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

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

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

June 26, 2009

EC Interpretation of the Headnote as "Exhausted" by Other Provisions

1. A central pillar of the EC's response to the U.S. complaint rests on a theory that is without basis in the text and utterly contrary to basic principles of treaty interpretation: that the headnote has no meaning, and is a nullity, "exhausted" by other provisions in the EC Schedule. In its answers to the Panel's questions, the EC could not be clearer on this point. The EC's response of course begs the question as to *why* it included the headnote in its Schedule in the first place, if as it asserts, the HS codes alone define its commitments. The EC's insistence that the headnote be read as a nullity does not accord with the approach to treaty interpretation providing that interpretations should not be adopted that render entire provisions of the Agreements inutile, and moreover, underscores two persistent flaws in the EC's analysis of the concessions at issue. First, rather than evaluate the meaning of the headnote and associated product description in Attachment B, the EC repeatedly conflates its analysis of the headnote with that for concessions for individual tariff lines, on the assumption that those lines *define* its commitments. This material is quite simply irrelevant to an analysis of the headnote — the headnote provides for duty free treatment for the goods in question "wherever...classified", and moreover the concessions in Attachment B for the products at issue are not drafted using HS terminology. Therefore there is no basis to rely on the HS to interpret them.

Defining the Product: The United States Has Adequately Identified the Products At Issue

2. Another assertion repeatedly made by the EC is that the United States has failed to "define the product" with sufficient clarity for the EC to respond to the claims. On this issue, the EC appears to be again advancing an argument it unsuccessfully made in *EC – Computer Equipment* — that, independent from the obligation to specify the measures that complainants consider to breach the EC concessions and the concessions that have been breached, complainants must also offer a "definition" of the product at issue in the dispute. There is no such requirement. The EC now concedes that "[c]learly...one can define the products at issue through the challenged measures." While it then proceeds to "comment" on the "complexity" of the products at issue, the number of criteria the measures use in classifying them, and that the measures are "classification measures," all of these points are *non sequiturs*. The products at issue in *EC – Computer Equipment* were equally "complex", yet there as well the Appellate Body rejected the EC's argument that the U.S. description of the product was insufficiently specific. As for its second "comment", that assertion is simply incorrect and again, its supposed relevance is nowhere explained. Finally, the fact that the measures are classification measures is equally true of the measures at issue in *EC – Computer Equipment* and *EC – Chicken Cuts* yet, as noted, the Appellate Body did not consider that that imposed any additional hurdle to complainants in those cases. Furthermore, while the measures may pertain to classification, this dispute, as both the relevant concessions and the relevant obligations reflect, is about the *tariff treatment* of the products in question. The obligations at issue are those described in the EC's concessions, which are tariff concessions, and in some cases, as noted previously, pertain to products "wherever...classified."

To Demonstrate That the Measures Are "As Such" Inconsistent, the United States Need Not Prove that Measures Result in a Breach in Their Every Application

3. Repeatedly, the EC attempts to to suggest that complainants can only prevail by

demonstrating that all products with the characteristic in question are subject to the concession, rather than demonstrating that the measure results in the imposition of duties on products with the characteristic in question, at least some of which are subject to the concession. Thus, for example, with respect to flat panel displays, the EC characterizes the U.S. argument as being that "the mere existence of the DVI interface makes an LCD monitor an ADP monitor", and on this basis, urges the Panel to reject the U.S. claim. Yet, even if some flat panel displays with a DVI interface are not subject to the EC concession, this begs the question of whether the EC measure results in the imposition of duties on some products that are subject to its concession. As the United States explains, by treating as dutiable any FPD with DVI, the EC measures result in the imposition of duties on some products that are subject to the concession.

Set Top Boxes Which Have a Communication Function

4. The EC's defense rests on two sleights of hand: first, complete disregard of the text of the measures being challenged, and second, complete disregard of the text of the concessions at issue. As a result of the amendments to the CNEN, EC customs authorities impose duties on *any* set top box "which incorporate[s] a device performing a recording or reproducing function (for example, a hard disk or DVD drive)." The language of the CNEN for 8528 71 13 could not be clearer in this regard. The United States has submitted over ten examples of BTI issued by various member States that confirm this interpretation is shared by the EC's own customs authorities. Indeed, the EC itself describes the language in the CNEN as "categorical" — an adjective meaning "absolute, unqualified."

5. When asked by the Panel how it would treat a set top box with a communication function and a hard disk, the EC has proceeded to offer an abstract discussion of EC classification practice. Of course, the EC offers no evidence that the measure *in fact* permits its customs authorities to consider other headings, nor is there any evidence that its customs authorities in fact *opt* for other headings, nor indeed is there evidence that even if it did opt for one of these other headings that it would result in duty-free treatment being accorded to the products. To the contrary, all the evidence indicates otherwise.

6. More fundamentally, the EC position is misguided in three key respects, and appears again to reflect an attempt to convert this dispute into a customs classification exercise. First, as a factual matter, the EC's position ignores a basic technological fact — a hard drive and a recording functionality are *additions* to a set top box, not a different product. Second, the EC's position is divorced from the text of its own measure, which does not by its terms distinguish between devices that have a "main purpose" communication function and a "main purpose" recording function. Third, the EC's analysis begs the question of whether the presence of a recording function is a permissible basis, *under its WTO tariff concessions*, to exclude a product from duty-free treatment — particularly where the EC is obliged to provide duty free treatment to set top boxes which have a communication function "wherever...classified". The concession in question is by its terms not limited to "main purpose communication function" devices.

7. At the heart of the EC's argument is the notion that it is entitled to impose duties on products that are set top boxes, and that have a communication function, merely because they also have a recording function. This position simply does not accord with the ordinary meaning of the text of the concessions, in context, and in light of the object and purpose of the GATT 1994. While the EC spends a great deal of time explaining its *classification* practice, nowhere does it even attempt to explain how imposition of duties on these devices is consistent with the terms of its *tariff concessions*.

8. First, there is no dispute that the devices in question are "set top boxes". Throughout its measure, the EC describes the products in question as "set top boxes." Even the EC recognizes that the term used by the drafters of the ITA, and in turn, the term that delimits the EC's tariff concessions pursuant to the headnote, is *not* confined to a particular subcategory of set top box (other than those "which have a communication function"), nor does the EC dispute that the products in question meet the ordinary meaning of the term. Likewise, in its answers to Panel questions, the EC repeatedly states that the products on which it imposes duties are a "type of *set top box* product." Second, there is no dispute that the products in question have "a communication function." The EC agrees that a set top box with a hard disk "still has a communication function." Thus, while the EC appears to believe that it is entitled to impose duties on any device that also happens to be able to record video, it points to nothing in the text that would explain why this is so.

9. Quite simply, nothing in the text of the concession supports the EC's position. Nor is the EC's position consistent with its own actions, in particular its acknowledgment in 2000 that STBs with tuners were covered by the description of "set top boxes which have a communication function" contained in Attachment B. The position of complainants is straightforward — the text of the concession defines what is and is not covered, and the text must be interpreted using the principles of treaty interpretation reflected in the Vienna Convention. In this case, the products are "set top boxes" and they "have a communication function." *Importantly, the EC agrees.*

10. In an effort to support its misguided interpretation of the text, the EC has offered a description of the STB market during the ITA negotiations and various historical documents, which it characterizes as informing the "surrounding circumstances" of the treaty and in turn the "ordinary meaning" within the meaning of VCLT Article 31. Much of the EC's description of the development of STBs is offered without citation or support, and evidence before the Panel confirms that it is in fact incorrect in a number of respects. As for the "negotiating history" the EC provides, the documents do not provide any useful insight into the outcome of the negotiation, and do not constitute "preparatory work of the treaty" within the meaning of VCLT Article 32, much less "surrounding circumstances" relevant to interpreting the ordinary meaning of text under VCLT Article 31.

11. Just as the Amended CNEN directs customs authorities to impose duties on any STB which has a communication function, merely because it has a hard disk or other device "performing a recording or reproducing function", the EC measure provides that STBs equipped with ISDN, Ethernet or WLAN ("wireless LAN") modems are not entitled to duty-free treatment. The EC does

not dispute that these devices are *per se* excluded from duty-free treatment. With respect to "cable modems" the EC argument is technically flawed and reveals fundamental contradictions in its own interpretation of the term "modem." First, as a technical matter, as the United States explained in detail in its answers to Panel questions, ISDN, Ethernet, and WLAN devices are "modems". The EC by contrast offers *no evidence* to support its various assertions regarding modems.

12. The mere fact that a device modulates and demodulates digital signals without converting analogue to digital signals does not support the conclusion that a device is not a "modem." The text does not limit the term "modem" to devices of a particular type, and indeed the phrase "communication function" is broad. With regard to the EC's assertion that only devices that "send and receive data in the form of audible tones transferred by telephone lines" are modems, again, nothing in the text of the concession, including the ordinary meaning of the term "modem", when read in context, supports the EC position, nor has the EC offered any evidence to support its claim. Third, while the EC concedes that at least some of the devices at issue are "technologies for gaining access to the Internet", the EC asserts that Ethernet and WLAN devices are not modems because they do not allow "direct" access to the Internet. Here again, no evidentiary support is offered for the EC position, and as a factual matter, the EC is simply incorrect.

13. Finally, with regard to STBs that do not have a tuner – and, in particular, STBs with a communication function that receive signals via Internet Protocol (TCP/IP) – the EC measure by its terms excludes all such devices from duty-free treatment merely because they lack a tuner. In so doing, the EC imposes duties on STBs covered by its tariff concessions. To date, the EC has offered no defense of this aspect of its measure, other than the statement that these devices connect to the Internet through an Ethernet modem, nor indeed can its position be reconciled with the text of its tariff concessions.

Flat Panel Display Devices

14. The EC now takes the position that it merely considered a DVI connector "a strong indicator" that a monitor is not an output unit of a computer. The only support it offers for this proposition is item 4 in the annex to the April 2005 Regulation and items 3 and 4 in the December 2005 Regulation, which it claims support the view that "the existence of a DVI has not been *necessarily* dispositive." For each of these items the EC concluded that the device in question is classified in a dutiable heading. This does not support the conclusion that DVI is not dispositive — to the contrary, it simply provides further confirmation that any device with DVI is dutiable. Furthermore, item 1 is a device that is not equipped with DVI, or for that matter any other connector that might be used by products other than a computer. Quite simply, the EC has pointed to *no evidence* — whether from the text of its measures or from the decisions of its customs authorities applying the measures — demonstrating that a device with DVI or a device actually capable of receiving signals from a source other than a computer could be classified in the duty-free subheading. Furthermore, the EC's response ignores the text of the CNEN *entirely*, which could not be clearer. As for the EC's discussion of its position since *Kamino*, the EC has offered no evidence that EC law has changed as a result of the *Kamino* decision, or that *Kamino* shows that

the United States has misunderstood EC law, and its repeated statements that it is "reviewing" the measures and may modify or repeal them suggests the opposite is true, as do prior opinions of the ECJ and other evidence submitted by the United States regarding the legal effect of an ECJ opinion on regulations that are not the subject of the case.

15. With regard to the concessions at issue, as the United States has explained, the products affected by the EC measures are "flat panel display devices." As the United States has also explained, the EC measures result in the imposition of duties on FPDs that are "for products falling within" the ITA. All parties agree that "for" is "a function word to indicate purpose." Nor does the EC appear to dispute that computers are among the products falling within the ITA. From this, it follows logically that an FPD that is "for" a computer is covered by the concession. However, rather than arrive at a conclusion based on the terms of the FPD concession read in context, the EC proceeds to argue that the concession is narrower.

16. Regarding the CRT monitor concession, first and foremost, unlike the FPD provision, the CRT monitor concession is expressly limited to a single technology — CRT monitors — which are not at issue in this dispute. The "exclusion" is not, therefore, a "general" exclusion. Second, the sentence does not constitute a "categorical exclusion" of all devices on which one can watch video — it refers to "televisions" *only*. Thus, as the EC response to panel questions reveals, the EC must make several additional logical leaps to draw the conclusion that not just televisions (the only product referenced) but also "video monitors" (what it claims to be the product at issue in this case) are generally excluded. Finally, as the United States noted during the first panel meeting, insofar as the EC believes that any device on which one can watch television or video is per se excluded from its obligations, this cannot be reconciled with the text of its concessions.

17. Specifically with regard to LCD monitors with DVI, the EC defends its approach on the grounds that "the presence of a DVI connector indicates the presence of certain electronic components inside the monitor that allows the LCD monitor to function with many different devices that are not covered by the ITA." Some devices with a DVI connector are *incapable* of functioning with anything other than a CPU. Thus, contrary to what the EC argues, the fact that a device has a DVI connector does *not* "indicate[] the presence of certain electronic components inside the monitor that allows the LCD monitor to function with many different devices not covered by the ITA." Second, the EC is incorrect in asserting that DVI is a connector that was not developed for computers. The EC claims that this view is supported by the fact that DVI is "display technology independent" and that therefore it was "foreseen to function with monitors using the CRT or LCD or other technologies." Of course, the fact that DVI was not designed for a particular display technology begs the question of whether the connector was in fact designed for computers (and, as is clear from the ITA itself, CRT as well as LCD technology is used in computer monitors). Third, the EC offers a number of unsubstantiated and factually incorrect assertions regarding the use of DVI in consumer electronics devices, in an attempt to support its presumption that monitors equipped with DVI are "multimedia" devices. The only difference between DVI-I and DVI-D is that DVI-I accepts both analog and digital signals and DVI-D accepts only digital signals. Moreover, even if the prevalence of particular interfaces in non-ADP devices

could be enough to support a *per se* rule such as that established by the EC (which it could not), the fact is that *virtually no* consumer electronics devices are today equipped with DVI, whether DVI-D or DVI-I; a large share of computers, on the other hand, are equipped with a DVI connector.

18. As explained in the First Submission and in responses to Panel questions, the U.S. argument is not limited to flat panel display devices with DVI. As noted, the EC measures also provide for duties on any product that is merely *capable* of accepting signals from a device other than a CPU (whether through a DVI interface or another technology). This does not accord with the EC concession, which requires it to provide duty-free treatment to any flat panel display device "for" products falling within the ITA.

19. In an effort to support its argument the EC cites to various material that it describes as the "specific classification practice of the United States," the"practice" of the ITA parties following the conclusion of the agreement, and various proposals to include products such as video monitors and a "multimedia monitor" as part of the ITA II negotiations. None of this material is relevant and none in fact supports the EC position. First, regarding classification, the concession at issue pertains to FPDs for products falling within the ITA, "wherever...classified." Thus, classification is simply not relevant to determining the scope of the concession. Regarding the supposed classification practice of the United States and other ITA participants, the EC refers to two documents, which provide no support for the EC view that its measures are consistent with its obligations, nor indicate any particular "practice" on the part of the United States regarding monitors. Likewise, the EC's description of where other ITA participants classified FPDs is irrelevant — the EC argument is again premised on its theory that the headnote is "exhausted" by individual tariff lines.

20. As for the negotiating documents the EC has submitted, none is relevant to the interpretative issue presented. For example, the fact that a proposal was made in ITA II for "multimedia monitors" and "video monitors" does not support the conclusion that the products at issue in this dispute (FPDs for computers) were not covered under the original concessions. The rest of the negotiating material referenced simply beg the question of what products were ultimately covered by the concessions. Nor would negotiating history be relevant under VCLT Article 32 unless the EC demonstrates that it is being used to "confirm" an interpretation or when the text as interpreted using VCLT Article 31 leaves the meaning obscure or produces a manifestly absurd or unreasonable result. The EC has failed to demonstrate that either is the case.

21. In addition to its obligation under the headnote to provide duty treatment to flat panel display devices for products falling within the ITA, "wherever...classified", the EC also committed to provide duty-free treatment to goods described by individual tariff lines in its Schedule. In particular, the EC committed to provide duty-free treatment to "input or output units, whether or not containing storage units in the same housing...other...other", contained in HS96 8471 60. As the United States explained in its First Submission, the products described above fall within the terms of this concession, based on the ordinary meaning of the text in context and in light of the object and purpose of the GATT 1994. The United States has also pointed to Chapter Note 5(B-C)

to Chapter 84 of HS(1996), which provides, among other things, that devices that are *either* "solely" *or* "principally" used in an automatic data processing system may be considered a unit for purposes of the heading. The EC now claims that it is entitled to grant duty free treatment only to devices that are "solely" used with computers based on an HS Explanatory Note. In the WCO, HS Explanatory Notes cannot supersede Chapter Notes. Furthermore, the Explanatory Note does not state that the devices described therein are the only devices covered by the subheading — rather, the Explanatory Note pertains to devices that are "solely" used with computers and simply does not address devices that are "principally" used with computers.

Multifunctional Digital Machines

22. While the EC at last concedes that the challenged regulations remain "formally in force" and that the Customs Code Committee opinion has "some interpretative value", as with FPDs, rather than confront the text of its MFM measures, the EC relies on the ECJ's judgment in the *Kip* case to argue that MFMs that can connect to computers and have "an equivalent copying function" (i.e., a copying function that "is not secondary in relation to their ADP functions"), fall within its concession for "photocopiers." As explained in the First Submission and will be discussed below, even this interpretation is flawed; yet, that aside, the EC nowhere acknowledges that its measures do not merely treat devices that have "an equivalent copying function" as dutiable. Rather, under the EC measures, any device capable of reproducing more than 12 pages per minute, and any device without a fax feature (regardless of speed) is dutiable.

23. This begs the question of why the copying function on a device that can reproduce more than 12 pages per minute is necessarily "equivalent", as the EC puts it, to the printing function, or why a device that can print and copy but not fax can *never* be considered to have a "primary printing function" (regardless of the number of pages per minute it reproduces). Again, the EC never explains — because it cannot — how the 12 pages per minute output speed indicates the relative importance of the functions a device performs, even if that question were relevant to determining whether the product falls within the terms of the concessions at issue.

24. As the United States has explained, the products in question fall within the concessions for "input or output units" and "facsimile machines". Again, the EC has failed to offer any interpretation of the ordinary meaning of the text of these concessions. Instead, it claims that all the products subject to duty under its measures are photocopiers and provides an interpretation of the concession for "photocopiers" of subheading (HS96) 9009.12.

25. None of the devices in question are "electrostatic photocopying apparatus." MFMs are comprised of a print module (*i.e.*, print controller and print engine), and scanner; in some cases, they also include a modem for facsimile transmission. Printers, scanners, and facsimile machines were all included in the ITA and are entitled to duty-free treatment under the terms of the EC's concessions. Yet according to the EC, when these technologies are combined in a single unit, that device becomes an "indirect process photocopier", not covered by its concessions. Beyond the fact that the EC has failed to demonstrate that the products subject to duty under its measures do not

meet the terms of the concession for "input or output units", this position does not accord with the ordinary meaning of the description associated with subheading 9009.12. An "indirect process photocopier" as that term is used in heading 9009 (and as it is used by technical experts) is a device that uses light to produce a copy, exposing an optical image on a photosensitive surface. An MFM does not use light to produce a copy, but rather to collect digital data into an electronic file that can then be printed, transmitted via fax or through a network, or stored for later use. Thus, even the various dictionary definitions the EC offers of photocopying do not accurately describe the MFM process — paper copies are not produced through the "electrical or chemical action of light," or "formed by the action of light," or "created on a sensitized surface...by the action of radiant energy." Rather, light is used in the creation of a digital file, which may then be stored, printed, or transmitted. The process for printing/producing "copies" of this digital file is in fact no different than that involved when a user presses the command to "print" on his or her computer and requests one or more "copies" of the original. Finally, what the EC claims to be the "commercial and common usage" of the term "photocopying", based on various sales brochures and newspaper articles, has no bearing on the meaning of the term in the EC's schedule of concessions.

26. Nor do the devices incorporate an "optical system" as that term is used in the subheading. Consistent with the text of heading 9009, the Explanatory Note to heading 9009 notes that a photocopier "incorporates an optical system (comprising mainly a light source, a condenser, lenses, mirrors, prisms, or an array of optical fibers) which projects the optical image of an original document on to a light sensitive surface, and components for developing and printing of image." Contrary to what the EC claims, a scanner is not a system of "lamps, lenses, and mirrors" – as the EC's own exhibit states, "the core component of the scanner is the CCD array...CCD is a collection of tiny light sensitive diodes, which convert photons (light) into electrons (electrical charge)." A photocopier, on the other hand, uses an optical image formed by a lens or mirror system from reflected, refracted, or diffracted light waves.

27. The EC argument appears to be based not on the physical characteristics of the devices, but rather the assumption that the "function" of making copies is "of equivalent or higher importance" than, for example, the printing or other functions performed by the machine. The EC offers no evidence that the devices are in fact predominantly used to make copies, nor that their physical characteristics are such to support this conclusion. As noted, the devices reproduce originals using a scanner and printer — rather than "secondary," the scanner and print module are the *primary* components that comprise the machine. This begs the question of how the EC distinguishes, for example, between the "copy function," the "scan" function, and the "print function", *when all are performed using the same components*.

28. Finally, as noted, the term "indirect process" is only relevant if it can be established that the product in question meets the terms of the heading. As noted in response to Panel Questions, even from a customs classification perspective, the EC's attempt to distinguish between inkjet MFMs and laserjet MFMs based on the print engine ignores the terms of the heading at the four-digit level, contrary to GIR 1. Furthermore, the EC analysis does not accord with GIR 3(b), which provides that composite goods which cannot be classified under GIR 3(a) "shall be classified as if they

consisted of the material or component which gives them their essential character." Rather than focus on the physical *component* that gives the device its "essential character," the EC attempts to divine the "function" of the device — thus ignoring that the main components of the MFM are the *print* module, and that the "function" of copying is performed by these elements operating in conjunction with a scanner. Classification under GIR 3(b) cannot focus on the MFM's "principal function", but rather depends on the "component" which imparts the MFM's "essential character". Contrary to this rule, the EC's analysis focuses on the type of print technology of the print engine in making its distinction at the 6-digit level for its views of heading 9009 but ignores the essential role that the print module component imparts to the complete device.

29. As with the other products, the EC again relies on various ancillary documents in an attempt to support its position, including the "practice" of the United States and the EC with respect to classification, and material it claims is "negotiating history". First, with respect to the supposed "practice" of the United States and the EC, the EC has not demonstrated that there exists a "common, concordant, and consistent practice" such that the material would be relevant as "subsequent practice" for purposes of Vienna Convention Article 31. Indeed, the EC mischaracterizes both U.S. classification decisions and its own position in asserting that both parties considered MFMs to be photocopiers during the ITA negotiations. While the EC claims that its authorities "have consistently taken the view that digital copying is a form of photocopying within the meaning of HS96 9009," the evidence before the Panel in fact shows that EC customs authorities issued decisions classifying MFMs in heading 8471 60 during the ITA negotiations. As for the United States, the rulings submitted by the EC in virtually all cases make no mention of 9009 and classify MFMs in 8471 60 (the EC claim to a "practice" is based solely on the reference to note 3 in those decisions as a legal basis for the action). Furthermore, nothing in this material suggests that either the EC or the United States believed or had a practice at the time of the negotiations indicating that any device without a facsimile function is a "photocopier" or that based on pages per minute (much less 12 pages per minute) one could deem all MFMs with a fax function as "photocopiers."

30. Second, the EC offers a number of documents it characterizes as "negotiating history" — as noted, none of these documents shed light on what was ultimately agreed upon by the parties. The EC claim that the United States initially opposed including heading 9009 simply begs the question of whether digital copiers were in fact considered included in that heading (indeed in the document the EC references, the term "digital photocopying" nowhere appears). Other evidence suggests that at the conclusion of the ITA, participants (including the United States) agreed to include digital copiers, in exchange for inclusion of digital cameras. More fundamentally, the EC has failed to show that (1) the material is relevant to "confirm" a meaning provided through application of VCLT Article 31, or that VCLT Article 31 leaves the meaning obscure or manifestly absurd or unreasonable; or (2) the material qualifies as "preparatory work" within the meaning of VCLT Article 32.

EC's Failure to Timely Publish STB CNEN

31. The EC argues that the measure was not in fact effective until it was "adopted" upon signature by the Vice-President of the Commission, and that it was published "promptly" after it was signed. However, this characterization of the facts is inconsistent with ample evidence to the contrary: the statements of the Customs Code Committee Chairman as well as BTI issued by member States after the vote both support the conclusion that the measure was *in effect* following the vote of the Customs Code Committee. Furthermore, while the EC points to additional work the Commission planned with respect to *other* aspects of its classification practice regarding set top boxes in an attempt to argue that the measure was not in effect, this is irrelevant to the question at hand: the facts demonstrate that the EC position on set top boxes with a record or reproducing function and set top boxes with certain types of modems (including IP-streaming boxes) was established definitively upon the vote of the Committee. Indeed, the EC offers no evidence to indicate that any member States were *not* following the CNEN amendments after the Committee vote and prior to publication — the only BTI before the Panel suggest that member States relied on the CNEN in their classification decisions once the Committee voted, and viewed it as a final decision.

32. The EC appears to be taking the position that an additional ministerial step in its process allows it to delay publishing a measure, even when the Commission is expressly encouraging member States to apply the measure and it is in fact being applied by member States. The consequences of the EC argument are significant, as they suggest that, simply by introducing an additional ministerial step in the process of "adoption" of a measure, a Member can avoid publishing a measure until long after it has come into effect. Furthermore, nothing in the text of Article X:1 suggests that that a measure that is in effect and being applied by member States would, on that basis, be disqualified from constituting an "administrative ruling[] of general application."

33. The EC also acted inconsistently with GATT 1994 Article X:2. The CNEN is a measure of "general application" and "effect[s] an advance in a rate of duty," as the United States explained in its first submission. In response, in addition to claiming that the measure was not in effect until it was officially published, the EC argues that the measure was not being enforced (notwithstanding four BTI on the record citing to the measure as a basis for the classification of the goods in question) and did not "effect...an advance in a rate of duty or other charge on imports under an established and uniform practice." In support of the latter assertion, the EC points to the four BTI the United States submitted that were issued before the CNEN amendments were voted upon. These BTI provide no support for the argument the EC is advancing — they say nothing about whether the measure was effecting an advance in a rate of duty *under* an established and uniform practice. Again, all the BTI on the record that were issued after the vote provide for classification in the dutiable heading, consistent with the requirements contained in the CNEN. Nor can the EC be suggesting that a CNEN, once in effect, does not effect an advance in a rate of duty...under an established and uniform practice; indeed, the EC has relied on CNEN in previous disputes to argue that it administers its customs regime uniformly.