A REVIEW OF THE WTO DISPUTE ON THE EUROPEAN UNION TARIFF TREATMENT OF FLAT PANEL DISPLAYS

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INTRODUCTION

The Information Technology Agreement (ITA)[1] has facilitating growth in the information technology (IT) sector.[2] The IT industry has undergone rapid change since the ITA was negotiated more than a decade ago. The number of multifunctional products has increased dramatically and many IT products have incorporated new technological features that were unavailable when the ITA was negotiated. However, the ITA has remained the same since its inception and there has been a growing need for better and more current trading and regulatory regimes in the IT sector.

The World Trade Organization (WTO) dispute in 2008 on the tariff treatment of flat panel displays raised the very issue of whether the decade-old

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[1] WTO, Ministerial Declaration on Trade in Information Technology Products (held on 13 December 1996), WTO Doc WT/MIN(96)/16, online: WTO <http://docsonline.wto.org>.

[2] Ian Dreyer & Brian Hindley, *Trade in Information Technology Goods: Adapting the ITA to 21st Century Technological Change* (2008) [unpublished, archived at <http://www.ecipe.org/media/publication_pdfs/trade-in-information-technology-goods-adapting-the-itata-to-21st-century-technological-change.pdf>] at 3.

ITA is still relevant to the current products and trade in technology. This is the only WTO decision on the ITA to date.

The WTO dispute on flat panel displays[3] arose between the United States, Japan, Taiwan (the "Complainants") and the European Union (EU)[4].[5] The EU enacted a series of regulations which automatically excluded monitors with certain characteristics from receiving tariff free treatment. The Complainants were of the view that the EU must provide tariff free treatment to monitors in accordance with the EU Schedule of Concessions to the *General Agreement on Tariffs and Trade* (GATT) and the ITA. However, the EU was of the view that these monitors did not fall within the scope of the ITA.[6] The WTO Panel set out to determine whether the EU had violated Articles II:1(a) and II:1(b) of the GATT by imposing tariffs on monitors that would otherwise be tariff free.[7]

The ITA only eliminates tariffs on a small number of consumer electronic goods. When it was negotiated, few IT products were multifunctional and it was easy to determine whether a product was covered by the ITA. This is not the trend in which technology has developed. The central problem surrounding the dispute on flat panel displays was the issue of how to classify multifunctional products that combined features of

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[3] For simplicity and ease of understanding, flat panel displays* may be thought of and referred to as monitors.

[4] For legal reasons, the European Union is officially known as the European Communities (EC) within the WTO. The European member states coordinate their positions in Brussels and Geneva, and the European Commission speaks for all members at the WTO meetings and affairs. This Paper will refer to the European member states as the EU, which is probably the more familiar term for readers.

[5] Three types of electronic products were litigated in this dispute: flat panel display devices, set-top boxes with a communication function, and multifunctional digital machines. The Panel decided to issue its Reports in the form of a single document constituting three Panel Reports, each of the Reports relating to each one of the three complainants in this dispute. The scope of this Paper is limited to the Panel's decision on flat panel display devices.

[6] *European Communities and its Member States–Tariff Treatment of Certain Information Technology Products* (2010), WTO Doc WT/DS375, 376, 377/R at para 2.1 (Panel Report), online: WTO <http://docsonline.wto.org>.

[7] Article II:1(a) states: Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement. Article II:1(b) states: The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, 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. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.

electronics identified in the ITA with features not identified in the ITA.[8] While the WTO decision correctly applied a broad interpretation to the ITA provisions, it does not provide clear guidance on determining whether a product is within the ITA for future disputes.

Part I of this Paper will provide a brief background to the ITA and the classification system used for IT products. Part II will briefly review the WTO decision on the dispute of flat panel displays. Part III will discuss the policy implications of the decision and provide suggestions for reform.

A Brief Background of the ITA

History, Current Status, Economic Impact and Objectives of the ITA

The ITA was signed during the WTO Ministerial Conference in Singapore in December 1996. The agreement came into force on April 1, 1997.[9] It was accepted by 44 countries accounting for approximately 90 percent of the world trade in the covered products.[10]There are three basic requirements to become an ITA participant: (1) all products listed in the agreement must be covered, (2) all tariff must be reduced to zero, either immediately or through equally-staged tariff reductions by 2000, and (3) all other duties and charges must be bound at zero.[11]

The ITA has now grown to 68 participants, accounting for approximately 97 percent of the world trade in IT products.[12] The agreement is perhaps the most significant trade liberalization that has taken place in the WTO since its creation.[13] The trade in IT goods has more than doubled[14] and the ITA has led to more efficient global production and reduced cost.[15] The tariff elimination has also been credited for stimulating economic

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[8] *Supra* note 2 at 2.

[9] *Supra* note 1 at 4.

[10] Catherine L Mann & Huepeng Liu, "Information Technology Agreement: Sui Generis or Model Stepping Stone?" (Paper prepared for WTO-HEI Conference Geneva, 10-12 September 2007) at p 8.

[11] WTO, *Information Technology Agreement* – Introduction, online: World Trade Organization <http://www.wto.org>.

[12] *Ibid.*

[13] Hosuk Lee-Makiyama, *Future-Proofing World in Technology: Turning the WTO IT Agreement (ITA) into the International Digital Economy Agreement (IDEA)* [unpublished, archived at <http://www.wto.org/english/tratop_e/serv_e/wkshop_june13_e/future_proofing_e.pdf>] at 3.

[14] Between the years 1996 and 2008, the share of ITA products traded was estimated to have grown 10.1% annually, rising from USD 1.2 trillion to USD 4.0 trillion.

[15] Tsai-Yu Lin, "Systemic Reflection on the EC-IT Product Case Establishing an 'Understanding" on Maintaining the Product Coverage of the Current Information Technology Agreement in the Face of Technological Change" (2011) 45:2 JWT at 402.

development, as the IT sector contributes significantly to productivity growth in other sectors and the world economy as a whole.[16] The objective of the ITA is to achieve maximum free trade of IT products and to encourage development of the IT industry.[17] The concessions made between ITA members are extended to all WTO members on the most favoured nation basis.[18]

Product Coverage and Modality

The ITA covers products in six general categories: (1) computers, (2) semi-conductors, (3) semi-conductor manufacturing equipment, (4) telecom apparatus, (5) instruments and apparatus, (6) data storage media and software, and parts and accessories to these six main categories.[19]

The product coverage of the agreement is described by paragraph 2 of the ITA:

> Pursuant to the modalities set forth in the Annex to this Declaration, each party shall bind and eliminate customs duties and other duties and charges of any kind, within the meaning of Article 11:1(b) of the General Agreement on Tariffs and Trade 1994, with respect to the following:
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> (a) all products classified (or classifiable) with Harmonized System (1996)
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> ("HS") headings listed in Attachment A to the Annex to this Declaration; and

[16] Shin-Yi Peng, "Taxing Innovation?—The Evolving Coverage of the Information Technology Agreement" (2010-2011) 64:1 Tax L at 79.

[17] *Supra* note 1.

[18] This structure of the ITA is vulnerable to the free-rider problem whereby members might reap the benefits from the tariff eliminations while standing outside the ITA and not giving any concessions in return. However, this problem has not had significant impact on the ITA because its participant members already account for 97% of the global trade in IT products.

[19] For ease of understanding, these products are examples of each category: (1) laptops, personal computers, (2) transistors, microprocessors (4) telephones, pagers, mobile phones (5) cash registers, electronic calculators (6) CDs, floppy disks; See Roy Santana, "Information Technology Agreement: Classification Divergences" (Lecture delivered at the WTO Symposium on the 15th Anniversary of the Information Technology Agreement, 15 May 2012).

> (b) all products specified in Attachment B to the Annex to this Declaration,
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> whether or not they are included in Attachment A; through equal rate reductions of customs duties beginning in 1997 and concluding in 2000, recognizing that extended staging of reductions and, before implementation, expansion of product coverage may be necessary in limited circumstances.

Product coverage is listed in Attachments A and B.[20] Attachment A specifies products by tariff heading using the HS nomenclature. It consists of a table with HS headings, sub-headings and their corresponding descriptions.[21] Certain headings and subheadings are "ex-outs", indicating that only a subset of products in the heading are bound to the specified duty.[22] Attachment B contains a list of specific products, in plain language, that are covered by the agreement.[23]

The Annex to the ITA, titled "Modalities and Product Coverage", provides the method for tariff elimination:

> Each participant shall incorporate the measures described in paragraph 2 of the Declaration into its schedule to the General Agreement on Tariffs and Trade 1994l, and in addition, at either its own tariff line level or the Harmonized System (1996) ("HS") 6-digit level in either its official tariff or any other published versions of the tariff schedule, whichever is ordinarily used by importers and exporters. Each participant that is not a Member of the WTO shall implement these measures on an autonomous basis, pending completion of its WTO accession, and shall incorporate these measures into its WTO market access schedule for goods.[24]

Each ITA participant has modified their Schedule of Concessions to the GATT to incorporate the products in the Attachments.[25]

The ITA requires its participants to meet periodically to review product coverage and determine if more products should be added to the agreement.[26] However, attempts to expand the product coverage have failed

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[20] *Supra* note 1 at 2.
[21] *Ibid.*
[22] *Supra* note 2 at 11.
[23] *Ibid.*
[24] *Supra* note 1 at Annex.
[25] *Ibid.*
[26] *Supra* note 1 at Annex.

and no new products have ever been added to the Attachments since its creation.

The HS Nomenclature

The HS establishes an international standard of product nomenclature for more than five thousand commodity groups.[27] Its aim is to standardize trade documentation and reduce the cost of re-classifying goods.[28] Over two hundred countries use the system for customs tariffs and the collection of international trade statistics.[29] The HS system identifies goods by a six-digit code. The first four-digits indicate the product groups, and the subsequent two-digits indicate the subcategory of the product group.[30]

Each country may create their own country specific codes as long as it is added after sixth digit of the HS.[31] For example, the EU uses an eight-digit code by adding two unique digits of its own. The EU tariff system is known as the Combined Nomenclature (CN).[32] Interpretation of the HS is informed by several sources. The HS Convention sets out six general rules for the code's interpretation and uniform application.[33] These six general rules are applied in order beginning with the first rule and proceeding to subsequent rules only if necessary.[34]

The HS Explanatory Notes (HSEN) is another useful interpretative guide. The HSEN contains classification opinions and advice from the HS Committee.[35] The HS Committee, with representatives from various countries, is responsible for proposing amendments to the HS according to the needs and changes in the IT sector.[36] The HS has been partially amended every four to six years since it came into force in 1988.[37] The next part of this Paper will review the WTO Panel decision on the ITA dispute.

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[27] *Supra* note 6 at 7.31.

[28] The HS was established under the "International Convention on Harmonized Commodity Description and Coding System" and entered into force on January 1, 1988.

[29] *Supra* note 6 at 7.33.

[30] The first two digits indicate the chapter to which they correspond and the two subsequent digits indicate the position within the heading of a particular chapter; *Supra* note 6 at 7.32.

[31] *Supra* note 6 at 7.33.

[32] *Ibid* at 7.49.

[33] *Ibid* at 7.34; The first five rules relate to the four-digit headings, while rule six relates to the classification in the five or six-digit subheading.

[34] *Ibid.*

[35] *Ibid* at 7.35.

[36] *Ibid.*

[37] The preamble of the HS Convention recognizes that it is important keep the HS updated with changes in technology and international trade.

The WTO Dispute on Flat Panel Displays

Background and Facts

According to the ITA, the EU agreed to eliminate tariffs on monitors that fall within the scope of Attachment B and tariff item number 8471 60 in Attachment A.[38] Computer monitors were given tariff free treatment under the ITA.[39] Since 2005, however, the EU has applied a 14 percent tariff to certain monitors by classifying them under CN codes 8528 59 10 ("black and white or other monochrome monitors") and 8528 59 90 ("colour monitors").[40] The EU was of the view that computer monitors which can also function as video and television monitors do not fall within the scope of its ITA concessions.

The Products at Issue

The Panel categorized the monitors in this dispute into two types:

1. Flat panel display devices that are capable of connecting to an automatic data-processing machine[41] (ADP) and are also capable of reproducing video images from a source other than an ADP, and

2. Flat panel display devices that are capable of connecting to an ADP and have a DVI connector, whether or not they are capable of receiving signals from another source.[42]

The EU Measures at Issue

A series of regulations enacted by the EU were considered by the Panel:

1. CNEN 2008/C 133/01
2. Commission Regulation no 634/2005

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[38] *Supra* note 6 at 7.700.
[39] See Santana, *Supra* note 19.
[40] *Supra* note 6 at 7.740.
[41] For ease of understanding, an example of an automatic data processing machine is a computer.
[42] *Supra* note 6 at 7.729.

3. Commission Regulation no 2171/2005
4. Commission Regulation no 179/2009

The first three regulations directed customs authorities to classify the monitors at issue as either "colour monitors" (CN code 8528 59 90) or "monochrome monitors" (CN code 8528 59 10), which are each subject to 14 percent tariff rate.[43] The fourth regulation temporarily suspended duty on monitors classified under the two codes mentioned above. However, to qualify for the duty suspension, the monitors must meet specific aspect ratios and must not be wider than 19 inches. The EU's reasoning was that monitors larger than 19 inches were likely to be used as television monitors.[44] The Panel's analysis of these regulations will be discussed later in this section.

The Position of the EU

The EU excluded two general types of monitors from tariff free treatment. The first type was a monitor that can connect to a computer and sources other than a computer, such as digital cameras and DVD players.[45] The second excluded type was any monitor fitted with a DVI, HDMI or other similar connectors that makes it possible for the monitor to receive signals from non-ADP sources.[46] Essentially, the EU limited tariff free treatment to monitors that can only connect to and accept signals from a computer.

The EU was of the view that the ITA should no longer cover a product if it gains the ability to operate with a non-ITA product. Also, the ITA should no longer cover a product if it incorporates a new technological feature. Non-ITA products were expressly excluded from the agreement when the agreement was negotiated and these products should not be covered now.[47] Similarly, new technological features that have emerged after the conclusion of the ITA negotiations were not contemplated by agreement and parties to the ITA should not be obligated to eliminate tariffs for these products.[48]

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[43] *Ibid* at 7.740.
[44] *Supra* note 16 at 416.
[45] *Supra* note 6 at 7.257.
[46] *Supra* note 6 at 7.257.
[47] European Union, "First Written Submission of the European Communities, European Communities and Its Member States—Tariff Treatment of Certain Information Technology Products" (2 April 2009), online: Trade Websites European Commission <http://trade.ec.europa.eu> at para 50.
[48] *Ibid.*

The Position of the Complainants

The Complainants argued that the monitors at issue are covered by the description in Attachment B and tariff item number 8471 60 90 of the EC Schedule.[49] The relevant section of Attachment B provides:

> Flat panel displays (including LCD, Electro Luminescence, Plasma and other technologies) *for* products falling *within this agreement, and parts thereof* (emphasis added).[50]

The Complainants asserted that the correct interpretation of the word "for" in the above provision should be "also for". Whereas according to the EU, the correct interpretation is "only for".[51] Also, the Complainants argued that since the ITA covered computers, then all monitors that can work with a computer would fulfill the term "products falling within this agreement".[52] Therefore all of the monitors at issue would fall within the scope of the narrative description in Attachment B. The Complainants further argued that the EU's narrow interpretation of the concessions would undermine the value of the ITA and discourage innovation and development, leading to rising prices for consumers.[53]

Issues to be Determined by the Panel

The Panel considered the following issues: (1) whether the monitors at issue are within the scope of the tariff concessions made by the EU; (2) whether the EU was acting in violation of Articles II:1(a) and II:1(b) of the GATT; and (3) whether products with non-ITA functions or new technological features would be disqualified from ITA coverage.[54] Without getting into the technical details and treaty interpretation of the Schedule of Concessions, the next part of this Paper will discuss the decision of the Panel. The discussion will focus on the Panel's interpretation of the narrative

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[49] See: *Supra* note 6.
[50] *Supra* note 1.
[51] *Supra* note 51 at 116.
[52] United States, "First Written Submission of the United States, European Communities and Its Member States—Tariff Treatment of Certain Information Technology Products", (5 March 2009) online: Office of the United States Trade Representative <http://www.ustr.gov> at para 56.
[53] *Ibid.*
[54] See *Supra* note 6.

description in Attachment B, tariff item number 8471 60 90 and the EU regulations as identified previously.

Decision of the Panel: Narrative Description Concession

Regarding the narrative product description, the Panel held:

> [...] The concession refers to certain apparatus or devices that have a flat display and are generally thinner than conventional CRT displays or monitors, and are designed for visual presentation of data or signals from products falling with in the ITA, including notably, automatic data-processing machines.[55]

In interpreting the narrative concession, the Panel noted that the concession does not expressly limit the technical characteristics of the product, such as the screen size, dimension, and the type of connectors it may possess.[56] The Panel saw no reason to exclude a product that would otherwise fall within the concession simply because it was fitted with a DVI or HDMI connector.[57] The Panel also concluded that the concession does not limit monitors to only connect to a computer or products within the ITA.[58] Therefore, monitors that can connect to non-ITA sources may receive tariff free treatment.

It should be noted the Panel did not necessarily extend the narrative concession to cover all the monitors at issue. The mere capability to receive signals from computers is not enough to qualify a product as an ITA product. Rather, the product must also provide an "acceptable level of functionality or operability".[59] If the resolution of a certain monitor does not meet the required specification to display signals from a computer, then it would not satisfy the "functionality or operability" test, thereby rendering it a non-ITA product.[60] No further clarification of the "acceptable level of functionality or operability" test was provided in the Panel decision.

The Panel was doubtful that the negotiators in 1996 did not contemplate the existence of monitors that can accept signals from multiple sources.[61] However, even if the EU was factually correct on this point, the

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[55] *Ibid* at 7.728.
[56] *Ibid.*
[57] *Ibid* at 7.730.
[58] *Ibid.*
[59] *Ibid* at 7.731.
[60] *Ibid.*
[61] *Ibid* at 7.599.

Panel concluded that this argument was of limited relevance.[62] The Panel held that the incorporation of newer technology into a product does not necessarily exclude that product from ITA coverage. Whether a product falls within the scope of the concessions was an issue determined by statutory interpretation.[63]

Decision of the Panel: Scope of Tariff Item Number 8471 60 90

The description of tariff item number 8471 60 90 provides:

> Automatic data-processing machines and units thereof; input or output units, whether or not containing storage units in the same housing;[64]

On the interpretation of an "input or output unit" in the above provision, the Panel held:

> "input or output unit" within the meaning of tariff item number 8471 60 90 is a device that forms part of an "automatic data-processing machine", is "of a kind solely or principally used by an automatic data-processing system", and that performs at least one specified function that involves accepting or delivering data in a form (codes or signals) that can be used by the automatic data-processing machine or "automatic data-processing machine system". More specifically, tariff item number 8471 60 90 of the EC Schedule covers all "input or output units" of an automatic data-processing machine that are not "for use in civil aircraft" (8471 60 10), "printers" (8471 60 40) or "keyboards" (8471 60 50).[65]

The Panel was not persuaded that the monitors at issue would necessarily fall outside the scope of "input or output units".[66] However, it should not be automatically assumed that all monitors at issue would necessarily fall within this concession either. It is possible for some products to fall into other tariff headings. Whether a particular product falls within the scope of this tariff number should be determined on a case-by-case basis. All

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[62] *Ibid* at 7.601.
[63] *Ibid.*
[64] See Santana, *Supra* note 19.
[65] *Supra* note 6 at 7.333.
[66] *Ibid* at 7.734.

the objective characteristics of the product must be taken into consideration.[67]

Decision of the Panel: The Regulations at Issue

The Panel proceeded to review whether the series of EU regulations amounted to a breach of Articles II:1(a) and II:1(b) of the GATT. To find a breach of Article II:1(b), the regulations must impose tariffs in excess of the tariff rate in the EC Schedule.

The Panel found that automatically classifying the monitors at issue under tariff codes with a 14 percent duty rate was in excess of the EU Schedule. This was inconsistent with Article II:1(b).[68] However, one of the regulations temporarily suspended the tariff for products classified under these codes as long as the product was 19 inches or less and met a specific aspect ratio.[69] This duty suspension regulation removes any inconsistency with Article II:1(b).[70] In the event that the duty suspension regulation could not be applied to a product, or if the duty suspension regulation was repealed, then the EU would be in a violation of Article II:1(b).[71]

The Panel then considered whether the regulations were inconsistent with Article II:1(a) of the GATT, even when the duty suspension was in effect. The Panel, quoting the decision in *Korea–Various Measures on Beef*, stated that:

Whether imported products are treated "less favorably" should be assessed by examining if a measure modifies the conditions of competition in the relevant market to the detriment of imported products. The test does not require an examination of the actual effects of the contested measure in the marketplace in order to demonstrate inconsistency.[72]

The duty suspension currently in place was not permanent and was set to expire automatically.[73] The regulation was subject to biannual reviews and required a formal extension to remain in effect. However, there was no specific conditions for its non-renewal and it may expire, be repealed, or be amended to increase or decrease coverage at any time. The Panel concluded

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[67] *Ibid.*

[68] *Supra* note 6 at 7.742.

[69] For greater clarity, the temporary duty suspension measure was Council Regulation No 179/2009.

[70] *Ibid* at 7.743.

[71] *Ibid* at 7.744.

[72] *Korea–Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (2000), WTO Doc WT/DS161, 169/AB/R at para 137 (Appellate Body Report), online: WTO <http://docsonline.wto.org>.

[73] *Supra* note 6 at 7.759.

that the duty suspension does not eliminate the inconsistency with Article II:1(a) because there was still the potential of deleterious effects on competition.[74]

Summary of Key Conclusions

The Panel adopted a broad interpretation of the ITA and found that the concessions could apply to multifunctional products. Some of the monitors at issue could fall within the scope of the narrative description in Attachment B and tariff number 8471 69 90. However, the monitors at issue may not always fall within the scope of these concessions. The test to be applied in making the determination is whether the product provides an "acceptable level of functionality or operability", and all objective characteristics of the product should be given consideration.

The next part of this Paper will discuss the competing policy perspectives of this dispute, the policy implications of the Panel's decision and provide suggestions for reform.

Competing Policy Perspectives of this Dispute

Within the last decade, IT products have become multifunctional and evolved towards technological convergence.[75] Different devices with separate functions are merged into a single device capable of performing all functions simultaneously.

The WTO needs to establish a trading and regulatory regime that recognizes the impact of technological convergence.[76] One significant ambiguity of the ITA is whether the commitments made by its signatories are an "open-ended" list capable of incorporating "new" products.

One approach is to read the ITA Attachments as a closed list of concessions. The EU viewed the monitors at issue as fundamentally different products than the monitors defined in the ITA. The monitors at issue blurred the line between commitments taken and those explicitly not taken under the ITA.[77] The EU viewed the concessions as an obligation to eliminate tariffs on monitors that existed when the agreement was negotiated. Therefore, the concessions cannot be interpreted to cover new technology. A new product

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[74] *Ibid* at 7.760.
[75] *Supra* note 16 at 92.
[76] Jeffrey A Hart, "The Continuing Role of State Policy" (2006) 58 Fed Comm L J 215.
[77] *Supra* note 51 at 47.

cannot be assumed to fall within the scope of the concessions just because it performs similar functions.[78]

The competing approach is to read the existing commitments accordingly as the IT sector is "organic and technologically innovative".[79] Otherwise, the ITA would lose its relevance once the IT sector has evolved past a certain point. This perspective is more consistent with the overall objects and purpose of the ITA. The intention of the ITA is to be inclusive and dynamic, encouraging the development of the IT industry, and supportive of the global trade regime to enhance market access opportunities for IT products. So the ITA negotiators must have recognized that ITA products would develop new features and technology would improve over time.[80] If ITA participants were allowed to impose tariff on ITA products simply because they have improved technologically, then virtually no product would be eligible for tariff free treatment.[81]

The broad approach to interpreting the ITA is more likely preserve the positive contributions that the free trade in IT products has made to economic growth and welfare.[82] Reading the ITA as a closed list of concessions seems to be at odds with the purpose and objectives of the agreement.[83] A closed list approach would also increase the potential for other countries to re-classify goods with the aim of re-imposing tariffs to lower competition from foreign producers.[84]

Suggestions for Reform

One weakness of the ITA is that it covers an insufficient number of IT goods. Also, its rigid product structure makes it difficult to accommodate all forms of technological change.[85] Together, these shortcomings of the agreement make the tariff status of new IT products unpredictable. Following the WTO decision in this dispute, it is more likely that some new IT products will not be excluded from tariff free treatment simply because they contain new technological features.[86]

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[78] *Ibid* at 113-114.
[79] *Supra* note 16 at 94.
[80] *Ibid* at 96.
[81] *Supra* note 15 at 416.
[82] *Ibid.*
[83] *Supra* note 16 at 94.
[84] *Ibid.*
[85] *Supra* note 2 at 3.
[86] *Supra* note 15 at 414.

Although the Panel's decision is helpful and has provided some clarification on the tariff treatment of new convergent technology, the Panel's distinction between products covered and not covered by the ITA may lead to confusion when applied in practice.[87] The Panel did not define what exactly constitutes an "acceptable level of functionality or operability" in its decision and how the criteria should be enforced by customs authorities. It would have been more helpful if the Panel had clarified the distinction between functionality and operability. Also, it would have been more practical if the Panel had provided a list of factors for customs authorities to consider when determining whether a product is within the scope of the ITA. This section proposes some suggestions for reform, including expansion of product coverage, establishing clear criteria for disqualification from coverage, and better regulation of the ITA review mechanism.[88]

Expansion of Product Coverage and Definition

The convergence of IT products makes it increasingly likely for products to fall outside the scope of the ITA. Although judicial interpretation may clarify whether certain products fall within the scope of the ITA, a more cost-effective and timely solution is for countries to revisit product coverage by means of negotiation, rather than litigation.[89] While the Panel may be able to resolve specific problems, there are limitations to what it can achieve.

ITA participants need a classification system that is updated and relevant to multifunctional products. Participant countries need to fully understand the obligations they are undertaking in their tariff commitments.[90] More transparent, updated and clear commitment schedules are needed to cover new and future IT products.

The ITA should adopt a broader definition of goods to accommodate technological change and convergence.[91] Descriptions of IT products covered in the Attachments should be expanded and updated to reflect current and future technological development. The Panel's ruling in this dispute may be used as a fundamental guideline in the next round of ITA negotiations.

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[87] *Ibid* at 415.

[88] The case for including non-tariff barriers in the ITA is supported by various authors. In many countries and for many goods, non-tariff barriers are very strong and sometimes a significant impediment to international trade. The issue of non-tariff barriers is outside the scope of this Paper. See *Supra* note 2 at 21 for further discussion.

[89] *Supra* note 16 at 95.

[90] *Ibid.*

[91] *Supra* note 2 at 20.

Apart from better defining the existing product boundaries, ITA participants should expand the range of electronic goods covered by the agreement. Participants should look into the possibility of adding more consumer electronics to the agreement. It would also be important to revisit the reasons for why certain electronic goods were excluded from the agreement during the original negotiations. Perhaps the reasons for product exclusion from a decade prior are no longer significant concerns.[92]

Disqualification Clause from ITA Coverage

As a general rule to aid the interpretation of product coverage, it may be helpful for Members to agree on criteria to disqualify a product from ITA coverage.[93] There should be guidelines for how "different" a product has to be in order to fall outside the scope of a concession. For example, how many new technological features does the product have to incorporate before it becomes a complete "new" product? Similarly, is there a maximum number or types of functions that a device can combine before it becomes something completely "new"? Furthermore, how "functional or operable" does a multifunctional product have to be in order to be consistent with the Panel's ruling in this case? Are there other standards and parameters, besides functionality and operability, which can be used to distinguish between ITA and non-ITA products?

The principle or normal use of a product may be a useful aid in determining when the product has evolved outside the scope of the concessions. In this context, the principle or normal use would refer to the primary use of a product, as determined by the majority of consumers worldwide. ITA participant countries could each collect market data in their respective countries to determine the primary use patterns of consumers of a multifunctional product. For example, in the case of a smartphone, consumers may be asked to rank which functions they use most frequently. These market data could be pooled together and adjusted for the relevant variables to form a global picture of primary use. Perhaps this data is already available in some countries from private sector companies. In the example of a smartphone, the data may show that consumers still primarily use the device for calling and text messaging, even though it has many other functions. The market data may show that not enough consumers subscribe to unlimited

[92] According to the WTO website, there has been some recent negotiations on the expansion of the ITA. However no consensus has been reached as of November 27, 2013.
[93] *Supra* note 2 at 20.

data plans to warrant the smartphone device being primarily used as a web-browsing device. Under these circumstances, the smartphone would be able to retain its classification as a wireless cell phone device.

Regulation of the ITA Review Mechanism

The expansion of product coverage and product definition alone will not resolve all the challenges facing the ITA. In reality, expanding the product coverage is hard to achieve given the political difficulties in negotiations. Also, even if all consumer electronics were negotiated into the ITA, they would likely encounter the same problem as current ITA products. After a decade of technological change, new technological features may exclude them from being classified as ITA products. The same questions raised in the present dispute will arise again.

The review mechanism contemplated at the signing of the ITA needs to be updated and the process needs to be better regulated. The review process has not been very successful to date.[94] Currently, participant countries must agree by consensus to an expansion of the product coverage. There is no obligation or deadline for participants to actually reach a result.[95] Although this setup may not be different from other trade agreements, the ITA must be able to quickly adapt due to the rapidly evolving nature of the goods it covers.

The ITA participants should establish a detailed agreement for reviewing the ITA (the "agreement to review"). The agreement to review could be annexed to the ITA, giving it legal standing and binding powers. The agreement to review should include the obligation to expand product coverage at least every five years. Also, it should provide deadlines and timelines for participants to reach results and implement concessions. In addition, there should be procedures to revisit issues that were not successful in negotiations, but nonetheless important to the goals of the ITA. Furthermore, the agreement to review should provide methods for decision-making in the event that a consensus cannot be reached. It is possible the consensus requirement is too onerous for some issues. One possibility is a vote among participants requiring a large majority 75 percent in support.

A plausible approach is to establish a Committee to start the process of forming a detailed plan to regulate the review of the ITA. After this is accomplished, the Committee should be responsible for administrating and

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[94] *Supra* note 2 at 17.

[95] *Supra* note 1 at Annex.

enforcing the review process. This would be a crucial step forward in improving the ITA.

Conclusion

A revolution towards technological convergence has unfolded in the last decade, making it increasingly likely for products to fall outside the scope of ITA coverage. The WTO dispute on flat panel displays manifests the issue of how to classify multifunctional products that combines non-ITA features or acquires new technology.

The Panel ruled that some of these multifunctional products might continue to fall under the scope of existing concessions. However, it is also possible for these products to fall into other dutiable tariff headings. The distinction is dependent on the objective characteristics of the product and whether it provides an "acceptable level of functionality or operability". This assessment is undertaken on a case-by-case basis. Although the decision of the Panel is helpful, it does not to provide clear criteria that can be applied in practice.

The ITA needs to evolve in order to maintain relevance to the current IT industry. This can only be done through negotiations and agreement among ITA participants. This paper proposed several suggestions for reform, including expansion of product definition and product coverage, establishing criteria for disqualification of products from ITA coverage, and better regulation to review the ITA. The reform of the ITA would be an important advancement to the WTO trade regime in IT products.