

ANNEX D

SUBMISSIONS OF THE EUROPEAN COMMUNITIES

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ANNEX D-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION BY THE EUROPEAN COMMUNITIES

I. INTRODUCTION

1. The present dispute is mainly about whether certain products are within the scope of the tariff concessions made by the European Communities pursuant to the ITA, as the complainants have alleged, or rather within the scope of other concessions included in the EC Schedule, which do not provide for duty free treatment.

2. It is regrettable, however, that the complainants have deemed it necessary to call into question the good faith of the European Communities by suggesting that the European Communities is seeking to undermine the ITA and to evade the tariff concessions which it has made pursuant to that agreement. Contrary to what the complainants may want to imply, the ITA is not "their project". It was, in fact, the European Communities which played a seminal role in developing the idea of an agreement on liberalization of trade in IT products. What resulted from the negotiations was a landmark agreement, but also a balanced compromise.

II. THE INFORMATION TECHNOLOGY AGREEMENT ("ITA")

3. Regrettably, the complainants never explain what the ITA is really about, and focus instead on a few selected provisions or excerpts thereof. The ITA consists of three parts: (i) the Ministerial Declaration, (ii) the Annex to it and (iii) Attachments A and B to the Annex. To capture the object and purpose of the ITA, all these parts have to be interpreted in such a way that all of them are given meaning and none of them is rendered ineffective. The complainants seem to forget that the certification of schedules by WTO members has completed the process envisioned in the ITA for its implementation. With the certification, the ITA obligations were transformed into binding Schedules. This approach of the complainants raises questions about the solidity of the assumptions that the complainants advance as legal bases for their claims against the EC.

4. The negotiating history illustrates well that the scope of the product coverage is one of the central issues of the ITA and that the ITA as a whole is about the *product coverage* and *ways* in which that product coverage *can (or cannot) be expanded* to benefit from liberalized market access.

III. THE CLAIM ON "FLAT PANEL DISPLAY DEVICES" (FPD) UNDER ARTICLE II OF THE GATT 1994

A. PRELIMINARY REMARKS

5. To the extent the European Communities is able to understand the claim relating to Flat Panel Display Devices, the complainants criticise two criteria the EC is allegedly incorrectly applying under the measures with the result that the EC is in breach of Article II of the GATT 1994: (1) the existence of a DVI connector and (2) the question whether a monitor is able to display signals only from an automatic data-processing machine.

6. Furthermore and to the extent the European Communities is able to understand the claim, the complainants are invoking at least two terms or positions in the EC Schedule that, according to them, cover the products at issue in this dispute.

7. The main focus is on the term "flat panel display devices (including LCD, Electro Luminescence, Plasma, Vacuum-Fluorescence and other technologies) for products falling within this agreement, and parts thereof" that is the result of the EC incorporating Attachment B of the ITA into its Schedule. This is not a term used by the Harmonised System. It is a specific term pursuant to the ITA.

8. "Alternatively" (Japan) or "independently" (TPKM) or "in addition" (US), the complainants invoke the tariff term "input or output units, whether or not containing storage units in the same housing – other – other" in tariff line 8471 60 90 (HS 96). This is clearly a secondary line of argument.

9. However, the complainants are not very clear on how they see the interplay between these allegedly separate commitments in the EC Schedule and/or in the ITA as allegedly incorporated into the EC Schedule. However, there is no dispute between the Parties that a monitor capable of displaying signals only from an automatic data-processing machine cannot be subject to duties despite the complainants insisting that such monitors are within the scope of the dispute.

B. LACK OF A PRIMA FACIE CASE

10. The European Communities is of the view that the complainants have failed to make a *prima facie* case in respect of the measures concerning "Flat Panel Display Devices" for at least four different reasons, namely they have

- failed to identify the product or products at issue in sufficient detail for the European Communities to defend itself and for the Panel to rule on the dispute in the absence of rebuttal;
- failed to identify with the necessary clarity the obligation the European Communities is allegedly in breach;
- failed to demonstrate that the European Communities would be applying ordinary customs duties in excess of those set forth in the EC Schedule because the European Communities does not apply duties on products the European Communities assumes could fall within the scope of the dispute;
- only identified certain specific elements in the disputed EC measures that could not, even if all the arguments of the complainants would be accepted, necessarily lead to a violation of Article II of the GATT 1994.

11. In any event, the case the complainants have brought cannot extend to challenging the EC measures *as such*.

C. THE MEASURES AT ISSUE AND THEIR INTERPRETATION BY THE EUROPEAN COURT OF JUSTICE

12. In the Panel request, the complainants have identified five different measures as "measures at issue":

13. Regulation 493/2005 suspending the application of duties on certain video monitors expired on 31 December 2008. It has been replaced by Council regulation 179/2009. In accordance with its Article 2, regulation 179/2009 applies from 1 January 2009. It suspends the application of customs

duties on certain flat panel video monitors. The product scope is wider than its predecessor regulation 493/2005 cited by the complainants in their panel request.

14. Regulations 634/2005 and 2171/2005 provided *inter alia* for the classification of certain LCD monitors within the CN codes 8471 60 80 and 8528 21 90 as the CN codes existed at the time in the light of HS 2002. The codes as they existed at the time no longer exist. As a result, the above mentioned classification regulations have effectively lost their relevance and the European Communities is in the process of repealing or replacing them as appropriate for reasons of legal certainty. However, the LCD monitors in the annexes are the only products the complainants have identified with sufficient clarity.

15. Council regulation 2658/87 as amended provides for the current version of the CCT. Monitors "of a kind solely or principally used in an automatic data-processing system of heading 8471" are free of duty. Other monitors and televisions carry a duty ranging from 2 to 14% *ad valorem*. However, as described above, the application on duties on most video monitors has been suspended.

16. Finally, the complainants have identified also Explanatory Notes to the Combined Nomenclature of the European Communities, 2008/C 133/01 (30 May 2008), "alone or in combination with Council Regulation (EEC) No. 2658/87 of 23 July 1987". It should, however, be underlined that Explanatory Notes are not legally binding in the EC legal order. Explanatory Notes are not "like a regulation" as the complainants' describe them. To the extent there is a conflict between the wording of the headings and the Explanatory Notes, the latter will be inapplicable.

17. On 19 February 2009 the European Court of Justice (ECJ) gave its judgment in case C-376/07 *Kamino*. As a matter of current EC law as interpreted by the ECJ, the classification of monitors using LCD technology as units of the kind used "principally" in an automatic data-processing system is *not* precluded on the sole ground that they are capable of displaying signals coming both from an automatic data-processing machine and from other sources as claimed by the complainants.

18. In fact it never was precluded as rigidly as the complainants assert in view of item 1 of regulation 2171/2005. However, any possible ambiguity that there was in this respect has now been clarified by the ECJ through the interpretation provided by the Court. It is also noteworthy that in order to reach its conclusion the ECJ essentially had to consider that there is a textual conflict between the HS2002 Explanatory Notes to heading 8471 and the HS2002 Note 5(B)(a) to chapter 84. The ECJ resolved this textual conflict on the basis of the hierarchy of Notes in the CN and the HS.

19. Neither is the fact that an LCD monitor is fitted with a DVI connector alone decisive on the tariff classification under EC law as claimed by the complainants although the ECJ uphold the relevance of the criterion. To decide whether a given monitor is or is not used "principally" in an automatic data-processing system requires inherently *a case-by-case analysis*.

D. CONCLUSIONS

20. In its first written submission the EC demonstrates that video monitors and televisions were explicitly excluded from the scope of the ITA and the concessions made pursuant thereto. The complainants fail to recognise that this follows from the narrative product definitions in Attachment B to the ITA.

21. Furthermore, as becomes clear when the claims are examined in the context of the Harmonized System, the European Communities has simply been applying the criteria contained

therein to distinguish between display units of ADP machines and video monitors. At the time relevant to the case, the language of the Explanatory Note to heading 8471 with regard to "separately presented units" such as "display units of automatic data-processing machines" stated that display units of ADP machines were "capable of accepting a signal *only* from the central processing unit of an automatic data-processing machine and [were] therefore not able to reproduce a colour image from a composite video signal whose waveform conforms to a broadcast standard (NTSC, SECAM, PAL, D-MAC etc.)". Such display units were equally "fitted with connectors characteristic of data-processing systems (e.g. RS-232C interface, DIN or SUB-D connectors)". These are precisely the two criteria the complainants claim the European Communities should *not* have applied.

22. Finally, even if one were to ignore the language of the HS96 Explanatory Notes to heading 8471, it would in most cases be necessary to have recourse to the application of GIR 3(c) because in most individual cases it is impossible to identify the *principal* function of a given monitor. As a result, the relevant monitor would be classified in one of the subheadings in heading 8528 because that "occurs last in numerical order among those which equally merit consideration". Indeed, as the European Communities demonstrates this is precisely how the United States classifies such monitors.

23. The European Communities considers that in respect of the claim on "flat panel display devices"

- (a) The complainants' have failed to present a prima facie case
- (b) To the extent the Panel considers the complainants have presented a prima facie case, the claim does not extend to an "as such" claim, and in any event,
- (c) The European Communities is not in breach of its obligations under Article II:1(a) and II:1(b) of the GATT 1994.

IV. THE CLAIM ON SET TOP BOXES WHICH HAVE A COMMUNICATION FUNCTION (STBC) UNDER ARTICLE II GATT 1994

A. PRELIMINARY REMARKS

24. The complainants have failed to explain and establish what constitutes the EC concession. The EC addresses the claim in the way put forward by the complainants, namely as that resting solely on the narrative description of the product at issue in the EC Schedule and/or ITA. That does not mean, however, that the EC necessarily agrees with the proposition that the EC tariff concession is set forth both in the EC Schedule and the ITA and that it is affected by the "headnote" in the way the complainants assert.

25. Neither the ITA nor the EC Schedule refers to a product referred to by the complainants as a "set top box *with* a communication function". The EC's commitment is made with respect to "[S]et top boxes *which have* a communication function". An analysis of a commitment in light of the Vienna Convention must, *at a minimum*, be based on a full, correct and unaltered text of that commitment.

26. The product descriptions provided by the complainants are inaccurate, irrelevant and misleading. By joining and combining descriptive elements from various sources and, importantly, time periods, the complainants avoided addressing any differences between the product existing at the time of the conclusion of the ITA (and when the EC made its bindings) and the product of today

which is under dispute. A product which had certain features and characteristics at the time of the conclusion of the ITA is not the product the treatment of which is complained about by the complainants.

B. THE NARRATIVE DESCRIPTION IN THE EC SCHEDULE

27. The narrative description of the product at issue is part of an international agreement (namely, the GATT 1994). In addition, the narrative description itself stems from an international agreement, the ITA. Hence, the EC interprets this term in accordance with the rules of interpretation under international law, *i.e.*, in accordance with the ordinary meaning interpreted in light of the surrounding circumstances, taking due account of the context and subsequent developments, including subsequent practice. This interpretation makes clear that the narrative description refers to a *certain specific category of set top boxes* and not all or any products called or referred to as "set top boxes" fulfilling certain minimum requirements. The narrative description covered only certain category of set top boxes, while other set top boxes (certain technologies) were not covered by the narrative description.

C. THE MEASURE(S) AT ISSUE RESPECT THE EC COMMITMENT

28. The complainants argue that the narrative description means that any STB, as long as it contains three "attributes" (namely, (1) it is a microprocessor-based device, (2) incorporating a modem for gaining access to the Internet and (3) having a function of interactive information exchange) is an STBC as defined in the EC Schedule and the ITA. It does not matter whether the product at issue has any other functions or incorporates any other devices "*in addition to*" the three "attributes". In other words, despite calling the narrative description a "definition", the complainants essentially view the narrative description of the STBCs as setting forth *minimal requirements*: once present, an apparatus qualifies for a duty free treatment, regardless of what else the apparatus contains. A set top box which performs 1% communication function and 99% other functions, or 1% of which is constituted by the above three "attributes" and 99% by other technical elements (a hard disk, a DVD recorder, etc.), is in the view of the complainants a set top box covered by the ITA and the EC commitment.

29. Such an interpretation would mean that one does not consider the objective characteristics of a product, *i.e.*, the technological elements present in the set top box. To the contrary, anything can be put into a set top box and, as long as it fits inside together with the above three elements, it is supposed to be, in the view of the complainants, a set top box covered by the EC Schedule. This is clearly wrong.

30. Moreover, products which the complainants want to have covered by the definition of "set top boxes which have a communication function" are no longer even considered as set top boxes: their main features and functionality make them a completely different product – a "digital video recorder" (DVR) or "personal video recorder" (PVR).

31. The ISDN/W-LAN/Ethernet devices are not "modems". Hence, set top boxes with these devices are not granted ITA treatment because they do not fulfil the narrative description and not because the EC would deny that they allow a connection to the Internet. Similarly, set top boxes which perform the function of a reception apparatus for television but which do not incorporate a video tuner (such as "IP-streaming boxes") do not incorporate a modem but connect to the Internet through, for example, an Ethernet interface.

32. The complainants also misunderstand the EC classification. It is through the CN codes that the EC implements its obligations flowing from its Schedule, including those taken pursuant to the

ITA. If the complainants consider that the EC misclassifies, they have to yet make their case. If they decide to do so, and considering that the EC classifies on the basis of objective characteristics of the products, they cannot merely point to one technical element out of many in a product – they have to make their case with respect to the totality of the objective characteristics of a given existing product, and not merely to an abstract category of products delineated by certain minimal attributes.

D. CONCLUSIONS

33. In its first written submission, the EC demonstrates, first, that the narrative description of the product at issue in the EC Schedule and the ITA does not support the claim made by the complainants. To the extent that narrative description constitutes the EC concession, that concession is not open-ended. The *Greece – Phonograph Records* case supports, rather than contradicts, the EC position.

34. Second, the EC's customs classification, through which the EC implements the ITA, is, in accordance with the guidance provided by the ECJ, WCO and the Appellate Body, based on objective characteristics of a product at the time of importation. This approach to classification does not mean that one selects a single characteristic and ignores all the other. To the contrary, the EC considers the totality of the characteristics to make a classification decision. The complainants are therefore wrong in arguing that the EC excludes certain STBs from the ITA treatment "merely due to the presence of a hard disk". It is rather because those products, based on a consideration of all their characteristics, perform other functions than that covered by the ITA description and the EC Schedule, that the EC classifies them in a certain way.

35. Third, by interpreting the narrative description as setting forth minimum requirements, the complainants avoided presenting any evidence showing that in any given case, the EC incorrectly considered the totality of the product as a whole and that it incorrectly concluded that it was not entitled to ITA treatment. Nonetheless, since the narrative description is about a certain type of products and not about minimum requirements, the complainants have yet to show that in any given case the EC acted inconsistently with its obligations. This is a highly significant observation, because it pertains both to the complainants' failure to identify conclusively the products at issue as well as to their lack of showing that the EC violates Articles II:1(a) and (b) GATT 1994 "as such and as applied".

V. THE CLAIM ON SET TOP BOXES WHICH HAVE A COMMUNICATION FUNCTION (STBC) UNDER ARTICLE X GATT 1994

A. ARTICLE X:1 GATT 1994

36. The US based its claim on the following premise: the CN EN at issue "were approved by the ... Customs Code Committee ... in October 2006 and May 2007, respectively. Yet the EC failed to publish amendments in its official journal until May 2008, over a year after the amendments had been approved." TPKM advances a similar claim, albeit arguing that the CN EN were adopted in April 2007.

37. The premise of the complainants is factually and legally wrong. First, it is incorrect to say that the CN EN were published over a year after their adoption. The Customs Code Committee does not "adopt" or "approve" anything in the management procedure. The complainants acknowledge this, in fact, in the initial parts of their submissions in which they describe the functioning of the EC customs law. By arguing something different in the sections dealing with their claim, they are contradicting themselves.

38. Second, what happened was that various parts of the interrelated text of the CN EN were revised several times following their first discussion in the Committee in May 2006 and, during the process of redrafting and revision, voted upon several times by the Committee (October 2006, April 2007 and February 2008). In this way, the draft developed into a coherent text reflecting the discussion. Once all the parts of the draft measure voted upon, the Commission services proposed the text to the Commission for adoption. The CN EN were adopted at the end of April 2008. Thereafter, the CN EN were promptly published on 7 May 2008.

B. ARTICLE X:2 GATT 1994

39. In reality, the complainants argue that the CN EN violated Article X:2 GATT 1994 because they were *enforced before their adoption* (and subsequent publication). The legal status and effect of draft CN EN, which were merely voted upon, cannot exceed that of *adopted* and *published* CN EN. Therefore, without considering any further arguments by the complainants, one can already conclude that the complainants are wrong.

40. It appears that the complainants are rather trying to convince the Panel that it is the votes and discussions in the Committee made in the context of the management procedure which constitute a measure in the sense of Article X:2 GATT 1994. This line of thought cannot be followed, however. Neither the misinterpreted statement presented as evidence, nor any of the BTIs provided by the complainants support the complainants' argument.

VI. CLAIM CONCERNING CERTAIN "MULTIFUNCTIONAL MACHINES" (MFMS) UNDER ARTICLE II OF THE GATT 1994

A. BACKGROUND

1. The products at issue

41. This claim concerns the tariff treatment accorded by the EC to imports of certain MFMs. Specifically, according to the complainants, the products at issue comprise: (a) MFMs which are connectable, either directly or indirectly, to an ADP machine (ADP MFMs); and, (b) MFMs which are not connectable to an ADP machine and use a phone line to perform a facsimile transmission function (non-ADP MFMs).

42. MFMs are not a "technological advanced version of printers". They are the result of a process of technological convergence, whereby devices with different functions (photocopying, printing and facsimile) have been merged into one in order to perform these various functions.

43. Many MFMs manufacturers produce stand-alone photocopiers and have developed MFMs from a photocopier basis. Producers such as Ricoh, Canon and Kyocera market their MFMs as "copier-based" or "copycentric". The essential component of MFMs is the print engine. However, a print engine is different from a printer. In an MFM the print engine is used not only for printing data from an ADP machine, but also for copying and for printing incoming faxes. If it is true that a print engine is a necessary component of all printers, it is also true that a print engine is equally a necessary component of all stand-alone copiers and fax machines.

2. The measures at issue

44. In the joint Panel Request, the complainants identified four measures as arguably been inconsistent with the EC obligations under the GATT 1994, namely, (a) Council Regulation (EEC)

No. 2658/87 of 23 July 1987, (b) Commission Regulation (EC) No. 517/1999, (c) Commission Regulation (EC) No. 400/2006, and (d) Statement of the Customs Code Committee, Tariff and Statistical Nomenclature Section, contained in the Report of Conclusions of its 360th meeting. In Commission Regulations 517/1999 and 400/2006, as well as in the CCCE statement, MFMs were classified under CN 9009 12 00. Yet, CN 9009 12 00 was removed from the CCT, effective 1 January 2007, as part of the implementation of the HS 2007. Hence, the EC considers that the only measure at issue in the present dispute is the current version of the CCT.

45. The EC also understands that the complainants' contention in this dispute is limited to the current CN 8443 31 91 ("machine performing a copying function by scanning the original and printing the copies by means of an electrostatic print engine"), as it is the only tariff line in subheading 8443 31 that provides a tariff rate of 6%, compared to the rest of the tariff lines of the said subheading, which provide for duty-free treatment.

3. Relevant Tariff Concessions

46. The complainants claim that the tariff treatment given to imports of MFMs under current CN 8443 31 91 (tariff rate of 6%) is less favourable than that recorded in the EC Schedule under the concessions for the various codes of subheading 8471 60 and for CN 8517 21 00, which provide for duty-free treatment. The EC, on the other hand, considers that, as a general rule, MFMs fall within the concession for CN 9009 12 00, which provides for a bound tariff rate of 6%.

4. The Issue

47. In essence, the matter to be resolved in this dispute is whether the MFMs currently covered by CN 8443 31 91 fall within the concessions made in the EC Schedule for the various codes of subheading HS 8741 60 and for CN 8517 21 00 or, rather, within the concession for CN 9009 12 00.

B. ADP MFMs

1. Digital copying is a form of photocopying

48. The complainants argue that "digital copying" is not a form of "photocopying", so that ADP MFMs cannot be classified under subheading 9009 12. However, digital copying is but a technological development of photocopying. There is nothing in subheading 9009 12 that may lead to the conclusion that this position excludes digital copying.

49. According to the ordinary meaning of "photocopying apparatus", the term "photo" means light. Light is, indeed, the defining feature that distinguishes photocopiers, both digital and analogue, from other types of copying machines. Moreover, the only difference between analogue and digital photocopiers is that the latter utilizes an additional intermediate step, *i.e.* the digitalization of the image before reconstituting it on an electrostatic drum. This difference, however, does not bring digital photocopiers outside subheading 9009 12, because this position also encompasses photocopying by means of indirect processes.

50. The context provided by other positions of the EC Schedule and the HS96 also shed light on the correct classification of MFMs. The complainants argue that digital photocopiers must not be classified under subheading 9009 12 because they do not use "optical technology", omitting that digital photocopiers use an optical system consisting of lamps, lenses and mirrors.

51. The EC has consistently classified digital copiers under subheading 9009 12. And so did the US until 2002. As noted by the complainants, even the WCO struggled with the classification of the MFMs at issue under the HS 96, to the extent that no decision could be reached.

2. ADP MFMs fall outside the concession for subheading 8471 60, unless it can be shown that their copying function is secondary

52. Note 5(B) to Chapter 84, which forms integral part of the HS, establishes three criteria that, altogether, must be met in order for a product to fall under subheading 8471 60. There is no dispute that letters (b) and (c) of that note are fulfilled by the MFMs in question. However, letter (a) will be met depending on the specific nature and relative importance of the functions performed by each particular kind of MFM. As recognized by the complainants, digital copying works independently from an ADP. Hence, to the extent an MFM is used for copying, it cannot be regarded as being "used in an automatic data processing system". As concluded by the ECJ in the *Kip* case, pursuant to Note 5(B)(a), ADP MFMs may not be classified directly under subheading 8471 60 unless the copying function is "secondary" in relation to the ADP functions.

53. The determination of whether the copying function is "secondary" must be assessed on a case-by-case basis in accordance with the "objective characteristics" of each kind of MFM. The application of letter (a) of Note 5(B) is not excluded by Note 5(D) to Chapter 84 because MFMs are not mere printers.

54. The negotiating history of the ITA also shows that the drafters never intended to cover the ADP MFMs at issue, even though they were already in the market in 1996. Neither "Landscape 1" of 12 March 1996, nor "Landscape 2" of 28 of March 1996 made any reference to MFMs at all.

3. ADP MFMs with equivalent copying function fall within the scope of concessions for CN 9009 12 pursuant to GIR 3

55. When the copying function of the ADP MFMs at issue is not "secondary" in relation to their ADP functions, they are *prima facie* classifiable under subheadings 8471 60 and 9009 12. It becomes necessary therefore to classify them in accordance with GIR 3. GIR 3(a) cannot be applied pursuant to its second sentence. GIR 3(b) cannot be applied either, because the ADP MFMs at issue cannot be classified after the component which arguably confers them their "essential character", i.e. the print engine. Indeed, that component may be classifiable under different positions depending on whether it is intended for use with a printer, a copier or a fax machine. Since neither GIR 3(a) nor GIR 3(b) can be applied, it becomes necessary to resort to GIR 3(c). As subheading 9009 12 occurs last in the HS, the ADP MFMs at issue must be classified under that position.

C. NON-ADP MFMs

56. The complainants claim that non ADP MFMs that have a facsimile transmission function fall always under the concession for CN 8517 21, and must be granted duty-free treatment. This assertion overlooks another of the functions of the non-ADP MFMs at issue, namely, photocopying. Although the complainants point out that in the commercial jargon these machines are usually called "facsimile machines", this is not always the case. But even if so, as the Appellate Body has reiterated, the subjective characterization of a product by its manufacturer is not dispositive for its classification.

57. Given the fact that the non-ADP MFMs at issue perform both facsimile and photocopying functions, and consequently, are *prima facie* classifiable under both subheadings 8517 21 and 9009 12, it is, again, necessary to resort to GIR 3. For the aforementioned reasons, neither GIR 3(a)

nor GIR 3(b) are applicable. Therefore, the non-ADP MFMs at issue must be classified in accordance with GIR 3(c). As subheading 9009 12 comes last in the HS, the non-ADP MFMs at issue must be classified under that position.

VII. CONCLUSION

58. In the light of the foregoing considerations, the European Communities respectfully requests the Panel to reject the claims made by the complainants.

ANNEX D-2

EXECUTIVE SUMMARY OF THE ORAL STATEMENT BY THE EUROPEAN COMMUNITITES AT THE FIRST SUBSTANTIVE MEETING

I. INTRODUCTION

1. This dispute is not about the EC's support for the ITA. The EC is fully committed to the success of the ITA and the liberalisation which the ITA has brought about.

2. Nor is this dispute about the good faith of the EC in implementing the ITA. As shown by the EC, the complainants' insidious and unsupported allegations of "methodical reclassification" are groundless.

3. Lastly, this dispute is not about "protectionism" on the part of the EC. In fact, the EC has no significant domestic production of any of the products at issue.

4. Instead, the present dispute raises a limited number of issues concerning just a few of the many products covered by the ITA. In essence, this dispute is about whether the products at issue fall within the scope of certain tariff concessions made by the EC pursuant to the ITA, as the complainants have alleged, or rather within the scope of other concessions included in the EC's Schedule, which do not provide for duty free treatment.

5. The EC considers that the complainants' claims stem from a misinterpretation of the relevant terms of the EC's Schedule. Unlike the complainants, however, the EC does not claim that the interpretation of those terms is straightforward. The fact that similar issues have been the subject of lengthy discussions within the World Customs Organization and the ITA Committee and have prompted litigation before several national courts, including the European Court of Justice, as well as the complainants' own shifting classification practices, all attest to the difficulties involved.

6. Those difficulties arise, to a large extent, from the fact that the three categories of products at issue in this dispute are "multifunctional", i.e. they can perform more than one function. As a result, they may be prima facie classifiable within more than one of the different concessions included in the EC's Schedule. The EC considers that, in deciding into which of those concessions the products at issue are to be classified, it is essential to take into account all the functions of those products, as well as their relative importance. In so far as the concessions at issue refer to the 1996 version of the Harmonised System (HS96), this analysis must be performed within the framework provided by the notes and interpretative rules stipulated in the HS96 in order to deal specifically with this type of situation.

7. The complainants' position, on the other hand, is guided by the notion that any multifunctional product which happens to have among its functions one covered by an ITA concession must always be classified according to that function, irrespective of that function's relative importance when compared to other functions not covered by the ITA. In essence, the complainants' view is that an ITA concession always trumps a non-ITA concession. The complainants seek to justify this over-extensive reading of the scope of the ITA by arguing that it is necessary in order to further the "object and purpose" of the ITA.

8. The EC cannot agree with the complainants' approach. In the first place, because it is incompatible with the basic rules of treaty interpretation, as well as with the specific rules for the interpretation of the HS96. Furthermore, the EC is concerned about the systemic implications of

upholding the complainants' simplistic way of reasoning; as would be the complainants themselves if only they could look beyond their immediate trade interests in this dispute. Unfortunately, however, the complainants are seeking to achieve very short term trade gains at the expense of the indispensable legal certainty and predictability of tariff concessions. It is obvious, however, that, without the latter, all Members will become reluctant to pursue the ITA liberalization process. Thus, far from furthering the ITA's "object and purpose", the complainants' short-sighted claims may well have the opposite effect.

II. THE CLAIM CONCERNING "FLAT PANEL DISPLAY DEVICES" (FPD) UNDER ARTICLE II OF THE GATT 1994

9. The complainants have made an "as such" claim against the measures of the EC in respect of *some* Flat Panel Display Devices under Article II of the GATT 1994. As the Appellate Body has held,

" 'as such' challenges against a Member's measures in WTO dispute settlement proceedings are serious challenges. ... We would therefore urge complaining parties to be *especially diligent* in setting out "as such" claims in their panel requests as clearly as possible."

10. If the Panel request already has to be presented especially diligently when the measures of a WTO member are challenged "as such", this must apply *a fortiori* to the first written submission when those claims are presented in detail. In the context of a claim alleging the breach of Article II of the GATT, the first written submission must necessarily be clear on the specific product that is the subject of the claim and the precise concession the respondent is alleged to have breached.

11. As regards the first omission, the EC has some sympathy for the apparent underlying reasons for the failure to identify the products with sufficient detail. Indeed, the exceptionally wide variety of different kinds of modern "monitors" and "displays", the different functions they can perform in connection with different devices and the various technical specifications that are legally relevant for tariff classification and for the purposes of classifying a given monitor within the EC's Schedule, make the task difficult. This task is not rendered any easier by the extraordinary speed in technological development and the convergence of the IT and the multimedia consumer electronics industries, even when one is to consider only a handful of specific monitors. Indeed, as China has correctly put it in its third party submission, the real cause of the present dispute is "the rapid development of IT technology".

12. However, if the ambitions are set as high as the complainants seem to have done without simultaneously at least identifying specific product categories, the task of setting out the claims with particular diligence becomes practically impossible without compromising the rights of defence. It is simply not good enough to state that the case includes "*certain*" or "*some*" monitors with certain attributes while also stating that it is not limited to those. *A fortiori*, it is far from sufficient if the product is not defined in any relevant detail, as is the case with the first written submission of the United States.

13. Of course, if the complainants in truth are claiming that all flat panel monitors are subject to the relevant commitments and zero duty, the task of defining the products at issue becomes easy. However, that is not what the Panel request states although the first written submissions do not fall far short of claiming so. To complicate things further, the claims differ even between the complainants.

14. The EC has far less sympathy for the second omission, namely the failure to identify in sufficient detail the relevant concession that it has allegedly breached. This is purely a legal question. The complainants ought to have identified in their first written submissions precisely where the relevant concession is. Remarkably, the complainants have failed to do so, at least when it comes to the product definitions in Attachment B to the ITA.

15. Having said that the EC would like to anticipate some arguments in order to avoid any misunderstandings: the EC is not trying to ignore the so called "headnote" in the Schedule. On the contrary, the EC readily accepts that it is part of the EC Schedule. However, the EC does not understand what the "headnote" and the "wherever classified" language can add to the commitments the EC has made by indicating specific headings next to the product definitions relevant to this case. All these headings carry a zero duty in the EC Schedule that follows the HS96 nomenclature. In other words, the commitments are in fact made twice and the EC believes that they exhaust the "headnote". This is precisely the same technique the United States and TPKM have used in their own Schedules and these Schedules have all been approved by consensus.

16. It is the complainants, not the EC, who wish to argue text out of the EC Schedule when they ignore the headings next to the product definitions. Just as the "headnote" is part of the EC Schedule, so are the headings next to the product definitions. Indeed, if the specific headings were not there, Attachment B to the ITA could simply have been incorporated into the Schedules of the ITA parties by mere reference or by merely copying the product definitions. Clearly this is not what was intended if one reads the text of the ITA objectively and in accordance with the customary rules on Treaty interpretation.

17. Now, let us assume for the sake of the argument that the "wherever classified" language in the "headnote" is a kind of "safety net" whereby there could, at least in principle, be other products that fulfil a given product definition and, thus, fall within headings other than those identified next to the product definitions. Leaving aside the legal and practical uncertainties that such an approach would entail, the EC could even agree with such an interpretation. However, a claim that essentially states that the EC ought to have identified another heading next to the product definition seems untenable in the light of the fact that the Schedule has been approved and certified by consensus and represents a common agreement between all WTO members. In any event and, at the very least, such a claim must be subject to a strict burden of proof showing that headings are missing from the list.

18. The EC understands that the complainants claim that all or at least the great majority of "flat panel display devices" are entitled to duty free treatment under at least two concessions in the EC schedule namely under heading 8471 60 90 "input or output units" for an automatic data processing machine and under a given narrative product definition in the EC Schedule relating to "flat panel display devices" that implements Attachment B of the ITA, although, at times, it seems that the complainants claim that the actual commitment is in the ITA itself. In any event, the legal arguments are made only in relation to multifunctional monitors that use LCD technology even if the claims are not apparently limited to such monitors.

19. The EC fully agrees that a genuine ADP monitor is entitled to zero duties treatment and therefore does not understand why the claim also covers monitors that can only be used with ADP machines. However, the real problem is that the radical changes in monitor technology over the past decade or so have made it extremely difficult to distinguish between computer monitors and video monitors including television sets. The latter are explicitly excluded from the scope of the commitments made pursuant to the ITA. Indeed, quite remarkably the complainants are completely silent in their submissions about the fact that Attachment B contains a definition of "monitors" that explicitly excludes video monitors and televisions from the scope of the obligations. Furthermore, the

complainants also fail to recognise that the two criteria the EC is allegedly incorrectly using in tariff classification are explicitly provided by the HS96 Explanatory Notes.

20. Even if one were to ignore the language of the HS96 Explanatory Notes to Heading 8471, the technological circumstances of today are very different from the circumstances that surrounded the ITA negotiations. Back in 1996 the technology used made it easier to distinguish between computer monitors and video monitors. Today these two product categories have, to a large extent, been merged into one where the same monitor can be connected to a number of different devices. The monitors are genuinely multifunctional. Of course some individual products or models are marketed in a way that the video or gaming functionalities are emphasised while in relation to others the data processing functionalities are underlined. Whether a product brochure uses a picture with a person working on a computer or watching a football match, the monitors can in most cases be used for both purposes. Therefore, when classifying the product for tariff purposes it becomes very important to look at the technical details of each individual product on a case-by-case basis. In many cases it will be impossible to identify the principal function of a monitor and therefore the General Interpretative Rule ("GIR") 3 c) of the Harmonised System will need to be applied. Indeed, this is precisely how the United States has tackled the problem as demonstrated in the EC's first written submission.

21. The European Court of Justice also upheld the necessity of a case by case analysis in its recent judgment in the so called *Kamino* case to which reference has been made in the written submissions of the EC and TPKM. That judgment represents the state of EC law today.

22. The EC is not guilty of reclassifications of modern LCD monitors motivated by bad faith as alleged by the complainants. There is a genuine problem of tariff classification that has emerged due to technological developments. The serious difficulties the complainants have faced in framing their case are themselves testimony to this problem. The complainants will no doubt attempt to use this hearing and the subsequent stages of the procedure for the purpose of trying to define their case better. The EC trusts that the Panel will carefully guard and protect the basic due process rules inherent in the DSU. Indeed, an objective assessment of the case under Article 11 of the DSU requires the Panel to examine whether the complainants have identified clearly and specifically the products that are the subject of the claim and the precise commitment the EC is alleged to have breached. The EC respectfully submits that this is not the case and requests that the complainants' claims must be rejected.

III. THE CLAIM CONCERNING SET TOP BOXES WHICH HAVE A COMMUNICATION FUNCTION (STBC) UNDER ARTICLE II OF THE GATT 1994

A. SET TOP BOXES INCORPORATING A HARD DISK

23. The EC does *not* exclude any STBs "from duty-free treatment *due to the presence* of a hard disk or other apparatus". On the contrary, set top boxes can be equipped with a hard disk and still qualify as STBCs with a zero rate of duty. The CN EN, in the pertinent part, explains rather clearly that it is *the recording or reproducing function* of a hard disk (or any other apparatus) in set top boxes which is the criterion at issue. The presence of this function requires that such STB should be classified as a video recorder, unless the totality of technological elements present in the STB were to suggest otherwise.

24. In its first written submission, the EC provided product brochures for one of the products that the complainants are concerned about (Exhibit EC-44). Those brochures confirm that that product is widely known in the market as a "digital video recorder". This is in stark contrast with the STBCs

which either incorporate no hard disk at all or a hard disk of 1, 2 or 5 GB. Such hard disks merely allow the STBCs to perform related functions such as saving of emails with attachments.

25. In the EC's view, this is perhaps the core of the dispute. The complainants try to create the impression that the EC denies duty-free treatment to STBCs equipped with some minor functions added almost as a necessity in the course of the technological developments. That is not correct. The recording functionality "added" to an STBC is far more than a supportive or ancillary one. That functionality is a fully fledged self-standing function that fundamentally and objectively changes the product. To put it briefly: an STBC does not need a hard disk of 160 GB for its functioning – a recorder does.

26. With a hard disk of that size, we should not speak about a hard disk being added to an STBC: rather it is the other way round. It is effectively the communication function which is added to a recorder. Needless to say, neither Attachment A nor Attachment B of the ITA mention video-recorders (or video-recorders with a communication function) as being included in the ITA.

27. As the EC explained in its first submission, and as even one of the third parties also pointed out, there are many varieties of set top boxes, some of which have been undoubtedly excluded from the ITA from the beginning. The consideration of others depends on the understanding and evaluation of all of their technical characteristics, which can only be done on a case-by-case basis. Moreover, let us not forget that the complainants pointed to a hard disk as being one of the decisive technical elements at issue. However, there are set top boxes with a hard disk which in our view fall within the product category of STBCs. Hence, at this moment, it is not clear which individual products or categories of products are at issue. Under the well-established principles of WTO law, confirmed recently by the panel in the *China – Auto Parts* case, complainants' advancing an "as such" claim have to establish that the challenged measures, in their *every* application in relation to a given product model (and, it is to be noted again that it is not the CN EN but rather the CN itself which is applied here) *always* and *necessarily* lead to a violation of the GATT 1994. The EC submits that this has not been shown. Nor have the complainants shown a violation of GATT 1994 in any individual case.

B. SET TOP BOXES USING "CERTAIN TYPES OF MODEMS TO COMMUNICATE"

28. The definition of STBCs included in Attachment B of the ITA was drafted with one particular product type in mind. That product incorporated a modem, i.e., the modem was inside the set top box. The in-built modem has therefore become one of the defining elements of a STBC. The complainants expressly acknowledge this much.

29. It is correct to say that the Ethernet/W-LAN devices, to which the complainants refer as "certain types" of "modems", also allow, like modems, a connection to internet. However, these devices do so by connecting the STB in question *through a cable* (or radio waves in case of W-LAN) to another device, namely an external (self-standing) modem. It is that *external modem* which then, in turn, connects to the Internet. In other words, the modems which are at issue here are not incorporated in the set top boxes: they are *outside*, connected to a set top box *via* cable (or radio waves).

30. Faced with this indisputable fact, the complainants are trying to circumvent the requirement of an incorporated modem by re-interpreting what a modem is. Through a creative new interpretation the complainants attempt to show that a modem which is beyond doubt physically located *outside* an STB is actually incorporated *inside* it, as required by the ITA definition.

31. The Oxford dictionary defines a "modem" quite accurately, namely as "[A] combined modulator and demodulator, used esp. to connect a computer to a telephone line, for converting digital electrical signals to analogue or audio ones and vice versa". Using this definition, the complainants would find it more difficult to prevail in their claim, because the device connecting to the telephone line, i.e., the modem, is simply not incorporated in the set top boxes communicating through Ethernet or W-LAN devices.

32. The dictionary the complainants rely on includes a more vague definition of a modem suggesting that it is "equipment that connects ... to a communication line". Basing themselves on the assumption that not only a telephone line but anything, even a piece of cable linking an indefinite number of individual devices and transferring information could be a "communication line", the complainants arrive at their objective. To give an example, using this vague definition, one could be connecting to Internet through a modem "incorporated" in his or her set top box even if that modem itself would be located in the neighbours' flat or another house. Needless to say, this is not what the drafters of the ITA intended.

IV. THE CLAIM CONCERNING SET TOP BOXES WHICH HAVE A COMMUNICATION FUNCTION (STBC) UNDER ARTICLE X OF THE GATT 1994

33. Many of the assertions made by the complainants are simply based on a mistaken understanding of the EC customs legal system – a system which has been extensively discussed in the recent *EC – Selected Customs Matters* case, both at the panel and Appellate Body levels. It seems odd, therefore, that the complainants advance before this Panel a factual description of EC customs law which often departs even from the very basic concepts discussed at length already in that case. What is even more puzzling is that the complainants often correctly describe certain aspects of EC customs law in the initial parts of their submissions, only to depart from them later on in their submissions without any explanation.

V. CLAIMS CONCERNING MULTIFUNCTIONAL MACHINES (MFMS) UNDER ARTICLE II OF THE GATT 1994

34. There appears to be agreement among all the parties that the question to be resolved by the Panel is essentially one of classification: whether the MFMs at issue are covered by the EC concessions for HS96 subheadings 8471 60 and 8517 21 or by the EC concession for HS96 subheading 9009 12.

A. ADP CONNECTABLE MFMS

35. The complainants' position is that the EC concession for subheading 8471 60 covers each and every MFM that can be connected to a computer; and this even if the MFM also performs other functions, such as copying, which do not involve the use of a computer.

36. Thus, the complainants' position is that any MFM which can both print and copy must always be treated as if it were a single-function printer. In other words, the complainants' position is that the copying function of an MFM is always irrelevant, irrespective of its relative importance, and must be disregarded for the purposes of classifying that MFM within the EC's Schedule of concessions.

37. In addition to being manifestly unreasonable, the complainants' position disregards the express language of Note 5(B) to Chapter 84 of the HS96. It follows from that note that an "output unit" cannot be classified directly under HS96 heading 8471 unless it is used "solely or principally" with an ADP system.

38. In essence, the EC position is that because of the wide variety of MFMs it is necessary to examine, on a case-by-case basis, the characteristics of each kind of MFM. If it is determined, on the basis of such examination, that for a particular kind of machine the copying function is "secondary" to the printing function, that kind of MFM must be classified under subheading 8471 60 and accorded duty free treatment.

39. On the other hand, where it is determined that the copying and printing functions of a given kind of MFM are of equivalent importance, such a machine must be deemed *prima facie* classifiable under two different subheadings: 8471 60 and 9009 12. In those cases, it becomes necessary to resort to GIR 3 of the HS96, which specifically addresses the situation where a product is *prima facie* classifiable under two or more positions.

40. As shown by the EC, neither GIR 3(a) nor GIR 3(b) can be applied to the classification of MFMs. Therefore, the MFMs at issue must be classified pursuant to GIR 3(c). The application of that rule leads to the conclusion that, where the copying function is equivalent to the printing function, the MFMs at issue fall under subheading 9009 12. It follows that, in those cases, the EC is not required to grant duty free treatment to the products at issue.

B. NON-ADP MFMS

41. The complainants' position with regard to the second subcategory of MFMs at issue is that any MFM which can be used for faxing and copying must always be treated as a facsimile machine and classified under subheading 8517 21. And this irrespective of the relative importance of each of the two functions. Thus, the complainants again disregard entirely the copying function of the MFMs.

42. In contrast, the EC's view is that a non-connectable MFM which can be used for both copying and faxing is *prima facie* classifiable under both subheading 8517 21, as a facsimile machine, and subheading 9009 12, as a photocopier. This renders it necessary, once again, to resort to the specific rule laid down in GIR 3 for dealing with this type of situation. As shown by the EC, the application of GIR 3 leads to the conclusion that this subcategory of MFMs falls under subheading 9009 12. Therefore, the EC is not required to grant duty free treatment for imports of this category.

C. PHOTOCOPYING IS A FORM OF DIGITAL COPYING

43. The complainants' position with respect to both subcategories of MFMs is based on the premise that digital copying is not a form of photocopying. As the EC has shown in its first written submission, this premise is mistaken.

44. Digital copying is but the latest technological development in the field of photocopying. There are obvious technological differences between analogue and digital photocopiers. But the terms of subheading 9009 12 are broad enough, when properly interpreted, to encompass both types of photocopying. Indeed, the complainants themselves continued to classify "stand-alone" digital copiers as photocopiers long after the conclusion of the ITA.

45. Furthermore, if "stand-alone" digital copiers could not be considered as photocopiers, they would have to be classified under subheading 8472 90, a residual subheading covering "other", mainly mechanical office machines. In any event, classifying digital copiers under subheading 8472 90, rather than under subheading 9009 12, would not dispose of the issue before the Panel. On that interpretation, the MFMs at issue would be *prima facie* classifiable under that position, in addition to being *prima facie* classifiable under subheadings 8471 60 and/or 8517 21. Hence, it would

still be necessary to determine which of these positions is the most pertinent, having regard to the relevant notes and interpretative rules of the HS96.

ANNEX D-3

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION BY THE EUROPEAN COMMUNITIES

I. GENERAL ISSUES

A. THE EC CONCESSIONS PURSUANT TO ATTACHMENT B OF THE ITA

1. In its first written submission the European Communities argued that the complainants have failed to identify the relevant obligations in the EC's Schedule pursuant to Attachment B with sufficient clarity. This failure was again emphasised in the EC's first oral statement. Following specific questions from the Panel, the complainants have attempted to identify the relevant concessions with more precision. To a large extent the replies only add to the confusion. The complainants now advance a rather revolutionary view with respect to the legal status of the ITA and they continue to disagree among themselves where precisely the concessions pursuant to Attachment B are in the EC's Schedule.

1. The legal status of the ITA

2. The parties to the dispute have a fundamentally different view of the ITA and its legal status. While the European Communities has considered it to be a fully-fledged international treaty within the meaning of Art. 2(1) VCLT, the complainants consider that the ITA is not a treaty in that sense and regard it as a mere "political declaration".

3. The first question which arises is how to interpret any terms of such a "political declaration", for instance any narrative definitions provided in Attachment B to the Annex of the ITA. In the light of Article 2(1) VCLT, the VCLT interpretative rules are not applicable, which the complainants expressly confirm. Even if they were applicable, however, they would not help much in the interpretative analysis.

4. The first command of the VCLT, namely to interpret the terms according to their ordinary meaning, entirely fails when applied to this "political declaration". This can be well illustrated on the word "agreement". A cursory review of Attachment B reveals that its drafters used at least 5 times the word "agreement". In its ordinary meaning, this word means "a mutual understanding, a covenant, a treaty" and "a legally binding arrangement between two or more parties". The word "agreement" is also used in Art. 2(1) VCLT to describe a basis of a treaty covered by that Convention. Yet, the complainants are of the view that the drafters, when they used the word "agreement", wanted to say "political declaration".

5. This has significant consequences. If the drafters indeed used such an imprecise language with respect to this rather important term, then how can the complainants be sure that the drafters used any other term in the declaration with more precision and accuracy?

6. Furthermore, in the view of at least the United States, there are at least two sets of narrative definitions relevant for the interpretation of the EC's Schedule. First, there is the "headnote" which "directs the reader to Attachment B of the ITA". One set of narrative definitions is therefore directly the one set forth in that Attachment. Second, there would also be another, separate set of narrative obligations in the EC's Schedule. This set, "separated by a heavy black line" from the "headnote",

includes both the narrative definitions and the HS/CN codes notified by the European Communities next to the definitions.

7. The first set of narrative definitions, namely the one provided in the Attachment B to the ITA to which the "headnote" points to, cannot be used for a credible and reliable determination of legal rights and obligations if the ITA is just a political declaration. There is no reason to assume that the drafters have been more careful and accurate with respect to some terms of Attachment B when they have been so apparently inaccurate in their use of the term "agreement".

8. Therefore, an interpreter of the EC's Schedule would have to base himself on the second set of the narrative definitions, namely the one "separated by a heavy black line" from the headnote. This set includes, however, the HS/CN codes notified at the same time alongside those narrative definitions. It follows that those codes are much more than mere context, they constitute the actual concession.

9. The complainants simply cannot have it both ways: relegate the ITA to a mere political declaration *and* rely on a specific interpretation of the words in such a political declaration.

2. Where exactly are the relevant Attachment B concessions?

10. There is a difference between the United States on the one hand, and TPKM and Japan on the other hand, on the question what precisely constitutes the EC's concession pursuant to Attachment B of the ITA. Although all of the complainants wish to downplay the legal relevance of the specific headings next to the product definitions in the EC's Schedule pursuant to Attachment A, Section 2 and Attachment B, the precise concession the complainants claim is breached by the European Communities in relation to "flat panel display devices ..." and "set-top boxes which have a communication function" is defined differently between the complainants.

11. Apart from there being a difference on what exactly is incorporated into the EC's Schedule, the United States considers that the so called "chart that follows the headnote" is a *separate* provision of the EC's Schedule. On this basis the EC's Schedule would contain two sets of commitments pursuant to Attachment B. Japan and TPKM in turn appear to see the "headnote" and the product definitions together with the headings next to them as part and parcel of the same concession. They emphasise that the headings next to the product definitions are illustrative only.

12. These differences are not just formal. It is fundamentally important to define what the relevant EC's concession is and what in turn provides context for its interpretation. The position of the European Communities is clear: the headings next to the product definitions cannot be read out from the EC's Schedule. They inform of the commitments made by the European Communities pursuant to Attachment B of the ITA.

13. Even if it were to be accepted that there is a "safety net" commitment that could be derived from the "headnote", overwhelming evidence must be required to demonstrate that a Member is in breach of its obligations because there is another product that fulfils a given definition despite not falling within the scope of the headings explicitly identified next to the product definition. The EC's Schedule together with the headings next to the product definitions was agreed by consensus and certified accordingly.

II. CLAIM CONCERNING CERTAIN "FLAT PANEL DISPLAY DEVICES"

A. CONTINUED LACK OF DILIGENCE IN SETTING OUT THE CLAIMS

14. The complainants have to some extent clarified which concessions in the EC's Schedule are subject to this case although the claim based on the concession pursuant to Attachment B suffers from the general shortcomings identified above. However, despite very clear questions from the Panel, the complainants continue to be extremely vague on the products at issue.

15. But there is another lack of precision in setting out the claims, which the European Communities was not able to identify from the first written submissions. Following the oral statements and the complainants' replies to the questions, the European Communities understands that the scope of the two claims the complainants are advancing in relation to flat panel monitors are very different in scope.

B. TWO SEPARATE CLAIMS UNDER TWO SEPARATE COMMITMENTS

16. Following the clarifications from the complainants, the European Communities understands the claim in relation to Attachment B to be as follows: according to the complainants, the European Communities fails to grant duty free treatment to all flat panel display devices that are "for" a computer or other products falling within the ITA. As TPKM put it in their first oral statement, "the real interpretative issue is the meaning of 'for' ". The complainants claim that any flat panel display device that is *merely capable of operating with a computer* is "for" a computer. Nothing more nothing less; no need to consider any other criteria. Thus, if the complainants do not succeed in convincing the Panel on their interpretation of the word "for", the claim falls.

17. The position of the complainants is completely at odds with the ordinary meaning of the word "for" read in its context that manifestly must include the other concessions in the EC Schedule and in particular those made pursuant to Attachment B. Among those definitions is the definition of "monitors" that categorically excludes televisions - including high definition televisions - from the scope of the whole agreement. In the view of the European Communities this exclusion also necessarily covers video monitors and particularly HD ready monitors because they are capable of receiving and processing television signals or other analogue or digitally processed audio or video signals without the assistance of a central processing unit of a computer.

18. However, while the scope of the claim under the concession pursuant to Attachment B becomes otherwise clearer, it manifestly creates confusion from the point of view of the measures challenged. The very wide interpretation of the word "for" and the consequent width of the products at issue the complainants advance under the concession pursuant to Attachment B of the ITA has some very important consequences for this case: it leads to a situation where it is entirely unclear *how the challenged measures come within the scope of each of the two separate claims*. Do the complainants consider that all EC's measures that would be relevant in assessing the duties on all products falling within the scope of the ITA and that follow the HS nomenclature are necessarily in breach of the EC's WTO obligations? Would there be other criteria in HS96 that in the view of the complainants would also lead to WTO violations? What parts of the CN and CNEN are actually within the scope of each of the two claims?

C. FURTHER CONFUSION ON THE PRODUCTS AT ISSUE: CONSEQUENCES OF THE TWO SEPARATE CLAIMS

19. The fact that the two claims the complainants advance in relation to flat panel monitors are different in scope necessarily has the same consequence in relation to the products at issue. Indeed, the claim under heading 8471 60 90 appears to concern monitors that are *solely or principally* for use with an ADP machine whereas the claim under the relevant concession pursuant to Attachment B of the ITA concerns monitors that are *merely capable of operating with a computer*. The European Communities understands that the latter claim is necessarily wider than the former and therefore more monitors are within its scope. However, with the exception of Japan's reply to question 48, the complainants refuse to otherwise clarify the borderlines and the legal criteria for distinguishing different monitors from each other in order to clarify the scope of and, perhaps even more importantly, the relationship between the two claims.

20. Prior to seeing the replies of the complainants to the questions from the Panel, the European Communities had assumed that, in addition to the five specific monitors identified in Commission regulations 634/2005 and 2171/2005, the products at issue were LCD monitors with a DVI interface irrespective of any other technical characteristic (all complainants) and LCD monitors that can display information only from an ADP machine (US and TPKM). Indeed, in the absence of any explanation to the contrary, the European Communities understood that the product scope was the same under the two claims.

21. Now the European Communities understands that *all* flat panel monitors, irrespective of any other technical characteristic, are within the scope of the claim that is based on the EC's commitments pursuant to Attachment B of the ITA. Indeed, not only LCD monitors with a DVI but any flat panel monitors including plasma and other technologies, with e.g. HDMI interface, or other technical characteristic such as a tuner etc. are within the scope of the claim as long as the monitor is merely capable of operating with a computer.

22. The claim under heading 8471 60 90 in turn appears narrower from the point of view of the products at issue. The European Communities understands therefore that the United States is *not* claiming that a modern flat panel television is within the scope of their claim under heading 8471 60 90 while such a product would appear to be within the scope of the claim under the relevant concession pursuant to Attachment B. Curiously both TPKM and Japan refrain from answering question 58 from the point of view of a TV that can connect to a computer and therefore considerable uncertainty remains on the product scope in relation to their claim under heading 8471 60 90.

23. In these circumstances the European Communities is simply not in a position to know what products come within the scope of the claim under heading 8471 60 90. There is a complete confusion. The complainants' replies *inter alia* to questions 3, 23 a), 48, 49, 58, 66 and 67 are simply not internally consistent and do not distinguish between the two separate claims under two separate concessions they appear to invoke. In such circumstances the European Communities is not in a position to provide an effective rebuttal and considers that its due process rights are being compromised.

D. THE MEASURES AT ISSUE: HOW ARE THE MEASURES WITHIN THE SCOPE OF THE TWO SEPARATE CLAIMS?

1. The CN

24. Regulation 2658/87 as last amended by Commission regulation 1031/2008 provides for the CN 2009 currently in force. Under the CN that reflects HS2007 there are a number of headings to which a given flat panel monitor could be classified depending on its objective characteristics. Among these is heading 8528 51 00 (HS2007).

25. Products falling within this heading "...monitors – other monitors -- of a kind solely or principally used in automatic data-processing system of heading 8471" are *duty free*. The same is the case for heading 8528 41 00. In the view of the European Communities, these headings implement in the CN currently in force the relevant obligations pursuant to the ITA.

26. It is not entirely clear to the European Communities what is the basis for considering that the European Communities would be in breach of its obligations under the claim based on heading 8471 60 90 (HS96) because the combined scope of heading 8528 51 00 (HS2007) and 8528 41 00 (HS2007) is at least as wide as heading 8471 60 90 (HS96) despite the clear differences in the wording in the text of the heading. Presumably the alleged violation stems from the alleged interpretative effect of certain criteria in the Explanatory Notes to the CN (CNEN) when the CN is applied in practice.

27. It is equally not entirely clear to the European Communities how the CN is alleged to breach the "safety net" concession pursuant to Attachment B of the ITA. The European Communities understands that the complainants claim that there are monitors that are classified elsewhere in a dutiable heading (such as "video monitors" under headings 8528 59 10 or 8528 59 90 or "televisions" under various eight digit headings under heading 8528 71) but would nevertheless still be entitled to duty free treatment. If the European Communities understands correctly, the claim means that it ought to have foreseen duty free headings also under the relevant CN headings for video monitors and televisions due to the "safety net" concession in the so called "headnote". But on the basis of what criteria should the European Communities have drawn the borderline between e.g. televisions that, in the view of the complainants, fall within the scope of the ITA and those that do not? Mere ability to connect with a computer?

2. The CNEN

28. The complainants also challenge the CNEN. However, it is not clear to the European Communities whether and in what respects the CNEN are challenged under the two claims made by the complainants i.e. under heading 8471 60 90 and the relevant commitment pursuant to Attachment B of the ITA.

29. The CNEN to heading 8528 41 00 provide for a lengthy list of relevant classification criteria. However, the European Communities understands that the CNEN to heading 8528 41 00 are not in themselves challenged under either of the claims. The challenge is only through the *mutatis mutandis* language in the CNEN to heading 8528 51 00.

30. According to the CNEN to heading 8528 41 00, "monitors of this subheading work with the cathode ray tube (CRT) display technology". Thus, in order to apply the CNEN to other technologies *mutatis mutandis*, it is necessary to distinguish between the technical criteria that are relevant only in relation to CRT technology. Contrary to what the complainants appear to argue, the words *mutatis*

mutandis do not incorporate all of the CNEN to heading 8528 41 00 into the CNEN to heading 8528 51 00. This is not a straightforward task although the CNEN do at times distinguish between different technologies.

31. However, to the extent the European Communities understands the claims, the complainants consider that the specific formulation of two criteria in the CNEN to heading 8528 41 00 as allegedly applied *verbatim* under heading 8528 51 00 necessarily leads the European Communities to classify some monitors in a different heading than 8528 51 00, which according to the complainants is necessarily a dutiable heading.

32. The European Communities understands this to be because of the allegedly mandatory language in the CNEN to heading 8528 41 00 that allegedly leaves no discretion to the customs authorities when applying the CN. In this context, it should be recalled that the criteria the complainants are challenging are provided in the Explanatory Notes to HS96.

33. Whether the complainants consider there to be other criteria in the CNEN that lead in their view to a breach of Article II of the GATT 1994 remains unclear. It is not clear whether the CNEN are challenged *in the same way* under both of the claims i.e. under heading 8471 60 90 and the relevant concession pursuant to Attachment B of the ITA. In particular, it is not clear whether the CNEN come at all within the scope of the claim made under the concession pursuant to Attachment B of the ITA.

34. In any event, the European Communities has already demonstrated in its first written submission that the allegedly mandatory language in the CNEN does not preclude the exercise of discretion in relation to a monitor identified with all of its relevant objective characteristics. Indeed, the CNEN are not legally binding despite the complainants' attempt to describe them as such. According to the established case law of the European Court of Justice;

"the Explanatory Notes drafted by the Commission, in respect of the CN, and those adopted by the WCO, in respect of the HS, are an important aid for interpreting the scope of the various tariff headings but do not have legally binding force ..."

35. It is also important to clarify the state of EC law following the judgment of the European Court of Justice in case C-376/07 *Kamino*. Indeed, all complainants refer to the case in their submissions.

36. In *Kamino* the European Court of Justice considered that the CN should be applied on a case-by-case basis taking into account all the relevant objective characteristics of a given monitor. The Court explicitly dealt with the two criteria addressed by the complainants.

37. Even if the view of the complainants on how the European Communities has applied these criteria in concrete cases would be accepted (*quod non*), they can no longer be applied in that way under EC law.

38. In the view of the European Communities there is nothing WTO inconsistent in the interpretation given by the ECJ in C-376/07 *Kamino*. However, the European Communities is in the process of repealing and/or replacing the relevant CNEN for reasons of clarity.

3. The classification regulations

39. Finally, the complainants challenge Commission regulations 634/2005 and 2171/2005 that have applied the CN in relation to certain specific monitors. Again, *it is unclear whether these regulations are challenged in the same way under both of the claims made by the complainants* i.e. heading 8471 60 90 and the relevant concession pursuant to Attachment B of the ITA. The complainants have not developed their argumentation in any relevant detail in respect of these regulations.

III. CLAIMS CONCERNING CERTAIN "SET-TOP BOXES WHICH HAVE A COMMUNICATION FUNCTION"

A. CLAIM ON STBCS UNDER ARTICLE II OF THE GATT 1994

1. The complainants have not established an "as such" violation

40. The complainants argue that the European Communities suggests that to succeed with their "as such" claims, the complainants are "required to demonstrate that the measures in question result in the imposition of duties *on every single model* of FPD, STB, or MFM that crosses the EC border". This is not correct. The European Communities argues that the complainants have to establish in this respect that the challenged measures necessarily result in inconsistency with WTO law when applied to "*a given product model*" or "*a certain product or category of products*" out of possibly many other categories covered by those measures and treated by the European Communities consistently with its obligations.

41. The disagreement between the parties seems to be in the fact that in the EC's view the category of products with respect to which inconsistency has to be shown has to be a *certain*, duly defined category of products. Knowing which products or types of products are at issue allows to examine of the totality of objective characteristics of those products (or, product types) which, in turn, allows to determine whether the challenged measures treat that category of products consistently with WTO law or not.

42. The complainants attempt to escape this issue by delineating the category of products by a single criterion, which they deem arbitrary. Clearly, one can define a product category like this. But, in the EC's view, explained in this and previous submissions, the Panel can hardly rule that the EC's treatment of a category including *all* set top boxes with a hard disk drive or DVD apparatus performing a recording or reproducing function (even if they otherwise fulfil the definition of an STBC) necessarily results in violation of the EC commitments. Such a finding would presuppose, in the EC's view, that one accepts the complainants' dubious theory of minimum requirements. In contrast, if the Panel finds itself convinced by the – so far non-existent – arguments by the complainants that a certain category of set top boxes within that overall category of all set top boxes which incorporate a device performing a recording or reproducing function (and which otherwise fulfil the definition of an STBC) is treated by the European Communities inconsistently with its obligations, the Panel can naturally make a finding in that regard. But then one would have to explain what that category of products is. In this respect, it should not be forgotten that besides the CN Explanatory Note (CN EN), the complainants also challenged the entire Combined Nomenclature, meaning that the combinations of products which are potentially at issue is, without any further specification, indeed truly endless.

2. The complainants incorrectly interpret the narrative description

43. The explanations provided by the European Communities have shown that even if the complainants' approach of focusing solely on the narrative descriptions were a correct way of interpreting the concessions in the EC Schedule, it would still fail to support the complainants' position with respect to "set top boxes which have a communication function".

44. The starting point for an interpretation of the narrative description is a *correct* text of that description. The European Communities is not of the view that one can interpret text "set top boxes which have a communication function" while using the phrase "set top box with a communication function". That does not mean that the complainants cannot interpret the phrase "set top box with a communication function" if they are of the view the relevant concession is in that phrase. But in such a case they must be clear about the fact that they are interpreting a language different from that of the narrative description of STBCs and that that different language is provided in a document distinct from Attachment B of the ITA or the EC Schedule. These differences cannot be ignored: each of these phrases has not only a different text, but also a distinct context, in which it is to be understood. This – and not so much the fact that "which" and "with" may have a different meaning in itself – is the main reason for which the European Communities insists on using a correct text for interpretation.

(a) Document G/MA/TAR/RS/74 and its relationship to the narrative description

45. To be able to assess the legal significance of that communication, one of course has to analyze its text, provided on page 2 of document G/MA/TAR/RS/74.

46. The first four paragraphs at page 2 explain the background of the communication, including the fact that the European Communities created a new tariff line in its nomenclature, 8528 12 91. The table included in the third paragraph explains that that code in the EC's domestic classification covers an "Apparatus with a microprocessor-based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange, capable of receiving television signals". As is further apparent from the table, the EC legislator adopting the legislative measure to the EC's Combined Nomenclature called these products "Set-top boxes *with* a communication function".

47. The use of this term – which is *not identical* to the narrative description set forth in the EC Schedule and the ITA – reflects well the fact that the description of the apparatus classifiable in CN 8528 12 91 is *not identical* with the narrative description provided in the ITA and the EC Schedule either (namely, the words "capable of receiving television signals" are added in the EC legislation).

48. No matter how interesting it may be to compare the two distinct phrases, however, the practical significance of such a comparison for the present case is rather limited. This is because no particular name or phrase used by the EC legislator for describing and naming a product in the context of adopting EC's own classification measure could be relevant for the interpretation of the scope of a tariff concession formulated at the WTO level (and the EC recalls that the complainants argue that it is narrative description of STBCs included in the ITA and the EC Schedule which constitutes the concession). As the US correctly stated, referring to the panel in *China – Auto Parts* case: "[I]t is well-established that a Member's classification law ... cannot add to or diminish its WTO tariff concessions."

49. The term "set-top boxes with a communication function" would naturally be relevant, had the European Communities made it a part of its Schedule. That is not the case, however, as specified in the fifth paragraph of the communication. This reflects two facts. First, it confirms that that in 2000,

just as it had been in 1996 and just as it is now, the European Communities was of the view that the CN codes inscribed in its Schedule next to the Attachment B product description matter. Second, it shows that the notification **neither introduced** a *separate narrative description* into its Schedule **nor modified** the *existing narrative description*. In that respect, the text could not have been clearer.

50. Nonetheless, even if one accepted that through document G/MA/TAR/RS/74 the *narrative description* was somehow modified (with the effect that its scope was enlarged), one still could not argue that such a modification meant that the European Communities recognized that a distinction between "with" and "which have" was without basis, as the complainants argue. And even less so could it be argued that through the 2000 notification the European Communities accepted that the narrative description was one of setting *minimum requirements*.

51. This is not only an issue of substance, it also has its procedural aspects. This is, in particular, because the complainants do not appear to have unified views on this issue. Of course such a split position is very comfortable for the multiple complainants, since no matter where the truth is, at least one of them will be correct in the end and, through the unclear "joint and several" approach all the complainants will eventually subscribe to that correct view. In contrast, the European Communities, acting alone, has to spread its efforts and cover the entire spectrum of the complainants' views. In such a situation, the EC's call for clarity is more than a call of its defence lawyers for an understanding of the complainants' position, it becomes a **due process** issue.

(b) Understanding of terms established from the documents used during the negotiations

52. The European Communities refers to its first written submission, in which it described certain surrounding circumstances established through a number of documents used in the ITA negotiations. In accordance with the guidance provided by the Appellate Body, the European Communities is of the view that a proper analysis of surrounding circumstances is essential for a correct interpretation.

53. The complainants seem to dispose summarily of the EC's arguments in this regard by arguing that "the ITA does not have a formal 'negotiating history' ". Irrespective of whether these documents as a whole constitute part of the ITA's negotiating history or not, they contain many individual statements which, on their own, establish certain circumstances surrounding and shedding light on the use of certain ITA terms by its drafters. What is indisputable is that those statements are *highly relevant* to the present dispute and cannot be ignored.

54. The complainants endeavour to downgrade these statements by pointing to the interpretative hierarchy established in Articles 31 and 32 VCLT (and, even then, they argue that they cannot be considered as a preparatory work). What the complainants ignore, however, is that this hierarchy of interpretative sources has its sense in a situation where different elements of the interpretative analysis (text, context, object and purpose, supplementary means of interpretation) provide different (or even contradictory) meanings. In this case, however, all the interpretative elements point to the same direction, and the application of the hierarchical order of the individual sources thus becomes less relevant for a correct outcome of the interpretative analysis.

(c) Relevance of HS Codes

55. As the European Communities explained in its first written submission, even if the complainants' theory that the EC's (and other ITA parties') concession on STBCs is indeed expressed solely in the narrative description of STBCs were correct, one cannot ignore the relevance of the HS codes notified by the parties next to that narrative description in accordance with paragraph 2 of the Annex to the ITA. At the very minimum, these codes constitute a context for the interpretation of the

narrative description, since they clearly *reflect the understanding* of the product at issue by the party which notified those codes at the time.

56. The European Communities is pleased to see that the complainants agree with that proposition. In addition, however, the complainants make the argument that the HS codes do not restrict the scope of the concession. The complainants point, in this respect, to the headnote, in particular its "wherever ... classified" language. This argument may or may not be relevant in the overall discussion between the European Communities and the complainants as to whether the EC concession is set forth in the narrative description and/or the HS/CN codes notified next to it. However, this argument has zero relevance in the context of the theory that it is the narrative description which comprises the EC commitment, which the complainants advance with respect to STBCs. One naturally has first to identify and understand the content of the narrative description, before one is able to say what product is to be granted a duty-free treatment and benefit from the language "whenever ... classified".

57. It follows from the above that the Panel should carefully examine the HS codes that the ITA participants notified to WTO with respect to STBCs. These codes are context and shed considerable light on what sort of products the ITA parties (i.e., not only the European Communities) understood to be covered by the narrative description in 1996/1997 (and, yet again, in 1999). It is also the multilateral nature of this evidence which makes clear that it cannot be ignored.

B. CLAIM ON STBCS UNDER ARTICLE X OF THE GATT 1994

58. First, the complainants' key assumption that "the EC did not publish [the CN EN] ... for over a year after it was approved, and applied it to collect the WTO-inconsistent duties even before it was published" is simply *factually* incorrect (in addition to their erroneous legal characterization of those mistaken facts).

59. Under EC law, the text of a measure has to be finalized, voted on (in all parts in the final version by the CCCE) and then adopted by the Commission for a CN EN to exist.

60. The Community measure, as the complainants portray it, does not exist in the WTO sense either. The discussions or votings in the CCCE pertaining to a draft measure simply have no legal or other effect alleged by the complainants. The complainants attempt to connect certain events to create a Community measure. Yet, those events are not connectable in the way complainants argue, and what they perceive as a causal link linking certain facts with a supposed Community measure is misunderstanding of the events, as just described. A *Community measure* which the complainants challenge does not exist, as a matter of *fact*.

61. Second, it is also useful to note that the European Communities naturally cannot prevent individual Member States from finding a certain interpretation of the Combined Nomenclature discussed in the CCCE convincing and from deciding, on their own, to follow such an interpretation. However, if an EC Member State indeed decides to change the interpretation of a certain tariff line in such a case (leading to a classification of products different from that followed by that MS previously), this change would be a measure of that individual Member State.

62. If this were indeed the complainants' theory, however, it would raise at least three questions. First, does the evidence provided by the complainants, i.e. the *three* BTIs issued by French customs authorities (all issued on the same day) and the *one* BTI issued by a Czech customs authority, indeed demonstrate the existence of a *change* of classification by the customs authorities of these Member States? Second, even if the Panel agreed that the complainants demonstrated the existence of such

measures, the next question is whether such measures would be properly before the Panel at all. Finally, even if such measures were before the Panel, the third question is whether they would indeed fall, given their nature and functioning, within the ambit of Art. X:1 or X:2 GATT. In the EC's view, the complainants have not established any of the three points raised above.

IV. CLAIM CONCERNING CERTAIN "MULTIFUNCTIONAL MACHINES" (MFMS)

A. ADP MFMS

1. Digital copiers are "photocopying apparatus with an optical system" - MFMS with a digital copying function are *prima facie* classifiable under HS96 subheading 9009 12

(a) HS96 heading 9009

63. The critical issue in deciding whether digital copiers meet the terms of HS96 heading 9009 is whether they are "photocopying apparatus". The dictionary definitions of that term cited by the complainants are equally apt to encompass both analogue and digital photocopiers. They confirm that the defining characteristic of all photocopiers is that they use light in order to produce instant copies of an original document.

(b) HS96 subheading 9009 12

64. Japan has advanced two arguments in order to show that digital photocopiers do not follow the "indirect process" described in subheading 9009 12. Both are clearly without merit. The first and main argument is purely grammatical, namely that subheading HS9009 12 uses the terms "image" and "copy" in the singular form. But no conclusion can be drawn from this. In describing a production process it is common to use the singular form even when such process can be used to produce simultaneously more than one unit of the same product.

65. Japan's second argument is based on what it describes, rather confusingly, as being simultaneously the "specific" and the "ordinary" meaning of the term "intermediate". According to Japan, that term would allude exclusively to an electrostatic drum or plate. But there is no basis for such a narrow reading. The ordinary meaning of "intermediate" is "coming or occurring between two things in time, place, order, character, etc". The "specific" dictionary meaning of "intermediate" cited by Japan does not belong to the field of photocopying, but rather to the printing machinery falling within HS96 8443. Even assuming that the term "intermediate" meant "electrostatic drum", the undisputable fact is that the digital copiers at issue do incorporate an electrostatic drum.

66. Japan is reading into the wording of HS96 9009 12 a requirement which is not there: that the "original image" must be "reflected" or "projected" onto the "intermediate" and that it must be so "directly". Yet what HS 9009 12 actually says is that the "original image" must be "reproduced" (and not "reflected" or "projected") onto the "copy" (and not onto the "intermediate") and that this must be done "via an intermediate". Even if the terms "via an intermediate" had to be read as meaning "via an electrostatic drum", this requirement would be satisfied provided that the image is reproduced onto the copy with the intervention of an electrostatic drum.

(c) The Explanatory Note to HS96 heading 9009

67. As the complainants cannot show that digital copiers fail to meet the terms of either heading 9009 or subheading 9009 12, their claim becomes dependant on a narrow reading of a non-binding and largely obsolete Explanatory Note. If that note does not mention digital copiers it is simply

because it was drafted before digital copiers came into existence. Although the note does not mention expressly digital copiers, it does not exclude them either.

68. In 2002 Japan made a proposal to amend the Explanatory Note to HS96 9009 in order to provide that the image of the document must be projected "directly" onto the light-sensitive surface. This proposal, however, was not accepted.

69. The United States has argued that a CCD is not a "light-sensitive surface" within the meaning of the Explanatory Note. But the Explanatory Note to the HS2007 describes a CCD as a "photosensitive surface" when defining the notion of digital copier.

2. The classification practice of the complainants and of the third parties supports the EC's position

70. The evidence made available to the Panel shows that, prior to the conclusion of the ITA, all WTO members, and not just the European Communities, classified digital copiers under HS96 9009: (1) TPKM has recognised that, both before and after the conclusion of the ITA, it classified all digital copiers as photocopying apparatus under HS96 9009; (2) the United States has recognised that it was not until 2002 that the US customs authorities ruled, for the first time, that digital copiers were not photocopying apparatus covered by HS96 9009; (3) Japan professes not to know now how or where its authorities classified digital copiers prior to the conclusion of the ITA or, indeed, at any point in time prior to the introduction of the HS2007. But in December 1997 Japan made a proposal to the ITA Committee with a view to including HS96 9009 12 within the scope of the ITA, so as to cover digital copiers. This suggests that, at that time, Japan took the view that digital copiers fell within that subheading; (4) Singapore has confirmed that, like TPKM, it classified all digital copiers under HS96 9009 both before and after the conclusion of the ITA; (5) none of the other third parties which have intervened in support of the complainants has alleged, let alone proved, that it classified any digital copiers under any HS96 heading other than 9009, either before or at any time after the conclusion of the ITA.

71. The evidence made available to the Panel also indicates that, at the time of the conclusion of the ITA, none of the complainants or of the third parties was of the view that all ADP MFMs with a digital copying function had to be classified necessarily under HS96 8471: (1) TPKM has recognised that, until the introduction of the HS 2007, it classified ADP MFMs with a copying function under HS96 9009 where, on the basis of a "case-by-case examination", it was determined that no function was more "important" than the copying function; (2) the United States has confirmed that until 2002 ADP MFMs with a copying function were deemed *prima facie* classifiable under both HS96 8471 and HS96 9009 and their classification was determined in accordance with GIR 3(b); (3) Japan says that it ignores how and where its authorities classified ADP MFMs with a copying function either before or after the conclusion of the ITA; (4) until the introduction of the HS2007, in Singapore ADP MFMs were deemed *prima facie* classifiable under both HS96 8471 and HS96 9009. Furthermore, Singapore has admitted that certain ADP MFMs may have to be classified under HS96 9009 pursuant to GIR3; (5) no other third party has provided any evidence showing that it classified all ADP MFMs with a copying function under HS96 8471, either before or after the conclusion of the ITA.

3. ADP MFMs cannot be classified directly under HS96 subheading 8471 60 unless they are used "solely or principally" with a computer

72. The thrust of the complainants' argument is that the ordinary meaning of the terms "output unit" is so unmistakably clear that the Panel can and must conclude, on that basis alone, that all ADP MFMs are covered by the concession for HS96 subheading 8471 60. The complainants' position is

wrong as a matter of law because it disregards Article 31 of the *Vienna Convention*. The context of a treaty provision is not a subsidiary means of interpretation. The HS96 is part of the context for the interpretation of the Members' schedules. Note 5(B) to chapter 84 is an integral part of the HS96 and, therefore, relevant context. Japan has recognised that Note 5 to Chapter 84 "speaks directly to the interpretative question at hand" and "must be given significant interpretative weight." It is, therefore, incomprehensible that, at the same time, Japan continues to argue that the HS is "of minimum practical value" in this dispute.

73. Note 5(B) to Chapter 84 makes it clear that a "unit" may not be classified under subheading 8471 60 unless it is used "solely or principally" with an ADP system. While denying the relevance of that Note, Japan asserts that printing is the "principal" or even the "predominant" function of all ADP MFMs. Nevertheless, Japan provides no evidence or argument in order to support such assertions. Instead, Japan refers to the ECJ's *Kip* judgement as confirming that printing is always the principal function. But the ECJ said nothing of the sort. Japan has quoted the ECJ as saying that ADP-MFMs "... are *likely* to be of a kind used principally in an automatic data-processing system". But the quoted text is just a translation. What the French original version says is that "... lesdits appareils sont *susceptibles* d'appartenir au type utilisé principalement dans un système automatique de traitement de l'information."

74. Japan goes on to argue that Note 5(B)(a) does not apply by virtue of Note 5(D). But it is rather Note 5(D) which is clearly inapplicable in this case, because ADP MFMs are not mere "printers". They are multifunctional machines.

B. NON-ADP MFMS

75. In its oral statement, Japan continues to gloss over the undisputable fact that the Non-ADP MFMs at issue, in addition to having a facsimile capability, also have a copying capability. Japan also contends that digital copiers do not fall within HS 9009. But, even if it were true that digital copiers are not photocopiers, it would not follow that all non-ADP MFMs must be classified under HS96 8517 21. On the assumption that digital copiers are not photocopiers, they would have to be classified under HS96 8472 90. Accordingly, on the same assumption, non-ADP MFMs would fall *prima facie* within both HS96 8517 21 and HS96 8472 90 and their classification would have to be determined, on a case-by-case basis, pursuant to Note 3 to Section XVI of the HS96.

76. Once again, the practice of the complainants and of third parties, as evidenced by their responses to the EC's questions, supports the EC's position: (1) TPKM has recognised that, both prior to the conclusion of the ITA and subsequently until the introduction of the HS2007, it classified non-ADP MFMs under HS 9009 "as long as it was determined that no other function was more important than the copying function"; (2) the United States has openly admitted that not all non-ADP MFMs which can both copy and fax are to be classified under HS96 subheading 8517 21. The United States has further explained that, until 2002, its customs authorities classified non-ADP MFMs on a case-by-case basis pursuant to GIR 3(b). Furthermore, starting in 2002, the US authorities classified in many occasions non-ADP MFMs under HS8472 90, rather than under HS8517 21, pursuant to Note 3 to Section XVI of the HS96, on the grounds that the copying function, and not the fax function, was the more "important"; (3) as usual, Japan pretends not to know how or where non-ADP MFMs were classified by its customs authorities at any point in time prior to the introduction of the HS 2007; (4) Singapore has recognised that the MFMs at issue may have to be classified pursuant to GIR3; (5) no other third party has alleged, let alone proved, that it classified all non-ADP MFMs under HS 8517 21 either prior to the conclusion of the ITA or at any time until the introduction of the HS 2007.

V. SPECIFIC COMMENTS ON THE COMPLAINANTS RESPONSES TO PANEL'S QUESTIONS

77. In this Section the European Communities addresses some specific elements in the replies of the complainants to the first set of questions from the Panel. No additional comments are provided where the EC's responses to the same questions already anticipate the complainants' arguments. In any event, the fact that the European Communities does not comment on all of the responses from the complainants does not necessarily mean that it agrees with their position.

ANNEX D-4

**EXECUTIVE SUMMARY OF THE ORAL STATEMENT BY THE EUROPEAN
COMMUNITIES AT THE SECOND SUBSTANTIVE MEETING**

I. THE CLAIM CONCERNING CERTAIN "FLAT PANEL DISPLAY DEVICES"

A. STILL NO PRIMA FACIE CASE

1. The European Communities has already explained at length in previous submissions why the complainants have failed to present a prima facie case as regards their claim on "certain flat panel display devices". There are many reasons for this but the main new element is that the complainants' respective positions are increasingly diverging.

2. It was clear from the outset that the claims were not the same between all complainants. However, the differences are far more important than what initially seemed. First, the complainants have so far clarified that they are making two separate claims in relation to "certain flat panel display devices". These two claims are based on two separate concessions. However, the concessions are identified differently by different complainants. Second, the European Communities insists that the complainants have failed to identify the products at issue in this dispute in relation to "certain flat panel display devices".

3. The complainants hardly even begin to explain how the measures define the products because they are not even able to be clear which headings in the CN are relevant to their case. The European Communities still does not know whether headings on video monitors and televisions are within the scope of the case.

4. In this respect it is important to recall that in *EC – Computer Equipment* the Appellate Body was interpreting Article 6.2 of the DSU. In the case before us the situation is different. The issue is whether the complainants have made a prima facie case and the consequences that follow from the failure to do so, including on the burden of proof. The European Communities has the right to know with sufficient precision, what types of products the complainants claim should be duty free in order to be able to rebut their arguments. The European Communities has also the right to know precisely which headings of the CN are within the scope of each of the two claims. It is simply not enough to point to the CN generally because it covers all products. And it is certainly not good enough to identify certain CN headings and certain products only to contradict such identification in the next or even in the same submission to the Panel.

5. The complainants insist that they are making two claims that are not identical in scope. They must therefore explain precisely what the difference between the claims is.

6. For instance, Japan identified the CN headings on video monitors and televisions to be relevant for the purposes of the claim on certain flat panel display devices. In its second written submission Japan first considers televisions as "non-ITA products" only to contradict this position later in the same submission. The confusion is complete even without the added issue of how these conflicting positions relate to the two separate claims.

7. In its previous submissions TPKM in turn appeared to consider that televisions are not covered by the ITA because it did not identify the relevant CN headings in its reply to question 66 of the Panel. In its second written submission TPKM first considers that televisions are not covered but insists later that televisions are in fact covered by the ITA concessions. TPKM goes even as far as

calling the most relevant CN heading 8471 60 90 in this case a "residual category covering all input/output units for ADP machines not specifically mentioned in previous CN codes". One is left completely perplexed. If CN heading 8471 60 90 is a "residual category" what does it mean for the second claim based on this heading?

8. For its part the United States appears to concede that televisions are not covered by the ITA concessions. Yet, the US insists that the definition of monitors in Attachment B of the ITA, including the carve-out on televisions, is limited to the CRT technology. This is simply logically inconsistent and confusing. If televisions generally are not covered by the ITA concessions because of the explicit carve-out in the definition of monitors, that definition cannot be limited to monitors and televisions using the CRT technology. It is equally not logically consistent to insist that any monitor that is merely capable of functioning with an ADP machine is covered by the ITA concessions only to concede that televisions generally are not covered by those concessions. Modern flat panel televisions are manifestly capable of functioning with an ADP machine. The United States accuses the European Communities of being illogical. In the light of the US arguments, the European Communities can therefore only assume that the United States uses a fundamentally different standard for what it considers to be logical.

9. Japan on the other hand insists in its second written submission that the case is very simple. According to Japan, one would only need to look at the ordinary meaning, or the "language" of the relevant definition. This definition is apparently so crystal clear that one only needs to read it. Indeed, the case appears to be limited to interpreting the word "for" in this definition as TPKM suggests. Or, as Japan puts it: "FPD devices that are capable of operating with a computer will by definition be "for" the display of data from an ADP machine". Apparently it is just absolutely clear that the word "for" must mean anything that is merely capable of functioning with an ADP machine. Nothing else appears relevant for adjudicating the case because everything else is allegedly just "irrelevant", including the HS, the ITA, the negotiating history, the submissions of ITA parties in the ITA II negotiations etc. Even the size of a monitor is allegedly completely irrelevant.

10. To the extent the European Communities is able to understand the complainants' overly simplistic assertions and arguments, they just do not add up under a serious legal analysis based on customary rules of interpretation of public international law.

B. MANIFESTLY INCORRECT FACTUAL ASSERTIONS

11. The European Communities is increasingly attacked on the basis of manifestly confusing and, at times, simply counterfactual or circular statements. The European Communities already pointed to the evidence submitted by the United States itself according to which the DVI specification "provides a high-speed digital connection for visual data types that is *display technology independent*". Japan changed its position and states that "the mere presence of a DVI connector in a flat panel display monitor does not by itself necessarily mean the FPD will be capable of operating with a computer". The United States boldly states that "virtually no consumer electronics devices are today equipped with DVI". It is hardly surprising that the US does not provide any evidence to support this rather startling assertion. Indeed they cannot because it is simply counterfactual and can be proven to be so in less than 10 seconds. It suffices to do an internet product search. In its second written submission the United States also claims that it has provided an example of a flat panel display device with a DVI interface that according to its operating manual exhibited as Exhibit US-78 allegedly "cannot operate without [a computer]". Again, it is no surprise that the United States does not provide the precise reference to this alleged statement in the operating manual because that statement is *not* in the operating manual. In fact, quite the contrary.

C. MANIFESTLY INCORRECT ASSERTIONS ABOUT EC LAW

12. The complainants go as far as claiming they know EC law better than the European Court of Justice. The complainants are manifestly unable to demonstrate anything in the CN itself that could possibly be incompatible with Article II of the GATT 1994. With regard to the Commission regulations listed in the Panel request, the complainants have not really even tried to argue their case although in their second written submissions some first attempts are made. When examining the regulations, the US remarkably even concedes that the regulations do not provide for a mandatory rule in respect of the DVI interface. In reality one is only left with the CNEN. However, presumably the complainants are not happy with this consequence of the way they are arguing the case because they desperately try to elevate the status of the CNEN to something more than they are within the EC legal order. In doing so, they are forced to blatantly disagree with the European Court of Justice on the interpretation of EC law. In addition they are forced to disagree not only *between* but remarkably *with* themselves.

13. It is crystal clear that under EC law the CNEN are fundamentally different from a regulation. Indeed, the CNEN have even less importance than the Explanatory Notes to the HS, the HSEN. The arguments of the complainants are simply circular. If an instrument is not legally binding, it cannot be mandatory. If an instrument *may* be taken into account by the customs authorities it by definition cannot be mandatory. A sentence or two in a non-binding instrument cannot alter the very nature of the instrument itself even if those sentences were to be written in a way that, if read in isolation and out of context, would give the impression of a mandatory rule.

14. Item 1 of Commission regulation 2171/2005 clearly provides for duty free treatment for an LCD monitor that is capable of "receiving signals from a source other than an automatic data-processing machine". Indeed, TPKM tries to limit the damage by claiming that "item 1 of Regulation ...2171/2005 is not subject to this dispute". The complainants cannot have it both ways: to include within their claim only those parts of the measures they think might support their argument and ignore those that do not.

15. The complainants are even distorting the *Kamino* judgment and the whole system of preliminary rulings under Article 234 of the EC Treaty. Further, in *Kamino*, the Court explicitly dealt with the two relevant elements in the CNEN. First with regard to the first sentence of point 1 of Part One, Chapter I(D), and, second, with regard to the number and type of sockets with which monitors are equipped. It is simply quite remarkable that TPKM explicitly argues that the "the *Kamino* case did not deal expressly with the CNEN" when the contrary is so manifestly the case. It is equally simply unbelievable that TPKM asserts time and time again that EC customs authorities would not apply the CN as interpreted by the highest court in the EC. In fact, TPKM is asking the Panel to decide this case on the manifestly unproven premise that the customs authorities of EC Member States will always deliberately and necessarily violate EC law.

16. The two elements in the CNEN the complainants criticise simply cannot be applied in the way the complainants claim when applying the CN following the judgment of the Court. If they ever were interpreted in such a way in the past, the European Court of Justice is very clear that this was not correct and national courts are obliged to follow the judgment even in relation to past imports if the facts are similar as in *Kamino*. If there ever was a need for a remedy, it has already been provided for in law. What is left is to adjust the CNEN to be in line with the ECJ's interpretation. Although not a legal requirement under EC law, this is essentially a formality in the interest of uniformity, clarity and legal certainty in order to avoid that customs officials could **erroneously** use the CNEN as guidance in the way criticised by the Court.

17. Finally, the European Communities recalls that it has since 2005 suspended the collection of duties on most flat panel monitors including on monitors on which duties would manifestly be due.

II. THE CLAIM CONCERNING CERTAIN STBCS UNDER ARTICLE II OF THE GATT 1994

A. IN SEARCH OF A MISSING CONCESSION

18. The complainants repeatedly say that the narrative description is dispositive of this dispute. It is therefore understandable that they are looking for a *narrative description* meeting their objectives. But what should we understand under a "*description contained in the four individual tariff lines*"? What if the European Communities decided to call one of these subheadings, e.g., the one it notified in 2000, simply "Other"? Would that be a valid narrative description of a commitment to the US? Clearly not. That does not mean that the word "Other", the phrase "Set-top boxes with a communication function" or any other word or phrase used in the descriptions of the subheadings is without any meaning. Such a word or phrase can naturally have a very precise meaning if one considers it together with the HS/CN code next to it. But that requires the employment of customs classification rules. TPKM does not refer to the "*description contained in the four individual tariff lines*" at all.

B. THE REQUIREMENTS OF AN "AS SUCH" CLAIM AND OTHER RED HERRINGS

19. With respect to the complainants' "as such" claims, the European Communities is of the view that to be able to say that a certain product model or a certain category of products is treated by the European Communities inconsistently with its obligations, the complainants have to first explain what that product model or a category of products is. Only if one knows what products or product categories are at issue, one can determine – on the basis of an examination of the totality of the objective characteristics of those products – whether the European Communities treats those products consistently with its obligations or not. The complainants nonetheless suggest that one can make such a determination simply on the basis of (one of) the criteria referred to in the challenged EC measures. This is wrong.

20. First, the challenged CN Explanatory note does not employ the one or more – allegedly arbitrary – criteria in the way the complainants argue it does. Second, even if the challenged Explanatory note were functioning in the way the complainants argue, it would not mean that the criteria which it refers to were arbitrary. Again, these are **classification** criteria (and not tariff treatment criteria). The complainants argue that their case is dependent on the *narrative description*. The HS/CN codes notified next to the narrative description are in their view "*irrelevant*". In such a situation, it is a schizophrenic approach that the complainants still focus on establishing that the **classification** criteria which are set forth in the Explanatory note (or elsewhere) are wrong. Third, the theory of *minimum requirements*, which is at the core of the complainants' claim, deeply flawed.

21. The US said: "[T]he ITA covers products, not 'functions' ". There is indeed no basis for arguing that anything, any set-top box which *also* happens to have a communication function, is covered by the ITA simply because it has the communication function. The US has made that quite clear.

C. STBS WHICH INCORPORATE A DEVICE PERFORMING A RECORDING OR REPRODUCING FUNCTION

22. Only apparatus which fulfils the requirements of heading 8521 can be classified in subheading 8521 90 00. This is also specifically recognized in the CN Explanatory note to subheading 8521 90 00 which talks about a rather specific category of products, i.e. a category with specific features, such as the capacity to receive television signals. This description reflects a category of products which are currently present on the market and which primarily serve to record and reproduce movies and other TV programs. Faced with this classification issue, the US makes some rather remarkable statements, which, however, have nothing to do with classification and are, frankly, also at odds with the technological reality.

23. In this respect, the US also takes issue with the product referred to in Exhibit EC-44. In its recent submissions, the US has submitted a couple of new exhibits pertaining to this product. These materials are worth a particularly close look before one takes the information which the US quotes from them for granted. The European Communities does not deny that these products also contain technology allowing for a communication function. But this function is clearly ancillary to its recording function. This product is a digital video recorder.

24. Also in terms of price, the STBC product fits at least twice in the DVR product. One has to ask what inside of the product is so valuable, what do the consumers pay the extra for? It is also important to understand that these issues are not irrelevant for the customs classification of a product either. As the ECJ stated, "the intended use of a product may constitute an objective criterion for classification if it is inherent to the product, and that inherent character must be capable of being assessed on the basis of the product's objective characteristics and properties."

D. SET-TOP BOXES WHICH DO NOT INCORPORATE MODEMS

25. In its second written submission, the US stated that: "[I]ndeed, at the time the ITA was concluded, the term "modem" was understood to apply to a range of modem devices, including digital devices, such as ISDN and LAN modems." In its submissions in the *EC – Computer Equipment* case, which is highly relevant among other things because of its timing, the United States stated that "[T]he principal types of LANs are Ethernet, Token Ring and FDDI" and that "Modems are not LAN equipment".

26. The fact that modems are different from ISDN technology can be also demonstrated on excerpts from a book by Mr. O'Driscoll, to which the complainants themselves refer, as well on the definition of "modem" in the McGraw-Hill Dictionary of Scientific and Technical Terms.

27. By asserting that Ethernet, WLAN and ISDN technologies are modems, it is the complainants, and not the European Communities, who read words into the narrative description that are not there. Given the overall acceptance of what the term "modem" means and meant at the time of conclusion of the ITA, it is highly unreasonable – to say the least – to assume that the drafters of the ITA relied on that word to cover ISDN, Ethernet or WLAN. Given the fundamental differences between the modem and these three technologies, and the fact that the ITA was not meant to be over-inclusive, it also cannot be argued that the term modem can somehow be interpreted in a liberalizing and forward looking way to ultimately include the other three technologies.

III. THE CLAIM ON STBCS UNDER ARTICLE X OF THE GATT 1994

28. First, the complainants continue to portray the functioning of the EC customs system in a misleading way. The principal point which the complainants misunderstand is that ECJ case law and other statements only relate to **CN EN which are existing**, i.e., to Explanatory notes which have been duly adopted and published by the European Communities. They do not and *cannot* relate to mere drafts (even less so to intermediate drafts), discussions, Member States' votes or Customs Code Committee opinions delivered in the management procedure. These events simply do not have any legal effect on the interpretation and application of the CN.

29. Second, as a matter of general principle a preparatory act or a mere draft of a measure which has not yet been adopted cannot be made subject to the requirements of Article X:1 and X:2. As explained, the discussion and vote in the Committee serves merely to fulfil one of the procedural requirements set forth in the so-called "Comitology decision".

30. Further, the question in this case seems to be whether, in this specific case before the Panel, there was anything more than a mere preparatory act, i.e., any further relevant factual circumstances suggesting that there is a measure in the sense of Article X:2 of the GATT 1994. In this respect, the statements by the Chairman of the Customs Code Committee and certain BTIs pointed out by the complainants cannot support their claim.

31. Hence, there is no Community measure in the sense of Art. X:2 before the Panel. The complainants have not brought any claim under Article X:3(a).

IV. THE CLAIM CONCERNING CERTAIN "MULTIFUNCTIONAL MACHINES" (MFMS)

A. PRODUCTS IN DISPUTE

32. In its second written submission TPKM has alleged, for the first time, that its claim also covers "ADP MFMs which perform a scanning and a copying function but not a facsimile function" and which, according to TPKM, would be classifiable under CN 8443 32 91. This additional claim is outside the Panel's terms of reference. The machines described by TPKM are not covered by the definition of 'MFM' made by the complainants in the panel request. Furthermore, while the panel request alludes expressly to the tariff treatment provided under CN 8443 31 91, it makes no reference to CN 8443 32 91.

B. ADP MFMS

1. HS96 heading 9009

33. The complainants argue that digital copiers are not "photocopying" apparatus because they do not use light to produce a copy, but rather to "collect digital data". But this argument is wrong on two accounts.

34. First, because the digital copiers at issue use light for two different purposes. First, a source of light projects the image of the original document onto the photo-sensitive surface of a scanning device, which converts it into electrical signals. Secondly, those signals are used to guide another source of light (a laser beam), which recreates the image onto another photo-sensitive surface (the electrostatic drum).

35. In addition, the complainants' argument assumes that the "collection of digital data" is not part of the copying process and, ultimately, that "digital copying" is not a form of "copying", but just a succession of scanning and printing. This argument is specious. To be sure, digital copying involves the use of the print engine. But it differs from the printing function in that it is performed autonomously from an ADP system. This difference is of crucial importance, because the use of an ADP system is the defining characteristic of all the "output units" falling within HS96 8471 60. That digital copying is a separate and distinct function is confirmed by the existence of single function (stand-alone) digital copiers. In addition, it is beyond doubt that manufacturers and users regard copying as a separate and distinct function from printing and scanning. Furthermore, in many cases the digital copying function is marketed as the "basic" function, with the other functions being offered as mere "options". Indeed, that digital copying is a distinct function has been admitted by the complainants themselves in their own definition of "MFM" included in the panel request.

36. The United States argues that digital copiers are not "photocopying apparatus" because they do not incorporate an "optical system". But digital copiers incorporate not just one, but two different optical systems. Japan does not contest the obvious fact that digital copiers incorporate an optical system. But it argues that it is not used for making copies. Again, however, this argument is premised on the implausible proposition that the collection of digital data is not part of the copying process and that, ultimately, digital copying is not "copying" at all.

2. HS96 subheading 9009 12

37. The complainants also argue that digital copiers are not "photocopying apparatus" because they do not follow the "indirect process" described in HS96 subheading 9009 12. However, in making this argument the complainants are reading into that subheading a series of narrowly defined requirements which, quite simply, are not there. What that subheading actually says is, simply, that the "original image" must be "reproduced" (and not "reflected" or "projected") onto the "copy" (and not onto the "electrostatic drum"); and that this must be done "via an intermediate".

38. Even if the terms "via an intermediate" had to be read, notwithstanding their ordinary meaning, as meaning "via an electrostatic drum", this requirement would be satisfied as long as the image is reproduced onto the copy with the intervention of an electrostatic drum. This is indeed the case of all digital copiers using an electrostatic engine.

3. The Explanatory Note to HS96 heading 9009

39. The complainants have failed to show that digital copiers do not meet the terms of either heading 9009 or subheading 9009 12. As a result, their claim is entirely dependant on the mere fact that digital copiers are not mentioned expressly in a non-binding Explanatory Note to HS96 heading 9009. However, if that Explanatory Note does not mention digital copiers it is simply because it was drafted before digital copiers came into existence. Furthermore, although the Explanatory Note does not mention expressly digital copiers, it does not exclude them either.

4. Notes 5(B) and 5(D) to Chapter 84 of the HS96

40. When an MFM is used for printing data received from an ADP machine, it functions as an "output unit". On the other hand, when an MFM makes copies, it does not use the ADP system at all and, therefore, does not operate as an "output unit". Rather it operates as a "photocopying apparatus". Since the MFMs at issue are caught prima facie by the "ordinary meaning" of two different concessions, each covering a different HS96 subheading, it is crucial to take the context into account. In turn, the most relevant contextual element is Note 5(B) to Chapter 84, because that note is meant to

address specifically the type of situation before the Panel. Indeed, letter (a) of Note 5(B) makes it clear that a "unit" may not be classified under HS96 subheading 8471 60 unless it is used "solely or principally" with an ADP system.

41. Japan argues that Note 5(B)(a) does not apply in this case by virtue of Note 5(D). But it is rather Note 5(D) which is inapplicable. MFMs are not mere "printers". They are multifunctional machines, which have other functions, such as copying or faxing, besides printing. Japan concludes that MFMs must be deemed "printers" for purposes of Note 5(D) because their "principal function" is printing. The EC disagrees. Note 5(D) provides a narrow exception to Note 5(B)(a). As such, it must be interpreted strictly. Any machines not expressly mentioned in Note 5(D) remain subject to the general rule of Note 5(B)(a).

42. The EC agrees that, as the ECJ held in *Kip*, pursuant to Note 5(B)(a) ADP MFMs must be classified directly under HS96 8471 60 and granted duty free treatment, if the copying function, which does not involve the "use of an ADP system", is of secondary importance in relation to other functions, which do involve the "use of an ADP system", such as printing. In order to determine whether the copying function is secondary, it is necessary to conduct a case-by-case examination of the objective characteristics of each model of MFM. In contrast, Japan's position is that it must be assumed *a priori* that printing is always and necessarily the "principal" function of any ADP MFM, irrespective of the specific objective characteristics of each model of ADP MFM. Japan has put forward three types of arguments in support of its position that printing is always the "principal" function. All of them are without merit.

43. The first argument is that what Japan calls the "print unit" or the "print module" is the "most important" component. However, most of the printing components, including in particular the print engine, are themselves multifunctional. Thus, from the mere fact that the printing components are the "most important" it does not follow that the printing function is the most important.

44. Japan's second argument is that the copying function is "incidental" to the other functions. This is, once again, the same implausible argument to the effect that "digital copying" is not really "copying". Furthermore, even if this argument were correct, it would be of no use to Japan in relation to Note 5(B)(a), because it is beyond dispute that digital copying, regardless of whether it is a distinct "function", does not involve "the use of an ADP system". Hence Japan's gymnastics to avoid the application of Note 5(B)(a) and to read a "principal function" test into Note 5(D).

45. Japan's third argument is that there is "empirical evidence" that the printing function is the "most used function". Such evidence consists exclusively of a self-styled "survey" supplied by the United States. But the so-called "survey" is just a power point presentation, without a proper explanation of either the meaning of the terms used or the methodology followed and without any indication of the margin of error. The number of respondents is very small: [just 200]. Besides, we do not know how they were selected, except that [they are all US companies]. In any event, the "survey" does not really support Japan's position.

5. GIR 3(b) of the HS96

46. The architecture and design of the MFMs at issue may vary considerably from one model to another, depending on the manufacturer, the functions of each model and the specific features and capabilities of each function. This makes the casual use of vague terms such as "print unit" or "print module", without any further precision, virtually meaningless.

47. A basic ADP MFM with the functions of copying and printing consists essentially of three types of components: a print engine; a scanner; and various electronic components. The electronic components ensure the interface between the print engine, the scanner and the ADP machine to which the MFM is connected and control the operation of the different functions of the MFM. The electronic components may fall within three subcategories: electronic components used when printing data from the ADP; electronic components used when operating the MFM autonomously from the ADP machine for making copies; and electronic components used for both copying and printing. In practice, the electronic components may appear in very different configurations within the MFM.

48. Japan's position appears to be that, since the print engine cannot operate alone, it must be grouped together with the electronic components used for printing data received from the ADP machine. However, there is no good reason why the print engine should be grouped with those electronic components, rather than with the electronic components used for operating autonomously the MFM in order to make copies. Furthermore, by Japan's own flawed logic, one could as well argue that, since in the MFMs with the functions of printing and copying, neither the scanner nor the print engine can be operated without certain electronic components, all such three components must be grouped together into a single "functional unit". The previous discussion evidences that requiring, as Japan does, that the "component" which confers the "essential character" for the purposes of GIR 3(b) must be, in itself, a "functional unit" capable of "operating alone", leads necessarily to various, and conflicting, possible definitions of that "component" and, ultimately, renders GIR 3(b) impossible to apply. This is so because many of the components of an MFM, including in particular the "print engine", are themselves multifunctional.

6. The classification practice of the parties and third parties

49. Japan is wrong when it says that the EC's own classification practice is irrelevant because that practice is the subject of this dispute. The present dispute is about the tariff treatment currently given by the EC to certain products. It is not about the EC's classification practice prior to the conclusion of the ITA, which is what the EC is invoking. The Appellate Body has made it clear that the classification practice of the importing country may be not only relevant, but indeed "of great importance"..

50. Japan makes much of the fact that MFMs with a digital copying function were already in existence at the time of the conclusion of the ITA. Japan argues that, because such products existed in 1996, the EC must have been aware that they were covered by the concession for HS96 8471 60. But it is obvious that one thing does not follow from the other. Indeed, as shown by the EC, the actual classification practice of the parties and third parties around 1996 contradicts Japan's assumption.

7. The negotiating history

51. The EC finds it truly remarkable that, while denying any interpretative value to negotiating documents signed by a high ranking US official, the United States appears to consider as most authoritative an article co-written by two officials of the OECD in their own personal capacity. The article in question provides a useful overview of the negotiating process. But the authors, not being experts in customs classification, have made mistakes when trying to decipher the complex details of the ITA's product coverage.

52. The United States appears to concede that the EC sought the inclusion of digital copiers in the ITA and that the United States opposed such inclusion. But why would the EC have made any concession to the United States in order to secure duty free treatment for the products at issue in this

dispute and, immediately after having achieved that objective, pretend that, in fact, those products were not covered by the ITA?

8. Non-ADP MFMs

53. In its second written submission Japan has finally acknowledged, for the first time in this dispute, that, in addition to a fax function, these machines have also a copying function. Nevertheless, Japan seeks to play down the importance of the copying function by describing it as merely "incidental". It is, of course, correct that the copying function shares some components with the fax function. But this does not mean that the fax function is always the "essential" function and the copying function purely "incidental". As shown by the EC, the copying performance of some of the machines at issue is similar or higher than that of certain stand-alone digital copiers. Furthermore, in some cases the copying function is marketed as the "basic" function and the fax function as a mere "option" which can be added at a relatively low cost.

54. In response to a question from the EC, the United States has conceded that not all non-ADP MFMs which can both copy and fax are to be classified under HS96 subheading 8517 21. For its part, TPKM has recognised that until the introduction of the HS2007, it classified non-ADP MFMs under HS96 9009 "as long as it was determined that no other function was more important than the copying function". This suggests that the United States and TPKM do not really agree with Japan's inflexible position that all non-ADP MFMs are covered by the concession for HS96 8517 21.
