

# Panel Report on *EC–IT Products*

PAOLA CONCONI\*

*Université Libre de Bruxelles (ECARES) and CEPR*

ROBERT HOWSE\*\*

*New York University School of Law*

**Abstract:** At the heart of the dispute on *EC–IT Products*<sup>1</sup> is the definition of information-technology (IT) products and the question of how to treat increasingly multifunctional high-tech goods. The dispute was triggered by various measures introduced by the European Union, resulting in the imposition of duties of up to 14% pertaining to the tariff treatment of certain multifunctional IT products. The complaining parties (the United States, along with Japan and Taiwan) argued that, by introducing these duties, the EU had violated the 1996 Information Technology Agreement (ITA). The WTO Panel Report, circulated on 16 August 2010, ruled in favor of the complaining parties, and ordered the EU to repeal the measures leading to the dutiable treatment of the products at stake. We argue that the Panel’s ruling enhances the credibility of trade-policy liberalization in the high-tech sector, fostering the development of new technologies.

## 1. Introduction

### 1.1 *Summary of the dispute*

At the heart of the dispute on *EC–IT Products* is the definition of information-technology (IT) products and the question of how to treat increasingly multifunctional high-tech goods. The dispute was triggered by various measures introduced by the European Union (EU) pertaining to the tariff treatment of certain products covered by the Information Technology Agreement (ITA), a 1996 accord signed by all major trading countries eliminating tariffs on a wide range of technology products. In particular, three key products were concerned in this dispute: flat-panel computer monitors (‘flat panel displays’); cable, satellite, and

\* Email: pconconi@ulb.ac.be

\*\* Email: howserob@gmail.com

<sup>1</sup> Panel Report, *European Communities and its member States – Tariff Treatment of Certain Information Technology Products*, WT/DS375/R, WT/DS376/R, WT/DS377/R, adopted 21 September 2010. We are grateful for very helpful comments on an earlier version by Petros Mavroidis. Throughout this report, we refer to the EC (European Communities) when designating the legal person named as the respondent in the dispute, the legal person that is a party to the WTO Agreements, including the ITA and related instruments, and otherwise to the EU (European Union).

other set-top boxes ('set-top boxes with a communication function'); and certain computer printers that can also scan, fax, and/or copy ('multifunctional digital machines').

The United States, along with Japan and Taiwan, brought this case to the WTO, in 2008, to address a series of EU actions resulting in the imposition of duties of up to 14% on imports of the above-mentioned high-tech products. The complaining parties argued that, by introducing these duties, the EU violated its ITA tariff commitments. In their view, the ITA agreement should account for technological changes and cover goods created in subsequent years.

The EU countered that it had been charging legitimate import duties on goods that by virtue of their classification fall outside the ITA product-coverage scope: the three products at issue should not be classified as technology products (which must be granted duty-free treatment) but as consumer goods (which are subject to import duties). For example, flat-panel computer screens that can be used to watch videos are more akin to televisions than to IT products. The EU also argued that the extension of the ITA rules to cover the multifunction products at stake in this dispute should not be automatic, but should only apply after a review of the ITA product list by ITA signatories.

The WTO Panel Report, circulated on 16 August 2010, ruled in favor of the complaining parties, and ordered the EU to repeal the measures leading to the dutiable treatment of the products at stake. The EU did not appeal the ruling, and the WTO Dispute Settlement Body adopted the final report issued by a WTO panel on 21 September 2010.

## 1.2 *Context of the dispute*

In 1996, the world's biggest trading partners agreed that they would apply zero import duties on all information-technology (IT) products, in order to boost the global economy.<sup>2</sup> The Information Technology Agreement (ITA) was meant to achieve 'maximum freedom of world trade in information technology products' and 'encourage the continued technological development of the information technology industry on a world-wide basis', guaranteeing that trade regimes 'evolve in a manner that enhances market access opportunities for information technology products'.<sup>3</sup>

As mentioned above, the issue at the heart of this dispute is the tariff treatment of high-tech multifunctional products. The past 15 years have witnessed increasing technological 'convergence', a tendency for different technological systems to

<sup>2</sup> The ITA was originally signed by 29 countries at the Ministerial Meeting in Singapore in December 1996, and came into force in the spring of 1997. It currently has over 70 signatories, accounting for more than 97% of global IT trade (see [http://www.wto.org/english/tratop\\_e/inftec\\_e/inftec\\_e.htm](http://www.wto.org/english/tratop_e/inftec_e/inftec_e.htm) [last visited 14 November 2011]).

<sup>3</sup> See Article 1 of the ITA.

evolve towards performing similar tasks. Convergence refers to previously separate technologies such as voice, data, and video that now interact with each other. We are surrounded by a multilevel convergent media world where all modes of communication and information are continually reforming to adapt to the enduring demands of technologies, 'changing the way we create, consume, learn and interact with each other' (Jenkins, 2006). Convergence allows us to access multiple media and information services on a single platform or device. A 'smart phone' is a good example: it is principally used for telephone communications; however, it also offers a technological platform for other forms of communication and information transmissions (e.g., TV, video, internet, email) and has also other functions (e.g., camera, GPS, MP3 player).

The dispute *EC-IT Products* was triggered by the fact that the EU reclassified three kinds of multifunctional devices (LCD screens, TV set-top boxes that contain a hard-disk drive, and printer/scanner/photocopiers) as consumer products that should be liable for import duties ranging from 3% to 14%. The EU has justified the duties simply on the basis that these products are now more sophisticated and can perform additional functions than were possible when the ITA was signed in 1996.

The complaining parties have argued that this interpretation would make the ITA quickly obsolete. It would also deter innovation, in contrast with the original goal of fostering the development of new technologies. When the dispute was launched in 2008, Susan Schwab, the US trade representative at the time, said that, if ITA participants provided duty-free treatment only to technology that existed in 1996, very few IT products would be eligible. After the circulation of the Panel Report, Ron Kirk, the current US trade representative, argued that the ruling on this case 'affirms the principle that changes in technology are not an excuse to apply new duties to products covered by the ITA... Technological innovation drives economic growth and improves living standards for working families and consumers in all countries. The high-tech sector is a vital part of our economy and has played a leading role in many states' economic growth.'

The key feature of IT products is the fast pace with which they evolve. This makes trade negotiations on IT products different from negotiations covering more traditional kinds of products. The WTO Panel stressed that, in light of the pace of technological development, the ITA commitments must be interpreted dynamically. The Panel also noted that generic terms were used in the ITA agreement to cover a wide range of products and technologies, though some multifunctional products (panel display devices designed for use with automatic data-processing machines, multifunctional monitors) already existed at the time the agreement was concluded.

In the remainder of the paper, we discuss what we believe to be the most interesting economic and legal issues raised by the Panel's ruling on *EC-IT Products*. The economic analysis is presented in Section 2, in which we examine the welfare implications of the protectionist measures introduced by the EU and the political-economy factors shaping the introduction of such measures. Section 3

presents the legal analysis. Section 4 concludes, discussing the implications of the Panel's ruling for trade in IT products and the future of the ITA.

## 2. Economic analysis

Given the increasing importance of the high-tech sector, *EC-IT Products* was a high-stake dispute. Since the ITA was signed in 1996, global trade in high-tech products covered by the agreement has increased from \$1.2 trillion to \$4 trillion in 2008.<sup>4</sup> US exports of the three categories of IT products destined to the EU were valued at \$7 billion<sup>5</sup> a year, and the value of total ITA products imported into the EU has been estimated to amount to \$11 billion annually, a figure that is likely to increase as a result of the Panel ruling on this dispute.<sup>6</sup>

In the remainder of this section, we will first examine the welfare effects of the tariff measures introduced by the EU, and then discuss the political-economy factors that have led to the adoption of such measures.

### 2.1 *Welfare effects of EU measures*

#### *Static welfare effects*

Let us consider first the static welfare effects of the measures introduced by the EU, which have raised tariffs on the affected high-tech products from zero to up to 14%.

These measures clearly hurt foreign high-tech producers, by reducing their access to the European market. They are also clearly detrimental to European consumers, since they *increase the price* they have to pay for IT products. Starting from Krugman (1979), 'new trade theory' suggests that trade barriers can also hurt consumers by *reducing the number of varieties* available to them. Recent work by Broda and Weinstein (2006) suggests that this effect could be sizeable: examining disaggregated US import data available for the period between 1972 and 2001, they show that goods from different countries are far from perfect substitutes, implying that increases in the number of varieties can generate potentially large welfare gains.<sup>7</sup> Indeed, they find that the four-fold increase in available global varieties arising since the early 1970s has produced large welfare gains for the United States, raising real income by about 3%.

The protectionist measures introduced by the EU also give rise to static welfare gains. First, they generate tariff revenues, estimated to be around €300 million

4 See 'WTO Orders EU To Lift Tech Tariffs', *Wall Street Journal*, 17 August 2010.

5 See Dow Jones Newswires, 16 August 2010.

6 See <http://www.internationallawoffice.com/newsletters/detail.aspx?g=a9581b82-f28c-490c-b4fe-3a0d22f653a0> (last visited 14 November 2011).

7 Interestingly, their estimates of the elasticities of substitution across similar goods produced in different countries are particularly low for IT products: for example, the estimate for television receivers and monitors is much smaller than the estimate for gasoline (2.34 instead of 9.85).

per year.<sup>8</sup> Second, they benefit European producers by sheltering them from foreign competition. The tariff restrictions can benefit both producers of multi-functional high-tech goods (e.g., LCD computer monitors) and producers of more traditional consumer electronics that can be incorporated in new technologies (televisions).

Standard trade theory suggests that the overall effect of a tariff increase depends on whether or not it affects the terms of trade, leading to changes in the world prices of traded goods. In the absence of terms-of-trade effects, a tariff unambiguously lowers welfare, since the welfare loss in terms of consumer surplus more than offsets the welfare gains associated with increased tariff revenues and producer surplus. If instead the tariff increase improves the country's terms of trade, its overall (static) welfare effect will be ambiguous.

### *Dynamic welfare effects*

We discuss next the dynamic welfare implications of the introduction of EU tariff restrictions on IT products.

In general, restricting trade is a bad idea for growth, as suggested by the recent literature exploring the link between countries' trade policies and their firms' productivity.<sup>9</sup> This literature asks whether firms achieve higher productivity growth by becoming exporters or by being forced to improve as a result of more intense competition with foreign rivals. Heterogeneous-firm models of international trade (e.g., Melitz, 2003; Bernard *et al.*, 2003) show that lowering trade barriers leads to productivity gains via the reallocation of economic activity across firms within industries.<sup>10</sup> Various empirical studies have examined the connection between changes in trade costs and firm-level outcomes, finding support for the predictions of heterogeneous-firm models.<sup>11</sup> There is also some evidence that liberalizing trade leads to increases in productivity by inducing firms to innovate.<sup>12</sup>

8 'EU-WTO dispute ruling on high-tech products', Bloomberg, 17 August 2010.

9 An older literature finds evidence of a positive correlation between trade openness and growth based on cross-country comparisons (e.g., Ben-David, 1993; Edwards, 1998). However, the robustness of this evidence has been challenged, most notably by Rodríguez and Rodrik (2001).

10 These models emphasize productivity differences across firms operating in imperfectly competitive industries. The existence of trade costs induces only the most productive firms to self-select into export markets. As a result, when trade costs fall, industry productivity rises both because low-productivity, non-exporting firms exit and because high-productivity firms are able to expand through exporting. The most productive non-exporters begin to export, and current exporters, which are the high-productivity firms, expand their foreign sales. In these models, the reallocation of activity across firms – rather than intra-firm productivity growth – boosts industry productivity.

11 For example, Pavcnik (2002) and Trefler (2004) have studied the impact of trade liberalization on the reallocation of resources across individual plants and firms in Colombia and Canada, respectively. These studies find that industry productivity increases when trade barriers are lowered, but highlight a conflict between the short-run adjustment costs of trade liberalization (faced by displaced workers and struggling plants) and the long-run gains (experienced by consumers and efficient plants).

12 For example, Bustos (2011) introduces investment decisions in a model of trade with heterogeneous firms and shows that stronger import competition increases firms' incentives to innovate. She then

Imposing restrictions on international trade *in general* can thus be detrimental for firms' productivity and innovation. Imposing tariff restrictions on IT products *in particular* is likely to be even more harmful. The vast literature on endogenous growth (see Aghion and Howitt (2009) for a review) stresses that investment in new technology and knowledge capital is key to fostering output growth. In line with this idea, the ITA was expressly designed to encourage growth through innovation in the IT sector. A study by Feenstra *et al.* (2009) suggests that lowering tariffs on IT products has indeed led to significantly higher productivity growth,<sup>13</sup> implying that tariff restrictions on high-tech goods are likely to reduce innovation and be detrimental to growth.

We conclude the analysis of the dynamic welfare effects of the EU measures by considering the impact of trade-policy uncertainty on investment and growth. Unpredictable tariff treatment can discourage investment in new technology. This is because, as first pointed out by Arrow (1962), uncertainty poses problems to exploratory scientific research and investment in innovation, which are often compounded by the long-time horizon needed for research to bear fruit in practical applications.

In the context of trade policy, uncertainty can arise because of the failure of the government to credibly commit to tariff cuts *vis-à-vis* private investors and firms.<sup>14</sup> Indeed, foreign IT firms complained that EC duties 'create uncertainty in the marketplace' and 'stifle innovation' on information-technology products.<sup>15</sup>

It has been suggested that international agreements can be used to 'tie the policymakers' hands', enhancing the credibility of trade liberalization. This idea was first put forward by Staiger and Tabellini (1987) and has been later formalized by Maggi and Rodríguez-Clare (1998).<sup>16</sup> They suggest that entering into a binding trade agreement, such as the GATT/WTO, can be a solution to this problem. This

shows that the Southern Common Market (MERCOSUR) has led Argentinian firms to upgrade their technology.

<sup>13</sup> Feenstra *et al.* (2009) demonstrate that part of the apparent speedup in productivity growth in the United States since 1995 is due to gains in the terms-of-trade and tariff reductions, especially for IT products.

<sup>14</sup> A large literature shows that commitment problems can lead to suboptimal levels of investment. For example, Matsuyama (1990) describes a model in which the government prefers protecting the firm for one period only if the firm invests in research and development. However, knowing that if it invests, the protection will be removed in the next period, the domestic firm prefers not to invest in the current period. Miyagiwa and Ohno (1999) examine whether temporary protection stimulates innovation. Their analysis shows that, if firms anticipate that temporary protection will be removed early should innovation occur before its terminal date, the protected firms invest less in research and development than they do under free trade. If, instead, they expect that protection will be extended should no innovation have occurred by its terminal date, investment falls below the free-trade level, and eventually to zero, as the terminal date approaches.

<sup>15</sup> See 'Global Industry Calls for Upholding Commitments of the WTO Information Technology Agreement', <http://www.eabc.org/pdf/HTTCJointStatement.pdf> (last visited 14 November 2011).

<sup>16</sup> In a subsequent paper, Maggi and Rodríguez-Clare (2007) extend their analysis to a setting with two large countries, in which both governments would like to commit *vis-à-vis* domestic industrial lobbies.

argument, however, forgets that, absent a supranational authority with autonomous powers of enforcement, a country's international commitments are not directly binding on that country, but rather they must be sustainable in light of the dynamic incentives that the country faces *vis-à-vis* its trading partners as well as its domestic agents.<sup>17</sup>

The literature on commitment problems in trade policy suggests that WTO rules can help to foster investment and innovation, but only if the private sector believes that they are credible. Uncertainty about the applicability of the rules can discourage firms from innovating. From this point of view, one of the fundamental problems with the ITA signed in 1996 is that it is based on a rigid list of products covered. The narrow range of products covered by the ITA implies that newly developed IT products face unpredictable tariff treatment: new products coming to the market, thanks to technological development, will have duties imposed on them when traded across borders.

The Panel's decision on *EC-IT Products* establishes the idea that all goods developed, starting from the high-tech products included in the ITA, should be traded freely among member countries. By effectively expanding the list of IT products covered by the original agreement, the Panel's ruling on this dispute should foster the credibility of trade-policy liberalization in the high-tech sector, thus stimulating innovation and growth.

## 2.2 *The political economy of EU measures*

Given that the tariff restrictions introduced by the EU are likely to lower welfare of the member countries (see analysis above) and go against the spirit of the ITA, why were they introduced?

The history of ITA negotiation can shed some light on this question. Before 1996, the EU maintained high tariffs (up to 14%) on selected IT products, and its policy up to that point had been to protect its high-tech industries from import competition. Two factors shifted the position of the EU, leading to its support for an ITA agreement. First, there was an increased focus on providing cheaper inputs to a fast-growing, productivity-enhancing IT industry. Second, in 1995, Finland and Sweden (along with Austria) joined the EU. These two countries had a strong telecommunications sector with export-oriented companies that pushed the EU towards a free-trade position.<sup>18</sup>

<sup>17</sup> Conconi and Perroni (2009) study the relationship between international policy coordination and domestic policy reputation when both are self-sustaining. They show that domestic policy commitment does not necessarily facilitate international cooperation; rather, efficient policies may be most easily sustained when governments are unable to pre-commit to policy domestically.

<sup>18</sup> Before accession, Finland and Sweden joined the EU with lower tariffs (bound and actual) on IT goods than the EU. When they joined, they negotiated an interim agreement that allowed them to keep lower tariffs. The fact that this agreement only lasted 12 months gave Finland and Sweden a strong

However, a significant number of IT products were left out from the ITA upon insistence from the EU, which wished to protect Dutch and French TV producers and insisted on keeping out, as much as possible, consumer products like television sets, video cameras, DVDs, and CDs. Thus, when the ITA was signed, the EU position on high-tech products was divided: some countries were strongly in favor of trade liberalization to foster exports of their high-tech producers, while others were trying to protect their import-competing industries of certain consumer electronics.

What led the EU to repeal its ITA commitment, by raising tariffs on several high-tech products? Unfortunately, it is not possible to systematically study the determinants of EU trade-policy votes, since very little information is made public.<sup>19</sup> Consider, for example, Council Regulation No. 493/2005 of 16 March 2005. This states that certain flat-panel displays, using LCD technology, that are ‘capable of reproducing video images from a source other than an automatic data-processing machine’ are not covered by the ITA agreement, should be classified as televisions, and thus should be subject to tariffs. The Monthly Summaries of Council Acts reports that this decision was taken by qualified majority voting and that Denmark abstained, but no information is provided about which countries voted in favor or against. However, some interesting information about the vote can be found in the following statement by the Irish delegation:<sup>20</sup>

In agreeing to the proposal for a Council Regulation amending Annex I to Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, Ireland notes *the difficulties in arriving at an acceptable solution* and the efforts made by the Commission to find an interim solution. This is against the background of rapid technological development and, in particular, converging technologies, which have created customs classification difficulties.

The importance of the ICT sector to the European Union, as a driver and contributor to the Lisbon process, is well documented at the level of the European Council, the Competitiveness Council, and, most recently, the Telecoms Council. Bearing this in mind, Ireland strongly believes that the ongoing work on the issue of customs classification should focus on ensuring that a solution is found which will ensure that ICT manufacturers located in the European Union do not have any additional costs imposed upon them. Given the highly competitive nature of the sector, and, not least, the level of *competition emanating from outside the*

motivation to push for a new EU policy around when ITA negotiations started. See Dreyer and Hindley (2008) for a detailed discussion of ITA negotiations.

<sup>19</sup> Various studies have examined the determinants of trade-policy votes in the United States (e.g., Blonigen and Figlio, 1998; Conconi, Faccini, and Zanardi, 2011). Unfortunately, similar studies cannot be carried out for the EU trade-policy votes, since they are not made public.

<sup>20</sup> See statement No. 24/05 in the Monthly Summary of Council Acts of March 2005.



*European Union*, it is imperative that all efforts be made to assist in ensuring both the competitiveness of the ICT sector and its *contribution to the Lisbon process*.

This statement shows that member states were divided over the introduction of tariffs on flat-panel computer monitors, as they had been at the time of the ITA negotiations. It has also been argued that the division among member countries can explain why the EU decided not to appeal.<sup>21</sup>

The above statement also suggests that this trade-policy decision was driven by the fact that some EU governments faced pressure to protect their domestic producers from foreign competition. Again, lack of systematic information prevents a systematic analysis of the role of lobby groups in shaping EU trade policies in general, and this Council decision in particular.<sup>22</sup> However, anecdotal evidence suggests that industry organizations may have exercised pressure on EU governments to impose tariffs on IT products, so as to be sheltered from foreign competition.<sup>23</sup>

Finally, the statement by the Irish representative helps to understand the context in which the Council vote took place. In particular, it suggests that one of the reasons for the introduction of protectionist measures was the pressure to meet the objectives of the Lisbon process – also referred to as the Lisbon agenda or Lisbon strategy. This is a development set out by the European Council in Lisbon in March 2000, with the goal of making the EU ‘the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion’ by the end of 2010.<sup>24</sup> In November 2004, a mid-term review of the Lisbon process concluded that most of its goals had not been achieved, and that the ‘European Union and its Members States have clearly themselves contributed to slow progress by failing to act on much of the Lisbon strategy with sufficient urgency’.<sup>25</sup>

Following this disappointing result, in the spring 2005 EU members adopted a new strategy, named ‘i2010’ and aimed at fostering growth and jobs in the IT and media industries. One of the main goals of the renewed Lisbon strategy was ‘to increase EU investment in research on information and communication technologies (ICT) by 80%’, given that Europe was clearly ‘lagging behind’ Japan and the

21 See ‘WTO Orders EU To Lift Tech Tariffs’, *Wall Street Journal*, 17 August 2010.

22 Lack of data on EU lobbies explains why the empirical literature on the role of interest groups in trade policy focuses on the United States (e.g., Goldberg and Maggi, 1999; Baldwin and Magee, 2000).

23 For example, the German Flat Panel Display Forum (DFF), an association representing 65 companies and research institutes with the goal of strengthening the European flat-panel-display industry, offers various services to its members including ‘lobbying of politics’, see [http://www.displayforum.de/press/11-06-30\\_en\\_Press\\_release\\_DFF.pdf](http://www.displayforum.de/press/11-06-30_en_Press_release_DFF.pdf) (last visited 21 November 2011).

24 See [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/00100-r1.en0.htm](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/00100-r1.en0.htm) (last visited 21 November 2011).

25 See Report from the High Level Group on the Lisbon Strategy, chaired by Wim Kok, November 2004, [http://ec.europa.eu/research/evaluations/pdf/archive/fp6-evidence-base/evaluation\\_studies\\_and\\_reports/evaluation\\_studies\\_and\\_reports\\_2004/the\\_lisbon\\_strategy\\_for\\_growth\\_and\\_employment\\_report\\_from\\_the\\_high\\_level\\_group.pdf](http://ec.europa.eu/research/evaluations/pdf/archive/fp6-evidence-base/evaluation_studies_and_reports/evaluation_studies_and_reports_2004/the_lisbon_strategy_for_growth_and_employment_report_from_the_high_level_group.pdf) (last visited 21 November 2011).

United States.<sup>26</sup> The need to meet these new objectives by the end of 2010, showing clear growth of the European ICT industry, can help explain why, during the spring 2005, member countries felt the pressure to protect EU producers from foreign competitors.

### 3. Legal analysis

#### 3.1 *Introduction and legal findings of the Panel*

The complainants challenged several regulatory actions of the EC, which they argued had the effect of compromising the legal security of concessions bound in the EC schedule, pursuant to its obligations under the Information Technology Agreement (ITA), a plurilateral WTO treaty, and therefore violating Article II of the GATT. GATT Article II:1(a) provides:

Each Member shall accord to the commerce of the other Members treatment no less favorable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.

Article II:1(b) provides in part:

The products described in Part I of the Schedule relating to any Member, which are the products of territories of other Members, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein.

As mentioned above, the ITA aimed at the achievement of duty-free trade in certain information-technology products deemed to be of particular importance to economic growth and development. In part as a response to the lag between rapid technological innovation and the process for formally revising the Harmonized System (HS) at the World Customs Organization, the ITA provides a mechanism where states parties can provide a narrative description of the products for which they commit to provide duty-free treatment that does not depend on the classification of such products on the basis of the existing HS nomenclature; this is done through attachment B, which contains narrative descriptions of products for which the states parties commit to duty-free access regardless of their HS classification.

Accordingly, on the basis of the ITA, the EC added a headnote to its schedule in order to bind these non-HS-based concessions. The headnote reads as follows:

With respect to any product described in or for Attachment B to the Annex to the Ministerial Declaration on Trade in Information Technology Products (WT/MIN (96)/16), to the extent not specifically provided for in this Schedule, the customs

<sup>26</sup> See EU Commission press release of 1 June 2005.

duties on such product, as well as any other duties and charges of any kind (within the meaning of Article II:1(b) of the General Agreement on Tariffs and Trade 1994) shall be bound and eliminated as set forth in paragraph 2(a) of the Annex to the Declaration, wherever the product is classified.

However, the EC schedule also lists the tariff line items associated with the products in the narrative description, which are based on the HS. Subsequent to the ITA, the EC engaged in a number of regulatory actions that raised the possibility that certain products apparently conforming to the original ITA-based narrative description could nevertheless be classified under an HS heading to which customs duties would apply; this classification would be based on an assessment that the products in question had certain specific features or characteristics additional to those explicitly mentioned in the Attachment B narrative descriptions. Taking the three kinds of products that were the basis of the present complaint, in the case of flat-screen monitors, these could be used as TV screens not just computer monitors; in the case of Set Top Boxes, these could be used not only as cable TV modem/transmission devices but also as recorders; and in the case of printers, these had a certain level of photocopier functionality.

Central to this dispute is the question of how technological change and innovation affect customs classification and the meaning of Members' schedules. The EC argued that its duty-free treatment, and the manner in which it bound this treatment in its schedule, was dependent upon assumptions at the time about the state of technology. According to the EC, if the bound products were later to acquire, through innovation, additional functions of other products, to which the EC was entitled to apply, it would be entitled to reclassify the duty-free products and apply the HS-based nomenclature used for other products with the functionality in question.

The Panel rejected this argument, insisting that absent some explicit condition or limitation in the EC's schedule, the EC could not remove from duty-free treatment a product that otherwise matched the qualifying description, *only by virtue of the fact* that the product acquired additional characteristics allowing the performance of functions associated with other products to which duty still applied. At the same time, the Panel conceded that in some cases it was possible that a given product would have *its overall character* so transformed by additional functions as to justify a reclassification.

This is the first litigated WTO dispute where the ITA arguably had a central importance, as the concessions at issue were all bound as part of the EC's implementation of its ITA commitments.<sup>27</sup> The complainants, however, framed

<sup>27</sup>The *EC-Computer Equipment (LAN)* dispute (Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, 1851) also concerned products to which the ITA applies, but the complaint concerned decisions about classification that preceded the date for the EC's implementation of its ITA commitments.

their complaint exclusively in terms of GATT violations, and did not allege any nullification and impairment of benefits under the ITA itself. Perhaps for this reason, the Panel undertook few interpretations of the provisions of the ITA itself, and indeed made the extraordinary finding (discussed below in the legal analysis) that the object and purpose of the ITA were not relevant to the meaning of the concessions at issue in the dispute.

In Section 3.2 below, we summarize the main findings of the Panel, citing selectively from its report.

### 3.2 *Main findings of the Panel*

#### *The nature of state responsibility under GATT Article II and ‘as such’ claims*

A preliminary objection of the EC to the complaint was that the regulatory actions in question did not engage state responsibility under the applicable provisions of the GATT, because they did not formally mandate or predetermine that any particular identifiable product would, necessarily, have duty applied to it. For example, one of the regulatory actions in question was the promulgation of a document providing interpretative guidance to customs officials in applying existing classifications, and the EC argued that, since it was not binding, it could not form part of the basis of an ‘as such’ complaint – that is, a challenge to laws or regulations on their face, as opposed to their case-by-case application to particular products at the border. In other instances, it appeared that the products in question were entering duty-free under a waiver, despite some of these regulatory actions, and there were issues also raised by the EC about the time frame or the formal validity of some of the actions.

Following the approach to state responsibility in the *US–S.301* Panel<sup>28</sup> and subsequent rulings such as the *US–Corrosion-Resistant Steel Sunset Review* Appellate Body Report,<sup>29</sup> the Panel held that state responsibility under the GATT with respect to legal security of tariff bindings could be engaged by measures that did not formally predetermine or mandate that a particular traded product *must* be subject to duties in excess of the bindings in the member’s schedule. It was enough that *some* features of the EC regulatory actions complained of would result in making *some* products otherwise covered by the duty-free concessions dutiable, *if* they were found to possess the particular characteristics identified in these challenged EC regulatory actions. In terms of state responsibility, one could express the principle as follows: the obligation in Article II of the GATT has to be understood as extending to a duty not to undermine *the legal security afforded to the expectations of traders* by the GATT scheduling architecture. Thus, Article II is

<sup>28</sup> Panel Report, *United States–Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000, DSR 2000:II, 815.

<sup>29</sup> Appellate Body Report, *United States–Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, 3, discussed in Howse and Staiger (2006).

violated by *any* regulatory action that diminishes the certainty provided by the concession. It is enough that the action in question gives rise to the *possibility* that the product will be subject to higher duties, due to characteristics or conditions not stated or implicit at the time the concession was made. Later on, we shall attempt to defend this apparently broad conception of state responsibility.

With respect to the non-guidance document, the Panel held that even though non-binding in domestic law, it nevertheless engaged state responsibility:

7.157... [T]he issue is whether CNEN are ‘authoritative’ such that ‘per se’ requirements set out in the CNEN could validly form the basis of an ‘as such’ claim of a breach of Article II of the GATT.

7.158 We find that CNEN do meet this standard. It is clear that CNENs are important in enabling the European Communities to maintain a uniform application of the Common Customs Tariff within its territory. Although the European Communities has noted that CNENs do not ‘preclude the exercise of discretion’ by member State customs authorities, it is apparent that there is a clear expectation that such discretion will be exercised in a certain fashion and that infringement proceedings may apply in instances where such discretion is not so exercised. The Panel also finds it relevant that CNENs are issued by the Commission, a body with undisputed authority within the European Communities for ensuring the uniform application of the Customs Code Tariff, and with the power to challenge interpretations not consistent with its own. Indeed, according to Regulation No. 2658/87, as amended, the Commission establishes and manages the CN.<sup>252</sup> In addition, according to its Article 9, the Commission adopts Explanatory Notes. Moreover, the Panel notes that BTIs will cease to be valid where they are no longer compatible ‘at Community level’ with ‘the explanatory notes... adopted for the purposes of interpreting the rules’.

### *Flat-screen monitors*

In ruling on the complaint with respect to flat-screen monitors, the Panel relied heavily on a textual analysis of the ‘ordinary meaning’ of the EC schedule, and in particular the headnote. It followed Appellate Body jurisprudence, indicating that, because schedules form an integral part of the GATT treaty, the rules in articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) apply to interpretation of Members’ schedules. On the other hand, even though the basis for the concessions at issue and the way they were structured in the EC’s schedule was the ITA, the interpretation of the provisions of the ITA itself played a rather marginal role in the Panel’s analysis. In the normative legal analysis, we will question certain aspects of the Panel’s approach to the ITA. At this point, we simply note that the legal claims of the complainants did not include violations of the ITA itself, even though they might well have asserted such violations.

As a matter of textual interpretation of the EC’s schedule, the EC argued that, because a list of HS-based tariff lines for the products in the Attachment B narrative description followed the general concession stated in the headnote for Attachment

B products, customs administration based on HS classifications still governed or controlled the implementation of the general Attachment B concession. In other words, the EC was free to interpret the scope of the general Attachment B concession in light of its approach to HS-based classification of the products in question. In other words, the EC was saying that it did not intend through the ITA and the headnote to make a legally binding concession autonomous from the HS framework itself. The Panel rejected this argument on the following basis:

7.339 Most, if not all, products described in or for Attachment B are classifiable somewhere within the EC's Schedule. If the headnote were to apply only to products that were not already 'provided for' in the EC Schedule, the duty free treatment provided for in the Annex to the EC Schedule would have extremely limited, if any, application. Such a limited interpretation would defeat the clear objective to provide duty-free treatment to products described in or for Attachment B...

In accordance with the methodology suggested in Appellate Body jurisprudence concerning the sequential application of Articles 31–32 of the VCLT, having made these findings with respect to the 'ordinary meaning' of the EC schedule, the Appellate Body went on to address other elements in VCLT 31 (context, object, and purpose) and, finally, VCLT 32.

In examining the context, object, and purpose, the Appellate Body was inevitably going to have to confront the significance of the ITA itself. The Panel concluded that, at a minimum, the ITA would qualify as 'context' by virtue of being within the scope of VCLT 31(2)(b):

7.376... both 'agreements' and 'instruments' may qualify as context as long as they meet certain conditions. The Vienna Convention refers to the concepts of 'agreement' and 'instrument' within the definition of 'treaty' above. The statement by the International Law Commission above implies that a qualifying 'instrument' may even be a unilateral 'document' so long as it complies with the additional requirements in Article 31(2)(b) that it was 'made in connection with the conclusion of the treaty', and 'its relation to the treaty was accepted in the same manner by the other parties'.

It is notable here that, as we will explore at length in our legal analysis, the Panel felt it had to stretch the wording of 31(2)(b) of the VCLT (the ITA was, as a matter of crude chronology, not collateral to the 'conclusion' of the covered Agreements but a subsequent agreement in time), when it could easily have found that the norms of the ITA were other relevant rules of international law applicable between the parties, within the meaning of VCLT 31(3)(c). As we shall explore in Section 3.3 below, this may have been due to earlier panel rulings that interpreted the word parties in VCLT 31(3)(c) in such a manner to make that provision largely inutile. We also note that in its analysis, by focusing on the word instrument, the Panel seemed to be creating some level of doubt as to whether the ITA is a treaty within the definition provided in the VCLT. This may have consequences for any future

dispute where a claim of violation of the ITA itself is central to the Panel's jurisdiction.

In any case, having found the ITA to be part of the 'context' within the meaning of VCLT 31(2)(b), the Panel nevertheless held that the object and purpose of this contextual instrument, as expressed in its preamble, was not relevant to the interpretative exercise before the Panel:

7.386 We begin with the phrases in the preamble which have been addressed by the parties and paragraph 1 of the ITA. We note that the parties have made reference to two phrases in the ITA preamble that read '*Desiring* to achieve maximum freedom of world trade in information technology products' and '*Desiring* to encourage the continued technological development of the information technology industry on a world-wide basis' as well as the language in paragraph 1 of the ITA that reads 'Trade regimes should evolve in a manner to enhance market access opportunities of IT products'. The use of the word 'desiring' at the beginning of the sentences in the preamble and the use of the word 'should' in paragraph 1 reflects that these opening provisions of the ITA represent non-mandatory provisions. This language contrasts with the use of the word 'shall' in ITA paragraph 2, which we discuss below. We do not see grounds, based on these provisions alone, to find that the ITA mandates a particularly expansive approach to product coverage or to interpret the specific duty free commitments made pursuant to the ITA. Indeed, we do not consider that these non-mandatory provisions should bear in any specific way on the interpretative task before the Panel, namely interpreting the meaning of the Annex to the EC Schedule, and the EC headnote in particular.

At the same time, the Panel did find that the structuring of concessions under the operative provisions of the ITA was relevant, and that it supported the Panel's view of the 'ordinary meaning' of the Annex to the EC schedule, including the headnote.

On the other hand, the Panel rejected the HS as 'context' for interpretation of the EC's Annex to its Schedule and the Headnote to the extent that the EC had explicitly scheduled the general concession in question on a basis *other* than HS classifications (paragraphs 7.443ff; 7.515–7.517). This is an important finding, which strongly reinforces the autonomy of WTO Members if they so choose to schedule additional concessions on a basis that is entirely independent of the HS, as a matter of legal commitment. In the normative legal analysis, we will discuss why this finding is correct and its desirable consequences.

Unlike that of the ITA, as disclosed in its Preamble, the Panel did consider the object and purpose of the WTO Agreement as relevant:

7.545 With respect to the relationship between the object and purpose of the GATT 1994 generally and a Member's tariff concessions in particular, the Appellate Body held in *Argentina – Textiles and Apparel* that: 'a basic object and purpose of the GATT 1994, as reflected in Article II, is to preserve the value of

tariff concessions negotiated by a Member with its trading partners, and bound in that Member's Schedule. Once a tariff concession is agreed and bound in a Member's Schedule, a reduction in its value by the imposition of duties in excess of the bound tariff rate would upset the balance of concessions among Members.<sup>723</sup>

7.546 In *EC-Computer Equipment*, the Appellate Body confirmed that the security and predictability of the reciprocal and mutually advantageous arrangements directed toward the substantial reduction of tariffs and other barriers to trade is a recognized object and purpose of the *WTO Agreement*, generally, as well as of the GATT 1994.<sup>724</sup>

7.547 We thus consider that tariff concessions made by WTO Members should be interpreted in such a way as to further the objectives of preserving and upholding the 'security and predictability' of 'the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other trade barriers to trade'. This includes consideration of the general objective of the expansion of trade and the substantial reduction of tariffs. However, a panel should take care not to disturb the balance of reciprocal and mutually advantageous concessions negotiated by parties.<sup>725</sup>

We would add here, again without preempting the normative legal analysis to follow, that this discussion of object and purpose in respect to primary obligations reinforces the Panel's view of state responsibility, especially the importance of security and predictability.

Having found that the ordinary meaning of the EC's Annex to its Schedule and the Headnote, in light of context, object, and purpose supported the complainant's claim, the Panel then went on to consider material that was presented as part of the negotiating history of the ITA. Here the relevant language in VCLT 32 that supports the use of such material is 'in order to confirm the meaning resulting from the application of article 31'. However, in the end, the Panel concluded that the nature of the material in question was such that it did not qualify for consideration under Article 32, and thus, in effect, that such material could neither confirm nor indeed undermine the determination of meaning under Article 31.

7.579 We have no evidence before us that the particular landscape papers were published, circulated or made available to the other ITA participants or the WTO membership more broadly at the time of negotiations or prior to this dispute. Thus, it is not clear to what extent if at all the views set forth in these documents reflect the commonly held intentions of the parties.

... 7.587 We are hesitant to attribute much weight to statements made in the context of negotiations for a separate, successor agreement that has not yet been concluded, and where the extent of progress towards reaching such an agreement remains unclear.

... 7.598 We observe once again that a Member, when making a commitment pursuant to Article II of the GATT 1994, may choose precise, even exclusive,



terms and conditions to qualify or limit the scope of coverage. These include terms and conditions that would limit coverage to a particular product based on its physical attributes, dimensions, technical characteristics or features. A Member may also refer to a particular classification or tariff heading to define or limit the scope of a concession. The determination of the scope of coverage comes from the meaning of the terms of that commitment. For this reason, a panel should not read qualifications into a commitment that are not there. At the same time, the other Members have an opportunity to agree or disagree with the proposed concession when it is put forward for incorporation into a Member's schedule.

Finally, the Panel responded to an argument of the EC that its schedule had to be interpreted dynamically, in light of developments in technology. The possibility that a product with the narrative description in Attachment B could have the functionality of a TV screen did not exist at the time that the EC modified its schedule, and therefore the EC had never contemplated that its concession would extend in effect to television, as opposed to computer components. However, according to the Panel:

7.599 The Panel has interpreted the concession based on the FPDs narrative description in this manner. In the case of this concession, the Panel notes that generic terms were used to cover a wide range of products and technologies. In addition, it appears to be undisputed that flat panel display devices designed for use with automatic data-processing machines existed at the time the ITA was concluded (for example, the European Communities has referred to an earlier version of the 'displays designed for use with computers' concession that expressly mentions both CRT and flat panel display technology)<sup>805</sup>, and that the notion of multifunctional monitors was not unknown to negotiators, as evidenced in the monitors concession in the ITA, which appears to contemplate the existence of monitors that accept signals from multiple sources.

7.600 We are of the view, therefore, that there is no need to consider further the particular status of technology at the time of negotiating the concession in assessing the scope of the concession before us. Thus, for instance, the Panel does not consider the fact that DVI was developed after the conclusion of the ITA operates to exclude FPDs with DVIs from the scope of the concession. As explained, we have established on the terms of the concession that 'flat panel display devices' incorporating a wide range of characteristics and technologies are covered.

7.601 We note the European Communities' argument that multifunctional monitors are 'new products' that did not exist at the time of the negotiations. As noted above, the notion of multifunctionality was not unknown at the time of the negotiations. Even if it were accepted that the European Communities' claim is factually accurate, however, it is of limited relevance to the question of whether the product is covered by the FPDs concession. This must be determined by interpreting the terms of the concession in accordance with the Vienna Convention.

*Set-top boxes*

As with the flat-screen monitors, the Panel held that the narrative description in Attachment B controlled the scope of the concession and thus focused on the ordinary meaning of the words in that description, rather than the HS classifications listed in conjunction with it in the Annex to the EC Schedule. The Panel's reasoning for this interpretative choice is essentially the same as that for flat-screen monitors.

In considering the 'ordinary meaning' of the narrative description, the Panel rejected the EC argument that the language 'which have a communication function' allowed the EC to exclude from the concession set-top boxes with other functions, namely in this case recording:

7.861 Accordingly, based on our preliminary assessment of the terms 'set top boxes which have a communication function', we conclude that the terms 'which have' in isolation do not necessarily limit the breadth of coverage of the concession to set top boxes which *only* have a communication function. However, we also find that the coverage of the concession was not intended to extend to devices which have set top boxes incorporated into them along with other functions in a way that they may no longer be described as, in essence, a 'set top box which ha[s] a communication function'. In other words, we determined that the concession covers set top boxes which have a communication function, but not necessarily *only* a communication function. In addition, the Panel notes that while 'which have' does not necessarily imply an exclusive functionality, it is clear that the drafters chose to emphasize functionality, and a communication function in particular, in defining the narrative product description. We will return to this below.<sup>1103</sup> Before addressing the words that appear after the colon, we address briefly the relevance of the use of a colon in the concession.

The Panel rejected the further EC argument that, because the narrative description referred to communication through a 'modem', the EC was not required to extend the concession to boxes that used other means than the telephone modem typical of the technology current at the time of the concession to connect to the Internet, including ISDN, WLAN, and Ethernet technology. In the Panel's view, the use of the word 'modem' was intended to describe the functionality of Internet connection and was not a static description of one particular kind of device used for Internet connection. The Panel thus rejected, as with flat-screen monitors, that the scope of the concession should somehow be limited in terms of the state of technology existing at the time the concession was made:

7.955...when making a commitment, Members may propose precise, even exclusive terms to define that concession, to qualify or limit the scope of coverage through terms and conditions, including by limiting terms to physical attributes, dimensions, technical characteristics or features. A Member may also refer to a particular classification or tariff heading to define or limit the scope of a concession. With regard to the STBCs concession we have found that that the

central focus is on function, as opposed to a precise or detailed assessment of the technical properties of the internal components of a set top box.

... 7.984 The complainants have presented evidence that devices based on ISDN, WLAN and Ethernet technology connect set top boxes to a communication line. We consider that it is clear that such devices incorporate, or have built in, technologies to access the Internet and provide interactive information exchange. We therefore conclude that set top boxes that otherwise meet the terms of the concession, and that incorporate ISDN, WLAN, and Ethernet technology fall within the scope of the concession.

...

7.986 ... However, we also recall that additional functionality may, at a certain point, result in a product not meeting the description of a 'set top box which ha[s] a communication function'. Such a determination about whether a product is or not such a set top box must be made based on a case-by-case analysis of the objective characteristics of a particular product as it is presented at the border.

These last observations of the Panel are of considerable importance. They suggest that the narrative description is only controlling with respect to EC classification *up to a point: even if the product meets the criteria in the narrative description, and thus prima facie fits within the concession, there is still a holistic judgment to be made as to whether given its overall characteristics and functions, the product is better classified in a dutiable HS classification. Thus, what engages state responsibility is that the EC measures give rise to the possibility that certain products may be excluded from duty free treatment merely because of the technology used for connection to the Internet or merely because they contain a recording device.*

With respect to context, the Panel, in addition to its rejection of the notion that the state of technology at the time was relevant context, also rejected the EC argument with respect to 'subsequent practice' within the meaning of the VCLT, namely that there was evidence that the overwhelming majority of WTO Members were classifying in the 1997–1999 period set-top boxes in HS classifications that supported the EC interpretation of the limited nature of the concession based on the narrative description. According to the Panel:

7.934 We recall from paragraphs 7.557–7.561, that 'subsequent practice' is the '...“concordant, common and consistent” sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties [to a treaty] regarding its interpretation'. It is an 'important element' in treaty interpretation that provides 'objective evidence of the understanding of the parties as to the meaning of the treaty'.<sup>1208</sup> Inconsistent classification practice must be disregarded. In determining what constitutes 'common' and 'concordant' practice, we noted that it would be *difficult* to establish a 'concordant, common and discernible pattern' on the basis of acts or pronouncements of one, or very few parties to a multilateral treaty, such as the *WTO Agreement*.

7.935 Accordingly, the Panel will consider whether there is evidence of ‘consistent, common and concordant’ classification practice on the part of the ITA participants and with respect to the set top box products at issue since the conclusion of the ITA until present.

Examining the evidence presented by the EC with respect to Members’ classification practice, the Panel found that the standard of ‘consistent, common and concordant’ classification practice was not met, noting considerable divergence in the HS classifications that various Members associated with their narrative description of set-top boxes.

### *Transparency*

The complainants argued that the EC had violated certain provisions of Article X of the GATT, in failing to publish some of the regulatory actions at issue in a timely fashion and by allowing for the possible (and actual in some cases) application of those changes prior to their being published. The EC argued, along the lines of its submissions on state responsibility, that because a number of the regulatory actions did not of themselves and at the time in question have a formal and binding character, they were not ‘laws, regulations, judicial decisions and administrative rulings’ within the meaning of Article X and thus that the operative provisions of that Article invoked by the complainants did not apply. The EC also argued that since some of the material had been put on a website in the form of committee minutes and draft documents, this sufficed in any case to meet the requirement of timely publication. The Panel disagreed with the EC on both points, and found for the claimants:

7.1026 Substantively, and when read as a whole within the context of Article X:1, the phrase ‘laws, regulations, judicial decisions and administrative rulings’ reflects an intention on the part of the drafters to include a wide range of measures that have the potential to affect trade and traders.<sup>1338</sup> A narrow interpretation of the terms ‘laws, regulations, judicial decisions and administrative rulings’ would not be consistent with this intention, and would also undermine the due process objectives of Article X referred to above.

7.1027 Based on the foregoing, we observe that the ordinary meanings of the terms ‘laws, regulations, judicial decisions and administrative rulings’ indicates that the instruments covered by Article X:1 range from imperative rules of conduct to the exercise of influence or an authoritative pronouncement by certain authoritative bodies.

### *Printers with fax and photocopying capacity*

In the case of these products, the relevant EC concession pursuant to the ITA was based on an HS classification, and therefore interpretation of the HS system was the central issue with respect to this part of the complaint. The complainants argued that the correct HS classification was subheading 8471 60, ‘Automatic data-processing machines and units thereof; Input or output units, whether or not

containing storage units in the same housing'. The European Communities insisted that in some cases, that is where the photocopying function of the device met certain performance standards, it was justified in classifying it instead under another concession under the EC Schedule, that is the HS1996 subheading 9009 12 ('indirect process electrostatic photocopying apparatus').

As context for its interpretation of these classifications, the Panel resorted to the kind of material considered relevant to context by the Appellate Body in *EC-Chicken Cuts*,<sup>30</sup> including HS interpretative notes. Of particular significance was one particular note that qualified the products that would fall under subheading 8471 60 as 'of a kind solely or principally used in an automatic data-processing system'. The EC argued that a 'unit' may not be classified under HS1996 subheading 8471 60 unless it is used 'solely or principally' with an ADP system. This would exclude any unit that was principally used as a photocopier.

The Panel disagreed with the EC reading of the note:

7.1304 It seems to the Panel, that the European Communities' argument requires reading the term 'of a kind solely or principally used' as 'solely or principally used', which would deprive the phrase 'of a kind' of any utility.<sup>1698</sup> Therefore, we agree with Chinese Taipei's position, which seems to be the one of the European Court of Justice in the *Kip* judgment, that the inclusion of the phrase 'of a kind' means that a determination pursuant to Chapter Note 5(B)(a) requires an examination of the design and intended use of a product based on its objective physical characteristics, rather than a simple look at the actual use. This does seem to inform the conclusion, that with respect to units of a complete system, the issue is not actual use with the computer but whether the unit was designed or intended solely or principally for use with the computer system and also satisfies the criteria of Note 5(B)(b) and (B)(c), i.e., is capable of connecting to the central processing unit and able to accept or deliver data in a form (codes or signals) which can be used by the system.

Again following the relevant Appellate Body jurisprudence in for example *EC-Computer Equipment*, the Panel considered, under 'context', whether there was consistent customs classification practice of WTO Members that could be considered 'subsequent practice.'

7.1348 We are not convinced that any of the evidence adduced can demonstrate a 'consistent, common, and concordant' practice. Indeed, the BTIs submitted by the complainants demonstrate that even within the European Communities, national customs authorities did not necessarily follow the Commission's view on the classification of multifunction digital machines with a copying function. Likewise, in the United States, while customs headquarters may have had a consistent view,

<sup>30</sup> Appellate Body Report, *European Communities-Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, 9157.

it seems that at least one port director issued contrary classification rulings. We have no evidence of Japan's classification practice and we do not accept that a negotiation proposal in the ITA II for all the participants to provide duty-free treatment for products in subheading 9009 12 can serve as evidence of such practice.

7.1349 We do not believe the evidence of Chinese Taipei's classification practice, which is the practice of only one Member, can add to our understanding of what the Members intended when providing a concession for 'input or output units' of computers in subheading 8471 60.

Having found that, *prima facie*, printers with fax and photocopying capacity were classifiable under 8471 60, the Panel went on to examine whether they might also (at least in some instances) be classifiable under 9009 12, as the EC argued. Here the examination of the structure of the HS classification and certain related documents (the HSEN 1996) as 'context' influenced the Panel's conclusion that 9009 12 applied exclusively to copiers that performed analogue photocopying using an optical system thus excluding any multifunctional machine with a digital copying capacity. As the Panel noted, the HS material in question contained relatively precise descriptions of the components of the copiers covered by 9009 12 (e.g. lenses, mirrors, etc.), which suggested a common understanding that 9009 12 applied to analogue copying technology. The Panel rejected the EC argument that these descriptions merely reflected the understanding of the characteristic means of photocopying based on the technology available at the time, and should not be taken to limit the application of 9009 12 to photocopiers using newer (e.g. digital) technologies.

### 3.3 *Legal analysis*

#### *Introduction*

The Panel ruling as a whole seems to reflect a good appreciation or understanding of how a legal structure like the GATT tariff regime can contribute to realizing the economic gains from tariff reductions by providing economic actors sufficient certainty or predictability to reduce the transaction costs of making investment and other economic decisions in reliance on the opportunities provided by the liberalization of tariff barriers; even though arguably efficient in itself, unilateral voluntary (that is, legally unbound) tariff removal captured fewer of the gains of liberalization to the extent that uncertainty is costly and thus, at the margin, lack of legal certainty deters some otherwise efficient decisions by the economic actors in question. The Panel also, at several points, emphasizes the importance of publicness and transparency to the operation of WTO legal norms, assuming (rightly) that these values are not peripheral but central and integral to the rule of WTO law; this is an approach that resonates with the Global Administrative Law perspective on global governance elaborated by Richard Stewart, Benedict Kingsbury, and others. It represents a rejection of the notion of the GATT/WTO as a club or

insider epistemic community, where it is tolerable to shape the meaning of legal commitments in a manner that is hidden from the public generally, and more specifically from the economic actors that rely on these commitments. The Panel also is precise and scrupulous in its understanding and application of the previous relevant Appellate Body jurisprudence, and in some instances the Panel's summary of the jurisprudence is clearer than the actual case law on its face. Perhaps here having the former head of Appellate Body secretariat on the Panel was an advantage. At the same time, the manner in which the Panel at some points proceeds with its interpretative exercise under the VCLT seems clumsy and imprecise as a style of analysis in public international law. One example is the uncertainty or doubt suggested by the Panel as to whether the ITA would be considered a treaty under the definition in the VCLT.

With these general observations in mind, we now proceed to analyze critically the Panel's approach to a range of specific legal issues.

### *State responsibility and 'as such' violation claims*

We agree with the Panel's findings that the regulatory actions of the EC in dispute engage state responsibility in that they affect the predictability and legal certainty of its tariff bindings pursuant to Article II of the GATT.

The first conceptually rigorous and self-conscious statement of the problem of state responsibility in WTO law is to be found in the *US-S.301* Panel Report<sup>31</sup>:

When evaluating the conformity of national law with WTO obligations in accordance with Article XVI:4 of the WTO Agreement<sup>640</sup> account must be taken of the wide-ranging diversity in the legal systems of the Members. Conformity can be ensured in different ways in different legal systems. It is the end result that counts, not the manner in which it is achieved. Only by understanding and respecting the specificities of each Member's legal system, can a correct evaluation of conformity be established... As a general proposition, GATT *acquis*, confirmed in Article XVI:4 of the WTO Agreement and recent WTO panel reports, make abundantly clear that legislation as such, independently from its application in specific cases, may breach GATT/WTO obligations: (a) In GATT jurisprudence, to give one example, legislation providing for tax discrimination against imported products was found to be GATT inconsistent even before it had actually been applied to specific products and thus before any given product had actually been discriminated against.<sup>651</sup> (b) Article XVI:4 of the WTO Agreement explicitly confirms that legislation as such falls within the scope of possible WTO violations. It provides as follows: 'Each Member shall ensure the conformity of its *laws, regulations and administrative procedures* with its obligations...' The three types of measures explicitly made subject to the obligations imposed in the WTO agreements – 'laws, regulations and administrative procedures' – are

31 Paras. 7.24, 7.41.

measures that are applicable generally; not measures taken necessarily in a specific case or dispute. Article XVI:4, though not expanding the material obligations under WTO agreements, expands the type of measures made subject to these obligations.<sup>652</sup>

As the Panel went on to hold, the nature of the state responsibility engaged by the general statement in Article XVI:4, that is what measures in the nature of ‘laws, regulations and administrative procedures’ might violate the requirement to ensure conformity with WTO obligations can only be determined by analyzing the primary obligations that are the basis of the complainant’s claim. In that case, the Panel was dealing with DSU Article 23.

According to the Panel, *some* primary obligations engage state responsibility when the measure creates uncertainty or undermines the legal security of the expectations of private economic actors:

7.75 Providing security and predictability to the multilateral trading system is another central object and purpose of the system which could be instrumental to achieving the broad objectives of the Preamble ... The security and predictability in question are of ‘the multilateral trading system’. The multilateral trading system is, per force, composed not only of States but also, indeed mostly, of individual economic operators. The lack of security and predictability affects mostly these individual operators.

...

7.77 Trade is conducted most often and increasingly by private operators. It is through improved conditions for these private operators that Members benefit from WTO disciplines. The denial of benefits to a Member which flows from a breach is often indirect and results from the impact of the breach on the market place and the activities of individuals within it.

These observations would seem to apply very strongly to tariff concessions. Member’s schedules provide one of the most important kinds of information on the basis of which individual economic actors make investment and other economic decisions to exploit competitive opportunities in global markets. Thus, as the *US–S. 301* Panel held, the provisions of the Preamble of the WTO Agreement that refer to predictability are significant for understanding the nature of state responsibility. As we have seen, these preambular provisions were rightly appreciated by the instant Panel in its elaboration of primary obligations.

Regardless of the formalistic pleas of the EC, it is clear from the facts that the regulatory actions complained of in this case introduced an element of uncertainty, specifically with respect to whether certain market-driven technological innovations, if fully exploited by private economic actors, would undermine the possibility of relying on duty-free access. Such uncertainty is costly – as explained in the economic analysis – and thus the value of the concession is undermined in fact regardless of whether, in any given case, the EC were in the future to apply the regulatory actions to impose tariffs on any specific product that would otherwise be



subject to duty-free treatment pursuant to the ITA and the Headnote of the EC's schedule.

*Ordinary meaning, context, object, and purpose*

The Panel followed the methodology of first ascertaining ordinary meaning (using dictionaries and the like) and then considering context, object, and purpose. As has been very strongly argued in a previous ALI report by Horn and Weiler (2005), this may amount to hermeneutical absurdity: the proposition that one could ever have an ordinary meaning of a treaty term that is non-contextual. However, in fairness to the Panel, it was here applying the same methodology as the Appellate Body.

*The ITA Agreement and VCLT 31*

The Panel appears to have rather bent the language in Vienna Convention 31(2)(b) in characterizing the ITA as '(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty'. The use of 'subsequent' in the next subparagraph of VCLT 31 is a clear indication that the VCLT drafters did not mean 'in connection with the conclusion of the treaty' to refer to instruments that, temporarily, were negotiated and concluded at a later time than the treaty itself. This is obviously the case with the ITA. This is very clearly confirmed by the French text, which reads '*a l'occasion* de la conclusion du traite' (emphasis added). This makes it obvious that the instruments referred to are ones concluded simultaneously with the conclusion of the main treaty. There were other, more logical options available to the Panel to characterize the ITA as 'context'. First, VCLT 31(3)(a): 'any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions'; second, VCLT 31(3)(c): 'any relevant rules of international law applicable in the relations between the parties'. There are two reasons why the Panel may not have used one of these characterizations. The first is alluded to explicitly.

The Panel seems reticent to come to the conclusion that the ITA is a treaty or an 'agreement' within the meaning of VCLT. The VCLT definition of a treaty is as follows: 'an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'. The Panel might have been led to a margin of doubt as to whether the ITA constitutes an agreement or treaty because it is called a Ministerial Declaration. But the VCLT, as just noted, clearly specifies that the 'particular designation' of the instrument does not matter. Moreover, the ITA article 6 specifies that Article XXIII of the GATT, that is the WTO dispute-settlement system, applies to address nullification and impairment of benefits under the ITA, regardless of whether there is any claim of a GATT violation itself. In other words, the dispute-settlement system is applicable to the ITA autonomously. Given such applicability, it would seem absurd to think

that the ITA is something other than ‘an international agreement in written form and governed by international law’.

The second reason why the Panel might not have had resort to VCLT Article 31(3)(c) is due to an erroneous reading by an earlier Panel, *EC–Approval and Marketing of Biotech Products*,<sup>32</sup> of the expression ‘parties’ in 31(3)(c) as meaning that the other legal norm would have to be binding not just between the parties in the dispute, that is the parties engaged by the immediate exercise of treaty in treaty interpretation but *all* WTO Members. Under this reading, a plurilateral agreement such as the ITA would per se be excluded from consideration under VCLT 31(3)(c). A working group of the International Law Commission has persuasively criticized the *EC–Approval and Marketing of Biotech Products* interpretation of ‘parties’:

Bearing in mind the unlikelihood of a precise congruence in the membership of most important multilateral conventions, it would become unlikely [based on the panel’s interpretation that 31(3)(c) requires that every party to a treaty be bound by another instrument in order for that instrument to be taken into account in interpretation] *any* use of conventional international law could be made in the interpretation of such conventions. This would have the ironic effect that the more the membership of a multilateral treaty such as the WTO covered agreements expanded, the more those treaties would be cut off from the rest of international law. (Paras. 171–172)

Citing extensively the concerns of the ILC about ‘systemic integration’ in international law, the Appellate Body of the WTO, in a ruling subsequent to the Panel that is the subject of this report, *EC and Certain Member States–Large Civil Aircraft*,<sup>33</sup> has taken a different approach to the meaning of ‘parties’ in 31(3)(c), which allows, in some circumstances, for taking into account provisions of treaties to which not all WTO Members are parties:

844. . . . We note that the meaning of the term ‘the parties’ in Article 31(3)(c) of the Vienna Convention has in recent years been the subject of much academic debate and has been addressed by the ILC. While the participants refer to WTO panels that have addressed its meaning<sup>1914</sup>, the Appellate Body has made no statement as to whether the term ‘the parties’ in Article 31(3)(c) refers to all WTO Members, or rather to a subset of Members, such as the parties to the dispute.

845. An interpretation of ‘the parties’ in Article 31(3)(c) should be guided by the Appellate Body’s statement that ‘the purpose of treaty interpretation is to establish the common intention of the parties to the treaty.’ This suggests that one must exercise caution in drawing from an international agreement to which not

<sup>32</sup> Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, Add.1 to Add.9, and Corr.1, adopted 21 November 2006, DSR 2006:III-VIII, 847.

<sup>33</sup> Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011.

all WTO Members are party. At the same time, we recognize that a proper interpretation of the term ‘the parties’ must also take account of the fact that Article 31(3)(c) of the Vienna Convention is considered an expression of the ‘principle of systemic integration’ which, in the words of the ILC, seeks to ensure that ‘international obligations are interpreted by reference to their normative environment’ in a manner that gives ‘coherence and meaningfulness’ to the process of legal interpretation. In a multilateral context such as the WTO, when recourse is had to a non-WTO rule for the purposes of interpreting provisions of the WTO agreements, a delicate balance must be struck between, on the one hand, taking due account of an individual WTO Member’s international obligations and, on the other hand, ensuring a consistent and harmonious approach to the interpretation of WTO law among all WTO Members.

Here the Appellate Body suggests a case-by-case balancing approach, taking into account the need for an interpretation of WTO law that applies to all Members not only those that are bound by another treaty, as well as the broader interest of international law in general in ‘systemic integration’, a concern that goes beyond the WTO as a specialized regime to the coherence and legitimacy of the international legal system as a whole – the importance of an interpretation of rights and obligations in one regime not undermining those undertaken in other multilateral fora.

In *EC and Certain Member States–Large Civil Aircraft*, the Appellate Body did not need to go on to apply the approach it outlined to the specific dispute at issue, since it also found that the rules of the other treaty that was being invoked were not ‘relevant’ in the sense required by the VCLT. In the case of the ITA, while it is obviously a treaty to which only a subset of WTO Members adhere, the ITA creates expectations as to how the parties will schedule concessions which they are then bound to extend to *all* WTO Members. In this respect, considering the ITA would, we argue, have been consistent with the Appellate Body’s concern in *EC and Certain Member States–Large Civil Aircraft* about relevance to the common intentions of all WTO Members, when the agreement in question only binds a subset of them. Having found (probably wrongly) that the ITA fell under 31(2)(b), the Panel came to the conclusion that only the binding or operative provisions of the ITA would be relevant as context to the interpretation of the EC’s Annex to its schedule and Headnote. It is difficult to discern the logic of this distinction. In fact, the preamble of an Agreement might well be the part of the text that discloses most fully the parties’ intended relation of that Agreement to the main treaty instrument being interpreted, and therefore be highly relevant as ‘context’.

The fact that an instrument is being invoked as context hardly suspends the interpretative canons of VCLT 31(3)(c) in respect of that instrument. Invoking an instrument as context obviously requires that the instrument in question be *interpreted*: and where to go other than the VCLT for those rules of interpretation (at least if the instrument in question is a treaty). The VCLT rules, in turn, justify considering the preamble in interpretation.

*The autonomy of members to schedule non-HS-based concessions*

A major dimension of the EC defense was, as noted, the idea that the non-HS-based narrative description that made up the general concession in the Headnote was still subject to the proper classification of each individual product under the EC's HS classifications. In effect, the EC was saying that it should not have been understood as making a concession, or perhaps even that it could not, within the WTO tariff architecture, make a concession, that bypasses the HS entirely. The Panel, consistent with the Appellate Body ruling in *Chile–Price Band System*,<sup>34</sup> is clear and indeed adamant that WTO Members have the autonomy to create concessions using an entirely different or alternative nomenclature, conditions, or qualifications than those found in the HS system. What Members cannot do (as was clear in *Chile–Price Band System*) is to restructure their tariff bindings with the *result* that existing HS-based concessions are not honored, or the products to which they apply are not correctly classified based on HS nomenclature to six digits. Superimposition of additional, further liberalizing concessions based on a different methodology is entirely acceptable, provided it is consistent with MFN and transparency obligations in the GATT. There is a fine distinction but an important one: under the WCO system, there is a requirement to employ to six digits the HS classifications in the creation of domestic nomenclature; but the WTO permits additional liberalization commitments on *other grounds than the characteristics of products as denoted in the nomenclature*.

Howse and van Bork (2006) have made this point, and developed its significance, in the context of the WTO negotiations on Environmental Goods and Services. ‘WTO negotiators should regard themselves as the clients or “masters” of the HS; this classification system is there to serve their needs, not to impose disciplines and obstacles on trade liberalisation efforts . . . While the Harmonized System does not provide classifications that correspond to the “environmental” properties of products, WTO customs classification practice is flexible enough to accommodate “ex-outs” and national nomenclature below the six-digit classification level. The WTO Information Technology Agreement “B” list is an example where tariff liberalisation commitments have been made on products, without prejudice to their classification within the HS.’ The ruling of the instant Panel affords important certainty to WTO members that they may proceed to give preferential tariff treatment to products based on environmental or social criteria for example, and bind additional concessions on that basis, despite the lack of such a basis for distinguishing products in the existing HS system. Here we note that the autonomy from the HS, according to the Panel, goes so far as to preclude its use even as ‘context’ for the interpretation of concessions scheduled on alternative bases.

<sup>34</sup> Appellate Body Report, *Chile–Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3045 (Corr.1, DSR 2006:XII, 5473).

*Transparency*

The core of the EC's argument on transparency was that in order to be subject to transparency obligations in GATT Article X, regulatory activity has to have certain formal legal or administrative characteristics such that it can be said to come within the expression 'laws, regulations, judicial decisions and administrative rulings'. Had the Panel accepted this interpretation, the perverse consequence would have arisen that, by resorting to the most informal and indirect methods of achieving regulatory outcomes, that is the *least* transparent, Members would be able to circumvent the Article X transparency obligations in question. One finds a parallel here to the EC argument in the *EC–Asbestos* dispute<sup>35</sup> that outright bans on products fall outside the discipline of the TBT Agreement; had the Appellate Body not in that case reversed the Panel's acceptance of the EC argument, Members would be able to avoid TBT disciplines altogether – including ironically the requirement of least-trade restrictiveness – by adopting the *most* restrictive form of trade measure possible.

In sum, we commend the instant Panel's purposive interpretation that the expression 'laws, regulations, judicial decisions and administrative rulings' in Article X is intended to reach a very wide range of regulatory activity, regardless of the exact legal or administrative form that the activity takes in a particular domestic administrative and constitutional-law system.

*Article II of the GATT and ambiguity in classification*

As noted above in the summary of the Panel's findings concerning printers, the relevant EC concession pursuant to the ITA was based on an HS classification, and therefore interpretation of the HS system was the central issue with respect to this part of the complaint. As with the earlier *EC–Computer Equipment (LAN)* and *EC–Chicken Cuts* cases, the question was whether the product fell under one of two possible subheadings, and implicitly the degree of discretion of the member in question to resolve any ambiguity one way or the other. In the instant dispute, the complainants argued that the correct classification for the printers in question was subheading 8471 60, 'Automatic data-processing machines and units thereof; Input or output units, whether or not containing storage units in the same housing'. The European Communities insisted that in some cases, that is where the photocopying function of the device met certain performance standards, it was justified in classifying it instead under another concession under the EC Schedule, that is that of HS1996 subheading 9009 12 ('indirect process electrostatic photocopying apparatus').

In *EC–Chicken Cuts*, the Appellate Body had been faced with a situation where, arguably the product in question, chicken that was *both* frozen and salted, could

<sup>35</sup> Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243.

have been classified either under an HS subheading that applied to frozen chicken or one that applied to salted chicken. The Appellate Body held that in order to prove a violation of Article II of the GATT, the complainant had only to prove that the product *could* be classifiable under the subheading that provides the lower rate of duty (in this case the salted category); it did not have to show that the product was *incapable* of being classified under the alternative classification that carries with it a higher rate of duty. In effect, the Appellate Body refused to consider seriously the possibility that certain products might have a combination of characteristics such that they could be classified *plausibly or reasonably* in *either* of the two classifications. On this point, Horn and Howse (2008) criticized the Appellate Body for not considering explicitly the possibility that a Member's obligations under Article II of the GATT could be discharged: the case where a product could be classified reasonably and objectively under *either* of two headings, that is by applying the duty corresponding to *either* heading, not necessarily the lower rate of duty associated with one of the two.

With respect to printers with photocopying and fax capacity, the Panel noted that the WCO in its response to the Panel's questions concerning the meaning 'of a kind' suggested that given that the WCO had not taken a view on this nomenclature, that it was left to individual administrations to interpret on a product-by-product basis:

7.1303 In response to a question posed by the Panel on the meaning of the phrase 'of a kind' in Note 5(B)(a), the WCO Secretariat explains that the Nomenclature Committee considered the issue, but declined to issue an Interpretative Rule defining the expression. Therefore, in the WCO Secretariat's view, it would 'seem reasonable to conclude that the Nomenclature Committee was, in effect, leaving the interpretation of the expressions to each administration to apply, on a case-by-case basis, in the context of classifying specific articles.'

Despite the WCO raising the possibility of a margin of deference to individual Member's interpretations of terms left open-ended or not fully defined by the WCO, the Panel – here following it would seem the approach of the Appellate Body in *EC–Chicken Cuts* – suggests that it is for the Panel to determine the correct interpretation of each term in a Member's schedule, not merely whether the Member's interpretation for customs-administration purposes is an objective and reasonable one. One of the challenges in relying upon definitive interpretations by the WCO – as opposed to non-binding advice from its Secretariat – is that the HS Committee, which alone can issue such definitive interpretations, meets only twice a year. There is no obvious basis in the DSU for the equivalent of *lis alibi pendens*, which would allow suspension of a WTO dispute-settlement proceeding pending a definitive interpretation by the HS Committee. In the absence of *lis alibi pendens*, the Panel focusing its inquiry not on the correctness but the reasonable and objective character of the Member's classification practice has the salutary effect of not preempting, as it were, a subsequent definitive interpretation by the WCO.

Nevertheless, it is notable (and somewhat of an improvement over the Appellate Body's approach in *EC–Chicken Cuts*) that the Panel did feel it necessary to consider not just the scope of the 'input output' classification but also the competing photocopier classification. Of course, as noted, the Panel found that the latter applied only to analogue photocopiers. The result was that the Panel was able to determine not only that the products at issue could be classified under the first concession, but also that they could not be classified under the latter. This raises the issue of what the Panel would have done had it found that the photocopier classification *also* applied to digital copying technologies. There is a hint in its discussion of set-top boxes of what the Appellate Body would have done in such a situation and that it would have applied a somewhat different logic than the Appellate Body in *Chicken Cuts* – namely, the Panel might have held that, on a product-by-product basis, it was for the EC to make a holistic judgment about whether, given all of the relevant characteristics and functions of each product, it made more sense to classify it as 'input – output' or a photocopier. This implies a degree of discretion to make a good-faith determination, based on all the relevant characteristics of a product, as to whether it falls into one of two possible or plausible classifications (because each captures some salient features of the product or combination thereof), even if the exercise of this discretion may result in choosing the classification to which the higher rate of duty applies.

But the underlying conceptual issue, avoided or ignored by the Appellate Body in *EC–Chicken Cuts* and not directly engaged by the instant Panel, could be framed as follows: if we acknowledge a genuine, irreducible element of ambiguity, which *cannot* be resolved by a Member's good-faith application of HS rulings, guidelines etc., is the nature of state responsibility under Article II such that a Member is always required to apply the classification that results in the lower rate of duty? If we return to our discussion of state responsibility above, and the significance we attached to providing certainty and predictability to private economic actors with a view to maximizing the welfare gains from tariff liberalization, such a *lex specialis* of state responsibility may make sense, at first glance. At the same time, it would risk some private economic actors manipulating the characteristics of products so as to create ambiguity, on the basis of knowing that ambiguity will always result in the *lower* rate of duty being applied.

#### 4. Conclusions

The broad objective of the ITA was to achieve 'maximum freedom of world trade in information technology products' and 'encourage the continued technological development of the information technology industry on a world-wide basis'.

In our view, the Panel's ruling helps to achieve this goal, by effectively expanding the list of duty-free products to all newly developed multifunctional products that combine features of products that are in the ITA with features of other products that were left out of the ITA. Eliminating EU tariff measures on complex

multifunctional products can give rise to large welfare gains for EU consumers and foster the development of new technologies.

On 25 June 2011, the EU published a regulation providing duty-free treatment for many multifunctional devices. However, the United States, Taiwan, and Japan have all expressed concerns about the measures undertaken by the EU, arguing that they do not comply with the WTO recommendations and rulings. First, some multifunctional ITA products are still subject to import tariffs.<sup>36</sup> Second, the measures are very ambiguous, so it is not clear how customs authorities in the EU will interpret them. Depending on the port of entry, the same ITA products may receive duty-free treatment or be subject to duties. The dispute on the tariff treatment of IT products may thus be far from over, since the EU's implementation of the WTO's Panel Report will likely result in continued litigation.

## References

- Aghion, Philippe and Peter Howitt (2009), *The Economics of Growth*, Cambridge, MA: MIT Press.
- Arrow, Kenneth J. (1962), 'Economic Welfare and the Allocation of Resources for Invention', in Richard R. Nelson (ed.), *The Rate and Direction of Inventive Activity: Economic and Social Factors*, Report of the National Bureau of Economic Research, Princeton, NJ: Princeton University Press, pp. 609–625.
- Baldwin, Robert E. and Christopher S. Magee (2000), 'Is Trade Policy for Sale? Congressional Voting on Recent Trade Bills', *Public Choice*, 105(1–2): 79–101.
- Ben-David, Dan (1993), 'Equalizing Exchange: Trade Liberalization and Income Convergence', *The Quarterly Journal of Economics*, 108(3): 653–679.
- Bernard, Andrew B., Jonathan Eaton, J. Bradford Jensen, and Samuel S. Kortum (2003), 'Plants and Productivity in International Trade', *The American Economic Review*, 93(4): 1268–1290.
- Blonigen, Bruce A. and David N. Figlio (1998), 'Voting for Protection: Does Direct Foreign Investment Influence Legislator Behavior?', *The American Economic Review*, 88(4): 1002–1014.
- Broda, Christian, and David E. Weinstein (2006), 'Globalization and the Gains from Variety', *The Quarterly Journal of Economics*, 121(2): 541–585.
- Bustos, Paula (2011), 'Trade Liberalization, Exports, and Technology Upgrading: Evidence on the Impact of MERCOSUR on Argentinian Firms', *The American Economic Review*, 101(1): 304–340.
- Conconi, Paola, and Carlo Perroni (2009), 'Do Credible Domestic Institutions Promote Credible International Agreements?', *Journal of International Economics*, 79(1): 160–170.
- Conconi, Paola, Giovanni Facchini, and Maurizio Zanardi (2011), 'Policymakers' Horizon and Trade Reforms', CEPR Discussion Paper 8561.
- Dreyer, Iana and Brian Hindley (2008), 'Trade in Information Technology Goods: Adapting the ITA to 21st Century Technological Change', European Centre for International Political Economy (ECIPE) Working Paper No. 06/2008.
- Edwards, Sebastian (1998), 'Openness, Productivity and Growth: What Do We Really Know?', *The Economic Journal*, 108(447): 383–398.

<sup>36</sup> For example, with respect to multifunction machines, the EU has provided for a new tariff of 2.2% on any device with the 'principal function' of 'digital copying'. The EU Customs Code Committee has put forward a multifunctional device's copying speed as the decisive criterion for its classification.



- Feenstra, Robert C., Benjamin R. Mandel, Marshall B. Reinsdorf, and Matthew J. Slaughter (2009), 'Effects of Terms of Trade Gains and Tariff Changes on the Measurement of US Productivity Growth', NBER Working Paper No. 15592.
- Goldberg, Pinelopi Koujianou and Giovanni Maggi (1999), 'Protection for Sale: An Empirical Investigation', *The American Economic Review*, 89(5): 1135–1155.
- Horn, Henrik and Robert Howse (2008), 'European Communities–Customs Classification of Frozen Boneless Chicken Cuts', in Henrik Horn and Petros C. Mavroidis (eds.), *The American Law Institute: The WTO Case Law of 2004–2005: Legal and Economic Analysis*, Cambridge: Cambridge University Press, pp. 9–38.
- Horn, Henrik and Joseph H. H. Weiler (2005), 'European Communities–Trade Description of Sardines: Textualism and its Discontent', in Henrik Horn and Petros C. Mavroidis (eds.), *The WTO Case Law of 2002: The American Law Institute Reporters' Studies*, Cambridge: Cambridge University Press, pp. 248–275.
- Howse, Robert and Robert W. Staiger (2006), 'United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products From Japan (AB-2003-5, WT/DS244/AB/R): A Legal and Economic Analysis of the Appellate Body Ruling', in Henrik Horn and Petros C. Mavroidis (eds.), *The WTO Case Law of 2003: The American Law Institute Reporters' Studies*, Cambridge: Cambridge University Press, pp. 31–51.
- Howse, Robert and Petrus B. van Bork (2006), 'Options for Liberalizing Trade in Environmental Goods in the Doha Round', ICTSD Trade and Environment Series Issue Paper No. 2, International Centre for Trade and Sustainable Development, Geneva, Switzerland.
- Jenkins, Henry (2006), *Convergence Culture: Where Old and New Media Collide*, New York: New York University Press.
- Krugman, Paul R. (1979), 'Increasing Returns, Monopolistic Competition, and International Trade', *Journal of International Economics*, 9(4): 469–479.
- Maggi, Giovanni and Andrés Rodríguez-Clare (1998), 'The Value of Trade Agreements in the Presence of Political Pressures', *Journal of Political Economy*, 106(3): 574–601.
- Maggi, Giovanni and Andrés Rodríguez-Clare (2007), 'A Political-Economy Theory of Trade Agreements', *The American Economic Review*, 97(4): 1374–1406.
- Matsuyama, Kiminori (1990), 'Perfect Equilibria in a Trade Liberalization Game', *The American Economic Review*, 80(3): 480–492.
- Melitz, Marc J. (2003), 'The Impact of Trade on Intra-Industry Reallocations and Aggregate Industry Productivity', *Econometrica*, 71(6): 1695–1725.
- Miyagiwa, Kaz and Yuka Ohno (1999), 'Credibility of Protection and Incentives to Innovate', *International Economic Review*, 40(1): 143–163.
- Pavcnik, Nina (2002), 'Trade Liberalization, Exit, and Productivity Improvements: Evidence from Chilean Plants', *The Review of Economic Studies*, 69(1): 245–276.
- Rodríguez, Francisco and Dani Rodrik (2001), 'Trade Policy and Economic Growth: A Skeptic's Guide to the Cross-National Evidence', Ben Bernanke and Kenneth S. Rogoff (eds.), *Macroeconomics Annual 2000*, Cambridge, MA: MIT Press for NBER, pp. 261–338.
- Sachs, Jeffrey D. and Andrew Warner (1995), 'Economic Reform and the Process of Global Integration', *Brookings Papers on Economic Activity*, (1): 1–118.
- Staiger, Robert W. and Guido Tabellini (1987), 'Discretionary Trade Policy and Excessive Protection', *The American Economic Review*, 77(5): 823–837.
- Trefler, Daniel (2004), 'The Long and Short of the Canada – US Free Trade Agreement', *The American Economic Review*, 94(4): 870–895.