EC Schedule pursuant to the ITA. Furthermore, the Appellate Body has previously established that while each Member's Schedule represents the tariff commitments made by that Member, Schedules also "represent a common agreement among *all* Members."[11]

13. Australia recalls that specific reference is made in the EC Schedule to "[f]lat panel devices … for products falling within this agreement, and parts thereof", and "[s]et top boxes". In its submission the EC has sought to narrow the scope of its commitments under the headnote to the HS codes it identified alongside the product descriptions. Australia disagrees with this approach and considers that such an approach effectively reads-out words or text included in the Schedule, in particular the headnote, and is not consistent with the rules of treaty interpretation.

14. Australia acknowledges that a provision to negotiate the inclusion of additional products exists within the ITA.[12] However, in our view, this does not imply that products that fell within the ITA at the time of its conclusion would automatically fall outside the scope of tariff free treatment on the basis of technological advancement.

15. In its first written submission, the EC cites a judgment of the European Court of Justice in the *Kip* case.[13] The Court there held that multifunctional digital machines capable of performing one or more data processing functions in addition to copying "could not be classified directly under heading 8471 60 unless it was shown that the copying function was 'secondary' " to other automatic data processing (ADP)-related functions (such as printing).[14] The EC goes on to state that when the "copying function of the MFMs at issue in this section is not secondary in relation to their ADP functions, they are prima facie classifiable under the HS96 headings 8471 and 9009".[15] In such cases, the EC concludes that the Harmonized System remains the correct procedure to classify products with more than one "material or component which gives them their essential character."[16] Australia does not make a comment on the individual classification decisions of the EC, but recalls that the legal obligation of the EC contained in the headnote to its Schedule provides that the customs duties on products described in or for Attachment B are to receive tariff free treatment "wherever the product is classified."

III. AUSTRALIA'S VIEWS ON THE PRODUCTS AT ISSUE IN THIS DISPUTE

16. We wish now to touch briefly on the specific products at issue in this dispute. Addressing flat panel displays, Australia recalls the EC states in its first written submission that only "genuine ADP"[17] monitors fall within HS96 heading 8471 60 and would accordingly be entitled to duty free

[10] See *Singapore Ministerial Declaration*, adopted on 13 December 1996, WT/MIN(96)/DEC para. 18.
[11] *EC – Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R and WT/DS68/AB/R, para. 109.
[12] Paragraph 3 to the Annex to the ITA, WT/MIN(96)/16.
[13] European Court of Justice, Joined Cases C-362/07, *Kip Europe and Others*, and *Hewlett Packard International* C-363/07.
[14] European Communities' first written submission in *EC – IT Products*, WT/DS375, WT/DS376 and WT/DS377, para. 359.
[15] European Communities' first written submission, para. 435.
[16] HS96 GIR 3(b). See European Communities' first written submission at para. 441 states "[s]ince GIR 3(b) cannot be applied, it is necessary to resort to GIR 3(c)."
[17] European Communities' first written submission, para. 100.

treatment. This is provided for in EC Regulation 1031/2008 which limits tariff free treatment to monitors "[o]f a kind *solely or principally* used in an automatic data-processing system" (emphasis added).[18] Australia notes the language "solely or principally" in that Regulation is reflected in Note 5(B)(a) of Chapter 84 to HS 1996.[19] Australia recalls that the headnote to the EC's Schedule provides, *inter alia*, for tariff free treatment of products "described in or for Attachment B" wherever they are classified.[20] Given that Attachment B specifically includes "[f]lat panel displays … for products falling within this agreement", Australia considers that the EC's approach of providing tariff free treatment only to monitors that can solely be used in an ADP is at odds with its requirement to provide tariff free treatment to products pursuant to its Schedule.[21]

17. Addressing multifunctional machines that can be connected to an ADP, Australia notes that Chapter Note 5(D) to Chapter 84 of the HS 1996 establishes that, among other products, "[p]rinters … which satisfy the conditions of paragraphs (B) (b) and (B) (c) above, are in *all* cases to be classified as units of heading No. 84.71" (emphasis added) where they are connectable to a central processing unit and can accept or deliver data used by the system. Further, "[p]rinters" are cited as an example of an "output unit" in Subheading Note (1) to Chapter 84 of HS 1996.

18. Lastly, briefly touching on set top boxes, Australia again notes the absence of restrictive language either in the EC Schedule or in Attachment B that could permit the narrow interpretation of products to receive tariff free treatment. Australia considers that the ordinary meaning of the neologism "set top box" was not frozen in time at the conclusion of the ITA, and an assessment of the objective characteristics or essential character of set top boxes must be viewed in their context and in the light of the object and purpose of the EC's Schedule.

IV. CONCLUSION

19. In conclusion, Australia considers that where a Member incorporates language in its schedule, this represents a binding obligation upon that Member. In the event of *specific* reference to, or incorporation of, another agreement, such as the ITA in the present dispute, this material constitutes relevant "context" to assist in the interpretation of the ordinary meaning of treaty text consistent with customary rules of international law, as provided for in the DSU.

[18] Commission Regulation (EC) No 1031/2008 of 19 September 2008.
[19] Note 5 (B) (a) to HS96 Chapter 84.
[20] See "headnote" to EC Schedule, WT/LET/156.
[21] Further, in the absence of restrictive language, the ordinary meaning of the word "*for"* cannot be viewed narrowly.

ANNEX E-2

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION BY CHINA

1. The People's Republic of China (hereafter "China") makes this third party submission for the systemic interests in the interpretation of the EC's Schedule of Concessions that implements EC's commitments under the ITA. (the "EC Schedule").

2. In disputes that involve alleged violation of Article II(a) and (b) of GATT 1994, the text to be interpreted is the WTO member's concession schedule. Therefore, China submits that the key issue of the present dispute concerns with the interpretation of the relevant parts of the EC Schedule. Since the EC Schedule is a WTO treaty, its interpretation should follow the well-established methodology provided in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (the "Vienna Convention"). China submits that the elements prescribed in Article 31, i.e. ordinary meaning, context and object and purpose of the text to be interpreted, are of equal interpretational value and none is dispositive in the interpretation.

3. In this submission, China will focus on the FPDs in the dispute. For the FPDs at issue, China first identifies two sources of text to be interpreted in the EC Schedule: (1) tariff heading 8471.60.90 and the corresponding product description and (2) the Headnote Table that includes all products of Attachment B to ITA. ("Headnote Table") Tariff heading 8471.60.90 covers input or output units for ADP machines. By dictionary definition, output units are external devices that deliver information from ADP machines. With respect to the Headnote Table, it covers "flat panel display devices (including LCD, Electro Luminescence, Plasma, Vacuum-Fluorescence and other technologies) for products falling within [ITA] and parts thereof." By dictionary definition, "flat panel display devices" are thin display devices for apparatus, including ADP machines. The term "products falling within [ITA]" excludes FPDs for non-ITA covered products.

4. China further submits that there are two sources relevant for contextual interpretation in the present dispute: (1) HS 1996 and (2) ITA. The relevance of HS as a source of context is confirmed by WTO law. Since the EC Schedule was based on HS 1996, it provides a relevant context for the interpretation. Furthermore, pursuant to Section 2(b) of Article 31 of the Vienna Convention, ITA also serves as the context for the interpretation of the EC Schedule.

5. To be a unit of ADP machines, the unit must be, *inter alia*, solely or principally used in an ADP system according to Note 5(B) to Chapter 84 of HS 1996. Therefore, an output unit of ADP under the heading 8471.60.90 is necessarily used solely or principally with ADP machines. Conversely, an output device is not considered a unit of ADP machine within the meaning of 8471.60.90 if it is not used solely or principally with ADP machines.

6. With regard to ITA, China notices that Attachment B to ITA expressly exempts television, including high definition televisions from its coverage. China also notices that Attachment B states in the relevant part that "[m]achines performing a specific function other than data processing, or incorporating or working in conjunction with an automatic data processing machine, and not otherwise specified under Attachment A or B, are not covered by this agreement." It can be concluded from the contexts that FPDs for non-ITA covered products, such as televisions, are beyond the scope of ITA.

7. Moreover, China observes that ITA features a limited coverage of IT products, with the object and purpose of reflecting a balance reached by the parties to ITA. China recalls that the panel in *EC* –

Chicken Cuts stated that interpretation of the term of a concession should not disrupt the balance negotiated by the parties. Thus China submits that WTO treaties should not be interpreted in a way that disrupts the balance on product coverage.

8. China hopes the viewpoints and various issues raised in this submission may assist the Panel in its decision

ANNEX E-3

ORAL STATEMENT BY CHINA AT THE FIRST SUBSTANTIVE MEETING

9. Mr. Chairman, distinguished members of the Panel, China appreciates this opportunity to present its views over the present dispute. In this statement, I will highlight the main points of China's third party written submission.

10. In this dispute, China believes the key issue is the interpretation of the relevant parts of the EC Schedule. In line with WTO jurisprudence, China follows the methodology established by Articles 31 of the Vienna Convention on the Law of Treaties ("Vienna Convention") for the interpretation of treaty languages and focuses its analysis on the flat panel devices ("FPDs") in question.

11. First, China identifies two sources of text in the EC Schedule for the interpretation of ordinary meaning: (1) tariff heading 8471.60.90 and the corresponding product description, and (2) the Headnote Table that includes all products of Attachment B to the Information Technology Agreement ("ITA").

12. Tariff heading 8471.60.90 covers input or output units for automatic data processing ("ADP") machines. According to dictionary definition, output units are external devices that deliver information from ADP machines.

13. The Headnote Table covers FPDs for products falling within ITA. It can be inferred from the term "products falling within ITA" that FPDs for non-ITA covered products are excluded.

14. Second, China submits that there are two sources of context: (1) HS 1996 and (2) ITA.

15. HS 1996 provides requirements for a device to qualify as a unit of ADP machines within the meaning of heading 8471.60 under HS 1996. According to Note 5(B) to Chapter 84 of HS 1996, a unit must be solely or principally used in an ADP system to be covered by the heading 8471.60.90. In other words, an output device is not considered a unit of ADP machine within the meaning of 8471.60.90 if it is not used solely or principally with ADP machines.

16. With regard to ITA, China notices that Attachment B to ITA expressly excludes television from its coverage. China also notices that Attachment B states in the relevant part that "[m]achines performing a specific function other than data processing, or incorporating or working in conjunction with an automatic data processing machine, and not otherwise specified under Attachment A or B, are not covered by this agreement."

17. It can be concluded from the above two contexts that FPDs for non-ITA covered products, such as FPDs not used solely or principally with ADP machines and FPDs used for televisions, are beyond the scope of ITA.

18. Third, with respect to the element of object and purpose, China recalls that the panel in *EC – Chicken Cuts* stated that interpretation of the term of a concession should not disrupt the balance negotiated by the parties. China observes that ITA features a limited coverage of IT products, reflecting a balance reached by the parties to ITA. Therefore, China submits that no interpretation should disrupt such a balance.

19. Based on the above analysis, China believes that FPDs for non-ITA covered products, such as FPDs not used solely or principally with ADP machines and FPDs used for televisions, are not covered by the EC Schedule.

20. This concludes my presentation. Thank you very much for your attention.

ANNEX E-4

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION BY COSTA RICA

1. Costa Rica is intervening in this case because of its systemic and commercial interest in the proper interpretation of the tariff concessions made by WTO Members pursuant to the Information Technology Agreement (ITA). As a developing country, Costa Rica has greatly benefitted from its participation in the ITA. In 2007, information technology products accounted for approximately 12 per cent of all imports to Costa Rica and for approximately 25 per cent of Costa Rica's total exports. The information technology sector is, thus, of critical importance to Costa Rica's economy.

2. The complainants submit that the products at issue in this dispute (multifunctional machines (MFMs), flat panel display devices (FPDs) and set-top boxes that have a communication function (STBs)) must be accorded duty-free treatment by the EC as provided for in its Schedule of Concessions and pursuant to its obligations undertaken in the ITA. The EC responds that the products at issue fall "within the scope of other concessions included in the EC Schedule, which do not provide for duty free treatment". The interpretative issue for this Panel, therefore, is to determine the proper product scope of the tariff concessions at issue. In Costa Rica's view, the Panel should conduct this analysis by using the principles of treaty interpretation as set out in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* and not by applying rules of customs classification.

3. In Costa Rica's view, the relevant obligation of which the EC is allegedly in breach can be determined through the following order of analysis:

- First, by an examination of the tariff lines of the EC's Schedule to determine whether the product at issue falls within the scope and content of the concession;

- Second, if the product at issue is not accorded duty free treatment in the Schedule ("to the extent not specifically provided for in this Schedule"), then by recourse to the headnote of the EC's Schedule, which provides:

> "With respect to any product described in or for Attachment B to the Annex to the Ministerial Declaration on Trade in Information Technology Products (WT/MIN(96)/16), to the extent not specifically provided for in this Schedule, the customs duties on such product, as well as any other duties and charges of any kind (within the meaning of Article II:1(b) of the General Agreement on Tariffs and Trade 1994), shall be bound and eliminated, as set forth in paragraph 2(a) of the Annex to the Declaration, wherever the product is classified."

- Third, by determining whether the product at issue is described in or for Attachment B (i.e., those products listed in Attachment A) to the Annex to the ITA.

4. The three complainants and the respondent all acknowledge the relevance of the ITA for the interpretation of the tariff concessions at issue in this dispute. In Costa Rica's view, it would be appropriate to identify the status of the ITA within the analytical framework of the *Vienna Convention on the Law of Treaties*. In Costa Rica's view, the ITA is "context" within the meaning of Article 31(2)(b) of the *Vienna Convention*. The Ministerial Declaration of the ITA reflects the intention of the participants to have a broad interpretation of the product coverage of the ITA.

Paragraph 3 of the Ministerial Declaration states that "Ministers express satisfaction about the broad product range outlined in the Attachments to the Annex to this Declaration." This statement, read in conjunction with the third and fourth recitals in the Preamble, read together with paragraph 3, suggest that although participants were pleased with the broad product coverage of the ITA, they nevertheless wanted to ensure technological development (i.e., such as new products) to achieve maximum "freedom" (i.e., duty-free treatment) for information technology products.

5. The EC states that "the inclusion of a new product must be negotiated; it cannot be assumed to be covered by the concessions just because it happens to also perform similar functions as a product that is covered by the concessions. And this negotiation procedure is precisely what the ITA foresees explicitly." It seems that the EC's position is that any technological change in a covered product gives rise to the requirement to agree by consensus to positively add that "new" product to the coverage of the ITA. This approach is contrary to the aim of the ITA, which notes that although the parties wanted to "encourage technological development", they specifically declared that "each party's trade regime should evolve in a manner that enhances market access opportunities for information technology products". If other WTO Members and the Panel were to adopt the approach suggested by the EC, the number of products that would benefit from duty-free treatment pursuant to ITA obligations would be steadily decreased in the light of the rapid technological developments that occur in the field of information technology.

6. With respect to set-top boxes, the EC submits that the complainants' claims suffer from serious errors because the complainants refer to a "set-top box *with* a communication function", whereas the EC commitment is with respect to "set-top boxes *which have* a communication function" (emphasis added). In the EC's view, based on the dictionary definition and the context of the words, there is a significant difference between the terms "which have" and "with". In Costa Rica's view, there is no support for an interpretation that would give the two phrases significantly different meanings. Costa Rica also notes that the wording in the French and Spanish versions of the ITA, which are both equally authentic, do not correspond exactly to the English phrase "which have".

7. With respect to flat-panel display devices, the issue is whether they fall within the definition of "flat panel display devices (including LCD, Electro Luminescence, Plasma, Vacuum-Fluorescence and other technologies) for products falling within this agreement, and parts thereof" provided in Attachment B of the ITA. The EC argues that a unit must be "solely or principally used in an automatic data-processing system" and therefore must be for *exclusive* use with an ADP machine in order to be classified as a flat-panel display device under 8471. In Costa Rica's view, there is no textual basis to support this interpretation.

8. Costa Rica notes that MFMs are machines that may be used for scanning, digital copying, or facsimile transmission, in addition to printing. The issue is whether a MFM with connectivity to an ADP machine that is capable of scanning, printing and faxing should be classified under 8471 60 as an "input or output unit for automatic data processing machines" or under 9009 12 00 as "photocopying apparatus". As noted by the three complainants, MFMs should be classified under 8471 or 8471 60 as they are not "photocopiers". Photocopying is based on optical technology, whereas the products at issue manipulate the digital data in order to produce the printout. In Costa Rica's view, it is doubtful that the transmission of digital data constitutes a form of photocopying.

9. Costa Rica considers that this case raises important questions with respect to the interpretation of the tariff concessions made by WTO Members pursuant to the ITA. As a developing country with a strong interest in expanding its information technology sector, Costa Rica considers that such tariff concessions must be interpreted, consistently with the *Vienna Convention*, in such a manner as to give

effect to the aim of the ITA that "each party's trade regime should evolve in a manner that enhances market access opportunities."

ANNEX E-5

ORAL STATEMENT BY COSTA RICA AT THE FIRST SUBSTANTIVE MEETING

I. INTRODUCTION

1. Costa Rica appreciates this opportunity to express its views at this meeting of the Panel with the parties and the third parties.

2. As a developing country, Costa Rica has greatly benefited from its participation in the ITA. Costa Rica is intervening in this case because of its systemic and commercial interest in the proper interpretation of the tariff concessions made by WTO Members pursuant to the ITA. This is the first time a panel is required to interpret a Member's tariff concessions pursuant to the ITA and to determine the treatment to be accorded to products falling under the ITA. As noted by Singapore, this case has potentially far-reaching implications for global trade in information technology and technological innovation generally.[1]

3. In its written submission, Costa Rica has put forward its views on the claims of the three complainants and on the defense of the respondent, and will therefore not repeat all its comments at this time. We respectfully request the Panel to be mindful of these comments, in particular with respect to the scope and coverage of the tariff concessions at issue and the categorization of the ITA as context within the meaning of Article 31(2)(b) of the Vienna Convention, in the course of assessing the matter before it.

4. Costa Rica would like to take this opportunity to comment on two substantive issues: (i) whether the procedures provided for in paragraph 3 of the Annex to the ITA must be followed in order for the products at issue to receive duty-free treatment or whether such products are covered by the concessions in the EC Schedule based on the ITA and its Attachments; and (ii) whether additional features or functionalities of a product disqualify that product from receiving duty-free treatment under the EC Schedule based on the ITA and its Attachments.

II. WHETHER THE PROCEDURES PROVIDED FOR IN PARAGRAPH 3 OF THE ANNEX TO THE ITA MUST BE FOLLOWED IN ORDER FOR THE PRODUCTS AT ISSUE TO RECEIVE DUTY-FREE TREATMENT?

5. Turkey states that only those products that are specified in the two attachments of the Annex to the ITA must be accorded duty-free treatment. In its view, the products at issue in this dispute do not fall under the current ITA. Turkey notes that if parties wish to extend the product coverage of the ITA, they have to follow the procedures set forth in paragraph 3 of the Annex to the ITA.[2] Paragraph 3 provides that parties shall meet periodically "to review the product coverage specified in the attachments with the view to agreeing, by consensus, whether in the light of technological developments, experience in applying the tariffs concessions, or changes to the HS nomenclature, the Attachments should be modified to incorporate additional products".

6. The EC has also stated that "the inclusion of a new product must be negotiated; it cannot be assumed to be covered by the concessions just because it happens to also perform similar functions as a product that is covered by the concessions. And this negotiation procedure is precisely what the

[1] Singapore's third party written submission, para. 8.
[2] Turkey's third party written submission, paras. 6 - 8.

ITA foresees explicitly." It appears that the EC's position is that any technological change in a covered product gives rise to the requirement to agree by consensus to positively add that "new" product to the coverage of the ITA. This approach is contrary to the aim of the ITA, which notes that although the parties wanted to "encourage technological development", they specifically declared that "each party's trade regime should evolve in a manner that enhances market access opportunities for information technology products". If other WTO Members and the Panel were to adopt the approach suggested by the EC, the number of products that would benefit from duty-free treatment pursuant to ITA obligations would steadily decrease in the light of the rapid technological developments that occur in the field of information technology. As Singapore notes, the ITA did not envisage continuous negotiations to keep the IT products it covered free from duties as and when a technological development occurred.[3]

7. Thus, mindful of the fact that negotiators were fully aware that there would be rapid technological developments in this sector, Costa Rica considers that it would be more appropriate to interpret the negotiation procedure envisaged in paragraph 3 as referring to the procedures to include brand new products under the coverage of the ITA. Turkey itself notes that the paragraph 3 provides procedures for the incorporation of *additional* products and that, in other words, the Attachments cannot be modified to "exclude" any of the listed products.[4]

8. Costa Rica considers that as long as a product is listed in Attachment A or B to the ITA, it must be given duty-free treatment. To exclude such products from ITA coverage would be contrary to the object and purpose of the ITA which, as noted by the Philippines, is to expand world trade in information technology products to the maximum extent possible.[5] Paragraph 3 thus contemplates procedures by which products may be added to, not excluded from, ITA coverage.

III. WHETHER ADDITIONAL FEATURES OR FUNCTIONALITIES OF A PRODUCT DISQUALIFY THAT PRODUCT FROM RECEIVING DUTY-FREE TREATMENT UNDER THE EC SCHEDULE BASED ON THE ITA?

9. The complainants submit that the products at issue in this dispute (multifunctional machines (MFMs), flat panel display devices (FPDs) and set-top boxes that have a communication function (STBs)) must be accorded duty-free treatment by the EC as provided for in its Schedule of Concessions and pursuant to its obligations undertaken in the ITA. The EC responds that the products at issue fall "within the scope of other concessions included in the EC Schedule, which do not provide for duty free treatment". The interpretative issue for this Panel, therefore, is to determine the proper product scope of the tariff concessions at issue.

10. With respect to flat-panel display devices, the issue is whether they fall within the definition of "flat panel display devices (including LCD, Electro Luminescence, Plasma, Vacuum-Fluorescence and other technologies) for products falling within this agreement, and parts thereof" provided in Attachment B of the ITA. The EC argues that a unit must be "solely or principally used in an automatic data-processing system" and therefore must be for *exclusive* use with an ADP machine in order to be classified as a flat-panel display device under 8471. Turkey further notes that flat panel display devices which incorporate digital visual interface or high-definition multimedia interface are able to be connected to certain consumer electronic products as well information technology products falling within the ITA. Turkey thus concludes that a flat-panel display device which is a dual-use

[3] Singapore's third party written submission, para. 16.
[4] Turkey's third party written submission, para. 12.
[5] Phillipnes' third party written submission, para. 16.

product does not fall under the existing ITA.[6] The task of the Panel is not to determine whether a product is capable of performing various functions, but rather to determine the scope of the tariff concession and whether the product at issue meets the basic criteria to fall under that tariff concession, regardless of whether that product performs additional functions.

11. With respect to set-top boxes, Turkey has stated that "set-top boxes ... having the function of processing and/or recording and transmitting input to televisions, monitors or other similar devices, should be regarded as consumer electronic products." Turkey is thus of the view that the primary purpose of these set-top boxes is to interact with television broadcasts, and their information exchange features are secondary, and therefore, these products do not fall within the scope of the existing ITA.[7] Costa Rica considers that Panel's task is not to determine the primary or secondary function of a product, but rather to determine the scope of the tariff concession and whether the characteristics of the product correspond to the description set out in that tariff concession, regardless of whether that function constitutes the primary or secondary purpose of the product.

12. In summary, in Costa Rica's view, as long as a product meets the minimum requirements to fall within Attachment A or Attachment B to the ITA, it must be given duty-free treatment, even though it may have additional technological features or different functions.

IV. CONCLUSION

13. Mr. Chairman, Members of the Panel, to conclude, Costa Rica wishes to highlight that this case raises important questions with respect to the interpretation of a Member's tariff concessions pursuant to the ITA and the tariff treatment to be accorded to such products. As a developing country with a strong interest in expanding its information technology sector, Costa Rica considers that such tariff concessions must be interpreted, consistently with the *Vienna Convention*, in such a manner as to give effect to the aim of the ITA that "each party's trade regime should evolve in a manner that enhances market access opportunities."

14. The participation in the ITA has brought tremendous economic benefits to Costa Rica and to other developing countries. It is of critical importance to Costa Rica and to other developing countries that the commitments that WTO Members assumed, pursuant to the ITA, are interpreted in a manner that enhances, rather than limits, international trade in the information technology sector.

15. Costa Rica thanks the Panel for the opportunity to present this oral statement.

[6] Turkey's third party written submission, paras. 35 – 37.
[7] Turkey's third party written submission, para. 38 – 39.

ANNEX E-6

ORAL STATEMENT BY HONG KONG, CHINA AT THE FIRST SUBSTANTIVE MEETING

1. Hong Kong, China welcomes the opportunity to participate and present its views as a third party before this Panel.

2. This is the first WTO dispute concerning the Information Technology Agreement (ITA")[1]. Hong Kong, China has a strong systemic interest in the proper interpretation and effective operation of the ITA, of which Hong Kong, China is one of the first 14 signatories. In addition, it has trade interests in some of the information technology products subject to this dispute. We would therefore like to make a brief statement of our views on some of the important issues in this dispute.

3. As provided in its preamble, the ITA aims to achieve **maximum freedom** of world trade in information technology products and to encourage the **continued technological development** of the information technology industry on a world-wide basis. The ITA also stipulates that each participant's trade regime should **evolve** in a manner that **enhances market access opportunities** for information technology products. Hong Kong, China considers that such object and purpose must be taken into account in interpreting the participants' commitments under the ITA, which have been transformed into commitments under the respective schedules of tariff concessions of the participants, as in the case of the European Communities ("EC").

4. Undoubtedly, the ITA has played a vital role in enhancing market access opportunities for information technology products since its implementation in 1997 and has resulted in tremendous expansion of world trade in information technology products. The products covered by the ITA as listed in Attachments A and B are, in our view, very broad, but clear. In particular, Attachment B provides a wide scope of product coverage, namely, "a positive list of specific products covered by the ITA **wherever they are classified** in the Harmonized System". For products covered under the ITA, they should be accorded zero-tariff treatment without any restriction. In other words, the participants' domestic customs classifications or reclassifications of such products should not affect the product coverage under the ITA.

5. Hong Kong, China generally supports the Complainants' arguments and agrees that the information technology products concerned in this dispute, i.e. flat panel displays, set-top boxes which have a communication function and multifunctional digital machines, should all be covered under the ITA and entitled to duty-free treatment, as committed by the EC in its schedule of concessions pursuant to the ITA. In this connection, Hong Kong, China submits that the Panel should determine the scope of the EC's tariff concessions commitments and/or the product coverage under the ITA by applying Articles 31 and 32 of the Vienna Convention on the Law of Treaties. Having regard to the ordinary meaning of the product descriptions in their context and in the light of the object and purpose of the ITA and the schedule of concession of the EC, Hong Kong, China is convinced that the Panel will come to the same conclusion as submitted by the Complainants.

6. Hong Kong, China is unable to accept the EC's argument on "differences between the product existing at the time of the conclusion of the ITA and the product of today which is under dispute," ostensibly for justifying its reclassifications and consequential tariff treatment for information technology products under dispute. The EC further argued that any "new products" that did not exist

[1] The Ministerial Declaration on Trade in Information Technology Products concluded at the Singapore Ministerial Conference on 13 December 1996 is known as the Information Technology Agreement.

at the time of signing the ITA are not covered by the ITA and must be negotiated. Such an argument implies that the ITA is static and merely covers information technology products which existed in 1996. However, information technology products by their nature keep enhancing, developing and evolving, and such continued technological development is indeed encouraged under the ITA. Hong Kong, China considers that the EC's argument ignores the "enhancement", "development" and "evolvement" aspects of the ITA and cannot stand in light of the object and purpose of the ITA. In our view, technology-sophisticated and functions-added information technology products are clearly contemplated and covered under the ITA. A restrictive interpretation as suggested by the EC would result in an absurd situation that while technology develops, the number of products benefiting from the market access opportunities pursuant to the ITA diminishes and is not commensurate with the growth in information technology products. Such an approach will no doubt undermine the benefits accrued to the participants of the ITA and will render the ITA meaningless in the near future. Hong Kong, China therefore submits that the Panel should reject the argument of the EC in this respect.

1. Conclusion

7. In view of the aforesaid, Hong Kong, China respectfully submits that the Panel should uphold the Complainants' claim and find that the measures imposed by the EC on the 3 subject categories of information technology products are inconsistent with its commitments pursuant to the ITA and its obligations under Articles II:1(a) and II:1(b) of the GATT 1994.

8. Mr. Chairman, Hong Kong, China hopes that its views will assist the Panel in its consideration of this dispute. Thank you for your attention, and once again, for the opportunity to appear before this Panel.

ANNEX E-7

ORAL STATEMENT BY INDIA AT THE FIRST SUBSTANTIVE MEETING

1. India welcomes this opportunity to present its views in these proceedings.

2. The present dispute concerns the treatment of three products under ITA having certain features. The complainants viz. the US, Japan and Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu have made detailed submissions as to why these products are required to be given duty-free treatment by the EC in terms of ITA. The EC has furnished exhaustive counter arguments in support of their contention that the products do not merit such treatment in all situations. The EC has also stated that the duty-free treatment cannot be extended to all variants of the products.

3. I am not entering into the details of rival submissions, nor am I going to comment on their respective merits. We are sure the Panel will do that. The facts of the case will have to be analyzed in detail and proper conclusion drawn with a view to ensuring that the rights of ITA Members are not adversely affected as a result of any improper interpretation of the scope of ITA. In this dispute, India has joined as third party because we do have some systemic concerns. We believe this dispute is of importance to other WTO Members as well because of the systemic and commercial interest.

4. We fully recognize the need to support and foster technological innovation and improvement. We also recognize that IT is an area where such innovation is the fastest, and products become obsolete in a short period of time. It is thus a valid objective that all benefits of trade agreements concerning such products are fully available during the life of the products concerned. However, on the other hand, the product coverage envisaged under any trade agreement is an equally important aspect. Therefore while debating the issue of applicability of preferential tariff treatment for IT products, one needs to take on board both these critical issues of fostering technological improvements and sticking to the mandated product coverage.

5. Mr. Chairman, the convergence of information technology and consumer electronics has led to emergence of "new" products. However, in the present dispute, given the intricacies involved and the facts at hand, it is difficult to say whether the three products at issue are actually new products or products that are evolved forms of what was included in the ITA due to improvements in technology. If the products are indeed new, not covered by ITA, their inclusion will have to be negotiated. In fact, the ITA does provide a negotiating procedure to include additional products. Paragraph 3 of the Annex to the 1996 Ministerial Declaration states that "participants shall meet periodically….to review the product coverage specified in the Attachments…..to incorporate additional products." Therefore, to the extent that any ITA participant wants to include additional products under the ITA, the same will have to be done through negotiations.

6. We understand, EC's schedule, like any other WTO Member, is an integral part of the WTO Agreement and, interpretation of this treaty should follow the rules provided in Article 31 and 32 of the Vienna Convention on Law of Treaties as they embody the "customary rules of public international law" within the meaning of Article 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, in determining the precise meaning and scope of the language in the EC's schedule, including individual tariff headings. Article 31 of the Vienna Convention contains the interpretative elements of ordinary meaning, context and object and purpose. However, Article 31 neither directs an interpreter to give more weight to certain element, nor does it impose a hierarchical approach in terms of interpretative value of the elements for the purpose of interpretation.

In our view these interpretative elements are of equal interpretative value and neither element is dispositive.

7. Mr. Chairman, it is true that the Ministerial Declaration talks about trade regimes of participants being evolved "in a manner that enhances market access opportunities for IT products". But then, the duty-free treatment can be accorded only if the products fall within the remit of Annex and the Attachments thereto of the said Declaration. From a perusal of submissions of the complainants, it is seen that their claims for duty-free treatment are basically on the ground that the products at issue are squarely covered by the Attachments A and B of the Annex to the Ministerial Declaration. This is crucial as in the WTO, Members obligation to provide a particular tariff treatment is not open ended but finite. The list of goods as agreed to in the Annex and the Attachments of the ITA in 1996 has to be the basis for determining the tariff treatment due to these products. We, therefore, support the view that classification of a product will have to be decided based upon the objective characteristics and technical parameters.

8. While deliberating on this issue, it is equally important to dwell on the principles enshrined in the Harmonized System (HS) classification. The HS classification is determined according to the terms of the headings and any relative Section or Chapter notes. When this is not possible and the goods are classifiable under two or more headings, the heading which provides the most specific description is preferred to headings providing a more general description. Composite goods made up of different components are classified as if they consist of the material or component which gives them their essential character. When the goods cannot be classified by adopting the above principles, they are classified under the heading which occurs last in numerical order among those which equally merit consideration.

9. Mr. Chairman, We are confident that the Panel will consider all relevant facts and take a view on classification and duty treatment in the light of what is contained in ITA and relevant HS rules.

ANNEX E-8

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION BY KOREA

1. In this submission, Korea wishes to highlight certain legal and interpretive questions for which the Panel could provide an important guidance for future disputes in the ITA covered product. Korea also comments on what it considers to be the appropriate interpretative methodology for this dispute.

2. After conclusion of the ITA, the participating Members in the ITA revised their respective tariff commitments for certain technology products through formal modification of their Schedules of tariff concessions. It is those Schedules of tariff concessions that bind those participating Members. Thus, Korea believes that this dispute is to be resolved by "accurately and correctly" interpreting the commitments made by the EC, as set out in its Schedule of tariff concessions.

3. The EC revised its Schedule in two ways pursuant to the ITA: (a) it modified the tariff commitments made in a number of headings and sub-headings of its Schedule; and, (b) it added to its Schedule a headnote and an ensuing list of products derived from Attachment B to the ITA. In Korea's view, the Panel's interpretative methodology in this dispute should begin with the terms of this headnote and the list of products following that headnote ("the headnote product list").

4. Regardless of the specific heading or sub-heading under which a particular product falls in the EC Schedule, a product included in the headnote product list which is derived from the corresponding ITA list, is entitled to duty-free treatment. Therefore, if a particular product is covered by the headnote product list, it would appear that the EC is required to grant that product duty-free treatment, "wherever the product is classified". In this regard, the list of HS headings attached next to each product cannot reasonably have the meaning that the EC attempts to ascribe to it, because this interpretation would render the phrase "*wherever the product is classified*", a phrase expressly stated in the EC's Schedule, simply ineffective and meaningless.

5. In Korea's view, given the "wherever the product is classified" language, what is controlling in this analysis should be the narrative product description in the headnote product list, that is, the phrase "*wherever* . . . classified". In contrast, by all accounts the HS headings next to the product descriptions appear to be illustrative, rather than exhaustive or controlling. Korea would welcome the Panel's thorough analysis and reliable guidance on the interpretative approach of this treaty language.

6. As to interpreting the product descriptions in the headnote product list, the Panel should apply the general rules of treaty interpretation, as embodied in Articles 31 and 32 of the *Vienna Convention*. In applying these rules, the Panel should examine the ordinary meaning of the terms, read in their context and in light of the object and purpose of those terms, as well as of the treaty as a whole. In examining the ordinary meaning of the terms, particular product descriptions may need to be given a "special meaning", pursuant to Article 31.4 of the *Vienna Convention*, because the terms found in the EC Schedule are overwhelmingly "technical" and appear in a "specialized" sector of goods trade, namely, information technology products.

7. Furthermore, Korea considers that it is not entirely clear what the precise products and product models are at issue in this dispute. In Korea's view, the present dispute does not involve "as applied" measures, where the particular product/product model at issue and the facts surrounding that product would be relatively clear. Rather, this dispute apparently involves "as such" measures regarding the tariff treatment of three broad product categories. Korea recalls that, under well-

established WTO principles, it is for the complainants to make a prima facie case that, in some instances at least, the respondent's "as such" measures necessarily violate the respondent's WTO obligations.

ANNEX E-9

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION BY THE PHILIPPINES

I. INTRODUCTION

1. The Philippines provided the Panel with its views in this dispute, in which the United States, Japan and Chinese Taipei claim that the tariff treatment the EC and its Member States accord to certain information technology products do not reflect the EC commitments to provide duty-free treatment for these products under the WTO Information Technology Agreement.

2. It will be recalled that in 1996, the "Ministerial Declaration on Trade in Information Technology Products" (or the "Information Technology Agreement," or "ITA") was adopted and the signatories committed to grant duty-free treatment to the products covered in that Declaration. Rate reductions were to take effect in equal steps starting no later than 1 July 1997 and ending no later than 1 January 2000.

3. As an ITA participant, the EC modified its Schedule to reflect the commitments made under the ITA. Such modifications became effective on 2 July 1997. Accordingly, the EC and its Member States must apply duty-free treatment on a number of products, including, *inter alia*, flat panel displays ("FPDs"), set-top boxes ("STBs") with a communication function, and certain "input or output units" of "automatic data processing machines" and facsimile machines ("MFMs").

4. However, as a result of certain EC measures, the EC and its member States apply customs duties on the aforementioned products, specifically, a 14% duty on *Flat Panel Displays (FPDs)*, 13.9% and 14% duties on *Set Top Boxes (STBs)*, and a 6% duty on *Multifunctional Machines (MFMs)*.

II. PHILIPPINE VIEWS ON THE EC TARIFF TREATMENT OF FLAT PANEL DISPLAYS, SET TOP BOXES, AND MULTIFUNCTIONAL MACHINES

5. The Philippines agrees that pursuant to Article 31(1) of the *Vienna Convention on the Law of Treaties*, a treaty must be interpreted in the light of its object and purpose. Furthermore, as underlined by the panel in *EC – Chicken Cuts (Brazil)*, the relevant aspects of the WTO Agreement and the GATT 1994 provide that concessions made by WTO Members should be interpreted so as to further the general objective of the expansion of trade in goods and the substantial reduction of tariffs.

6. In this respect, it is clear from the Preamble and text of the ITA that the manifest object and purpose of the ITA is to expand world trade in IT products to the maximum extent possible by way of eliminating customs duties as well as any other duties and charges. Interpretations such as the one advocated by the EC do not conform to the ITA's object and purpose. In particular, an interpretation that would result in excluding from the EC concessions certain IT products will be contrary to the objective of substantial reduction of tariffs through reciprocal and mutually advantageous arrangements.

7. Article II:1(a) of the GATT 1994 contains a general prohibition of according treatment less favourable to imports of products from the other contracting parties than that provided for in a WTO Member's schedule. Article II:1(b) prohibits a specific kind of practice that is inconsistent with paragraph (a), that is, the application of ordinary customs duties in excess of those set forth and provided in the schedule.

8. The Philippines submitted that the EC and its Member States accord, through the measures at issue, treatment to the products at issue that is less favourable than that provided for in the EC Schedule. Specifically, the EC currently imposes a 14% duty on *Flat Panel Displays (FPDs)*, 13.9% and 14% duties on *Set Top Boxes (STBs)*, and a 6% duty on *Multifunctional Machines (MFMs)* instead of applying duty-free treatment on the said Information Technology products as provided for in the EC Schedule. For certain FPDs, the EC also makes the granting of a zero tariff upon importation subject to terms, conditions and qualifications not set forth in the EC Schedule. The Philippines submits that there was no justification for the new EC classification and the EC thus violates its obligations under Articles II:1(a) and (b) of the GATT 1994.

9. In addition, with respect to STBs, the Philippines submitted that the EC and its member States acted inconsistently with their obligations under Articles X:1 and X:2 of the GATT 1994 by failing to promptly publish EC classification-related regulations and by applying duties prior to their publication.

III. CONCLUSION

10. The Philippines agrees with the claims of the United States, Japan and Chinese Taipei that the measures of the European Communities and its Member States concerning flat panel displays, set top boxes with a communication function, and multifunctional machines are inconsistent with Articles II:1(a) and II:1(b) of GATT 1994. Furthermore, we agree that the EC measures concerning set top boxes with a communication function are also inconsistent with Articles X:1 and X:2 of GATT 1994.

ANNEX E-10

EXECUTIVE SUMMARY OF THE ORAL STATEMENT BY THE PHILIPPINES AT THE FIRST SUBSTANTIVE MEETING

I. INTRODUCTION

1. The Philippines noted that in view of the enabling nature of information technology, it has rightfully become an important priority for many members of the global trading system. It underscored its strong interest in the correct interpretation and application of the EC's ITA commitments, as it is currently ranked as the 10th largest ITA supplier to the European Union with Total EU imports of ITA products at $223 billion in 2005, and the Philippines accounting for $5.4 billion of that amount. The Philippines fully endorsed the presentations made by the three complaining Members.

II. GENERAL CONSIDERATIONS

2. Noting **Article II:1(a) and II:1(b) of the GATT 1994,** the Philippines submitted that the central element in this dispute is whether the EC has in fact collected duties in excess of those set forth in the EC Schedule, and that the key issue revolves around the misapplication or non-application by the EC of their tariff commitments and concessions as scheduled.

3. As the ***concessions contained in the EC Schedule are integral parts of the WTO Agreement*** pursuant to **GATT 1994 Article II (7),** the Philippines posited that these concessions are part and parcel of the language of the covered agreements whose meaning must abide by the customary rules of treaty interpretation. As established in WTO jurisprudence, ***Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("Vienna Convention")*** codify "customary rules of interpretation of public international law" within the meaning of Article 3.2 of the DSU. These provisions thus comprise the legal framework within which any interpretative exercise of language contained in the WTO covered agreements must take place.

4. The Philippines stated that a key question in this dispute is whether or not the EC measures have resulted in an undue limitation of the scope of their concessions and a derogation of rights of the members affected by such measures. The Panel is, as such, not concerned with the question whether the classification adopted by the EC is correct or not, but rather, what is important is that the tariff which results and is in the end applied because of such classification decision, was in fact the correct and legally binding tariff under the Agreement and the EC Schedule, which was and is an integral part of the Agreement. In this regard, customs classification rules and practice in the domestic setting may certainly be helpful but can never be decisive for the above analysis.

5. The Philippines believed that interpretations such as the one advocated by the EC do not conform to the ordinary meaning of, nor the object and purpose, of their concessions and are not faithful to the Agreement entered into and committed to by the EC.

III. ON FPDS

6. The Philippines posited that the Panel will have to determine the scope of the EC concessions on FPDs, which were in accordance with Attachments A and B of the ITA. The question at issue is whether FPDs with certain other technological features or connectors, such as a DVI that enables the FPD to receive signals both from an ADP machine and from other sources, would preclude them from duty-free treatment as granted by the EC Schedule.

7. The Philippines argued that the EC cannot limit the scope of the FPDs covered by the concession to those that can *only* be used with an ADP machine. As the European Court of Justice held in the *Kamino* case, the EC position on this matter "cannot be accepted" and would be tantamount to altering the EC's own rules on what could qualify as a flat panel display.

8. This view is further confirmed by the language of other concessions made by the EC pursuant to the ITA, and can be demonstrated by the EC's until 2004.

9. The Philippines argued that the principal unanswered question is how and why the EC opted to impose the particularly higher tariff of 14% from the category heading of reception apparatus for television; video monitors from heading 8528.2190 despite no showing of any easily intelligible basis or common reasoning that would lead an ordinary person to consider what is in essence *a flat panel display* to become now ***not*** a *flat panel display* and rather a video monitor.

IV. ON STBS

10. In regard to set-top boxes (STBs) with a communication function, the Philippines argued that in conducting its assessment, the Panel should take into consideration and draw appropriate conclusions from **the head-note in the EC's Schedule**. This head-note is self-explanatory: customs duties on STBs which have a communication function – a product contained in Attachment B to the ITA – must be granted duty-free treatment, wherever such STBs are classified.

11. The Philippines drew attention to the clear and ordinary meaning of the text of the concession. It covers STBs with **any** type of communication function. And the Philippines could not agree with the EC that technology, with its new functionality, has created a fundamentally and objectively changed product.

12. Again an examination of the EC schedule fails to justify in any ordinary meaning or layman approach why a STB with some improved feature suddenly is not a set top box, but is now classifiable as a video tuner or video recorder related item.

13. In addition, and still with respect to STBs, the Philippines also believes that the EC and its Member States acted in a manner that was patently contrary to Articles X:1 and X:2 of GATT 1994, by failing to promptly publish their measures and by implementing the measures before publication. The Philippines urged the Panel not to exercise judicial economy on the claims relating to Article X of GATT 1994 because of the grave systemic and legal implications of the matter.

V. ON MFMS

14. The Philippines submitted that the MFMs at issue fall within the scope of the concessions made by the EC with respect to subheadings HS ***8471.60, 9009.1100*** and ***8517.21.00*** for which the EC committed to grant duty-free treatment. There is no reasonable basis to glean from the schedule how an MFM originally with zero duty became dutiable under ***CN 9009.1200*** or ***8443.3191***, as a result of its having improved in efficiency and productivity.

15. On the second category of MFMs under HS subheading ***8517.21.00*** "facsimile machines," the Philippines submitted that there is a broad meaning to "facsimile machine" as confirmed by the factual context. The term "photocopy" thus does not cover the reproduction of originals by printing or transmitting a previously scanned data file as it is done by MFMs. And the number of pages these 2 separate functions, i.e. facsimile and photocopy, are able to perform are not determinative or definitive, as the main objective in either case is to do as efficiently as possible the task.

ANNEX E-11

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION BY SINGAPORE

I. INTRODUCTION

1. The European Communities (EC) is a participant to the Ministerial Declaration on Trade in Information Technology Products (ITA) and has committed to eliminate customs duties on products covered by the ITA.

2. The EC has however adopted measures with respect to flat panel displays (FPDs), set top boxes which have a communication function (STBCs) and multi-functional machines (MFMs) that deny *at least some* of these products tariff-free treatment, even though the products fall under the coverage of the ITA. These measures are clearly in violation of the EC's commitments under the ITA and the General Agreement on Tariffs and Trade 1994 (GATT 1994).

II. AN ASSESSMENT OF THE EC'S CONTESTED MEASURES

A. HORIZONTAL REMARKS

1. The nature of the dispute

3. This is *not* a case about the classification or tariff treatment of *new* products as such, but how to treat ITA products that have technologically developed. The EC's approach is essentially that whenever a new functionality is added to a product covered by the ITA, the product risks being excluded from the ITA. This approach is overly restrictive and runs counter to the ITA's object and purpose.

2. The nature of the EC's commitments

4. The meaning to be given to the product definitions included in Attachment B cannot be circumscribed by the tariff headings which the EC has added in its Schedule of Concessions. The language of the ITA is clear: Attachment B represents a positive list of specific products to be covered by this agreement wherever they are classified in the Harmonized System (HS).

3. The requirements of an "as such" claim

5. In order to substantiate an "as such" claim, it is *not* necessary to show that the contested measures *always* lead to a violation of the EC's commitments under the ITA. Rather, it is sufficient to show that at least in some respects the contested measures necessarily lead to such a violation.

4. The impact of the EC's duty suspension

6. As regards the suspension of import duties by the EC over some FPDs, this does not regularise a WTO-inconsistent measure. A WTO member is by definition free to lift the suspension of a WTO-inconsistent measure.

B. FPDS

7. The exclusion of any FPD (which would otherwise satisfy the ITA) merely because it has a DVI connection is a violation of the EC's ITA commitments.

1. Attachment A

8. Singapore agrees that FPDs constitute "output units" and notes that some FPDs may also constitute "input units" e.g. touch screen monitors.

9. The ECJ's judgment in *Kamino*, and the Opinion of Advocate General Mengozzi that preceded it, both confirm that EC customs officials apply the "solely or principally threshold" incorrectly towards FPDs fitted with DVI.

2. Attachment B

10. To the extent that an FPD is "for" a product covered by the ITA, such as a computer or an STBC, it is properly covered by Attachment B.

11. In fact, DVI functionality best enables FPDs to display the digital output of computers. FPDs with DVI functionality are thus properly covered by Attachment B.

3. The EC concedes as such violation of FPD-related measures

12. The EC's first written submission effectively concedes that, in the light of the *Kamino* judgment, its Explanatory Notes to the Combined Nomenclature (CNEN) necessarily leads to a violation of the EC's ITA commitments in respect of at least some FPDs. The EC's indication that it may amend the contested CNEN is no defence to an "as such" violation.

C. STBS

13. There is *nothing* in the ITA that precludes an STBC from ITA coverage simply because it has a recording function. The EC's measures do so and are therefore in violation of its ITA commitments.

14. The EC's tariff treatment of STBCs with a recording function is also inconsistent with its own laws. The definition of a "simple set-top box" in EC Regulation 107/2009 (on ecodesign requirements for certain STBs) contemplates that a simple STB can be equipped with recording functions.

15. Further, the European Commission estimates that the most basic forms of STBs will be equipped with hard disks by 2012. By treating STBCs with recording function as falling outside the ITA, the EC would, in effect, render the ITA concessions on STBCs meaningless in a few years.

D. MFMS

16. The EC's measures to exclude from tariff-free treatment, MFMs that are classifiable as either "input or output" units (within sub heading 8471 60) or "facsimile machines" (within sub heading 8517 21) under Attachment A of the ITA, are in violation of its ITA commitments.

1. Computer MFMs

17. MFMs with a digital connection to a computer must be classified within heading 8471 if they satisfy the conditions under Note 5(B) to Chapter 84 of the HS, namely that they: (i) are of a kind "solely or principally" used with a computer; (ii) are connectable to a computer CPU; and (iii) are able to send or receive data in a recognised computer language.

18. The ECJ's judgment in *Kip*, and the opinion by Advocate General Mengozzi that preceded it, indicate that most computer MFMs will be principally used with a computer and should be classified within heading 8471.

19. Even if there has to be recourse to HS General Rule 3, the application of General Rule 3(b) would lead to the majority of computer MFMs being classified as printers as the printing functionality represents that component of computer MFMs that gives them their "essential character".

2. Non-computer MFMs

20. The ordinary meaning, whether as defined by the complainants or the EC, of "facsimile machine" and "photocopying apparatus" do not contemplate output limitations. The 12 page per minute output limitation placed by the EC on non-computer MFMs is arbitrary and does not accord with the ordinary meaning to be given to these terms.

21. Singapore submits that most non-computer MFMs can come under heading 8517, which broadly covers "electrical apparatus for line telephony", and specifically under subheading 8517 21, which covers "facsimile machines", based on the ordinary meaning of the terms of those headings.

22. Even if there has to be recourse to HS General Rule 3, the application of General Rule 3(b) would result in most non-computer MFMs being classified as facsimile machines as the facsimile functionality represents that component of non-computer MFMs which gives them their "essential character".

3. The EC concedes as such violation of MFM-related measures

23. The EC's first written submission concedes that in the light of the criteria enounced by the ECJ in the *Kip* case, there may be computer MFMs in which the copying function must be deemed secondary and which should, therefore, be accorded duty-free treatment. By the EC's own admission, its measures necessarily lead to a violation of the EC's ITA commitments in respect of at least some MFMs. The EC's indication that it is "currently examining this matter with the assistance of the Customs Code Committee" is no defence to an "as such" violation.

III. CONCLUSION ON THE ITA AND ITS OBJECTIVES

24. Singapore submits that the EC's contested measures necessarily lead to duty treatment of FPDs, STBCs and MFMs that is inconsistent with the EC's tariff commitments undertaken pursuant to the ITA and violate WTO law, notably Article II GATT 1994, as such.

25. Singapore notes that this dispute can have far-reaching implications for trade in information technology (IT) products and the IT industry. The ITA aims to encourage innovation and trade in IT products. The interpretation of the ITA that Singapore calls upon the panel to uphold is consistent with its legal text and aspirations.

ANNEX E-12

EXECUTIVE SUMMARY OF THE ORAL STATEMENT BY SINGAPORE AT THE FIRST SUBSTANTIVE MEETING

I. INTRODUCTION

1. Singapore will start with some general points. First, Singapore does not seek an overly broad or inclusive construction of ITA commitments; what it opposes are the EC's overly restrictive interpretations of them. Second, Singapore agrees that any extension of product coverage should be through negotiation but here, we are dealing with products that are and remain covered by the ITA. This case is *not* about *new* products, but about the treatment of products that are *already* included in the ITA but which have developed new functionalities. Third, the products covered pursuant to Attachment B of the ITA cannot be circumscribed or "exhausted" by the tariff headings in the EC's Schedule of Tariff Concessions giving effect to the ITA ("EC Schedule") – the headnote in the Schedule makes it clear that the list and the tariff headings which follow are not exhaustive. Finally, to show that the EC's measures are inconsistent with its commitments, it suffices that the measures necessarily result in the EC imposing duties on at least *some* products which must be given tariff-free treatment; and this is the case for all three products in issue.

II. FLAT PANEL DISPLAYS ("FPDS")

2. Singapore's primary objection is to the EC excluding FPDs from tariff-free treatment so long as they have a DVI feature. FPDs are covered by both Attachment A and Attachment B of the ITA and the EC Schedule.

3. With respect to FPDs covered by HS 8471 60 by virtue of Attachment A, nowhere do the HS notes to that heading state that FPDs with DVIs must be excluded. It would not make sense to so exclude when it is precisely DVI that enables computer data to be better displayed. The inconsistency of the EC's measures is underscored by the ECJ judgment in the *Kamino* case. In light of this case, the EC has effectively conceded in its first written submission that its measures violate its commitments in respect of at least some FPDs. Its attempt to salvage the situation by stating that the presence of a DVI feature is but one of the criteria to be considered ignores the wordings in its measures.

4. The EC's measures on FPDs are also inconsistent with its tariff concessions giving effect to Attachment B, specifically under "flat panel displays … for products falling within this agreement". The EC's attempt to argue that "for" ITA products means "only for" ITA products is to read the limiting word "only" into the ITA when that word is not there. Even if it is assumed that CRT and non-CRT TVs are not covered by the ITA, the EC is not allowed to arbitrarily exclude an FPD simply because it has a DVI feature without looking at the product as a whole to see if it is indeed a TV or an FPD for a computer system.

5. The EC's suspension of its measures does not cure the inconsistency. Tariff-free treatment means no imposition of duties, not the temporary halting of duties. The suspension is also limited to certain FPDs, and tariffs continue to be levied for other FPDs that are entitled to tariff-free treatment.

III. SET TOP BOXES ("STBS")

6. Singapore objects to the EC's measures which treat STBs as "video recording or reproducing apparatus", just because they can perform a recording or reproducing function. This is inconsistent

with the EC's concession giving effect to Attachment B of the ITA to accord tariff-free treatment to: "set top boxes which have a communication function…".

7. First, there is nothing in the text of Attachment B or the EC's Schedule that makes the absence of a recording or reproducing function a condition for tariff-free treatment. Second, the simplistic and sweeping approach taken by the EC to treat an STB as a video recorder by virtue of the added functionality is similar to its approach for FPDs, and is erroneous for the same reasons. Third, the EC's treatment of STBs is inconsistent with its own recent regulation concerning so-called ecodesign requirements for STBs, which recognises that STBs can have recording functions without losing their character as STBs.

IV. MULTI-FUNCTIONAL MACHINES ("MFMS")

8. Singapore's position is that many MFMs would fall under Attachment A of the ITA – under subheadings 8471 60 (for computer MFMs) or 8517 21 (for non-computer MFMs).

9. As regards computer MFMs, Singapore concurs with the approach taken by the ECJ and by the Advocate General of that court in the *Kip* case. First, many MFMs capable of being connected to a computer would be used "solely or principally" with computers and are therefore input or output units. Second, if an MFM is used solely or principally with computers, it must *ipso facto* be classified as an input or output unit under subheading 8471 60. Third, *Kip* does not give rise to any presumption *against* classification of an MFM such that a computer MFM cannot be classified under subheading 8471 60 *unless* it is shown that the copying function is "secondary". It is necessary to make an objective assessment of the characteristics of the product in issue, instead of relying only on the existence of a copying function or copying speed as the criterion. Fourth, even if the copying and computing functions were found to be of equal importance, one cannot jump to GIR 3(c) without first applying GIR 3(b) to determine what the "essential characteristic" of the product is. Fifth, the EC appears to concede in its written submission that in light of *Kip*, its current regime is not fully consistent with its WTO obligations.

10. The same approach should be taken for non-computer MFMs which have a fax function. A proper assessment according to the objective characteristics of the products must be made to determine if they should be regarded as fax machines falling within subheading 8517 21. The machines' copying speed may be one of the relevant factors in making this assessment but it cannot be the *only* or decisive factor. The EC's approach, which is to regard the copying function as primary or equivalent to the fax function, simply on account of their having an electrostatic print engine and a copying speed of more than 12 pages per minute, is wholly arbitrary.

ANNEX E-13

ORAL STATEMENT BY THAILAND AT THE FIRST SUBSTANTIVE MEETING

1. Mr. Chair and Members of the Panel. Thailand appreciates the opportunity to present its views to the Panel today. As a signatory of the Information Technology Agreement ("ITA") and an exporter of the products at issue, Thailand has both a systemic and substantive interest in ensuring that other signatories abide by their ITA tariff commitments. Trade benefits accruing under the ITA play a significant role in Thailand's development: ITA products account for approximately 15 per cent of Thailand's global exports per year, with an annual value of approximately US$28 billion. The EC's interpretation of its ITA commitments, if adopted, would harm producers by limiting trade in information technology products, and we support the arguments made by the United States, Japan, and Chinese Taipei in their respective written submissions. In light of the complainants' comprehensive arguments, we will present just a few points this evening.

2. At the outset, Thailand would like to recall that the ITA is at its core a "tariff-cutting mechanism."[1] This is set out in the ITA preamble, which recognizes as one of its goals "*expanding* the production of and trade in goods."[2] The ITA also specifically provides that any changes in a signatory's treatment of covered products "should evolve in a manner that *enhances* market access opportunities."[3] To this end, Thailand endorses the United States' view that ITA participants "contemplated a positive evolution in market access, not the steady narrowing of duty-free treatment" such as that imposed by the European Communities as a result of the measures at issue in this dispute.[4] We also share the expansive views of the ITA as expressed by Chinese Taipei and Japan.[5]

3. The expansive and trade-liberalizing object and purpose of the ITA should inform the Panel's interpretation of the EC's tariff commitments in this dispute. These commitments are set out in paragraph 2 of the ITA, which requires parties to "bind and eliminate customs duties and other duties and charges of any kind, within the meaning of Article II:1(b) of the GATT 1994" with respect to covered products. In this regard, Thailand supports the complainants' position that the EC is obligated to provide duty-free treatment to STBs, FPDs, and MFMs. The EC's commitments for these products are thus straightforward: the aforementioned products form part of the EC's ITA commitments to provide duty-free treatment under Attachment A, B, or both; the EC modified its Schedule of Concessions by incorporating these ITA commitments; and consequently, these commitments are part of the EC's obligations under Article II:1(a) and (b) of the GATT 1994.[6]

4. That the EC's measures at issue[7] impose import duties on STBs, FPDs, and MFMs, when the EC is bound to provide these products with duty-free treatment, is in Thailand's view clearly inconsistent with the EC's obligations under GATT Article II:1(a), which obligates the EC to provide treatment that is "no less favourable than that provided for in the appropriate part of the appropriate

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[1] WTO ITA: Introduction, http://www.wto.org/english/tratop_e/inftec_e/itaintro_e.htm ("The ITA is solely a tariff cutting mechanism").

[2] ITA preamble, para. 3 (emphasis added).

[3] ITA, Article 1 (emphasis added).

[4] United States' first written submission, 5 March 2009, para. 28.

[5] Chinese Taipei's first written submission, 5 March 2009, para. 27 (stating that the object and purpose of the ITA is to "expand and enhance trade in IT products"), and Japan's first written submission, para. 46 (describing how the ITA seeks to "create and preserve market access for the covered technology products, not to create temporary duty reductions that would disappear over time").

[6] See United States' first written submission, paras. 31-32.

[7] As set out in Chinese Taipei's first written submission,, paras. 66-121.

Schedule." The EC's measures are also inconsistent with its obligation under GATT Article II:1(b), which requires that scheduled products "be exempt from ordinary customs duties in excess of those set forth and provided therein." We note that, like several other Members, Thailand is particularly concerned about the EC's tariff treatment of the products at issue, in the circumstances of this case. In other words, the EC must abide by its tariff commitments and provide duty-free treatment for the products at issue. We hope, like the complainants, that the Panel also reaches this conclusion.

5. On that note, Mr. Chair, we would like to end our statement. Once again, Thailand thanks the Panel for this opportunity to present our views.

ANNEX E-14

**EXECUTIVE SUMMARY OF THE
THIRD PARTY SUBMISSION BY TURKEY**

I. INTRODUCTION

1. Turkey believes that the issues subject to complaint by Japan, the United States and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu have to be analyzed with a view to ensure that the rights of the Members of the Ministerial Declaration on Trade in Information Technology Products (hereinafter referred to as "ITA") are not adversely affected.

2. While not taking a final position on the facts of this case, Turkey considers that this dispute is related to the scope of the ITA.

II. INFORMATION TECHNOLOGY AGREEMENT

3. Ministerial Declaration on Trade in Information Technology Products was signed in 13 December 1996 by 14 Members of the World Trade Organization (WTO), including Turkey as a signatory party.

4. In order to expand the product coverage of the ITA, parties have to follow the procedures set forth in the Paragraph 3 of the Annex to the ITA. Paragraph 3 reflects the common understanding of the parties regarding the modification of product coverage of the Agreement.

5. However, Turkey considers that ITA Members have not been able to put into practice the provisions of the Paragraph 3 so far. Hence, there has been no formal modification on any of the Attachments. Turkey is of the opinion that Paragraph 3 (and also Paragraph 5) of the Annex of the ITA can hardly yield satisfactory results unless some amendments are put into effect.

6. On 15 September 2008, the European Communities submitted a document (Document Symbol is G/IT/W/28 and TN/MA/W/107) to the attention of the Committee of Participants on the Expansion of Trade in Information Technology Products and the Negotiating Group on Market Access proposing to negotiate the ITA with the purpose of an update.

7. Turkey considers that re-negotiation of the ITA may well be an avenue to pursue when taking into account the current Doha Round conditions. The need for the revision of the Attached Lists arises, *inter alia*, from the fast evolving nature of information technology products, doubts on the classification of a group of products, and the failure to reflect changes made to HS classification in 2002 and 2007.

III. ASSESSMENTS CONCERNING THE COMPLAINANTS CLAIMS

8. Turkey notes that flat panel display devices which incorporate digital visual interface (DVI) are not only able to produce output from information technology products falling within the ITA, but also from consumer electronics products having DVI or HDMI (High-Definition Multimedia Interface) interfaces.

9. Turkey shares the view that "Televisions and other monitors or display units *able* to receive and process television signals or other analogue or digitally processed audio or video signals *with the assistance of or directly from* another product other than the central processing unit of a computer are

explicitly excluded from the scope of the commitments to eliminate customs duties on certain products."[1] Turkey considers that flat panel display devices which are dual use products do *not* fall under the existing Information Technology Agreement.

10. Since the receiving, watching and recording of television broadcasts are the primary purposes of use for these set top boxes, access to internet and interactive information exchange features must be regarded as secondary and to be of limited use. Turkey is of the view that set top boxes of this kind do *not* fall under the scope of the existing ITA.

IV. CONCLUSIONS

11. Turkey considers that contrary to the claims of the complainants, the products at issue do *not* fall under the current Information Technology Agreement. Any technologically newly developed product which has multi-usage that may partially incorporated by the Attachments of the ITA (mainly Attachment B cannot automatically be considered as covered by the ITA.

12. Turkey requests this Panel to review the claims taking into account observations and comments stated in this submission. On the other hand, the litigation process should not diminish Members' rights beyond obligations undertaken at the time of the signing of the ITA. Turkey reserves its right to make further comments at the third party session of the first substantive meeting with the Panel.

[1] Economic Communities' first written submission, para. 132.

ANNEX E-15

ORAL STATEMENT BY TURKEY AT THE FIRST SUBSTANTIVE MEETING

1. I am glad to present you with the views of Turkey at this stage of the panel proceedings regarding the complaint launched by Chinese Taipei, Japan and the United States of America. I will summarize Turkish position on the subject, to the extent possible, by refraining from repetition of details presented in our written submission.

2. To begin with, I would like to state here that Turkey is a signatory party of the "Ministerial Declaration on Trade in Information Technology Products (ITA)" from the time it was signed in 13 December 1996 by 14 Members of the World Trade Organization (WTO). Turkey still shares the view that information technology makes positive contribution to global economic growth and welfare.

3. Based on the panel establishment requests submitted by the complainants, products subject to complaint in this panel are called Flat Panel Displays (FPDs), Set-Top Boxes (STBs) and Multifunctional Digital Machines (MTMs).

4. Complainants submit that the European Communities imposes customs duties of about 14% on FPDs and STBs, and 6% on MTMs, while the EC is under obligation to grant duty-free tariff rate for these products as required by its schedule of commitments resulting from the ITA.

5. Turkey finds it necessary to point out shortly the following issues relating to the products at issue, so as to underline the fact that tariff commitments under ITA are being applied.

6. Monitors pertaining to goods falling under ITA have been accorded duty free access courtesy of headings 8528.41.00 and 8528.51.00.

7. STBs embedded with the following attributes should be designated as STBs being accorded with the concessions offered by ITA: being microprocessor-based, incorporating a modem for accessing the internet, having a function of interactive information exchange. STBs housing all definitional elements, vividly cited in the agreement, are classified under the heading 8528.71.13, which accords duty free access.

8. MFMs are granted duty free access under the heading 8443.31.10. However, those that are incorporated with copying function as its primary attribute will be dutiable under the heading 8443.31.91.

9. Turkey believes that this dispute has occurred thanks to the rapid development and convergence in "consumer electronics" and "information technology" products. Most consumer electronics products, like televisions, are not covered by the ITA. On the other hand, with the addition of certain features that was not foreseen at the time of signing of the ITA, producers created products that can operate either e.g. as an information technology product or as a TV. Likewise, some STBs and MTMs gained such quality and producers of these devices have sought duty-free access to markets under the ITA.

10. Complainants and some third parties insist that products that can be used as an information technology or as an ordinary electronics device must be granted zero tariff rate. However, they fail to explain how for example an FPD that can also be used as a television fall under ITA. Accepting this logic simply means granting zero tariff for televisions, which are not covered by the ITA.

11. Moreover, the importation of multi-use products with zero tariff rates granted under ITA concesssions may also constitute a form of "circumvention" of customs obligations.

12. Article 3.2 of the DSU provides that "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements." Our view is that, if accepted, complainants' claims will serve to add to the obligations of many signatory parties of the ITA by expanding the product coverage of the Agreement, without resorting to ITA Annex Article 3.

13. In order to find an effective solution to the current disagreement, as stated in our written submission, complaining parties should consider negotiation and update of the ITA product coverage, and parties should devise a feasible mechanism to replace Article 3 of the ITA Annex.

14. Turkey also considers that views expressed by Korea with regard to the legal basis of this dispute are worth mentioning. In its third party written submission, Korea states that the ITA is not among the agreements annexed to the WTO Agreement and is not one of the "covered agreements" within the meaning of Appendix 1 of the DSU.[1] Korea also quotes the following expression from the Panel Report *US – Lead and Bismuth II*: "the Ministerial Declaration is a mere 'Declaration', rather than a 'Decision' of the Ministers. In our view, a Declaration lacks the mandatory authority of a Decision."[2] Korea further argues that "the ITA participants revised their tariff commitments for certain technology products through formal modification of their Schedules of tariff concessions" and that "It is these revised tariff commitments that govern the WTO market access obligations of each ITA participant with respect to the products concerned."[3]

15. With this approach, it occurs that the ITA is not even a Ministerial Decision and thus it is not binding. If this Ministerial Declaration is not binding then the question as to how Signatories are bound with its Annexes or other obligations arises. As a result, Turkey is of the view that the Panel should consider clarifying the legal basis of this dispute taking into consideration Korea's approach.

16. Turkey wishes to thank the Panel for the opportunity to submit its views during this hearing.

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[1] Korea's third party submission, para. 4.
[2] Korea's third party submission, footnote 2.
[3] Korea's third party submission, para. 5.