BEFORE THE WORLD TRADE ORGANIZATION

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

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

JAPAN'S ANSWERS TO PANEL QUESTIONS TO THE PARTIES FROM THE FIRST SUBSTANTIVE MEETING

3 JUNE 2009

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EC – Computer Equipment	Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62, 67, 68/AB/R, adopted 22 June 1998, DSR 1998:V, 1851.
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I. THE INFORMATION TECHNOLOGY AGREEMENT

1. (All parties) The Panel notes that the Information Technology Agreement ("ITA") is mentioned by the complainants along with the WTO and the GATT when discussing "object and purpose" within the meaning of Art. 31.1 of the Vienna Convention on the Law of Treaties ("Vienna Convention"). Does this mean that the complainants consider the ITA itself to be a "treaty" within the meaning of Art. 31.1 of the Vienna Convention?

1. No. Japan does not consider the ITA itself to be a "treaty" within the meaning of Articles 2.1(a) and 31.1 of the Vienna Convention on the Laws of Treaties ("*Vienna Convention")*. Japan considers that the status of the ITA to be that of a political declaration. Japan considers that the EC's Schedule of tariff concessions, an integral part of the WTO Agreement and the GATT 1994, represent the "treaty" at issue in this dispute.

2. Japan mentioned in its First Written Submission that "the ITA elaborated on these core objects and purposes"(Japan FWS, para. 175), by which Japan referred to the object and purpose of the WTO Agreements and the GATT 1994 as "expanding the production of and trade in goods and services" and "reduction of tariffs and other barriers to trade." This does not mean that the ITA is considered a "treaty" within the meaning of Article. 31.1 of the *Vienna Convention*.

2. (All parties) In interpreting the European Communities' concessions in this case, what relevance and weight should be placed on the provisions contained in the ITA, including the preamble? Under what provision of the Vienna Convention would these be relevant?

3. Japan stated in its FWS that "[t]he ITA elaborated on these core objects and purposes" of the WTO Agreement and the GATT 1994 (Japan FWS, para. 175.), by which Japan referred to the object and purpose of the WTO Agreements and the GATT 1994 as "expanding the production of and trade in goods and services" and "reduction of tariffs and other barriers to trade." Japan considers that the ITA could be relevant as part of the context within the meaning of Article 31(2)(b) of the *Vienna Convention*, as an "instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty."

3. (All parties) To what extent, if any, does "technological development" of products affect the determination of the scope of tariff treatment included in WTO concessions:

in relation to tariff treatment in general involving any product;

4. The question is always whether the products at issue fall within the relevant tariff concessions, as interpreted in accordance with Article 3.2 of the DSU and the relevant provisions of the *Vienna Convention*, i.e., with reference to the ordinary meaning of the text read in context, and in light of the object and purpose of the treaty. Whether a relevant tariff concession reaches a product newly created as the result of technological development solely depends on the text of that tariff concession read in context and in light of the object and purpose of the WTO Agreement.

in relation to ITA-related tariff concessions. In particular, what significance, if any, does the phrase "... and other technologies ..." found in Attachment B's description of flat panel display devices have with respect to "technological development" and innovation?

5. The basic interpretative framework discussed above is the same for ITA-related tariff concessions and other concessions.

6. That being said, the language used in a concession will often be crafted with a view toward possible technological developments. The language of a specific tariff concession may well be broad enough to apply to products using the changed technology. In contrast, the language of the relevant tariff concessions, when read in context, may reveal that the specific terms used in the particular tariff concession can cover only products using specific technology, and consequently, cannot cover products based on some new and different technology. This different coverage comes from the text and its context, rather than from the technological nature of subject products or the pace of developments in technologies used for subject products.

7. With respect to LCD monitors, the specific phrase "and other technologies" does not change this framework. Rather, the phrase "and other technologies" indicates that the complete parenthetical statement "(including LCD, Electro Luminescence, Plasma Vacuum Fluorescence and other technologies)" provides an illustrative list and NOT an exhaustive list of covered technologies. In other words, the phrase evidences a common intent among the ITA signatories to include all FPDs for the products covered by the ITA, even those are based on some yet to be developed technology that might not have existed at the time of the ITA.

4. We take note of the following passage of the ECJ case C-67/95 Rank Xerox case decision (Exhibit TPKM-63):

> ***"22. It is irrelevant that the indirect process common to the two machines relies on modern technology. The Court held in [...] Analog Devices [...], that, even though it cannot be denied that technical developments in the industrial sector concerned justify the drawing up of a new customs classification, it is for the competent Community institutions to take account thereof by amending the Common Customs Tariff. In those circumstances, failing such an amendment, the interpretation of the tariff cannot vary as and when technology changes." (emphasis added)***

In the case at hand, parties have different views on the relative importance of* technological development *leading to a new product as a factor in the assessment of the scope of tariff commitments.

> ***(a) (European Communities) Please, explain whether the ECJ's rationale in Case 122/80 Analog Devices is in line with your position on the relative importance of technological development. Could the above rationale apply mutatis mutandis in the context of ITA commitments to indicate that until Participants clarify the scope of a given commitment (using the ITA negotiating mechanisms), the interpretation of that commitment "cannot vary as and when technology changes."***

Not applicable to Japan.

> ***(b) (Complainants) Please comment.***

8. Japan agrees with the ECJ's rationale that "the interpretation of the tariff cannot vary as and when technology changes," as applicable to the interpretation of the EC's tariff concessions as well. The issue is simply that if the products at issue are covered under the EC concession on an HS heading or a product description included in the EC concessions, then those products are duty-free; if the products are not covered by the EC concessions, those products will be dutiable.

9. All goods, including ITA-related goods, that exist today shall be classified under some heading of the HS, even if the product did not exist at some earlier time. The product has to go somewhere. In other words, even for purposes of tariff classifications under the HS, a new product will still need to be classified into one of the existing headings in light of the physical characteristics of the product, and in light of the language of the various HS headings.

5. (All parties) Are the product narratives contained in Attachment B of the ITA incorporated into the European Communities' WTO Schedule, or are the obligations found in the narrative descriptions of the products contained in the European Communities' Schedule. To the extent that there are any discrepancies between the two, which should prevail?

10. The obligations should be found NOT in *Attachment B* itself, but in the EC's Schedule. The language of the product narratives contained in *Attachment B* of the ITA, however, has been incorporated into the EC's Schedule, and thus constitutes the language of the EC's tariff concessions. The EC's Schedule creates obligations with regard to the narrative descriptions of the products contained therein.

11. Japan is not aware of any discrepancies between the two. If there is a specific apparent discrepancy the Panel would like Japan to address, we would be happy to do so.

6. (Complainants) The European Communities has stated that if the concessions are in the ITA itself, then concessions must be given identical interpretation in relation to all signatories to the ITA. However, if the concessions are in the WTO Member's Schedule (e.g. the EC Schedule) and have been identified with a given HS/CN code, then WTO Members have agreed that some differences were an inherent part of the concessions that were made pursuant to Attachment B (see European Communities' first written submission, paragraph 60). Do the complainants agree with this position? Please elaborate.

12. No. The EC position proceeds from a false premise – that the listing of specific HS/CN codes somehow changes the meaning of the language of the product description. That language means what it says, and the listing of specific HS/CN codes, which reflect the EC's classification at the time of concession, is illustrative only, and does not purport to narrow or limit in anyway the language of the product description. Any possible doubt on this issue should be resolved by the language in the headnote that provides duty-free treatment for the products provided in and for *Attachment B* to the ITA, "wherever the products are classified." If the language of a product description incorporated from *Attachment B* and Section 2 of *Attachment A* to the Members' tariff concessions is the same as that in and for *Attachment B* to the ITA, the meaning of that language will be the same for all ITA members, regardless of which HS codes those ITA members may have chosen to illustrate how they might be classifying the product at issue.

7. (All Parties) What is the purpose and interpretative relevance of the HS codes that appear next to the products listed in WTO Schedules?

13. The HS codes have a somewhat different meaning depending on where they appear in the EC schedules at issue in this case.

14. The HS codes appearing in the EC Schedule in relation to the products enumerated in *Attachment A* correspond to the product descriptions in the HS nomenclature. In most cases, the full HS heading is included in *Attachment A*, in which cases the HS code and the narrative product description are just alternative ways to convey the same meaning.

In some cases, only part of the HS heading is included (indicated by the "ex" notation), in which cases the narrative product description describes what portion of the HS heading was being covered by the concession. The product narrative must take precedence.

15. The purpose of the HS codes that appear next to the products listed in the concessions made pursuant to *Attachment B* (a "positive list of specific products") and Section 2 of *Attachment A* (a listing of "semiconductor manufacturing and testing equipment and parts thereof") is illustrative. These HS codes help illustrate the range of products that might fall within the product narrative, by listing those HS codes that a particular country has been using to classify products that would fall under the product narrative. The headnote to the EC Schedule sets forth that "the customs duties … shall be bound and eliminated … wherever the product is classified," thereby indicating that the HS codes enumerated next to the narrative description of the subject products cannot be either determinative or exhaustive.

16. The fact that different countries might have listed different HS codes along side the narrative product description does not affect the meaning of that product description. The scope of the tariff concession is delineated by the actual language of the narrative product description. Different countries may have been using different HS codes to capture these specific products under their prior practice, and therefore the range of HS codes might vary somewhat in each country's schedule of concession. This variation is precisely why it is the narrative product description that must control.

8. (All Parties) Could the parties confirm that the concessions made by the European Communities pursuant to the ITA, which are relevant to this case, are those contained in documents WT/Let/156, WT/Let/261 and G/MA/TAR/RS/74? If they are not, please explain why not and indicate the correct documents.

17. Yes, these are the correct documents.

9. (Complainants) Do you have in your respective WTO Schedules a "headnote" identical to that found in the EC WTO Schedule? If not, what are the differences?

18. Japan's Schedule has a note corresponding to the "headnote" in the EC's WTO Schedule, as referred to below. The Japan's note indicates that for *Attachment B* products, the narrative product descriptions incorporated from *Attachment B* dictate. It should also be noted that Japan's Schedule for *Attachment B* products has no HS code next to the language describing the specific products, reflecting Japan's aforesaid understanding of the note. The note in Japan's Schedule is as follows:

> 3. Notwithstanding the provision of paragraph 3 of the Notes to the Schedule, the tariff reductions from the bound rate as of 1 January 1997 to free in respect of the products in Lists III and IV, wherever they are classified, shall be implemented in three equal rate reductions as follows: (a) The first reduction shall be implemented on the date that this instrument becomes effective; (b) The second reduction shall be implemented on 1 January 1998; (c) The third reduction shall be implemented on 1 January 1999.

19. The "headnote" in the EC's Schedule and the note in Japan's Schedule are not identical, but are almost the same. The headnote in the EC's Schedule indicates how to

eliminate customs duties in respect of the products provided "for" and "in" *Attachment B* with the condition "wherever the products are classified." So does the note in Japan's Schedule.

10. (All Parties) Regarding the section in the WTO Schedules of ITA Participants reflecting Attachment B of the ITA, please answer the following:

(a) Is the effect of the headnote to incorporate Attachment B of the ITA in its entirety into each of these Schedules?

20. On the basis of the headnote, the description of products in *Attachment B* of the ITA is incorporated into the EC Schedule. So is the description of products "for Attachment B" as listed in Section 2 of *Attachment A*.

(b) What is the significance of the phrases "to the extent not specifically provided for in this Schedule" and "wherever the product is classified" found in the headnote to these Schedules? Furthermore, how do these phrases relate to each other? Has this wording any implication for the order in which the Panel must look at the case?

21. The significance of the phrase "to the extent not specifically provided for in this Schedule" read within the context of the headnote, for example, together with the phrase "shall be bound and eliminated", is to mean that Attachment B concessions grant a duty free treatment to certain products that are not given duty free treatment by any other specific concessions.

22. The phrase "wherever the product is classified" indicates that the narrative product descriptions -- incorporated from *Attachment B* and for those products "for Attachment B" set forth in Section 2 of *Attachment A* -- take precedence over the HS headings used by the ITA participants to classify these products in the past, and thus determine the scope of the tariff concessions on *Attachment B* products. Accordingly, the HS codes next to the product description are not exhaustive, but rather are only illustrative, and the product described in or for *Attachment B*, even if not classified into one of these HS codes, shall still be legally entitled to duty-free treatment.

23. These phrases do not contradict each other because they provide different things independently.

24. In addition, neither phrase has any implication for the order in which the Panel must look at the case. Obligations in tariff concessions made pursuant to the description of products in *Attachment A* and those made pursuant to the description of products listed in and for *Attachment B* are legally independent of each other, and both must be respected.

(c) Attachment B's heading and the headnote found in these Schedules contain, respectively, the phrases "wherever they are classified in the HS" and "wherever the product is classified". Do you attach any significance to the differences in these phrases?

25. We cannot find any significance to the difference in these phrases. Both phrases confirm that the scope of the duty-free tariff concessions on the products provided in *Attachment B* should be interpreted solely based upon the product descriptions

incorporated from *Attachment B* to the EC's Schedule, and should not be restricted based on the particular HS/CN codes that might be listed as illustrative.

(d) What is the purpose and interpretative relevance of the HS codes that appear next to the products listed in concessions made pursuant to Attachment B?

26. That language of the narrative product descriptions in *Attachment B* and for those products "for Attachment B" from Section 2 of *Attachment A* means what it says, and the listing of specific HS/CN codes are illustrative only, and do not purport to narrow or limit in anyway the language of the product description. Any possible doubt on this issue should be resolved by the language in the headnote that provides duty-free treatment with respect to any product provided in and for *Attachment B* to the ITA, "wherever the products are classified." The language of the product description has meaning, and that meaning is the same as the description of the concessions made by all the other ITA members, regardless of which HS codes each ITA member may have chosen to illustrate how that member might be classifying the product at issue.

11. (All parties) Attachments A and B of the ITA both contain certain express quantitative specifications in the description of certain products listed therein. For example: "portable digital ADP machines, weighing not more than 10 kg ..." (HS96 8471 30 in Attachment A) or "Monitors: display units of ADP machines ... with a dot screen pitch smaller than 0,4 mm ..." (in Attachment B). For products described in the Attachments A and B of the ITA that do not have such specifications, is it legitimate for a Member to introduce quantitative specifications in its national nomenclature ("domestic Schedule") implementing such attachments? If so, how should Participants ensure that such inclusion is done in a manner that is objective and also preserves the scope intended in those Attachments of the ITA?

27. Even where the product descriptions included in *Attachment A* and *Attachment B* of the ITA do not themselves include quantitative limitations, it could be legitimate for the member to use such quantitative limitations to create two or more subdivisions under the given product descriptions in its domestic schedule, but only if the scope of tariff concessions has been preserved and the product entitled to duty-free treatment under the concession remain duty-free.

28. In this dispute, the quantitative limitation "12 ppm" is used in the language of the subdivisions under the subheading 8443.31 in the EC's domestic schedule. These subdivisions seem to result from the transposition of some part of the scope under HS96 subheadings 8471.60 (tariff rate 0%) and 8517.21 (tariff rate 0%) and some part of the scope under HS96 subheading 9009.12 (tariff rate 6%) into the scope under newly created HS 2007 subheading 8443.31.[1] In other words, the quantitative limitation here serves as a bifurcation between two original HS96 subheadings.

29. Although there is nothing inherently wrong in creating such subdivisions, in this instance the subdivisions based on 12 ppm have nothing to do with the scope of the original concessions. It is crucial to make sure that tariff concessions under each of original subheadings are preserved and not impermissibly changed by this HS 2007 transposition.

[1] Although there was a broad consensus among the members of WTO on a possible correlation of subheading 8443.31 of HS07 with subheading 8471 60 of HS96, the EC has continued to deny any possibility of this correlation in subheading 8443 31.

30. The language used in the product description must be interpreted in accordance with the ordinary meaning of that language, read in context, and in light of the object and purpose of the schedule of the concessions (an integral part of the GATT 1994). In interpreting the language relating to the original two subheadings under the EC's concessions before HS2007, we cannot find any rationale to consider the "12 ppm" criterion to serve as a bifurcation between two original HS96 subheadings. The absence of any rationale grounded in the language of the concessions themselves demonstrates that the quantitative limitation "12 ppm" is not objective but rather is arbitrary and thus impermissibly limits the scope of the tariff concessions on the products properly falling under the language of those original two HS96 subheadings. Therefore, this quantitative limitation is not legitimate and serves to impose duties on a product that should be duty-free.

12. (All parties) Does the ITA have a documented negotiating history? If so, what is it? Which of these documents, if any, that constitute "preparatory works" within the meaning of Article 32 of the Vienna Convention are relevant for the interpretation of concessions in this case?

31. The negotiating history of the ITA, and related material if any, is not relevant for the interpretation of the concessions. The ITA is not the treaty at issue (the EC Schedule is at issue) and the negotiating history of the ITA therefore does not constitute "preparatory work of the treaty" within the meaning of Article 32 of the *Vienna Convention* when interpreting the language of the EC's Schedule of concessions, which is an integral part of the GATT 1994. Nor does the material supplied by the EC constitute "preparatory works" of the ITA.

32. Even assuming such materials were somehow relevant, Japan underscores that where the ordinary meaning of the language is clear and makes sense when read in context, there is no occasion to have recourse to other means of interpretation.[2]

13. (All parties) The complainants make a contextual argument that "residual Subheadings" included in Attachment A of the ITA (and incorporated into the WTO Schedules of Participants), such as the HS96 Subheading 8471 90 ("Other"), means that a "broad" concession was intended. Do the parties consider that the existence of "residual Subheadings" could also mean that Participants anticipated "technological developments" in regard to product scope?

33. Japan must note that it refers to the "residual Subheadings" (specifically, Subheading 8471.90) in the EC Schedule rather than the *Attachment A* of the ITA.[3]

34. Again, the question is always whether subject products fall within the relevant tariff concessions, as interpreted with reference to the ordinary meaning of the text of the concessions read in context. The Participants' expectations are irrelevant. In some instances, changing technology has already been addressed by the language itself. For example, the language of heading 84.71 is broad enough to cover products using the changed technology – the language itself is in no way limited by the technology used in the products covered by heading 84.71. In addition to the fact that subheadings 8471.60, 8471.70 and 8471.80 covering computer "units" include collectively every possible type of computer "unit," the existence of "residual" subheading 8471.90 confirms the understanding that all types of computers and all types of computer units, whether or not

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2 "Draft Articles on the Law of Treaties with commentaries 1966", at para. 18, pages 222-23, Yearbook of the International Law Commission, 1966, Vol.II. Exhibit JPN-26.

3 Japan FWS, para. 142.

reflecting "technological developments," still fall within heading 84.71. See Japan's First Written Submission, paragraphs 140-143.

35. Having said that, as explained in its First Written Submission,[4] Japan notes that the "residual Subheadings" are intended to capture all products that fall under the relevant heading, but are not classifiable elsewhere in the same heading. If the terms used for the heading are broad enough to cover products using the changed technology, the inclusion of the "residual subheading" in the heading into the duty-free category would capture such products, if any of the other specific subheadings were too specific to cover the products. In this sense and to that extent, the inclusion of a "residual subheading" would mean that the relevant concessions are broad enough to cover products reflecting technological developments.

II. GENERAL QUESTIONS

14. (All parties) Japan has made arguments on the meaning of certain terms of the concessions under this dispute, not only based on the "ordinary meaning" of these terms, but also based on their "technological sense". Japan claims that "[t]ariff concessions about technology products can best be understood by considering the technology sense of the words of those concessions" (Japan's first written submission, paragraph 85). In addition, at least one other party has similarly suggested that the Panel should take into account the "special meaning" of certain concession terms in this dispute based on Article 31.4 of the Vienna Convention. Do the parties consider that this provision would be applicable in the interpretation of some terms under analysis in this case? Does Japan's use of "technological sense" implicitly invoke Article 31.4 of the Vienna Convention?

36. In its First Written Submission, Japan developed its arguments concerning the ordinary meaning of certain terms of the concessions regarding the products at issue under this dispute by referring to both technological dictionaries and general purpose dictionaries.[5] Regarding the sentence quoted from paragraph 85 of Japan's First Written Submission in the above question from the Panel, it is obvious from the subtitle above paragraph 79 -- "(a) The ordinary meaning of the phrases "units thereof"…" -- that it is a statement made in connection with the ordinary meaning of the terms, and not the special meaning. Japan does not consider it necessary to apply Article 31.4 of the *Vienna Convention* in the interpretation of terms under analysis in this case.

37. Japan's use of "technological sense" neither explicitly nor implicitly invokes Article 31.4 of the *Vienna Convention*. Japan considers that the EC's Schedule should be interpreted in accordance with the ordinary meaning under Article 31.1 of the *Vienna Convention*.

15. (All parties) Assuming that the Panel were to apply the provision of Article 31.4 of the Vienna Convention, please answer the following:

> ***(a) Could the Panel, sua sponte, apply this provision without any Party having invoked it? The Panel in Mexico - Telecoms seemed to indicate that since the provision under interpretation was "technical" and from a "specialized service sector" it was "entitled" to examine what "special meaning" it may have in the telecommunications context (Panel Report, Mexico - Telecoms paragraph. 7.108). Could the parties please comment on this statement?***

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4 Japan FWS, para. 143.

5 Japan's FWS at paras. 79-90, 197-205, 295-303, 376-383.

38. It is difficult for us to conceive of a situation in which the Panel needs to apply *sua sponte* the provision of Article 31.4 of the *Vienna Convention*. Any decision to invoke and apply Article 31.4 of the *Vienna Convention* would have to meet all the requirements of Article 31.4 – requirements that exist whether this provision is invoked by the parties or not.

39. Regarding the argument on the "special meaning" in the Panel Report of *Mexico- Telecoms*, the Panel examined whether it is established that there is a special meaning to a term, only to reach the conclusion that there was no "special meaning" to be given to a term that would be different from an ordinary meaning of the term. It is not clear whether that panel would have invoked a possible "special meaning" if it were planning actually to rely upon the special meaning rather than rejecting a special meaning.

(b) Who bears the burden to prove that a "special meaning" of a treaty term was intended?

40. In Japan's understanding, the burden of proof would rest with the party invoking the special meaning of the term.[6]

(c) If a "special meaning" is to be given to a treaty term according to Article 31.4 of the Vienna Convention, what is the relationship between this provision and the elements of the preceding paragraphs of Article 31, in particular those related to context and elements to be taken into account together with context?

41. Article 31.4 of the *Vienna Convention* provides for the exceptional case where, notwithstanding the apparent ordinary meaning of a term in its context, it is established that the parties intended the term to have a special meaning.[7]

16. (All parties) Can it be assumed that in a sectoral negotiation, such as the ITA negotiations, a party would normally seek counsel from experts in that field, or include in its delegation experts in the field(s) covered by such an agreement. In particular, did your delegation include customs experts and/or technology experts?

42. It is reasonable to assume that in a sectoral negotiation, such as the ITA negotiations, a party would normally seek counsel from experts in that field, or include in its delegation experts in the field(s) covered by such an agreement. Regarding Japanese delegation to the ITA negotiations, our records indicate that customs experts and technology experts, or at least persons with a strong technological background, were included and/or consulted during the negotiations.

17. (All Parties) Could the parties please indicate their views with respect to the designation of individual European Communities member States as respondents in these disputes?

43. It is well-established that EC member States are Members of the WTO in their own right, with obligations, including the obligations under Article II of GATT 1994. Both the EC and the member States play a role in the application of duties to products, and played a role in the application of duties to the products at issue under this dispute. The EC administers the CN and has issued the regulations and explanatory notes at issue; member States have issued BTIs interpreting and applying those regulations and explanatory notes,

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6 "Draft Articles on the Law of Treaties with commentaries 1966",at para. 17, page 222, Yearbook of the International Law Commission, 1996, Vol.II. See Exhibit JPN-26.

7 "Draft Articles on the Law of Treaties with commentaries 1966", at para. 17, page 222, Yearbook of the International Law Commission, 1996, Vol.II. See Exhibit JPN-26.

and applied duties to the products in accordance with the relevant EC regulations and explanatory notes. As Members of the WTO, identified as having breached various provisions of the WTO Agreements in the requests for consultations and for establishment of this Panel, the member States are also respondents in this dispute. The legal relationship between the EC and its member States cannot be invoked to diminish the rights of other WTO members to exercise their rights under DSU against either the EC or its member States or both.

44. We note that prior panels have reached this conclusion. One Panel found that it would consider whether Ireland and the United Kingdom deviated from WTO obligations in the context of the EC commitments.[8] Another Panel found that Article XXIV:12 of GATT 1994 does neither constitute an exception to nor a derogation from the obligation of uniform administration in Article X:3(a).[9]

45. Thus, the complainants have simply exercised their rights under the DSU in bringing this dispute against both the EC and its member States.

18. (All Parties) Do the complainants consider that all of the regulations and CN Explanatory Notes listed with respect to each product are still valid and have legal effect? Please give reasons to your responses.

46. Japan assumes that all of the regulations and CN Explanatory Notes listed with respect to each product are still valid and have legal effect. Even if certain of the measures have been superseded by other more recent measures, the older measures still exist as part of the legal context in which the EC would presumably interpret its more recent measures. Japan cannot confirm that some regulations and CN Explanatory Notes listed are invalid and have no legal effect unless and until the EC presents sufficient evidence that the older measures have been formally withdrawn and therefore have no legal effect under the EC system.

47. Moreover, we note that even if they are no longer in effect as a legal matter, the prior measures and EC practice in applying those measures help explain the current version of the measure at issue**.**

19. (All Parties) The Panel notes that the terms "device" and "unit" are used in several parts of the EC's concessions pursuant to the ITA. Do these words have the same meaning in the different phrases in which they are used, or different meanings? If the latter, why and what would be those meanings?

48. According to *The New Shorter Oxford English Dictionary*, the term "device" means "a thing designed for a particular function or adapted for a purpose."[10] The term "unit" means "an individual thing, person, or group regarded as single and complete" or "a device with a specified function forming part of a complex mechanism."[11]

49. Although the terms have closely related dictionary meanings when viewed in isolation, the Panel must be sensitive to whether the terms would have different meanings depending on the context in which they are used in a particular instance. It should be noted that the term "unit" used in the language of heading 84.71 is subject to the

8 Panel Report, *EC-Computer Equipment*, para 8.16.
9 Panel Report, *EC-Customs Matters*, paras. 7.136-145.
10 New Shorter Oxford English Dictionary, Vol I, at p. 655. See Exhibit JPN-27.
11 New Shorter Oxford English Dictionary, Vol II, at p. 3491. See Exhibit JPN-27.

rule provided for in Note 5 to Chapter 84. This instance of the use of the term "unit" perhaps has a more focused meaning in a particular context.

50. We do not believe these two terms are ever used in the EC schedule of concessions in a way that would be inconsistent with the usage elsewhere in the concessions. If the Panel would like us to address any specific instances of how these terms were used in the EC schedule of concessions, we would be happy to do so.

51. The ordinary meaning of the term "flat panel display device" is interpreted in the context of *Attachment B*, not in the context of HS.

20. (All Parties) Assuming that the HS96 interpretative rules are relevant as context for the interpretation of the concessions in the EC Schedule, what would be the interplay among the different rules that have been cited, e.g.: 1) GIR 3; 2) Note 3 to Section XVI; and 3) Note 5 to HS 84. In other words, when will one be applied instead of the others? Is there an order in which they have to be applied? If so, what is that order and why?

52. Japan must first note that the HS is not relevant for interpreting the EC's concessions incorporating the description of the products in *Attachment B*.

53. With respect to the other concessions, even assuming that the HS96 interpretative rules are relevant as part of the context for the EC's tariff concessions, this conclusion does not mean that the mechanical application of the rules would produce an appropriate interpretation of the relevant tariff concessions. What is required under Article 31.1 of the *Vienna Convention* is treaty interpretation with a holistic approach based on the text, context and object and purpose of the treaty.

54. GIRs: In the HS, there are six rules known as General Rules for Interpretation or GIRs. Classification of goods in the HS Nomenclature shall be governed by these six rules. The GIRs apply in hierarchical fashion, ie., GIR1 takes priority over GIR2, GIR2 over GIR3, and so forth. GIR 1 stipulates "…for legal purposes, classification shall be determined according to the terms of the headings and any relevant Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions (of GIRs)." Therefore, classification should be based, first, on the terms of the headings, relevant Section or Chapter Notes pursuant to GIR 1 and provided such headings or Notes do not otherwise require, according to the provisions of GIRs 2 through 6. In this regard, we note that GIR 1 places priority on the text of the relevant concession – the language of the heading itself, read in the context of any relevant Section or Chapter Notes – as would WTO interpretation under the *Vienna Convention*.

55. GIR3 specifically provides classification principles to use when, by application of Rules 2(b) or for any other reason, goods are *prima facie* classifiable to two or more headings. GIR 3 consists of three parts (i.e., (a), (b) and (c)) which must be applied in that specific sequence.

56. The main point of the GIRs is that they apply generally to all headings in the HS nomenclature, and thus do not speak specifically to any particular heading. Moreover, pursuant to GIR 1 itself, tariff concessions must be interpreted based on the language of the heading itself, and any relevant Section or Chapter Notes, before considering the other GIRs, including GIR 3. Therefore GIR 3 has lower interpretative weight than either language of the heading, or the Section or Chapter Notes. GIR 3 does not apply at all if the

interpretative question can be resolved by reference to the language of the heading, read in context.

57. Section and Chapter Notes. If relevant, Section and Chapter Notes are considered along with the language of the heading under GIR 1. Section Notes apply to several chapters. Chapter Notes apply only to the specific chapter at issue. From the perspective of WTO interpretation, the more specifically a Section or Chapter Note speaks to the language of the relevant heading, the more interpretative weight that Section or Chapter Note should receive. This approach for WTO interpretation is consistent with the Appellate Body's explanation in *EC-Chicken Classification*.

58. If there is a contradiction between Note 3 to Section XVI and Note 5 to Chapter 84, Note 5 to Chapter 84 takes priority over Note 3 to Section XVI. Note 3 to Section XVI starts with the qualifying phrase "[u]nless the context otherwise requires," which means that this Note is applied consistently with the relevant terms of heading and other Notes. However, Note 5 to Chapter 84 does not have such a qualifying phrase.

59. Moreover, Note 5 to Chapter 84 is quite specific and speaks directly to the interpretative question at hand – what is a "unit" of a automatic data processing machine. Note 5 specifically defines "automatic data processing machine," i.e., a computer, and describes the "units" of such computers, such as printers or monitors. Therefore, the clarifications stipulated in this Note must be given significant interpretative weight, and should be considered more heavily than the more general provisions of Note3 to Section XVI when deciding how to interpret the language of a heading.

60. For these reasons, the interpretative weight of the three rules referred to above should be as follows. The most interpretative weight should be placed on Note 5 to Chapter 84, the only interpretative material that speaks directly the meaning of "units" as that term is used in heading 84.71. Much less weight should be accorded Note 3 to Section XVI, which does not speak to the specific language of any heading, but at least applies to Chapters 84 and 85 and thus has some specific relevance for heading 84.71. The least interpretative weight should be assigned to GIR 3, which is general overarching principle of classification that only becomes relevant when the language of the heading itself, even when read in the context of Section or Chapter Notes, does not resolve this issue.

21. (All Parties) In its first closing statement, Chinese Taipei stated that "the HS is clearly not relevant at all for the interpretation" of the concessions made pursuant to Attachment B of the ITA (paragraph 3; emphasis added). The other co-complainants seem to share this view. Please explain how this view accords with the fact that the heading of Attachment B seems to require the application of certain HS interpretative rules ("HS Notes 2(b) to Section XVI and Chapter 90, respectively") to parts specified in this Attachment? Could the European Communities please comment?

61. The second sentence of the heading of *Attachment B* ("Where parts are specified, they are to be covered in accordance with HS Notes 2(b) to Section XVI and Chapter 90, respectively.") applies only to the phrase "parts thereof", i.e., parts of three products (i.e., "electric amplifiers," "flat panel display devices" and "paging alert devices") specified in *Attachment B*. As a condition to identify the coverage of "parts thereof," the second sentence uses the rule of "if suitable for use solely or principally with a particular kind of" machine provided in HS Notes 2(b) to Section XVI and Chapter 90. This rule is applied irrespective of HS codes because the "parts thereof" are also covered by the first sentence of *Attachment B*'s heading, which provides for duty-free treatment

wherever they are classified in HS. Therefore the HS is irrelevant to the second sentence of *Attachment B*'s heading.

62. As stated above, the second sentence of the heading of *Attachment B* applied only to the "parts thereof", not the products themselves specified in *Attachment B*. The products at issue here, however, are not "parts thereof" but products themselves, such as "flat panel displays for products falling within this agreement," which are covered by the first sentence of the heading that includes the phrase "wherever they are classified in HS."

63. Therefore, Japan continues to believe that the HS is irrelevant for the interpretation of the concessions made pursuant to *Attachment B* to the ITA in this dispute.

22. (All Parties) Both parties refer to, inter alia, the China - Auto Parts case in respect of the complainants' "as such" claims. In the pleadings, there are two different characterizations of what needs to be demonstrated in order to establish an "as such" claim:

> ***(a) The United States (in oral statement paragraph 8) states that the complainants "need to show that the measures necessarily lead EC customs authorities to impose duties on <u>one or more</u> products subject to the commitments" (emphasis added);***
>
> ***(b) The European Communities (in Oral statement paragraph 37) states that the complainants have to establish that "the challenged measures, in their every application in relation to a given product model...<u>always and necessarily</u> lead to a violation of the GATT 1994." (emphasis added)***

Could the parties elaborate on what, in their view, needs to be proved to establish an "as such" claim?

64. Japan agrees with the U.S. view that the complainants "need to show that the measures necessarily lead EC customs authorities to impose duties on one or more products subject to the commitments." We note that this dispute involves tariff treatments, and whether certain products should be treated as dutiable or not. For such measures, the EC argument requiring a proof that every single product model – or every single transaction – has been subjected to duties is simply wrong.

65. *China – Auto Parts* confirms this view. The EC cites two paragraphs that use the words "always" and "necessarily" but in doing so misses the main point of *China – Auto Parts*. Paragraph 7.584 cited by the EC for "always" and paragraph 7.588 cited by the EC for "necessarily" in fact show that an element of a challenged measure that requires a certain classification and duty treatment – for example, the EC rule on sole use test for flat panel display devices – can require classification and duty treatment that is consistent with the terms of a particular HS heading. Neither these paragraphs nor any other part of *China – Auto Parts* supports the EC argument that every application regarding every model of a particular product must be shown to be inconsistent. Indeed, elsewhere in *China – Auto Parts* the Panel noted that it needs only to determine whether "any aspect of the criteria set out in the measures will necessarily lead to a violation."[12]

66. This basic point can also be seen in the Appellate Body logic in *EC – Certain Computer Equipment*. In that case, the EC tried to make the same basic argument it is making now, but presented the argument instead as a failure to meet the obligations of DSU Article 6.2. The Appellate Body largely rejected that argument. The Appellate Body

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

noted that it "may also be necessary" to identify the specific products subject to the measures in some instances, a comment the EC takes pain to cite.[13] In that case involving EC duties imposed on arguably duty-free products, the Appellate Body went on to note that broader product descriptions that are "readily understandable in the trade" are sufficient, and specifically noted that it shared the U.S. concern that undue product specificity will lead to drawn out battles where the defending party will seek to exclude any product not defined in sufficient detail.[14] Although the EC does not in this dispute raise the same Article 6.2 objection, the underlying logic is the same. More importantly, the Appellate Body logic for rejecting the EC argument also applies in this dispute. It makes no sense to require complaining parties to meet the level of specificity set out by the EC argument.

23. (All Parties) A common theme of the European Communities' first oral statement is that, in making classification decisions, products must be analysed on a case-by-case basis, weighing the relative importance of various functions. In the light of the various measures identified by the complainants, how is such a case-by-case assessment to be carried out with respect to the following products, taking into account the relevant classification regulations and explanatory notes:

(a) 20-inch LCD flat panel display device with a DVI connector

(b) A set-top box with a communication function and a 60 GB hard drive

Could different EC national customs authorities classify these products differently? Please explain.

Could the complainants indicate how they have classified such products pursuant to and since the ITA?

67. At the outset, Japan notes that the issue in this dispute is not product classification, i.e. NOT whether LCD monitors are or should be classified, on the one hand, as television or video monitors, or on the other hand, as computer monitors. The proper question in this regard concerns treaty interpretation, i.e., whether or not the relevant EC tariff concessions grant duty-free treatment to the subject products, e.g. LCD monitors with a DVI connector. By saying this dispute is not about classification, we mean that the Panel should interpret the scope of treaty language using the *Vienna Convention* and WTO precedents, not the rules of tariff classification, particularly not the tariff classification practices of certain national authorities.

68. Having said that, the product described in item (a) above would be covered by *Attachment A* as an "output unit" of a computer under subheading 8471.60 prior to the HS 2007 and as a monitor (other than CRT monitor) of "a kind solely or principally used in a computer system of heading 84.71" under subheading 8528.51 since the adoption of HS 2007. This product would also be covered by *Attachment B* as a flat panel display devices "for" a computer, provided the product is capable of operating with a computer, since a DVI is the most commonly available interface that enables these monitors to be "for" ADP machines, both before and since HS 2007.

69. The EC measures – particularly the EC Explanatory Note -- are clear in necessarily classifying this product as a dutiable product, because the DVI connector enables the product at issue to receive signals from any other source than ADP machines. As explained in Japan's First Written Submission, CN 8528.51.00 specifies, among "[m]onitors and projectors, not incorporating television reception apparatus," those "of a

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13 EC Oral Statement, at para 37, citing *EC – Certain Computer Equipment*, at para 67.

14 *EC – Certain Computer Equipment*, at paras 70, 71.

kind solely or principally used in an automatic data-processing system of heading 8471" as a duty-free item, and consequently, such monitors that are not covered by that CN are dutiable (14%). In this regard, Exhibit JPN-18 indicates that the Note made clear that CN 8528.51.00 was to be limited to LCD monitors that "are capable of accepting a signal only from the central processing unit of an automatic data processing machine of heading 84.71." The Note further sets forth that CN 8528.51.00 is not available for LCD monitors that can "be connected to a video source such as a DVD recorder or reproducer …". The DVI connector was developed to ensure digital connectivity with a computer, but some DVD players in the market are also equipped with a DVI connector. These provisions and facts reveal that "a 20-inch LCD flat panel display device with a DVI connector" (with no television reception apparatus incorporated therein) would necessarily be subject to 14 percent import duties.

70. With regard to set top boxes, Japan's customs authorities will grant "set-top boxed with a communication function" duty-free treatment, whether or not incorporating a hard drive.

III. MFMs

24. (Complainants) The complainants claim that the following four measures result in the denial of duty-free treatment to certain ADP and non-ADP MFMs: (i) Commission Regulation 517/1999, (ii) Report of Conclusions of 360th meeting of the Custom Code Committee, Tariff and Statistical Nomenclature Section, TAXUD/555/2005-EN, (iii) Commission Regulation 400/2006 and (iv) Council Regulation 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff (CCT), including all annexes thereto, as amended. The European Communities, on the other hand, considers that the only measure at issue in this dispute regarding these products is Council Regulation 2658/87, as amended. It explains that the first three measures cited above are no longer applicable as a result of the EC's implementation of the HS 2007. Do you agree? If not, please explain how the first three measures cited above are still applicable.

71. Japan cannot agree that the older EC measures are not applicable, unless the EC presents sufficient evidence that the first three measures above have been formally withdrawn, because the complainants have presented a *prima facie* case for these measures. Japan understands that these measures – particularly item (ii) -- are still reflected in the EC's interpretation of the HS 2007 -- albeit with a slight change in the copying speed threshold -- to deny a duty-free treatment to certain MFMs with facsimile function.

72. For the measures (i) and (iii), Japan can agree with the EC, however, only to the extent that the EC agrees that it has a consistent policy to treat MFMs as dutiable products. As far as Japan understands, those measures are still effectively applied by national authorities despite the adoption of the CN 2009. For instance, a national authority can look at measures (i) and (iii) for guidance on how to classify a MFM and conclude that classification should take place under heading 9009, even though heading 9009 no longer exists. The national authority will then check the table of equivalences between CN 2006 and CN 2009: the conclusion will be that an apparatus previously classified under CN code 9009.12.00 will be classified under heading 8443 in a CN code subject to duty according to the table of equivalences. In addition, the prior measures and EC practice in applying those measures also help explain the HS 2007 provisions that result in the assessment of duties that should not be collected on MFMs with digital connectivity.

25. (Complainants) In describing non-ADP MFMs, the three complainants indicate that these apparatus have no connectivity to a computer, including through a computer network, but rather connect to a

telephone line. On the other hand, the European Communities argues that it currently provides duty-free treatment, inter alia, to (i) non-ADP MFMs without a copy function (under CN 8443 31 99); (ii) non-ADP MFMs with a copy speed of less than 12 monochrome pages per minute (under CN 8443 31 10); and (iii) non-ADP MFMs that do not use an electrostatic print engine (under CN 8443 31 99). All these CN codes fall under HS2007 Subheading 8443.31 which are, by definition, apparatus "capable of connecting to an automatic data processing machine or to a network". In response to an oral question posed by the Panel during the first substantive meeting, the European Communities clarified that, for the purposes of that Subheading, a connection over a telephone line is considered a connection over a network. In the light of the above:

> ***(a) Do you agree with the assertion by the European Communities that a connection over a telephone line is also a connection over a network? If not, how do the complainants then consider that the tariff treatment described above violates Articles II:1(a) and II:1(b) of the GATT 1994? In other words, can you explain this claim in relation to EC concessions regarding non-ADP MFMs considering that the above codes pertain to products which are "capable of connecting to an automatic data processing machine or to a network"?***

73. Yes, we understand that the EC interprets the phrase "a connection over a network" in HS 2007 subheading 8443.31 to cover "connection over a telephone line."

74. However, we also understand that that the EC imposes 6 percent duties on non-ADP MFMs with (i) a copying function of (ii) more than 12 monochrome pages per minutes and (iii) using electrostatic print engine (under CN 8443 31 91) in violation of its concessions. The fact that the EC does not impose duties on all products falling under this heading does not excuse the measure that imposes duties on some of the products falling under this heading that should be treated as duty-free.

75. Non-ADP MFMs -- i.e. facsimile machines -- are the products that enable a user to transmit the data of scanned documents to another facsimile machine over telephone line for reproduction. The printing technologies used – such as inkjet, laser, thermal or dye-sublimation -- are irrelevant to determining whether the device is a facsimile machine. Obviously, the scanned data transmitted over a telephone line is not an optical image of the original document.

> ***(b) Would wireless networks also be covered within the notion of a network?***

76. Yes. Wireless networks also would be covered within the notion a network. The text of HS 2007 heading 85.17 stipulates as follows:

> Telephone sets, including telephones for cellular networks or for other wireless networks; other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of heading 84.43, 85.25, 85.27 or 85.28. (emphasis added)

77. This language means that: (i) networks includes both telephone line and cellular networks, wired and wireless, and (ii) the context is relevant with apparatus of other headings such as 84.43. Therefore, "network" in the texts of subheadings 8443.31 and 8443.32 should include wireless networks.

26. (All parties) Did the multifunctional machines at issue in this dispute exist, or were they contemplated at the time of the ITA negotiations? Please provide evidence to substantiate your response.

78. Japan must first emphasize that the EC's argument aims to sidetrack the panel. The question at issue is not whether newly created multifunctional products were supposed to be covered at the time of negotiations, but whether the products at issue are covered by the EC's relevant tariff concessions granting a duty-free treatment. The EC's subjective expectation at the time of the concessions is irrelevant, and the issue of a product's existence is only relevant to the extent it assists in properly interpreting the language of the relevant concessions.

79. Nevertheless, in the case of MFMs, these devices existed well before the ITA was concluded. Multifunctional devices had been developed and were commercially successful at the time of the ITA negotiations. Multi-functional device technology advanced at a rapid pace in the early to mid-1990s, with developments leading to lower costs and greater appeal to a mass market. MFM producers began developing the technology in the 1980s, with early prototypes encompassing a digital copier, laser printer, fax and scanning capabilities emerging as early as 1990.[15] Although initially very costly,[16] these devices became more widely available over the next several years, emerging as "the hottest items" at a large computer trade show by 1994.[17] In 1994 MITA was marketing its AF-1000 MFM.[18] In 1995, Brother was marketing its MFC-6000; indeed, Brother was marketing this MFM specifically in Europe using German language marketing materials.[19] Diminishing retail cost played an important role in this growth, as a single device able to perform copying, faxing and printing functions became more affordable than purchasing the components individually.[20] MFMs continued to increase in popularity and producers aggressively pursued development of additional product offerings. By 1995, Xerox, Canon, Ricoh, Panasonic, Minolta, Savin, and Lanier all produced devices with copying, printing, faxing, and scanning capabilities, each with wide scale market potential due to decreased costs.[21] In fact, the market had expanded to small businesses and personal use, no longer confined to large corporations who could afford the high cost.[22] In light of this larger market, analysts in 1995 expected sales of multifunction devices for the desktop to increase from 311,000 in 1994 to 7.2 million by 1999.[23] By 1996 the technology had reached a

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15 Paula Rooney, *Ricoh, Xerox eye multiple-function club: Companies work on mix and match of printer, scanner, fax, modem and copier functions*, EDN, June 28, 1990. Exhibit JPN- 28.

16 *Id*. (listing the retail price of Entire Corp.'s MFD in 1990 at $30,000). Exhibit JPN-28.

17 COMDEX *host to new multifunctional printers (mega computer trade show in Las Vegas, Nevada)*, Purchasing, Jan. 13, 1994. Exhibit JPN-28.

18 See Exhibit JPN-28. Note the date of this brochure can be found in the lower right hand corner of the last page. The date listed is 2004.

19 See Exhibit JPN-28. Note the date of this brochure can be found in the lower left hand corner of the last page, printed vertically alone the side. The date listed is 2 November 1995.

20 Barry Cooper, *Multifunction printers are versatile, reasonable*, Orlando Sentinel, Oct. 21, 1995. Exhibit JPN- 28.

21 Multifunctions *outshine copiers (combination copier, scanner, printer, fax devices)*, Purchasing, Sept. 21, 1995; *Who will service multifunctions*, Purchasing, Feb. 15, 1995. Exhibit JPN-28.

22 Marla Williams, *All-in-one 'business partner' – Multifunction machines work as hard as an extra employee*, The Seattle Times, Oct. 15, 1995 ("The 'multifunction' machine or combination printer-copier-fax-scanner is the latest offering for home offices."); David Butler, *Copier, fax machine, printer all in one*, The Roanoke Times, May 2, 1995 ("The last few months have seen a veritable explosion of new multi-function desktop products. More than a dozen manufacturers now offer MFPs with configurations to suit nearly every situation and budget."). Exhibit JPN-28.

23 Glenn Rifkin, *The future of the document*, Forbes, Oct. 9, 1995. Exhibit JPN-28.

technological milestone, with Xerox introducing software completely integrating its MFMs with the Windows 95/NT desktop. [24]

27. (United States) In its first written submission (paragraph 78), the United States mentions that the page-per-minute criterion was established in the 2005 Customs Code Committee Statement as "the key criterion" for determining the duty treatment of the MFMs in question. Later, the United States refers to this criterion in absolute terms when it states that this would mean that MFMs exceeding the established output speed "would per se be excluded from duty-free treatment." (paragraph 148). Could the United States explain whether it considers the page-per-minute criterion as one among other criteria, or whether it is the sole criterion, that would automatically change the classification of the product concerned?

80. Not applicable to Japan.

28. (United States and Chinese Taipei) Regarding a certain comment from the WCO Secretariat:

(a) (United States) The United States quotes from WCO document NC0335E1 (paragraphs 29-30), which contains a Note from the US Customs, as if those statements were instead made by the WCO Secretariat. Please explain why you consider that such document should be characterizes in this way (see, e.g. United States first written submission, footnote 222 to paragraph 158 and Exhibit US-91).

(b) (Chinese Taipei) Chinese Taipei states that this WCO Secretariat comment is contained in WCO document NC0300E1, but instead attached WCO document NC0335E1. Please explain (see Chinese Taipei's first written submission, paragraph 524, footnotes 256 and 257 and Exhibit TPKM-74).

81. Not applicable to Japan.

29. (All Parties) The "2000 WCO Secretariat Comments" set out in Exhibit JPN-10 states in paragraph 36:

> ***"Finally, the Committee may also come to the view that the digital process is a further technological development of the 'photocopying' process. If this were the case, then classification in heading 90.09, by application of GIR1 and 3(b), would seem to be appropriate. The Secretariat would point out that, in such a case, it would be necessary to view the scanning and printing functions as being combined to form the photocopying function and that this photocopying function would then predominate over the 'faxing' function."***

Could the parties please comment on this statement in general, and specifically the part that says "digital process is a further technological development of the 'photocopying' process"?

82. As a general matter, Japan considers that this statement was made by the WCO Secretariat for balancing the arguments about the classification of these products. The normal practice for the WCO Secretariat when an issue is disputed by the parties is to present both sides when drafting a working document.

83. That being said, the overwhelming weight of the WCO Secretariat commentary in fact supports Japan's position on this issue. This characterization can be seen in the WCO document (Exhibit JPN-10) where the Secretariat noted that the scanner and print engine in a digital copier do not operate in the same fashion as a photocopier (paragraphs 12 to 14), the evolution of the digital copier from the printer (paragraphs 16 and 20), that the bulk of the cost of a multifunctional digital copier is attributable to the

[24] Xerox *launches Pagis Pro 97 – A new way to scan, organize and use color documents*, PR Newswire, Oct. 28, 1996. Exhibit JPN-28.

printing component, and that its intended use is mainly for printing (paragraphs 22 to 23). Most importantly, the Secretariat concluded that multifunction digital copiers did not meet the terms of heading 90.09 and, as such, were not classifiable in that heading(paragraph 27). Therefore, the statement by the WCO Secretariat quoted above – a short comment at the end of a rather lengthy analysis – should be seen simply as a concluding recognition by the Secretariat that the parties could take a different view, even though such view would be at odds with the detailed analysis the Secretariat had just provided.

84. More specifically regarding the comment that the "digital process is a further technological development of the 'photocopying' process," Japan has the following comments. First, although the Secretariat notes the Committee might adopt this view, in fact there is no technical support for this conclusion, and the Secretariat provides none in its early comments. That is why in paragraph 27 the Secretariat concludes specifically that "multifunction digital copiers do not meet the terms of heading 90.09."

85. Second, even if this statement were technically true, it would be of very little relevance, and should be given no weight in interpreting the EC tariff concession on HS 8471.60. As a matter of treaty interpretation, the text of the relevant tariff concessions is dispositive. Whether digital copying is a technological development of the photocopying process does not affect the proper interpretation of the text of the concessions. To focus on whether digital copying evolved from photocopying would be tantamount to the resort to the now rejected "legitimate expectation" approach and cannot override the meaning of the text of the relevant concession.

86. Finally -- and perhaps most importantly -- we note that this statement is simply incorrect. "Digital process" -- in other words, the "digital copying" feature of MFMs -- is not a further technological development of "photocopying process" but rather represents a technologically advanced version of printers. The comment from the WCO Secretariat ignores the 'printing' function. As explained in our FWS and oral statement, the underlying technologies of digital copying and photocopying are fundamentally different. Specifically, nothing about traditional "photocopying" involves the use of digital data.

87. In particular, an analogue photocopier cannot function as an MFM because it completely lacks the ability to interact with other digital devices that make up an MFM. The digital copying function of an MFM, like printers, involves a data conversion process. A photocopier that is based on analogue and optical technology reflects light off of the original document and then uses that reflected light to transfer the original image of the document to a light sensitive surface. It is clear that the reflected light is not digital and cannot be used or manipulated as can digital data.

30. (European Communities) We note that the European Communities claims in paragraph 366 of its first written submission that "[d]igital copying is a technological development of photocopying. While there are obvious technological differences between traditional, analogue, photocopiers and digital photocopiers, the terms of the concession for the Subheading 9009 12 encompass both types of photocopying". The EC rationale seems similar to that of the complainants' when they argue that technological developments cannot diminish the scope of CN 8471 60. Does the European Communities consider that technological advances can be accommodated within the product descriptions found in the ITA?

88. Not applicable to Japan.

89. But we note that this apparent inconsistency reveals the problematic nature of the EC argument on technological developments. As explained elsewhere, the terms used in the EC's concession on subheading 9009.12 are too specific to cover MFMs in that MFMs can produce multiple copies from one original document by once shedding a light on it, and in that process, use more than one "intermediate," both in contravention of the explicit language of the concession. Nevertheless, the EC claims that this specific language should be interpreted to cover MFMs, the product that the EC alleges represents a later stage of technological development of photocopiers.

31. (European Communities) Please comment on the following statement from Japan: "Nor did the EC in any way acknowledge that improving printing output speed was simply the natural improvement of these products, not some dramatic change in the nature of the product." (Japan's first written submission, paragraph 57)

90. Not applicable to Japan.

32. (European Communities) Does the European Communities agree with Japan that the terms "input/output devices" and "peripheral devices" are synonymous? (see Japan's first written submission, footnote 53 to paragraph 83)

91. Not applicable to Japan.

33. (Japan) In paragraph 114 of its first written submission, Japan states that "digital copiers are often described as 'scan to print' technology". Please provide evidence of this statement?

92. Many digital copier producers commercially refer to their products as scan to print systems because it accurately describes the functions of the device. For example, IDEAL Scanners & Systems described a new product as a "multi-purpose scan to print system" because of its dual functions.[25] Canon and VIDAR similarly market their digital copiers as scan to print technology.[26] Software producers also described the hardware in this manner, with one developing applications to "support scan-to-print capabilities."[27]

93. Moreover, the current CN 8443.31.91 also endorses that digital copying technology is described as 'scan to print' technology; the text of that CN which covers MFMs says "Machines performing a copying function by scanning the original and printing the copies by means of an electrostatic print engine."

34. (Japan) Japan claims that "the language used in the other relevant headings of Chapter 90 all refer to optical technologies, an inherent technological distinction that precludes products built around digital technologies from the scope of heading 90.09" and that "Heading 90.09 does not cover digital products." (Japan' first written submission, paragraph 127). Does this mean that HS96 Chapter 90 does not cover any digital products at all? What does Japan mean by "other relevant headings" of HS96 Chapter 90? How does Japan distinguish which Headings of HS96 Chapter 90 are relevant and which are not?

94. Chapter 90 covers a wide range of products. The "relevant headings," referred to in Japan FWS at paragraphs 126 and 127, are the initial headings of Chapter 90

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25 *Color Digital Blueprint Machine*, Product News Network, July 1, 1998. Exhibit JPN-29.

26 *Canon U.S.A. and Ribstone Systems announce availability of new MEAP scan-to-print application for the legal marketplace*, Business Wire, May 17, 2005; *VIDAR and Vivid Image Technology announce OEM agreement to provide SP2000 large format scan-to-print solution*, PR Newswire, April 7, 2000. Exhibit JPN-29.

27 *Onyx Graphics, a Raster Graphics Company, releases version 4.5 of award-winning PosterShop Color Production software*, Business Wire, Jan. 26, 1999. Exhibit JPN-29.

(headings 90.01 to 90.10, encompassing heading 90.09). The language used in headings 90.09, and the language used in all these relevant headings of Chapter 90 all refer to analogue optical technologies, an inherent technological distinction that precludes products built around digital technologies from the scope of heading 90.09.

95. The most important heading of Chapter 90 for purpose of this dispute is heading 90.09. That heading covers particular types of photocopying technology that do not cover the digital technologies used in MFMs. Japan believes the other identified headings are relevant for this dispute to the extent they confirm that heading 90.09 – read in the context of the other headings in Chapter 90 – covers analogue optical technologies, and does not cover digital technologies.

35. Regarding the relevance of the language of the HS Explanatory Note 1996 and HS Explanatory Note 2007 to the question as to whether the notion of "digital copying" is or not included in that of "photocopying":

(a) (European Communities) Japan notes that because the explanation of "indirect process" is the same in the HS Explanatory Note 1996 and HS Explanatory Note 2007 (first written submission, footnote 79 to paragraph 162), which proves that if the intention was to include "digital copying" within the meaning of "photocopying" the latter HS Explanatory Note would certainly have taken this into account. Please comment on this statement.

(b) (Complainants) The European Communities states in paragraph 384 of its first written submission that the HS Explanatory Note 1996 "does not mention digital photocopiers [...] for the simple reason that those photocopiers did not exist at the time when the Explanatory Note was drafted." Please comment on this statement.

96. Japan does not agree with the EC's statement, which is factually incorrect. This Explanatory Note was adopted in 1996, and thus should be deemed to reflect the state of technology in 1996. There is extensive evidence that digital photocopiers existed in 1996.

97. First, the EC itself notes this fact. In paragraph 380 of its First Written Submission, the EC notes that "digital copying machines were already well-known by 1996." The EC argues that the drafters of the HS96 would have mentioned digital copiers in their discussion of subheading 8472.90, yet subheading 8472.90 on its face was a residual subheading to capture a variety of products. There is no reason to think that any particular product would be added to the purely illustrative list of products covered by subheading 8472.90. In fact, it is far more likely that the drafters would have mentioned digital photocopying in heading 90.09 or the Explanatory Note for heading 90.09 – if that heading had been intended to cover digital photocopying. Instead the heading focused exclusively on analogue optical technologies.

98. Second, the *Rank Xerox* case refers specifically to digital copiers and confirms their market presence in the early 1990s. The case involved the Xerox 3010, a multifunctional machine with a scanner, digital memory, and laser printer. It did not have digital connectivity. The court decision specifically discusses imports of this product into the Netherlands in January 1992,[28] long before the adoption of the HS96 at issue in this dispute.

[28] *Rank Xerox*, at para 11. See Exhibit TPKM-62.

99. Third, other evidence supports this conclusion. The commercial introduction of digital copiers was widely published as early as 1990.[29] These products were widely known and commercially available long before the HS96 was finalized.

100. Finally, we note that, descriptions of the HS Explanatory Notes can be changed and updated anytime when an HS contracting party makes a proposal to change in the Harmonized System Committee, and the proposal is examined and accepted by the Committee. Such proposals can be accepted by other member countries. As we pointed out in paragraph 20 of Japan's Oral Statement, the EC clearly indicated its interpretation in Council Regulation (EC) No 2380/95 on 2 October 1995 that digital copiers do not fall within the scope of the product classified in HS subheading 9009.12.[30] Since the EC did not make any proposals to change the HSEN, we consider that the EC must have concluded that there was no need to change the HSEN. This policy decision by the EC in 1995 speaks much more persuasively to their thinking in 1996 when the HS96 and HS96 Explanatory Notes were drafted than the 1997 decision in *Rank Xerox* in 1997, after the HS96 materials had been drafted.

36. (Chinese Taipei) Chinese Taipei states in paragraph 606 of its first written submission that Note 5 (B) to Chapter 84 (HS96) "confirms that the central element in order to be regarded as a 'unit' of an ADP machine is the ability of being connectable to the ADP machine (...)". The Panel notes that connectivity is an element in item (b) of Note 5(B). Does this mean that (b) takes primacy over (a) and (c) within Note 5(B) to Chapter 84 (HS96)?

101. Not applicable to Japan.

37. (Complainants) Do the complainants agree with the following European Communities statement: "[T]he issue to be decided by the Panel is whether the MFMs currently covered by CN 8443 31 91 fall within the concessions provided in the EC Schedule for the various CN codes of Subheading 8741 60 00 and for CN 8517 21 00 or, instead, within the concession for CN 9009 12 00." (European Communities first written submission, paragraph 356)?

102. Japan disagrees with the EC's framing of the issue. The EC is attempting to re-frame the issue as if it were a matter of classification between subheadings 8471.60 and 8517.21 on the one hand, and subheading 9009.12 on the other. The question for the Panel, however is not whether a product at the issue is classified under one subheading or another, but whether it is subject to the tariff concessions on heading 84.71 and subheading 8471.60 and whether they can possibly be considered to use the type of "photocopying" technology specified in the language of heading 9009 and subheading 9009.12.

103. The distinction between framing the dispute incorrectly as a matter of classification and rather more properly as a matter of interpreting the scope of the particular concession is important. The fundamental issue is whether the MFMs at issue are dutiable or not. The WTO obligation does not involve putting the products into one heading or another; the classification does not really matter. Rather, the WTO obligation is to assess any duties against products that properly fall within the scope of the language used in heading 84.71 and its various subheadings.

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[29] By 1990, digital technology had spread rapidly, as developers introduced second generation models with increased quality and capabilities. Geoffrey Rowan, *Xerox launches document processing products*, The Globe and Mail (Canada), Oct. 3, 1990. Exhibit JPN-30.

[30] Council Regulation (EC) No 2380/95, 2 October 1995, imposing antidumping duties on imports of plain paper photocopiers originating in Japan. Exhibit JPN-24, at paras 12-13.

38. (European Communities) Please give examples of products covered by CN 8443 31 91, CN 8443 32 91, CN 8443 39 10, CN 8443 39 31 and CN 8443 39 90? What are the criteria that distinguished them? Please elaborate.

104. Not applicable to Japan.

39. (European Communities) In paragraph 447 of its first written submission, the European Communities takes issue with the complainant's characterisation of the non-ADP MFMs as "facsimile machines", arguing that "[t]he subjective characterization of a product made by its manufacturer (...) is not dispositive of its classification for tariff purposes." However, in paragraph 375 of the same submission, the European Communities states that, with regard to the meaning of "photocopying", "it is relevant to consider also the usage of that term made in the trade, as well as by the general public". The European Communities also submitted Exhibit EC-67 containing the characterization of products by manufacturers to support its point. Given the above statement, what relevance do trade/commercial and common usage of terms like "photocopying" have for interpreting ITA participants' concessions?

105. Not applicable to Japan.

40. (European Communities) Can the European Communities explain the origin and the rationale behind the 12 ppm threshold, which apparently evolved from 2 to 3 and 4 ppm since 1997 (see Commission Regulation 2184/97) and 1999 (see Commission Regulation 517/99)?

106. Not applicable to Japan.

41. (All parties) Why was "scanning" not included in the new functions merged in HS2007 Subheading 8443 31? Is it because it is a necessary part of the "copying" function referred to in the heading?

107. Although our examination of the relevant WCO documents provides no clear reason why the term "scanning" was not added to the HS2007 description contained in heading 84.43 or subheading 8443.31, Japan considers as follows:

In order to resolve classification disputes as to whether MFMs should be classified as computer printer (output unit) of subheading 8471.60, facsimile machine of subheading 8517.21 or electrostatic photocopying apparatus of subheading 9009.12, they were merged into subheading 8443.31 under heading 84.43 which had covered printing machinery following HS2007 amendments. In order to cover MFMs fully, it was considered necessary and sufficient to identify the three functions of printing, faxing and copying in the product description for subheading 8443.31. In contrast, there was no need to use "scanning" function.

108. Therefore, this question that "scanning" was not included in HS2007 subheading 8443.31 because it is a necessary part of "copying" function rests on an incorrect understanding of the basic operation of MFMs. The scanning function is not purely instrumental to the digital copying function. Only with both scanning and printing functions can the digital copying function exist. In contrast, the scanning process goes beyond a part of digital copying process, because the scanning process may accompany transmitting scanned data to a ADP machine or any other devices, e.g., as an input unit for ADP machines.

42. (European Communities) Does the European Communities agree with the claim by the complaining parties that the Kip judgment (ECJ, C-362/07) confirms that the current measures are, at least partially, in violation of WTO rules? If not, why not?

109. Not applicable to Japan.

43. (All parties) Assuming the panel were to find that "digital copying" falls within the meaning of "indirect process photocopying", what would be the relevant concession in the EC schedule for a "digital copying machine" using an engine other than an electrostatic print engine (for example, an inkjet printer), having no connectivity to a computer or to a network and no facsimile function? Would it be covered by the European Communities' concessions pursuant to the ITA? If not, what would be its bound duty?

110. This question addresses a stand-alone digital copier as another kind of MFM without connectivity to a computer, which is a combination of a scanning unit and a printing unit. Accepting for the sake of argument the Panel's assumption that "digital copying" falls within the meaning of "indirect process photocopying," this MFM using an engine other than an electrostatic print engine (for example, an inkjet printer) would not be subject to the tariff concessions on heading 8471.60 because both the scanning and printing units of such an MFM work only for digital copying as its sole main function. Under the Panel's assumption that digital copying is "indirect process photocopying," this MFM would be subject to the tariff concessions on subheading 9009.21 as photocopying apparatus incorporating optical system other than an indirect electrostatic photocopying apparatus of subheading 9009.12.

111. Such products falling under subheading 9009.21 would be covered by the EC's concessions pursuant to the ITA. The EC excluded only subheading 9009.12 – a certain type of electrostatic photo-copying apparatus – from its concessions. In contrast, subheading 9009.21 was included in the concessions. Its bound duty rate would be 0 percent.

112. However, Japan believes that unlike a photocopying process under heading 90.09, a digital copying process of such an MFM is not a unitary function. In fact, digital copying can be divided into both a scanning process and a printing process and therefore if each of scanning unit and printing unit of MFM could perform their own respective functions other than digital photocopying, such a MFM would not be subject to tariff concessions on subheading 9009.21. That is because digital copying is secondary to scanning and printing functions since digital copying is just a combination of a part of scanning functions and a part of printing function. Under this assessment, even under the Panel's assumption, we would reach the following conclusions: where the MFM have connectivity to a computer, such MFM would be subject to tariff concessions on subheading 8471.60; where the MFM have no connectivity to a computer but facsimile function, such MFM would be subject to tariff concessions on subheading 8517.21

44. (All parties) Assuming the Panel were to find that "digital copying" does not fall within the meaning of indirect process photocopying of 9009.12, what would be the relevant concession in the EC schedule for a "digital copying machine" using an electrostatic print engine, having no connectivity to a computer or to a network and no facsimile function? Would it be covered by the European Communities' concessions pursuant to the ITA? If not, what would be its bound duty?

113. Accepting the Panel's assumption that "digital copying" does not fall within the meaning of "indirect process photocopying," there is no reason to consider the applicability of the tariff concession on subheading 9009.12. Moreover, such a digital copying machine is not subject to tariff concessions on any other subheading within heading 90.09 since this digital copying should also not fall within the meaning of "direct process photocopying" and therefore cannot be covered as a photocopying apparatus incorporating optical system of heading 90.09.

114. In this case, a stand-alone digital copier as another kind of MFM without connectivity to a computer would be subject to tariff concessions on subheading 8472.90. It is a kind of office machine provided for in Chapter 84, not in Chapter 85. Without connectivity to a computer and facsimile function, it is classified in subheading 8472.90 since this subheading is the residual subheading. Therefore it would not be covered by the EC's concessions pursuant to the ITA. Its bound duty rate would be 2.2 percent.

45. (Complainants) Do the complaining parties consider that the European Communities has a concession on the indirect process photocopiers in 9009.12 and that the bound duty is 6%?

115. Yes, Japan considers that the European Communities has a concession on the electrostatic indirect process photocopiers in 9009.12 and that the bound duty is 6 percent.

IV. FLAT PANEL DISPLAY DEVICES

46. (All parties) The Panel notes HS96 Subheading 8531 90 in Attachment A, Section 1 of the ITA. Is the scope of products covered by this Subheading limited by the size of the "indicator panel" incorporating an LCD? Could an LCD flat panel display device be an "indicator panel" under this code? Would it make a difference if these displays could connect to a device other than a computer?

116. Attachment A, Section 1 includes as follows:

	8531	20	Indicator panels incorporating liquid crystal devices (LCD) or light emitting diodes (LED)
ex	8531	90	Parts of apparatus of subheading 8531 20

117. So we would like to answer these questions based on the assumption that the Panel was actually asking about subheading 8531.20 and not subheading 8531.90 (which covers only "parts" of subheading 8531.20).

118. First question: No. Nothing in the text of subheading 8531.20 -- "[i]ndicator panels incorporating liquid crystal devices (LCD)" -- limits its coverage based on the panel size. Nothing in HSEN for heading 85.31 (D), which explains these indicator panels in more detail, limits the coverage of this heading; the HSEN simply indicates that the heading includes not only room indicators and clock type indicators but also station indicating panels for showing the times and platforms of trains and indicators for race courses, football stadiums.

119. Second question: Yes.

120. Third question: No. The ability of the device to connect to other devices would not be relevant. Heading 8531 covers FPD devices which cannot connect to a computer as well as those which can connect to a computer. As a result, it also covers an FPD device which can connect to a device other than computer.

47. (All parties) Does the European Communities have an ITA-related concession on "video monitors" and if so what is the applicable bound duty?

121. The EC Schedule specifies 14 percent as the tariff concession on subheadings 8528.21 and 8528.22 for "video monitors."

122. Japan believes that a flat panel display devices capable of receiving signals from and capable of operating with a computer are covered by *Attachment B* as the flat panel display devices "for" the ITA product, even if they are classified under subheadings 8528.21 or 8528.22 for "video monitors". Flat panel display devices are covered by *Attachment A* as an output unit of an automatic data processing machine provided that they are solely or principally used in an automatic data processing system. Flat panel display devices should not be excluded from duty-free treatment simply because they are also capable of accepting a signal from not only a computer but from sources other than a computer such as a video.

48. (Complainants) The European Communities suggests that the complainants have limited the scope of their arguments to flat panel LCD displays with a DVI interface that may be used with both automatic data-processing machines and other sources. Could the complainants please clarify if this is the case? If not, what is the scope of the product the complainants consider at issue in this dispute (as pertains to flat panel display devices)? Please explain.

123. Japan does not agree with the EC's suggestion that the scope of the product at issue has been so limited. Japan and the other complainants have not limited the scope of their arguments to flat panel LCD displays with a DVI interface that may be used with both automatic data-processing machines and other sources. Japan's claim concerns all flat panel display devices "for" ADP machines and other ITA products, within the meaning of the EC's *Attachment B* concession, which are subject to duties under the EC measures. Thus, the scope of the product at issue is different from the EC's suggestion in the following three ways.

124. First, LCD monitors are merely one type of flat panel display devices. The scope of the products at issue in this dispute encompasses all types of flat panel display devices, including LCD, Electro Luminescence, Plasma and other technologies. As noted in response to Question 3 above, the additional phrase "and other technologies" indicates that the phrase "(including LCD, Electro Luminescence, Plasma, Vacuum Fluorescence and other technologies)" provides an illustrative list and not an exhaustive one, and includes all FPDs for the products covered by the ITA, even those based on some yet to be developed technology that did not exist at the time of the Agreement.

125. Second, the DVI is the most commonly available interface that enables these monitors to receive signals from a computer. We referred to DVI for the purpose of illustrating rather than defining the products at issue. The LCD monitor with a DVI interface is intended to provide only the most commonly marketed type of flat panel display device for ADP machines, not to limit or define the entire class of FPD devices covered by this dispute.

126. Third, the FPD devices at issue are limited to those "for" ADP machines or other ITA products, i.e., only those capable of operating with a computer or any other ITA product. The *Attachment A* concession on heading 84.71 applies only to those FPD devices that have digital connectivity. The *Attachment B* concession, however, goes more broadly and covers FPD devices that can be used with computers or any other ITA products.

127. DVI connectors are designed to ensure connectivity between digital products and a computer, and thus, flat panel display devices with a DVI interface should be normally designed as capable of operating with a computer, whether or not they are also capable of operating as a television or video monitor. Japan understands, however, 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. It depends on all relevant technological specifications, including interfaces on the flat panel display device, to determine whether the FPD is in fact capable of operating with a computer and/or some other ITA products.

49. (All parties) Does the product at issue also include flat panel display devices that have an HDMI interface? Would these products be treated differently from those with a DVI interface? Please explain.

128. Japan considers that the product at issue includes all flat panel display devices "for" ADP machines and other ITA products. It includes flat panel display devices that have an HDMI interface so long as the device is capable of receiving signals from and operating with a computer or other ITA products. The EC measures treat as dutiable any device that is capable of receiving signals from a device other than a computer. Japan understands that an HDMI interface was developed for audio-visual appliances on the basis of DVI, which was developed for digital products. Accordingly, flat panel display devices with an HDMI interface in the market may or may not be capable of operating with a computer or any other ITA product.

50. (European Communities) Does the European Communities agree with the assertion that the development of the DVI connector was developed to permit computers to interface with flat panel display devices (including LCD monitors)?

129. Not applicable to Japan.

51. (All parties) Do the parties consider that both finished and semi-finished flat panel display devices are at issue in this dispute?

130. No. This dispute concerns only finished flat panel display devices.

131. Japan notes that "[f]lat panel display devices …, and parts thereof" is referred in the EC tariff concession. Japan believes that semi-finished products are to be covered by either "flat panel display devices" or "parts thereof," and are subject to duty-free treatment.

52. (Complainants) The European Communities comments, "it is not clear to the European Communities whether the complainants wish to interpret the exclusion of video monitors and televisions to be limited to only those functioning with the CRT technology" see European Communities first written submission, paragraph 131). Could the complainants comment in this regard?

132. The exclusionary language of televisions for "[m]onitors" in the EC's *Attachment B* concessions specifically refers only to CRT monitors. Japan thus believes that this exclusionary language does not limit the scope of "flat panel display devices" that are exclusively described by other language that does not have this exclusion. If the language on CRT monitors demonstrates anything, it demonstrates that when the drafters of the language in *Attachment B* wanted to restrict a product under the ITA to products used exclusively with a computer, they were fully aware how to do so. The fact that the drafters of the ITA attachment and of the EC's concessions chose not to restrict flat panel

display devices in this manner is therefore compelling evidence that they did not intend to restrict flat panel display devices similarly.

133. Japan believes the EC's argument to the contrary is unreasonable because it totally disregards the fact that a CRT monitor is technologically different from a flat panel display monitor; the former is an analogue device using CRT technology, while the latter is a digital device with a thinner profile, and thus is technologically closer to computers, which are a central item of the ITA.

134. This important technological distinction between CRT monitors and FPD monitors also prevents the exclusionary language in the first sentence for "Monitors" from being applied to FPD monitors. For example, "dot screen pitch" is relevant only to CRT monitors, while "pixel pitch" is used for flat panel display devices. Further, in Japan's view, it is obvious from the term "therefore" that the purpose of the exclusionary language in the second sentence is to confirm the meaning of the first sentence that CRT monitors that are capable of receiving and processing television signals are not covered by the ITA concessions. Because the first sentence cannot apply to FPD monitors, the second sentence cannot so apply, either.

135. In addition, Japan also would like to point out that the note on "monitors" excludes only "televisions." The EC's assertion that the note also excludes "video monitors" is without any foundation.

53. (European Communities) On the one hand, the European Communities at times suggests that the European Communities' ITA-related commitments do not cover new products resulting from technological development. On the other hand, in discussing treatment of flat panel display devices, the European Communities refers to the narrative description of "monitors" within Attachment B of the ITA, specifically noting that the complainants failed to reference this description. The European Communities indicates that the complainants considered the reference to CRT technology in the definition of "monitors" means that the definition has no relevance for interpretation of flat panel display devices. The European Communities further states that the identification of CRT technology in the definition of "monitors" is only logical because that is the technology ADP monitors and televisions used at the time when concessions were made. (see European Communities first written submission, paragraphs 129, 131). Is there a contradiction in the view that technological development and commercial reality should not factor into an expansive interpretation of the narrative description of flat panel display devices, while the narrative description of "monitors" should be viewed more expansively as including not only CRT monitors but also other technologies, such as LCD?

136. Not applicable to Japan, although we note that we agree there is a contradiction and logical inconsistency in the EC arguments on this issue.

54. (All parties) We note that the concession in the EC Schedule concerning flat panel display devices added the word "devices", which the parties seem to agree was the result of an agreement amongst the ITA Participants. In this regard, could the parties describe what was, in their opinion, added by this word and what was the purpose of such addition? Moreover, is there a reason why the additional word was not added to the other references to flat panel display that are found in other product descriptions (e.g. ex 8479 89 and ex 8543 30, both described as "Apparatus for wet etching, developing, stripping or cleaning semiconductor wafers and flat panel displays")

137. We note that our examination of the available negotiating records to Japan does not provide any definitive answer to this question, although Japan does not consider these materials or other negotiating history is relevant on this interpretative point. Taking into consideration the dictionary meaning of the term "devices," Japan believes the

addition of the term did not materially change the meaning of the concession. According to *The New Shorter Oxford English Dictionary*, the term "device" means "a thing designed for a particular function or adapted for a purpose."[31] A flat panel display for a computer serves to perform the function of displaying a signal from a computer. Therefore such addition does not change the original meaning of "flat panel displays" provided for in *Attachment B* to ITA. As long as the meaning of the original language in *Attachment B* has not changed, the purpose of such addition is irrelevant.

138. This view is confirmed from the grammatical standpoint. When the phrase "flat panel display" is inserted in front of the word "devices," the phrase "flat panel display" serves to modify and describe the intrinsically neutral term "devices." Whether this phrase "flat panel displays" is used as the noun, or at the modifying of the noun "devices," the meaning remains the same.

139. We suspect the term "devices" was added in some places but not other places simply as matter of stylistic inconsistency.

55. (All parties) The United States notes in footnote 70 of its first written submission that:

> ***"Shortly after the ITA was concluded, participants approved a handful of technical clarifications, before the submission of implementing schedules. Among these technical clarifications were two changes to the flat panel display device language: the addition of the term 'devices' and the addition of a reference to 'Vacuum-Fluorescence' technology. See WT/MIN(96)/16/Corr.1 (13 October 1997) (Exhibit US-36)".***

Could the parties please refer to the legal standing of the document submitted by the United States in Exhibit US-36.

140. The content of the document Exhibit US-36 is incorporated into the ITA and constitutes a part of ITA, which is a declaration among the Members of the ITA.

56. (All parties) Does the European Communities have an ITA-related concession on "video monitors" and if so what is the applicable bound duty?

141. See the answer to Q47, provided above.

57. (Complainants) We note that in paragraph 301 of its submission Japan, bearing in mind the technological context, considers that the word "output" should be defined as "an electrical signal delivered by the computer to which the 'output' unit has been connected." Would this definition exclude other means of delivering the signal from the computer to the "output unit" (e.g. wireless signals)?

142. Japan considers that the said definition is broad enough to cover wireless signals. There is no reason that the word "connect" in the definition is limited to physical or tangible connectivity. If the "output" unit is capable of receiving signals from and operating as an output unit with a computer, Japan considers the unit to be "connected" to the computer.

58. (Complainants) Is it the complainants' argument that <u>any</u> machine or apparatus capable of connecting to a computer should be considered a "unit" under Subheading 8471.60 including, for example, a computer guided airplane or a TV that can connect to a computer? If not, what would be the criteria for considering a device a "unit"?

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[31] New Shorter Oxford English Dictionary, Vol I, at p. 655. See Exhibit JPN-27.

143. No. Not every device that can connect to a computer can be considered a "unit" for purposes of heading 84.71. Note 5 to Chapter 84 provides relevant context for interpreting the term "unit" in heading 84.71 and subheading 8471.60. Note 5 prevents such an overbroad interpretation of heading 84.71 in two important ways.

144. First, Note 5(B) states that, subject to paragraph 5 (E), for a product to be considered a part of ADP system, the product must be (a) of a kind solely or principally used in an ADP system, (b) connectable to the CPU either directly or through one or more units, and (c) able to accept or deliver data in a form (codes or signals) which can be used by the system. These conditions limit the scope of "units" that are also to be considered as part of an ADP system.

145. Second, Note 5(E) addresses the issue of other machines that incorporate or work with a computer. Note 5(E) makes clear that if such devices are "performing a specific function other than data processing," then they must be classified in the heading appropriate to that "other function."

146. An airplane or some other device connected to computer that was not engaged in "data processing" would therefore be excluded from the scope of the term "units" by reading this term in the context of Note 5, and particularly Note 5(E). In any event, MFMs with digital connectivity are far from an airplane, and fall squarely within the term "unit" as that term is used in heading 84.71.

59. (European Communities) Does the European Communities contest the claim by the complaining parties that LCD monitors that can solely connect to a computer are covered by its concessions pursuant to the ITA, and more specifically, pursuant to that in Attachment B concerning "flat panel display devices..."?

147. Not applicable to Japan.

60. (European Communities) Does the European Communities agree with the claim by the complaining parties that the Kamino judgment (ECJ, C-367/07) confirms that the current measures in respect of some flat panel display devices are, at least partially, in violation of WTO rules? If not, why?

148. Not applicable to Japan.

61. (European Communities) Please comment on Japan's assertion that the European Communities, has consistently applied duty-free treatment to projection-type flat panel displays that "can" display information from a computer pursuant to its concessions under Attachment B, even if they have dual or multiple uses (see Japan first written submission, paragraph 286). What would be different in respect of the analysis for the flat panel display devices?

149. Not applicable to Japan.

62. (European Communities) Does the European Communities agree with the assertion that the development of the DVI connector was developed to permit computers to interface with flat panel display devices (including LCD monitors)?

150. Not applicable to Japan.

63. (All parties) The European Communities argues that the flat panel display devices that the complainants claim are included in the concessions made pursuant to the ITA are "new products" that did not exist at the time of the ITA negotiations. The complainants disagree. What is the factual basis for

your views in this regard (e.g. scientific or technical publications, pending or granted patent applications for flat panel display devices, et cetera)?

151. As a factual matter, the EC has provided absolutely no support for its claim that the devices are "new products" that did not exist at the time of the ITA negotiations. It was well known in 1996 that there would be a convergence between computers and "entertainment" media, so that the additional functionality of computers was in fact widely recognized at the time. It is not disputed that FPD devices that can receive signals from and operate with computers existed at the time the ITA was negotiated. Moreover, television sets with LCD display existed in the market as early as 1987, nine years before the ITA was negotiated. Considering the existence of such flat panel display devices, Japan considers that at the time the concessions were negotiated, it was widely foreseen and indeed expected that flat panel display devices for ADP machine could be able to receive a signal from other devices.[32]

152. Japan notes that the relevant question is whether the relevant EC tariff concession grants duty-free treatment to the flat panel display devices at issue, and the Panel's examination must be conducted objectively in light of the text and context of the tariff concession. This textual approach means that a Member's own perception is irrelevant in interpreting the term of the tariff concession. Whether a Member perceives a product to be "new" or not provides no legally relevant guidance for interpreting the terms of the tariff concessions.

64. (All parties) The Panel notes that the word "for" is used in numerous Headings and Subheadings of the Harmonized System (e.g. Subheading 3002.20: "Vaccines <u>for</u> human medicine" (emphasis added)) and the descriptions at the 8-digit level of the EC's concessions pursuant to the ITA (e.g. 8529 10 40: "--- Inside aerials <u>for</u> radio or television broadcast receivers, including built-in types" (emphasis added)). Should "for" be interpreted in the same manner in all the phrases where it appears in the EC schedule, including in the description of "flat panel display devices... <u>for</u> products falling within this agreement..."? Please elaborate.

153. The word "for" as used in the *Attachment B* concession covering FPD devices must be interpreted according to its ordinary meaning read in context. In general, words will have the same meaning, unless the context suggests otherwise. The language used in the Harmonized System represents one context. *Attachment B* to the ITA represents a different context.

154. For the examples mentioned in the above question, the context of any particular use of the word "for" will be that particular heading and any other heading or subheading that uses the word "for." This context will also include any relevant Section or Chapter Notes that might shed interpretative light on the meaning of "for" in these various settings.

155. *Attachment B*, however, represents a very different setting. Products listed in *Attachment B* are not defined by reference to headings from the HS96 nomenclature, but rather by reference to the specific language of *Attachment B*. The Panel should be cautious in trying to use other references to the word "for" in the Harmonized System headings and interpretative materials to interpret the word "for" in *Attachment B* that is consciously not

[32] See Japan Oral Statement, at para 47. See also Exhibit JPN-25, providing supporting evidence of the points made in the oral statement and in this answer.

based on the Harmonized System. The Panel should be even more cautious in trying to use such references in areas completely unrelated to the ITA products, such as vaccines.

156. Nevertheless, Japan believes the word "for" as used in *Attachment B* has a simple and clear ordinary meaning. It is an inclusive term that covers FPDs "for" a computer or other ITA product.

65. (All parties) For flat panel display devices, measure number 4 in the Panel request specifies Council Regulation 2658/87 and all annexes thereto, as amended. In a footnote it is stated that this includes amendments adopted pursuant to Commission Regulation 1214/2007 (CN 2008). Following circulation of the Panel request, there was an additional update in Commission Regulation 1031/2008 (CN 2009). Do all parties agree that the latter is the relevant measure in terms of this particular measure at issue?

157. Yes. Japan agrees.

66. (Complainants) With regard to Commission Regulation 1031/2008 (CN 2009), what precise CN code(s) is relevant for the purposes of the flat panel display devices claim? Is it CN 8528 51 00 and CN 8528 59 90?

158. Our claim covers all flat panel display devices for a computer or other ITA products, regardless of whether they are black and white and monochrome, or colour. So the answer is that relevant CN codes include CN 8528 59 10, CN 8528 72 20 to CN 8528 72 99, and CN 8528 73 00 in addition to CN 8528 51 00 and CN 8528 59 90.

67. (Complainants) Are the complainants claiming that the European Communities breaches its commitments in relation to:

(a) the requirement in CN 8528 51 00 that in order to receive duty free treatment a monitor has to be "of a kind solely or principally used in an automatic data-processing system of heading 8471"; and/or

(b) the requirement in CN 8528 51 00 in combination with the explanatory note that "monitors of this Subheading cannot be connected to a video source...fitted with interfaces such as DVI...be used in systems other than automatic data-processing systems."

In other words, is the Panel called upon to determine whether a sole/principal use test is consistent with the European Communities' obligations; or is the Panel only being called upon to determine whether a sole use requirement is consistent with the European Communities' obligations?

159. Since the EC is currently applying a sole use test to assess duties on FPDs that can connect to and be used in conjunction with products other than computers, the Panel is not necessarily called upon to determine whether a sole/principal use test itself is consistent with the EC's obligations.

160. However, this EC use of the sole use test does not mean the Panel should stop its legal examination if and when it finds that the EC measure is inconsistent with its Attachment A concession. The *Attachment B* concessions raise different and equally important issues in this dispute, and cover FPDs for computers under heading 84.71 as well as for other ITA products beyond those covered by heading 84.71. Accordingly, remedies granted to the complaining parties may differ depending on which concessions the Panel relies. For this reason, we respectfully urge the Panel to address both the *Attachment A* and *Attachment B* concessions, and not to refrain from examining the *Attachment B* claim by exercising judicial economy.

68. In its first oral statement (paragraph 16), the European Communities claimed that "the complainants seem to seriously claim that 61 inch flat panel monitors should, apparently generally, be entitled to duty free treatment as computer monitors".

(a) (Complainants) Could the complainants comment on this statement?

161. Japan considers that even 61 inch flat panel monitors should be entitled to duty-free treatment, provided they are capable of receiving signals from and operating with a computer, and thus are "for" automatic data processing machines. For example, such a large flat panel display monitor might well be installed in a conference room. The monitor could connect to a computer, and the monitor would thus receive computer signals and display various documents and photos stored in a computer to facilitate conferencing. One may or may not be able to watch television programs on this monitor, but it is irrelevant in relation to the scope of the relevant EC concessions.

162. The language of the EC's concessions does not provide any limitations based on the size of flat panel display devices. It is legally unjustifiable to exclude certain flat panel display devices from duty-free treatment just due to their size.

(b) European Communities) Could the European Communities indicate if a "61 inch flat panel monitor" could ever be entitled to ITA duty free treatment? In other words, is size per se dispositive? What if, rather than a personal computer, this product is connectable to any other type of an automatic data-processing machine, such as, for example, that used on Stock Market floors.

163. Not applicable to Japan.

V. SET TOP BOXES WHICH HAVE A COMMUNICATION FUNCTION

69. (European Communities) How does the European Communities define "set top box" in general?

164. Not applicable to Japan.

70. (All parties) During the ITA negotiations, besides "a modem", what were the other technologies available for gaining access to the Internet? If no other technology existed at that time, why was the reference to "a modem" made in the Attachment B description of "Set top box..."? Would it have sufficed to mentioned, e.g. " ... incorporating [a device] for gaining access to the Internet ..."?

165. When the ITA was negotiated, several technologies allowed access to the Internet, but all devices using such technologies were considered modems. "Conventional" modems converted digital signals to analog signals (and vice versa) via a Public Switched Telephone Network, but dictionaries at the time recognized the existence of cable modems (which worked through a cable TV line) , ISDN modems, and modems which worked over a broadband Local Area Network (LAN). There was no need to use the word "device" instead of "modem" as a modem is by definition, "a device that performs modulation and demodulation functions necessary to transmit signals over communication lines." In the case of STBs, such communication allows the user to gain access to the Internet. .

71. (European Communities) Set top boxes that connect to the Internet via a cable modem may be eligible for duty-free treatment. However, the PC Magazine Encyclopaedia indicates that "cable modems connect to the computer via an Ethernet port." If a set top box containing an internal cable modem connects via an RJ-45 connector, will this set top box qualify for duty-free treatment?

166. Not applicable to Japan.

72. (Complainants) Could the parties present evidence to demonstrate that ISDN-, Ethernet or WLAN-technologies modulate and demodulate data in a similar fashion by varying characteristics of the electrical signal as the information is transmitted?

167. ISDN. ISDN transmits voice calls (analog signals) and digital signals on a digital channel (communication medium). To communication information over an ISDN line, the characteristics of the electrical signal are varied. For instance, ISDN uses pulse code modulation to convert analog to digital signals at the transmitter (modulate) and to convert back (demodulate) the digital signals to analog at the receiver. Pulse Code Modulation is one of the most basic digital modulation schemes, where the amplitude of an analog signal is sampled and the sampling is done in uniform intervals (the amplitude is quantized uniformly).[33]

168. Ethernet. Ethernet is a collection of different standards (802.3 IEEE) that specify different Ethernet implementations: Ethernet, Fast Ethernet, Gigabit Ethernet, and 10 Gigabit Ethernet. The 802.3 IEEE standard describes the different Ethernet physical layer implementations. The electrical characteristics of the signal of the communication medium are varied so as to transmit information. For instance, Fast and Gigabit Ethernet use Pulse Amplitude Modulation (PAM)[34].

169. WLAN. As with other types of modems, a wireless LAN (WLAN) varies the characteristics of the electrical signal (in this case a radio frequency) in order for information to be transmitted and received. IEEE 802.11 is the standard that describes the physical and medium access control communication layers for wireless LANs. The two most popular versions of the standards are 802.11b and 802.11a. 802.11b supports DBPSK, DQPSK modulation schemes, while 802.11a supports BPSK, QPSK, 16-QAM and 64-Qam Modulation schemes.[35] For example, when DBPSK is used, the data (information) to be transmitted are modulated at the transmitter side according to a binary constellation. At the receiver side, the received symbols/signals are demodulated according to the same constellation to retrieve the data (information). 802.11 a supports BPSK, QPSK, 16-QAM and 64-QAM Modulation schemes.[36] For example, when 64-QAM is used, the data (information) to be transitted are modulated at the transitter side according to a 64-point constellation. At the receiver side, the received symbols are demodulated according to the same 64-point constellation to retrieve the data (information).

73. (European Communities) Do modems based on ISDN-, Ethernet or WLAN- technologies enable "interactive information exchange"?

170. Not applicable to Japan.

74. (European Communities) How does the European Communities define the concept "a function of interactive information exchange" included in the narrative description of set top box which has a communication function?

171. Not applicable to Japan.

[33] See ITU-T Recommendation G.711: General Aspects of Digital Transmission Systems. Terminal Equipments: Pulse Code Modulation of Voice Frequencies . (Exhibit US-109)

[34] IEEE STd. 802.3-2005, Section 2, Part 3: Carrier Sense Multiple Access with Collision Detection (SCMA/CD) access method and physical layer specifications, p. 426. (Exhibit US-110)

[35] IEEE Std. 802. 11b-1999, p.42. (Exhibit US-111)

[36] IEEE Std. 802. 11a-1999, p.24. (Exhibit US-112)

75. (European Communities) The European Communities seems to suggest in paragraph 265 of its first written submission that one of the reasons for excluding set top boxes which incorporate ISDN technology was due to the fact that this technology allows for a "faster" transfer rate. In the European Communities' view, how does a faster transfer rate factor into an assessment of whether a set top box may connect to the Internet, or achieve "interactive information exchange" as listed in the portion of the narrative description following the colon in Attachment B of the ITA? In addition, how exactly does the European Communities consider it relevant that a device which connects via WLAN- or Ethernet technology, and hence achieves a connection to the Internet via a computer network, affect its ability to conduct "interactive information exchange"?

172. Not applicable to Japan.

76. (All parties) What is the meaning of the term "incorporating" in the definition of set top box?

173. *The New Shorter Oxford English Dictionary* defines "incorporate" as: "1. combine or unite into one body or uniform substance; mix together. 2. Put (one thing) in or into another to form one whole; include, absorb."

174. " Incorporating" requires the set top box to include a modem for gaining access to the Internet.

175. In this connection, we would like to note that there are some examples of "incorporating" appeared in the HS as follows:

> "8531.20 Indicator panels incorporating liquid crystal devices (LCD) or light emitting diodes (LED)";
>
> "9102.10 Wrist-watches, electrically operated, whether or not incorporating a stop-watch facility"; and
>
> "Note 1 to Chapter 90
>
> This Chapter does not cover:
>
> (g) Pumps incorporating measuring devices, of heading 84.13…"

All these examples would let us understand that the term "incorporating" used in the HS would mean that something is included or mounted in internal space of a frame or a base in a housing of a machine, to be fitted together to form a whole.

77. (Complainants) Could the parties present evidence to demonstrate that ISDN-, Ethernet or WLAN-technologies modulate and demodulate data in a similar fashion by varying characteristics of the electrical signal as the information is transmitted?

176. See response to Question 72 above.

78. (European Communities) Is the European Communities of the view that any additional feature of a set top box which has a communication function that wasn't well-known as an available feature of that product at the time of negotiating the ITA cannot be considered part of the concession? Is there any degree of technical development that would not lead to the conclusion that a set top box is excluded from that concession?

177. Not applicable to Japan.

79. (Complainants) Leaving aside the argument concerning Attachment B of the ITA, should the Panel look exclusively at the language in the European Communities' concession in CN 8528 12 91 as provided for in G/MA/TAR/RS/74? Or should the Panel also look at the full description including the heading and the other eventual applicable sub-divisions up to the 8-digit tariff level? In case of the latter, what would be all those relevant descriptions?

178. As with other modifications to the EC's Schedule, the modification contained in G/MA/TAR/RS/74 must be interpreted based on its ordinary meaning in context, and in light of object and purpose. It is well-established that the tariff heading and other associated text in the Schedule is relevant context for interpreting a concession. In this case, heading 8528 provides in relevant part for: "Reception apparatus for television, whether or not incorporating radio broadcast receivers or sound or video recording or reproducing apparatus; . . ."

179. The heading text simply confirms the fundamental inconsistency between the EC's measure and its concession. For a set top box to be classified in heading 8528, it must first be "reception apparatus for television." The EC does not contest that the devices at issue fall within this description. The EC claims, however, that a set top box with a DVD drive or a hard disk drive is excluded because it is performing video reproducing or video recording functions. Yet the heading text provides for reception apparatus for television "whether or not incorporating . . . video recording or reproducing apparatus". In effect, the CNEN automatically excludes products from the subheading that contain additional features that are specifically listed in the legal text as being allowed within the heading. Thus, the heading text provides even further support for the conclusion that the EC's measure results in tariff treatment contrary to its obligations under its Schedule of Concessions.

80. (Complainants) Why do the complainants refer at times to the phrase "set top box with a communication function" to refer to the EC's product description pursuant to Attachment B of the ITA instead of the actual language appearing in the EC Schedule of concessions, "set top boxes which have a communication function"?

180. The phrase "set top box with a communication function" is at times used simply to paraphrase the language associated with the *Attachment B* headnote; in other cases it used to refer to the concession the EC made in 2000 for "set top boxes with a communication function." Contrary to the EC's suggestion, the complaining parties have accurately quoted the EC's concessions throughout their submissions. In those cases in which the phrase is used to paraphrase the concession, it should be noted that the EC itself paraphrased the *Attachment B* headnote language in this fashion when it modified its Schedule in 2000.

181. Finally, the substantive distinction between "with" and "which have" the EC now claims exists is without basis (as the EC itself recognized in 2000). Set top boxes "which have" a communication function are not limited to set top boxes which "only" have a communication function, as the EC attempts to argue. Had the drafters intended to limit the concession in this fashion, they would have done so.

81. (Complainants) Do the complainants agree with the European Communities' contention that primarily two categories of set top box existed in 1996 in the market: (i) "traditional" set top boxes that permitted viewing television programming (e.g. digital television on analogue television sets, often with a decoder function), and (ii) "Internet on TV" devices (see EC's first written submission, paragraphs 221-223).

182. No. Set top boxes existed in 1996 that permitted both television programming and Internet access via TV. Such products existed in the marketplace and are clearly distinguishable from "Internet on TV" devices such as WebTV. For example, the Explorer 2000 set top box was promoted as using its internal cable modem to access both TV and Internet services such as shopping, games, and distance learning. Literature at the time recognized a wide range of STBs with more traditional uses, such as television viewing or ordering a pay-per-view movie and more advanced uses, such as interactive services including home shopping and Internet. The "Internet on TV" devices referred to by the EC identify a small group of devices whose purpose was to mimic the use of a computer on a television. These devices are not, and never have been, the only devices to fall within the terms of the concession for STBs with a communication function.

82. (Complainants) Do the complainants consider the tables presented by the European Communities in paragraphs 243 and 246 of its first written submission to be accurate? Are the European Communities' conclusions at paragraphs 244 and 247 reflective of the Participants' understanding of the scope of intended coverage of the ITA at the time of negotiations? Please elaborate.

183. Japan does not dispute that the HS subheadings indicated in its Schedule with respect to the concession for set-top boxes which have a communication function are the following ex85175010, ex85175090, ex85252030 and ex85252090.

184. However, Japan disagrees with the conclusions of the EC.

185. First of all, Japan disagrees with the EC's argument at para. 241 of its first written submission, according to which the indication in the Schedule relating to the concession for set-top boxes which have a communication function of codes in HS heading 8517 and 8525 but not in HS heading 8521 or 8528 shows "that 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" (para. 253), i.e., STBs which have a communication function that include a hard disk or DVD drive and STBs that include modems such as ISDN- and WLAN- modems.

186. On the contrary, heading 8525 covers "transmission apparatus (…) whether or not incorporating reception apparatus or sound recording apparatus." Thus, the title of the heading confirms that apparatus covered by this heading fall under it regardless of whether they incorporate reception apparatus or sound recording or reproducing apparatus. The title of subheading 8525.20 under which the EC stated in its Schedule that certain STBs which have a communication function should be classified covers expressly transmission apparatus "incorporating reception apparatus".

187. The terms "recording" and "reproducing" are placed before the first semi-colon in the title of heading 8525. They must thus refer to functions that transmission apparatus for radio-telephony, radio-telegraphy, radio-broadcasting or television – one of which is STBs classified under subheading 8525.20 – may perform.

188. In any case, as illustrated by the table, some WTO Members have indicated for set-top boxes which have a communication function a code in HS heading 8528, contradicting the understanding the EC alleges existed among the Members.

83. (European Communities) In the EC's first oral statement (paragraph 30) it is stated that the presence of a recording function requires that a set top box be classified as a video recorder, "unless the totality of

technological elements present in the set top box were to provide otherwise". The European Communities refers in a footnote to the ultimate paragraph in the CN Explanatory Notes on 8528 71 13. Could the EC clarify how the CN Explanatory Notes in question would allow the "totality of technological elements" to override classification decisions in a dutiable code when a given set top box has reproducing and recording functions?

189. Not applicable to Japan.

84. (European Communities) What are the criteria that the European Communities takes into account to determine what is a "video recorder" under HS2007 Subheading 85.21? Would the classification of a hard drive-based device change depending on whether is capable of "video recording" or "downloading" a movie? More fundamentally, how do you distinguish "video recording" from "downloading"? Please explain.

190. Not applicable to Japan.

85. (All parties) In the European Communities' oral statement (paragraph 31), the EC uses the example of set top boxes with hard disks of 1, 2 or 5 GB as products that were classified as set top boxes receiving duty-free treatment. As technology advances, and emails (potentially with large attachments) increase in size, how would the treatment of products based on the capacity of hard drives remain appropriate? What if, for example, e-mail attachments contain large High Definition videos that are stored in the hard drive of the set top box to be watched later?

191. As a preliminary remark, Japan would like to emphasize that the EC has not provided any evidence of decisions or examples where customs authorities have classified set top boxes with hard disks of 1, 2 or 5 GB as set-top boxes receiving duty-free treatment. Actually, the CNEN are clear and exclude from the scope of the CN code 8528.71.13 (that receives duty-free treatment) all set-top boxes which incorporate a device performing a recording or reproducing function (for example, a hard disk or DVD drive). The CNEN does not specify any recording capacity under which the device would not be regarded as performing a recording or reproducing function.

192. Moreover, even if considering that there was criterion that under a certain recording capacity, the STBs would still qualify for duty-free treatment, as highlighted by the example in the question, this criterion appears to be arbitrary..

86. (European Communities) The European Communities notes in its first written submission that it or its Member States do not exclude set top boxes from duty-free treatment merely due to the presence of a hard disk, but rather based on consideration of all their characteristics (see EC's first written submission, paragraph 286). How does the European Communities reconcile this statement with the language appearing in the Combined Nomenclature Explanatory Note published on 7 May 2008 in its Official Journal, which states, "Set-top boxes which incorporate a device performing a recording or reproducing function (for example, a hard disk or DVD drive) are excluded from this Subheading (Subheading 8521 09 99)".

193. Not applicable to Japan.

87. (All parties) Is it acceptable to interpret a concession as follows: where a subheading does not enumerate or limit the number of functions that may be performed by an apparatus, then the titles do not limit the number of functions that may be performed?

194. The analysis of the scope of a tariff concession starts with the analysis of the ordinary meaning of the words of the concession. If the wording of the concession does not provide for any type of limitation as to the functions performed by a given product, the concession must be understood as not limiting the functions that can be performed by the

product covered by that concession. Obviously, the ordinary meaning is to be viewed in the light of the context of the concession being examined. In that respect, for concessions made with respect to given HS subheadings (that is not the case of the concessions made pursuant to *Attachment B*), the HS may be a relevant part of the context and may indicate in certain cases that classification under a certain HS subheading will be excluded if some additional functions are performed notwithstanding the fact that this limitation is not contained in the wording of the subheading itself.

88. (Complainants) Are the complainants arguing that the set top boxes in question should receive duty free treatment irrespective of other additional features that they may have?

195. If a product constitutes a set top box which has a communication function within the meaning of the concession as interpreted on the basis of its ordinary meaning and in its context and in light of the object and purpose of the treaty, that product must receive duty-free treatment irrespective of whether it has additional features.

89. (European Communities) The European Communities claims in paragraph 35 of its oral statement that a case-by-case analysis is required to determine the proper classification of set top boxes. With respect to set top boxes with a recording function, how do the CN Explanatory Notes allow for a case-by-case analysis?

196. Not applicable to Japan.

90. (European Communities) The Panel notes the parties' views on the adoption and publication of the Explanatory Notes on set top boxes and their views on the internal discussions of the Customs Code Committee. Could the European Communities please provide the Panel with the documents mentioned in the summary reports? In particular, please provide the following documents: TAXUD/0667/2006; TAXUD/0667/2006 Rev 1; TAXUD/0667/2006 Rev 2; TAXUD/0667/2006 Rev 3; TAXUD/0667/2006 Rev 4 and TAXUD/0590/2007.

197. Not applicable to Japan.

91. (European Communities) The Panel notes the European Communities' argumentation in its first written submission, paragraphs 306-310, that a Combined Nomenclature Explanatory Note does not fall within the scope of Article X of the GATT 1994 because of its "factual features". Could the European Communities please clarify what flexibility a European Communities Member State customs authority has to classify a product contrary to the tariff heading indicated in the Combined Nomenclature Explanatory Note?

198. Not applicable to Japan.

92. (European Communities) In the 433rd meeting of the Customs Code Committee, the Chairman indicated that the opinion of the Customs Code Committee should be respected by all European Communities Member States even before the measure is adopted. Does this mean that the customs authorities of the European Communities Member States were required to comply with the draft Combined Nomenclature Explanatory Note for set top boxes with a hard disk as presented at the 420th meeting? Can the European Communities clarify, in the light of the statement by the Chairman in the 433rd meeting of the Customs Code Committee, what flexibility a European Communities Member State customs authority has to classify a product contrary to the tariff heading indicated in a Combined Nomenclature Explanatory Note prior to its adoption?

199. Not applicable to Japan.

93. (Complainants) For set top boxes, the Panel request specifies Council Regulation 2658/87 and all annexes thereto, as amended. In a footnote it is stated that this includes amendments adopted pursuant

to Commission Regulation 1214/2007 (CN 2008). Following circulation of the Panel request, there was an additional update in Commission Regulation 1031/2008 (CN 2009). Do all parties agree that the latter is the relevant measure in terms of this particular measure at issue?

200. Yes, the latter is the relevant measure.

94. (Complainants) With regard to Commission Regulation 1031/2008 (CN 2009), what precise heading is relevant for the purposes of the complainants' claims regarding set top boxes? Is it CN 8528 71 13 and CN 8521 90 00?

201. The relevant CN codes include CN 8528 7119 and CN 8528 7190 in addition to CN 8528 7113 and CN 8521 9000.

VI. MISCELLANEOUS

95. (Japan) Japan has referred to the following sources without providing copies of them for the Panel's consideration:

(a) H. Kawamoto, "The History of Liquid-Crystal Displays," Proceedings of the IEEE, Vol. 90, No. 4 (April 2002), available at http://www.ieee.org/web/aboutus/history_center/lcd.html.

(b) Digital Visual Interface, Revision 1.0 (2 April 1999), at 5, found at http://www.ddwg.org/lib/dvi_10.pdf.

Could Japan please provide hard copies of the specific sources to the Panel?

202. Please see Exhibits JPN-31 and JPN-32, which provide the two requested documents.

96. (Japan) Japan also refers to the following web pages without specifying what is the precise relevant part therein that supports the point it makes, nor did Japan provide copies of such relevant parts:

(a) http://www.ddwg.org/ (Japan refers to this website generally at footnote 121 of its first written submission)

(b) Wireless Broadband Modems, International Engineering Consortium, www.iec.org.

Could Japan please clarify and provide hard copies to the Panel?

203. With regard to the first request, see Exhibit JPN-33. The website introduces activities of the Digital Display Working Group which developed Digital Visual Interface. At the center of the website, you can see the column titled "What is the DDWG?", which writes "The Digital Display Working Group is an open industry group lead by Intel, Compaq, Fujitsu, Hewlett Packard, IBM, NEC and Silicon Image. The objective of the Digital Display Working Group is to address the industry's requirements for a digital connectivity specification for high-performance PCs and digital displays."

204. With regard to the second request, the relevant excerpts from www.iec.org can be found at Exhibit US-69.

97. (European Communities) Please provide, for the years 1996-2006, annual import data (value terms), at the 8 digit level, showing the evolution of the imports on the HS96 tariff lines described in Table 1 below. If the European Communities considers that additional tariff lines are relevant for the Panel, please also include detailed information about them. Correlations/concordances used to take account of

modifications in the codes or descriptions in the CN throughout the years, should also be indicated. Please provide an electronic copy of these data, in spreadsheet or database format, to the Secretariat.

Table 1

HS96	Product description
8471.60.10	-- For use in civil aircraft
8471.60.40	--- Printers
8471.60.50	--- Keyboards
8471.60.90	--- Other
8517.21.00	-- Facsimile machines
8517.50.90	-- Other
8517.80.90	-- Other
8525.20.99	--- Other
8528.12.14	---- With scanning parameters not exceeding 625 lines
8528.12.16	----- With a vertical resolution of less than 700 lines
8528.12.18	----- With a vertical resolution of 700 lines or more
8528.12.22	---- With a screen width/height ratio less than 1,5
8528.12.28	---- Other
8528.12.52	------ Not exceeding 42 cm
8528.12.54	------ Exceeding 42 cm but not exceeding 52 cm
8528.12.56	------ Exceeding 52 cm but not exceeding 72 cm
8528.12.58	------ Exceeding 72 cm
8528.12.62	------- Not exceeding 75 cm
8528.12.66	------- Exceeding 75 cm
8528.12.72	------- With a vertical resolution of less than 700 lines
8528.12.76	------- With a vertical resolution of 700 lines or more
8528.12.81	------ With a screen width/height ratio less than 1,5
8528.12.89	------ Other
8528.12.90	------- Electronic assemblies for incorporation into automatic data- processing machines
8528.12.93	-------- Digital (including mixed digital and analogue)
8528.12.95	-------- Other
8528.12.98	------ Other
8528.13.00	-- Black and white or other monochrome
8528.21.14	---- With a screen width/height ratio less than 1,5
8528.21.16	----- With scanning parameters not exceeding 625 lines
8528.21.18	----- With scanning parameters exceeding 625 lines
8528.21.90	--- Other
8528.12.91	-------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 ("set-top boxes with communication function") ***Note: The Panel understands from the submissions that this tariff line was added in the year 2000.***
8528.22.00	-- Black and white or other monochrome
8528.30.05	-- Video projectors operating by means of a flat panel display (for example, a liquid crystal device), capable of displaying digital information generated by an automatic data-processing machine
8528.30.20	--- Colour
8528.30.90	--- Black and white or other monochrome
8531.80.30	--- Flat panel display devices
9009.11.00	-- Operating by reproducing the original image directly onto the copy (direct process)
9009.12.00	-- Operating by reproducing the original image via an intermediate onto the copy (indirect process)
9013.80.11	---- Colour
9013.80.19	---- Black and white or other monochrome
9013.80.30	--- Other

205. Not applicable to Japan.

98. (European Communities) Could the European Communities provide, for the years 2007-2008, annual import data (value terms) at the 8 digit level showing the evolution of the HS2007 tariff lines described in Table 2 below. If the European Communities considers that additional tariff lines are relevant for the Panel, please also include detailed information about them. Correlations/concordances used to take

account of modifications in the codes or descriptions in the CN throughout the years, should also be indicated. Please provide an electronic copy of these data, in spreadsheet or database format, to the Secretariat.

Table 2

HS2007	Product description
8443.31.10	--- Machines performing the functions of copying and facsimile transmission, whether or not with a printing function, with a copying speed not exceeding 12 monochrome pages per minute
8443.31.91	---- Machines performing the function of copying by scanning the original and printing the copies by means of an electrostatic print engine
8443.31.99	---- Other
8443.32.10	--- Printers
8443.32.30	--- Facsimile machines
8443.32.91	---- Machines performing a copying function by scanning the original and printing the copies by means of an electrostatic print engine
8443.32.93	---- Other machines performing a copying function incorporating an optical system
8443.32.99	---- Other
8443.39.10	--- Machines performing a copying function by scanning the original and printing the copies by means of an electrostatic print engine
8443.39.31	---- Incorporating an optical system
8443.39.39	---- Other
8443.39.90	--- Other
8471.60.60	-- Keyboards
8471.60.70	-- Other
8517.11.00	-- Line telephone sets with cordless handsets
8517.12.00	-- Telephones for cellular networks or for other wireless networks
8517.18.00	-- Other
8517.61.00	-- Base stations
8517.62.00	-- Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus
8517.69.10	--- Videophones
8517.69.20	--- Entry-phone systems
8517.69.31	---- Portable receivers for calling, alerting or paging
8517.69.39	---- Other
8517.69.90	--- Other
8521.90.00	Other
8525.60.00	- Transmission apparatus incorporating reception apparatus
8528.41.00	-- Of a kind solely or principally used in an automatic data-processing system of heading 8471
8528.49.10	--- Black and white or other monochrome
8528.49.35	---- With a screen width/height ratio less than 1,5
8528.49.91	----- With scanning parameters not exceeding 625 lines
8528.49.99	----- With scanning parameters exceeding 625 lines
8528.51.00	-- Of a kind solely or principally used in an automatic data-processing system of heading 8471
8528.59.10	--- Black and white or other monochrome
8528.59.90	--- Colour
8528.61.00	-- Of a kind solely or principally used in an automatic data-processing system of heading 8471
8528.69.10	--- Operating by means of flat panel display (for example, a liquid crystal device), capable of displaying digital information generated by an automatic data-processing machine
8528.69.91	---- Black and white or other monochrome
8528.69.99	---- Colour
8528.71.11	---- Electronic assemblies for incorporation into automatic data-processing machines
8528.71.13	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 ("set-top boxes with communication function")
8528.71.13	---- 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 ('set-top boxes with communication function')
8528.71.19	Other
8528.71.19	---- Other
8528.71.90	Other
8528.71.90	--- Other

HS2007	Product description
8528.72.10	--- Television projection equipment
8528.72.20	--- Apparatus incorporating a video recorder or reproducer
8528.72.31	------ Not exceeding 42 cm
8528.72.33	------ Exceeding 42 cm but not exceeding 52 cm
8528.72.35	------ Exceeding 52 cm but not exceeding 72 cm
8528.72.39	------ Exceeding 72 cm
8528.72.51	------- Not exceeding 75 cm
8528.72.59	------- Exceeding 72 cm
8528.72.75	--- Other ---- With integral tube ----- Other ------ With scanning parameters exceeding 625 lines
8528.72.91	----- With a screen width/height ratio less than 1,5
8528.72.99	----- Other
8528.73.00	-- Other, black and white or other monochrome

206. Not applicable to Japan.

99. (European Communities) Could the European Communities provide the conversion tables for CN 2006-2007 and CN 2007-2006 for Chapters 84, 85 and 90?

207. Not applicable to Japan.

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