

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

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

**SECOND WRITTEN SUBMISSION
OF THE UNITED STATES OF AMERICA**

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I. INTRODUCTION

1. The ITA is a seminal achievement of the post-Uruguay Round WTO system, guaranteeing duty-free treatment for a wide range of information technology products. The continued importance of the tariff concessions that resulted from the ITA to the WTO membership as a whole was evident in the speeches delivered on the tenth anniversary of the signing of the agreement and, most recently, in the first meeting of this Panel, from the remarks of the many Members who have taken the time to participate in this dispute.

2. As explained in the U.S. First Submission, in connection with the ITA, the EC incorporated concessions into its WTO Schedule of Commitments,¹ providing for duty-free treatment for a range of IT products, including (1) set top boxes which have a communication function (STBs); (2) flat panel display devices, and (3) multifunction digital machines. Yet, through a series of measures relying on arbitrarily chosen technical characteristics, the EC has taken steps to reclassify products and thereby exclude an increasingly significant share from duty-free treatment.

3. In its submissions thus far, the United States has described the concessions, explaining how, based on the ordinary meaning of the text, in context and in light of the object and purpose of the GATT 1994, they require the EC to grant duty-free treatment to the products at issue. The United States has additionally explained how the EC measures result in the imposition of duties on these products, and provided evidence, both from the text of the measures themselves and

¹References to the EC Schedule of Commitments include concessions in Schedule LXXX, as certified by Members, and those in Schedule CXL, which the EC has committed to respect, pending submission of a new schedule. *See* U.S. First Submission, para. 31 n.23. References to the “EC” should be read to refer to both the EC and its member States, unless the context indicates otherwise. *See* Part II.D.

from their application by EC member States, demonstrating that they necessarily result in the application of duties to products covered by the EC’s duty-free concessions.

4. The EC’s response thus far is largely comprised of four refrains. First, the EC claims that it does not understand the dispute, because complainants have not sufficiently defined the “product.” Contrary to what the EC argues, the United States has been clear about the measures subject to the dispute, as well as the products affected by those measures. As discussed in greater detail below, the EC position appears nothing more than the rehashing of an argument rejected by the Appellate Body in *EC – Computer Equipment* — an argument which should, again, be rejected in this case.

5. Second, the EC attempts to divert attention from the measures that are within the terms of reference of the Panel in this dispute — rather than addressing the measures identified in the panel request, the EC asks the Panel to opine on standards articulated by the ECJ in recent court cases, or to read what the EC concedes to be “categorical” language in the measures themselves as somehow affording customs authorities a flexibility nowhere evident on the face of the measures (or indeed from the evidence regarding how customs authorities have in fact applied them to date). On the first point, as explained below and in the U.S. answers, the measures in question are those identified in the panel request, each remains in effect (as the EC now appears to largely concede), and each results in the imposition of duties on products covered by the EC’s duty-free commitments.

6. On the second point, regarding the meaning of the measures at issue, the United States submits that the facts are clear.² The complainants have pointed to specific language in each of the measures directing customs authorities to classify *any* device with a given arbitrary characteristic in a dutiable heading, without regard to the device’s other objective characteristics, and more importantly, without regard to the fact that it falls within a duty-free concession the EC made following the ITA. As further support, complainants have offered several examples of how member States have applied the measures — all of which demonstrate that the mere presence, for example, of a device performing a recording or reproducing function (such as a hard disk), or DVI, or the ability to reproduce more than 12 pages per minute, results in the imposition of duties on a product. The EC assertion that it does not in fact treat as dutiable all STBs with a device performing a recording or reproducing function (such as a hard disk), or all LCDs with DVI, or all indirect process MFMs that reproduce more than 12 pages per minute, is not supported by the text of the measures themselves, nor has the EC identified *a single decision of an EC or member State customs authority* applying the measures in question in this fashion.

²The Panel’s findings on the meaning of the challenged measures are part of its objective assessment of the matter before it, in particular, its “objective assessment of the facts of the case.” *See, e.g., EC – Geographical Indications (US)*, para. 7.55 (“Although the Regulation is part of the European Communities’ domestic law, the parties agree that the Panel is not bound by the European Communities’ interpretation of its provisions. Rather, the Panel is obliged, in accordance with its mandate, to make an objective assessment of the meaning of the relevant provisions of the Regulation.”) (footnote omitted); *id.*, para 7.101 (reaching conclusion on the interpretation of the EC regulation and reciting panel’s duty under DSU Article 11 to “make an objective assessment of the matter before it, including an objective assessment of the facts of the case”); *id.*, para. 7.43 (noting that the EC “submits that the Panel must take due account of the fact that the Regulation is a measure of EC domestic law and establish its meaning as a factual element”).

7. Third, even as the EC disavows the ordinary meaning of its own measures in claiming flexibility nowhere evident in the measures themselves, the EC at times asserts that no product exists today that is worthy of such flexibility — that is, the EC claims that its “categorical” measures are WTO-consistent because in fact *all* set top boxes with hard disks, *all* monitors with DVI, and *all* MFMs capable of reproducing more than 12 pages per minute (and even some without regard to speed) on the market today are not subject to its duty-free commitments. Again, it offers no support for this assertion, and as the complainants have demonstrated, these criteria are *irrelevant* to determining whether or not a product is covered by the concession.

8. It must be emphasized that the complainants have not entered into dispute settlement proceedings lightly. Three Members have, at significant expense of time and energy, taken the steps of requesting a panel, preparing submissions, and collectively offering hundreds of exhibits in support of their positions. They have done this because the EC’s measures do exactly what those measures say. They result in the imposition of duties on STBs, MFMs, and FPDs. While the United States would of course be pleased were this not the current situation in the EC, the measures remain in effect, duties continue to be imposed based on the measures at issue, and the ECJ judgments and the EC’s newfound claims to “flexibility” have not altered this reality.³

³In addition, while the United States has not discussed EC motives in its submissions, it may be noted that the EC in its oral statement claims that the motives behind each of the measures in question are not “protectionist.” EC Oral Statement, para. 5. Of course, there is no *mens rea* requirement in Article II, and therefore the United States has not considered it necessary to opine on the EC’s motives; that said, the facts are perhaps not as simple as what the EC has described. *See e.g.*, Polish Information and Foreign Investment Agency (PAIiIZ), Poland’s Electronics Industry (2006) (describing the electronics industry in Poland and noting recent investments) (Exhibit US-117); PAIiIZ Press Release, “Investment agreement between the Polish Government and six LCD component manufacturers signed” (November 30, 2005) (Exhibit US-118); 2007 Taiwan Industrial Outlook, Chapter 6, Information Technology Industry,

9. Fourth, in the process of attempting to rewrite the measures at issue and the text of the concessions complainants have identified, the EC reveals a theory of its obligations that has serious implications for the ITA as whole. That is, even if, based on its objective characteristics, a product meets the terms of a duty-free concession, the EC believes that it is entitled to deprive that product of duty free treatment if it is able to perform a function that is also performed by a non-ITA product. As the United States explained in its closing statement, given the number of ITA products that have come to perform new and different functions, the EC theory would rapidly turn the agreement from what is widely regarded as a significant achievement into an empty vessel, and in the process reverse the economic benefits that are recognized to have resulted from the ITA's conclusion. The ITA covers products, not "functions," and was designed to facilitate technological progress, not impede it. The EC position is untenable, grounded neither in the text of the agreement nor in principles of treaty interpretation reflected in the Vienna Convention, and, as such, should not be accepted by this Panel.

II. INITIAL ISSUES

10. Before responding to particular points raised with respect to individual products, the following provides an overview of some threshold legal issues presented by the EC response, including the EC's interpretative approach to certain of the concessions at issue, burden of proof, and the member States as respondents in the dispute.

para. 117 ("Faced with the prospect of higher tariffs in the European market, in 2006 the Taiwanese LCD monitor makers began to adjust their production location strategies. As the higher tariffs will apply only to 19-inch and larger monitors with a DVI interface, it is mainly production of larger, high-end models that will be re-located to Europe.") (Exhibit US-119).

A. Interpreting the EC’s ITA Concessions: EC Interpretation of the Headnote as “Exhausted” by Other Provisions in its Schedule Does Not Accord with Basic Principles of Treaty Interpretation

11. As the United States explained in its First Submission, upon conclusion of the ITA, the EC modified its Schedule in two ways. First, it bound individual tariff lines for ITA products at zero and, second, it incorporated the following headnote into its Schedule:

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 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.⁴

12. Importantly, as the United States has explained, this headnote sets out a commitment independent from those in product descriptions associated with subheadings in the Schedule: to provide duty free treatment to Attachment B products, “wherever...classified.” Two products that are the subject of this dispute are described in Attachment B to the ITA: “flat panel display devices for products falling within” the ITA and “set top boxes which have a communication function.” As explained in the U.S. First Submission, the headnote was one of the tools developed by the ITA negotiators to address the very issue presented by this dispute. It was designed to provide additional assurance that duty free treatment would be maintained for the listed products even in the event that customs authorities reclassified them.

13. 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

⁴Exhibit US-7.

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. It states that:

The [HS] codes reflect the commitment taken by the European Communities pursuant to Attachment B of the ITA by identifying the HS/CN headings (codes) that come within the scope of the respective narrative product definitions. Indeed, just as with the commitments made pursuant to Attachment A, Section 2, the headings identify the specific commitments made pursuant to the ITA. Even if the safety net interpretation of the headnote for commitments made pursuant to Attachment B would be accepted, the European Communities considers that the headings *exhaust* the definitions within the EC Schedule. Therefore, there are no additional products and consequently additional headings that could come within the scope of a safety net commitment other than those already identified in the EC Schedule.⁵

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. Even if ITA participants used different codes to classify Attachment B products, if they had been interested simply in providing for duty free treatment for goods described in individual tariff lines in which they at the time classified the goods, they could have simply bound the duties for the lines in question at zero. There would have been no need to include the headnote.

14. 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,⁶ and moreover, underscores two persistent flaws in

⁵EC Answers to Panel Questions, para. 31; *see also* EC Oral Statement, para. 19 (“[T]he EC does not understand what the ‘headnote’ and the ‘wherever classified’ language can add to the commitments the EC has made by indicating specific headings next to the product definitions relevant to this case....In other words, the commitments are in fact made twice and the EC believes that they exhaust the ‘headnote’.”).

⁶*E.g.*, *US – Gasoline (AB)*, p. 23 (“One of the corollaries of the “general rule of interpretation” in the Vienna Convention is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.”); *US–Section 211 (AB)*, para.

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. For example, with respect to flat panel displays, the EC offers a passing discussion of the "input or output unit" concession and focuses on its "video monitor" concession, but treats the FPD concession as mere surplusage.⁷ Second, in responding to the U.S. argument regarding the meaning of the Attachment B concessions, the EC relies on HS nomenclature and what it claims to be the classification practice of its customs authorities and those of other Members. For example, with respect to set top boxes, the EC spends many pages discussing the merits of its classification of the goods in question and detailing the tariff lines in which other Members classified them.⁸ This material is quite simply irrelevant to an

338 ("To adopt the Panel's approach would be to deprive Article 8 of the Paris Convention (1967), as incorporated into the TRIPS Agreement by virtue of Article 2.1 of that Agreement, of any and all meaning and effect."); *Argentina – Footwear Safeguard (AB)*, para. 88 ("We believe that, with this conclusion, the Panel failed to give meaning and legal effect to all the relevant terms of the WTO Agreement, contrary to the principle of effectiveness (*ut res magis valeat quam pereat*) in the interpretation of treaties."); *Canada– Dairy (AB)*, para. 135 ("The net consequence of the Panel's interpretation is a failure to give the notation in Canada's Schedule any legal effect as a 'term and condition'. If the language is merely a 'description' or a 'narration' of how the quantity was arrived at, we do not see what purpose it serves in being inscribed in the Schedule").

⁷*E.g.*, EC Answers to Panel Questions, para. 28 ("The European Communities does not see any added value in the latter analysis [of the headnote] compared to an analysis under tariff heading 8471 60 90 unless the Panel would agree (*quod non*) with the overly broad and untenable interpretation by the complainants of the word 'for' in the narrative product definition of 'flat panel displays...'); EC First Submission, para. 99-101 (asserting that "there is no need to examine the arguments of the complainants in respect of the ordinary meaning of the tariff term "Input or output units..." because "[s]uch monitors may fulfil also the ordinary meaning of video monitors...or, some cases, reception apparatus for television").

⁸*E.g.*, EC First Submission, paras. 239-47, 269-84.

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.⁹ Therefore there is no basis to rely on the HS to interpret them.

15. Contrary to what the EC suggests, the headnote in its Schedule has meaning. It is a commitment to provide duty-free treatment to the Attachment B products, as defined by the descriptions contained in Attachment B of the ITA, wherever the products are classified in its domestic tariff schedule. As explained below, the EC has failed to do so with respect to the products at issue in this case.

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

16. 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.¹⁰ 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. As the United States noted in its Oral Statement, there is no such requirement. The products at issue, consistent

⁹Indeed, the EC concedes this in its first submission. *See* EC First Submission, para. 140 (“[A]ssuming that the EC understands the complainants’ position to be that there is a systemic predominance of the narrative product definitions over the actual detailed commitments identified with the specific CN headings next to the product definition, the product would still need to be classified as being covered by one of the product descriptions, *albeit not always with the assistance of the logic contained in the Harmonized System.*”) (emphasis added).

¹⁰EC First Submission, paras. 34-47.

with the reasoning of the Appellate Body report in *EC–Chicken Cuts*, flow from the measures identified in the panel request.¹¹ Those measures have been described in detail by the United States in its submissions; importantly, the affected products are not limited to those described in a *subset* of the measures, as the EC periodically attempts to argue in its submissions.¹² As for the Appellate Body’s statement in *EC – Computer Equipment* that “with respect to certain WTO obligations, in order to identify the ‘specific measures at issue’, it may also be necessary to identify the products subject to the measures in dispute,” it found in that report that by using terms in its panel request and submissions to describe the products that were “readily understandable in the trade,” the United States had sufficiently identified the products.¹³ Similarly, in this case, the United States has used such terms to describe each product, and provided definitions as well as technical background information.¹⁴

17. The EC now concedes that “[c]learly...one can define the products at issue through the challenged measures.”¹⁵ 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*.¹⁶ The products at issue in *EC – Computer Equipment* were equally “complex”, yet there as well the Appellate

¹¹*EC – Chicken Cuts (AB)*, para. 165 (“[I]dentification of the products at issue must flow from the specific measures identified in the panel request. [...] It is the measure at issue that generally will define the product at issue.”).

¹²*E.g.*, EC First Submission, paras. 48-49.

¹³*EC – Computer Equipment (AB)*, para. 70.

¹⁴*E.g.*, U.S. First Submission, paras. 42, 50-54, 68-71; *see also, e.g.*, Exhibits US-22, US-23, US-24, US-25, US-31, US-32, US-33, US-34, US-35, US-53, US-54, US-55, and US-56.

¹⁵EC Replies to Panel Questions, para. 87.

¹⁶EC Answers to Panel Questions, para. 87.

Body rejected the EC’s argument that the U.S. description of the product was insufficiently specific, noting that “if the EC arguments on specificity of product definition are accepted, there will inevitably be long, drawn-out procedural battles at the early stage of the panel process in every proceeding.”¹⁷ As for its second “comment” — that “most” of the measures do not apply a single criterion when considering their classification¹⁸ — as discussed below, that assertion is simply incorrect¹⁹ 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.”

18. Thus, the EC appears to now agree that there is no separate obligation to identify the products at issue, notwithstanding its protestations to the contrary. The complainants have clearly identified the measures that are subject to the dispute and have explained how they breach the obligations at issue. Having done so, complainants have met their burden.

¹⁷*EC – Computer Equipment (AB)*, paras. 71-73.

¹⁸EC Answers to Panel Questions, para. 87.

¹⁹However, the United States notes with interest the EC’s suggestion that, at least as to *some* of the measures, the parties are in agreement that the EC applies a single criterion to classify products. EC Answers to Panel Questions, para. 87 (stating that “most” of the measures do not apply a single criterion).

C. Establishing a Breach: 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

19. In order to demonstrate that the measures in question are inconsistent with the EC’s obligations, the United States must show that they result in WTO-inconsistent treatment in at least some cases.²⁰ In its answers to the Panel’s questions, the United States has explained precisely how it has fulfilled its burden of proof with respect to measures applicable to each of the products at issue.²¹

20. Repeatedly, however, the EC attempts to reverse the argument, 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

²⁰*China – Auto Parts (U.S.) (Panel)*, para. 7.540 (stating the scope of its review with respect to the EC’s Article II claim was “limited to the very narrow question of whether the criteria set out in the measures will necessarily lead to a violation of China’s obligations under its Schedule and consequently Article II:1(a) and (b) of the GATT 1994”); *Mexico – Rice (Panel)*, para. 6.26 (“In our view, the Appellate Body was thus clearly not requiring that for an ‘as such’ claim to be successful, evidence is to be adduced of the application of the law by the executive authorities and the domestic courts, in each case.”); *see also Argentina – Footwear (AB)*, para. 62 (“We agree with Argentina, therefore, that the application of the DIEM does not result in a breach of Article II for each and every import transaction in a given tariff category. At the same time, however, we agree with the Panel that there are sufficient reasons to conclude that the structure and design of the DIEM will result, with respect to a certain range of import prices within a relevant tariff category, in an infringement of Argentina’s obligations under Article II:1 for all tariff categories in Chapters 51 to 63 of the N.C.M.”).

²¹US Answers to Panel Questions, paras. 54-61.

LCD monitor an ADP monitor”, and on this basis, urges the Panel to reject the U.S. claim.²² 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.

D. Both the EC and its Member States are Proper Respondents in this Proceeding

21. The complainants have exercised their rights under the DSU to bring claims against the EC member States as well as against the European Communities, as reflected in the terms of reference of this Panel.²³ While the EC claims that it alone is responsible for the member States, as the United States explained in its answers to the Panel’s questions, the internal legal relationship between the European Communities and the EC member States (including the EC’s assertion that it “assumes full responsibility” with respect to the claims at issue in this dispute) cannot diminish the rights of other WTO Members to exercise their rights under the WTO

²²EC First Submission, para. 65; see also EC Answers to Panel Questions, para. 26 (claiming incorrectly that the Panel is “called upon to examine whether...all LCD monitors with a DVI irrespective of any other technical characteristics are ‘input or output units...’”).

²³The terms of reference refer to “the matter referred to the DSB by the United States ... in document WT/DS375/8.” Document WT/DS375/8 is clear in referring to measures of the individual member States as well as of the EC itself.

Agreement, including rights under the DSU.²⁴ The EC as well as individual member States have made commitments in their Schedules of Concessions with respect to the products at issue.²⁵

22. The EC's assertion that the only measures at issue are those of the EC is incorrect.²⁶ In fact, as the United States noted in its responses to the Panel's questions, both the EC and the member States play a role in the application of duties to products, including the products in question in this dispute.²⁷ While the EC has issued the regulations and explanatory notes at issue, member States have issued BTI interpreting and applying those regulations and explanatory notes,²⁸ and apply duties to the products.²⁹ Thus, the United States has requested that the Panel find, *inter alia*, that "the EC and its member States have applied and continue to apply duties to STBs with a communication function, flat panel display devices, and MFMs at rates in excess of those set forth in their Schedules, inconsistent with Articles II:1(a) and (b) of the GATT 1994,"

²⁴See, e.g., *EC – Computer Equipment (Panel)*, para. 8.16 (Panel found that it would consider whether Ireland and UK deviated from WTO obligations in the context of EC commitments); U.S. Answers to Panel Questions, paras. 40-41.

²⁵Bulgaria, Romania, the Czech Republic, Estonia, the Slovak Republic, and Poland were ITA participants before becoming EC member States, and made concessions pursuant to the ITA, which are reflected in their WTO Schedules of Concessions. As a result of the measures at issue, member States with duty free bindings in their own Schedules breach their WTO obligations and references to the breach of the EC Schedule include references to these Schedules.

²⁶EC Answers to Panel Questions, para. 64.

²⁷See U.S. First Submission, para. 34 (explaining the relationship between the EC and member States in administration of EC customs laws and discussing the role of EC member States in applying duties to the products at issue).

²⁸The evidence before the Panel includes BTI issued by France, Germany, the United Kingdom, Belgium, Czech Republic, the Netherlands, Bulgaria, and Ireland. See, e.g., Exhibits US-28, US-50, and US-62.

²⁹The EC does not dispute that all member States apply duties in accordance with the measures at issue (indeed, it has identified some measures as ensuring uniformity of administration in the EC). See U.S. Answers to Panel Questions, para. 44.

and that “the application and continued application of these duties by the EC or any member State is inconsistent with Articles II:1(a) and (b) of the GATT 1994.” These findings are appropriately made in respect of the member States as well as the EC. Both have obligations under the WTO Agreement, and both are properly respondents in this proceeding.

III. EC AND ITS MEMBER STATES ACT INCONSISTENTLY WITH GATT 1994 ARTICLE II:1(a) AND (b) IN IMPOSING DUTIES ON SET-TOP BOXES WITH (OR WHICH HAVE) A COMMUNICATION FUNCTION

23. The EC’s WTO Schedule of Commitments (“Schedule”) provides for duty-free treatment for set top boxes with a communication function. It does so in two respects: first, through the ITA headnote (which provides for duty free treatment “wherever...classified” to products described in or for Attachment B, including set top boxes which have a communication function)³⁰ and, second, through product descriptions associated with individual HS1996 tariff lines in the EC Schedule — in particular the concession for “set top boxes with a communication function” associated with HS96 8528 12 91.³¹ Contrary to the EC’s suggestion in its initial submissions, both of these concessions were clearly described (and quoted verbatim, with citations to their location in the EC Schedule, which was also submitted as an exhibit) in the U.S.

³⁰EC ITA Schedule Modifications, Section 2, p. 1 (“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 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.*”) (emphasis added). Attachment B describes STBs as follows “Set top boxes which have a communication function: a microprocessor-based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange.” ITA, Attachment B. *See also* U.S. First Submission, paras. 87-108.

³¹U.S. First Submission, paras. 109-110.

first written submission; to further assist the Panel (and the EC), the United States also prepared a graphical summary of the concessions (again quoting the text verbatim with citation), which was submitted with the oral statement of the United States at the first Panel meeting.³² There should thus be no doubt about which concessions the United States considers the EC to have breached: the headnote providing for duty free treatment “wherever...classified” and the commitment to provide duty free treatment for set top boxes meeting the description contained in the four individual tariff lines in the EC Schedule noted above, HS96 8528 12 91 in particular.

A. EC and Member State Measures Result in the Application of Ordinary Customs Duties “In Excess of” the Bound Duty Rate Provided in the EC Schedule for Set-top Boxes with a Communication Function, Contrary to Article II:1(b)

24. As the United States explained in its first written submission, following implementation of the ITA, set top boxes with a communication function imported into the EC were generally classified in CN line 8528 71 13 or its predecessor lines, and entered duty-free.³³ However, as a result of CNEN Amendments approved in 2006 and 2007, the EC and its member States began applying duties of 14% to set top boxes with a communication function, based on arbitrary technical criteria.³⁴ The EC’s assertion that it did not “reclassify” products is quite simply incorrect. Due to the CNEN, products that were once classified in the duty-free subheading by

³²U.S. First Submission, paras. 87-88 and 109-110; *see also* U.S. First Oral Statement, attachment. *Cf., e.g.*, EC First Submission, para. 191.

³³*See* U.S. First Submission, para. 89.

³⁴ *See* U.S. First Submission, para. 89.

EC customs authorities were placed in the dutiable heading, merely because they had a hard disk or a particular type of modem.³⁵

25. 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. The following discussion focuses on each of these aspects of the EC response to the U.S. argument, in turn, for set top boxes equipped with a device performing a recording or reproducing function, and for set top boxes equipped with certain types of modems or lacking a tuner.

1. Set Top Boxes with a Communication Function and a Hard Disk

a. The EC Response Ignores the Text of its Own Measure

26. 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).”³⁶ The language of the CNEN for 8528 71 13 could not be clearer in this regard. It provides, among other things, that “[s]et top boxes which incorporate a device performing a recording or reproducing function (for example, a hard disk or DVD drive) *are excluded* from this subheading (subheading 8521 90 00).”³⁷ The CNEN text for 8521 90 00 is equally clear. It states that “[t]his subheading *includes* apparatus without a screen capable of

³⁵*Compare* FR-E4-2005-03506 (February 8, 2005) (BTI issued by France classifying a device with 160GB hard disk in duty-free subheading 8528 12 91) and GB114068108 (August 4, 2005) (BTI issued by UK classifying a device that “can also record video onto a hard disk drive” in duty-free subheading 8528 12 91) (Exhibit US-120) *with* Exhibit US-28 (BTIs issued by member States based on the CNEN, classifying devices with hard disks in dutiable subheading).

³⁶U.S. First Submission, paras. 90-97; Amended STB CNEN, p. 8 (Exhibit US-30).

³⁷Amended STB CNEN, p. 8 (Exhibit US-30).

receiving television signals, so called “set-top boxes”, which incorporate a device performing a recording or reproducing function (for example, a hard disk or DVD drive).”³⁸ Goods classified in subheading 8521 90 00 receive a duty of 13.9%. Thus, time and again, whenever a device has a hard disk, it is subject to duties. 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.³⁹ Indeed, the EC itself describes the language in the CNEN as “categorical”⁴⁰ — an adjective meaning “absolute, unqualified.”⁴¹

27. 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. In the process, it on the one hand concedes that HS heading 8521 would be “deemed to be the more specific heading of the two which merit consideration”⁴² (and ergo, that the measure would necessarily result in classification in the dutiable line⁴³), and at the same time claims that other headings “would merit consideration” if the hard disk “is not primarily used for recording or reproducing video.”⁴⁴ 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

³⁸Amended STB CNEN, p. 8 (Exhibit US-30).

³⁹See Exhibit US-28.

⁴⁰EC Answers to Panel Questions, para. 99 n.19 and para. 237.

⁴¹Definition of “categorical” *in* Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary>.

⁴²EC Answers to Panel Questions, para. 97.

⁴³EC First Submission, para. 278 (“The EC classifies certain products which do not fall within that code in CN codes 8521 90 00, 8528 71 19 and 8528 71 90. None of those codes was notified to WTO and all of them are subject to duty.”).

⁴⁴EC Answers to Panel Questions, para. 99.

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.

28. Likewise, when asked how the CNEN would permit the EC to classify a device with a hard disk in a duty free heading if “the totality of technological elements present in the set top box were to provide otherwise” (as the EC claimed in its oral statement), the EC admits that its citation to the measure was misplaced, identifies no language in the CNEN that would so provide, and instead claims that because its classification process begins at the four-digit level it is in fact taking into consideration all technological elements in its classification decision.⁴⁵ Of course, the fact that the EC, like all HS users, begins classification at the four digit level, says nothing about the operation of the measure at issue and is of no consequence to the matter before this Panel: the fundamental fact remains that if an STB “incorporate[s] a device performing a recording or reproducing function,” EC customs authorities will find that the device is disqualified from duty-free treatment.⁴⁶ The EC again provides *no* support for the opposite

⁴⁵EC Answers to Panel Questions, para. 223. Nor is there any evidence that, as the EC suggests in its Answers, the presence or absence of certain features such as “recording and replay buttons predominantly placed on the front of the product” or a “remote control...entirely focused on recording,” or whether or not the operating manual “focus[es] almost exclusively on how the product records and replays movies” would lead the EC to accord duty-free treatment to an STB if it has a hard disk. *Id.*, para. 98. These considerations are neither sufficient to result in WTO-consistent treatment of set-top boxes nor reflected in or accommodated by the CNEN.

⁴⁶U.S. First Submission, paras. 90-97; U.S. Answers to Panel Questions, para. 58; Exhibit US-28. The EC suggestion is akin to arguing that because it does not classify tennis shoes or oranges as set top boxes, its measure allows a case-by-case analysis. If accepted, this would imply that no classification measure could be challenged “as such”.

conclusion, whether from the text of the measure itself or the actions of its customs authorities when interpreting the measure.

29. Indeed, the EC’s lengthy discourse on customs classification aside, its core position on the measure in question appears to be as follows: according to the EC, the “categorical” language in the CNEN is permissible because, in fact, no device with a “rather large hard disk and a main purpose communication function is ... presently offered.”⁴⁷ Quite simply, in the view of the EC, it is entitled to impose duties on all set top boxes with a communication function on the market today that have a hard disk because not one device available today with that characteristic has a “main purpose communication function.” Again, no evidentiary support is offered for this assertion, and indeed the EC appears to take the opposite view elsewhere (noting that “one naturally cannot exclude that there are products on the market with other technological elements which would necessitate to depart from the above analysis”⁴⁸). In effect, according to the EC, notwithstanding the fact that there is no basis in the text of the concession to impose duties on a product merely because it has the ability to record, it is entitled to *assume* that all devices with the characteristic in question are dutiable until it is demonstrated that one product currently on the market meets the terms of the concession — whereupon it might provide duty-

⁴⁷EC Answers to Panel Questions, para. 99 n.19. It may also again be emphasized that the EC’s suggestion that a device with a “small” hard disk would *not* be subjected to duties under its measure, EC Oral Statement, para. 30, is unsupported by a single decision of an EC customs authority applying the measures in question. *See also* EC Answers to Panel Questions, para. 227 (“[T]he CN ENs are drafted with an understanding of the products as they currently exist in the market and with respect to which one can, in the view of the Commission, use the recording function criterion so categorically.”).

⁴⁸EC Answers to Panel Questions, para. 227. The EC of course fails to explain how, under the terms of the CNEN its customs authorities could depart from the analysis in such a manner that would result in duty-free treatment for the products at issue.

free treatment for that product alone. The EC will exclude items meeting the terms of the concession from duty-free treatment, unless convinced otherwise (on some unstated and apparently as yet never found basis). In this respect, the EC argument merely confirms that the measures result in dutiable treatment for products that fall within the scope of the concession.

30. 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.⁴⁹ Unlike, for example, a videocassette recorder, a set-top box is only capable of recording if it is converting and decoding signals sent over a communication channel into a form that can be viewed on a television set.⁵⁰ If the device is not performing its underlying function as a set-top box, it cannot record video.⁵¹ Likewise, if the hard disk in a set-top box is defective, the set-top box can still operate, enable television signals to be displayed on a television, and enable at least some interactive information exchange.

⁴⁹*Cf.* EC Oral Statement, para. 34 (claiming that “[i]t is effectively the communication function which is added to a recorder”).

⁵⁰*See* Walter Ciciora et al., *Modern Cable Television Technology Video, Voice, and Data Communications* (2nd ed. 2004) (Exhibit US-121), para. 22.3, Cable TV Digital In-Home Processing, p. 849 (Figure 22.1 showing a schematic of a typical set-top box with cable modem and optional hard drive); and para. 22.7, Optional Personal Video Recorder, p. 894 (“An optional personal video recorder (PVR) function is shown in Figure 22.1.”).

⁵¹*See, e.g.*, Explorer 8300 HD DVR, Frequently Asked Questions, p. 1 (Exhibit US-122) (“The Explorer 8300 is not available for retail purchase in the U.S. It is currently available only through select cable operators on a lease basis. Please contact your local cable company to find out if the Explorer 8300 HD is available in your area.”).

31. Similarly, a set-top box that has a hard drive can perform a wide range of functions – only one of which is the ability to record.⁵² And even the hard drive itself enables the set-top box to do more than record video – for instance, it can download video to share via email and store email attachments.⁵³ There is accordingly no basis to conclude that a set-top box with a hard drive is, based on its objective characteristics, a “video recording apparatus”. As even the EC admits, they are “set top boxes”.

32. For example, the specific device that the EC references in its First Written Submission and its answers to panel questions is clearly identified in both the EC’s own BTI and in the company’s technical specifications as a set-top box.⁵⁴ Contrary to the EC’s suggestion that the communication function is not mentioned, the product manual states that the device is “fully capable of supporting real-time, two-way interactive applications—such as impulse pay-per-view (IPPV), network based games, enhanced TV, e-mail, Internet browsing, chat, voting/polling, E-commerce, video-on-demand (VOD) and subscription VOD (SVOD) to the television.”⁵⁵ The device is not for retail sale (*i.e.* it must be installed by a cable TV operator in conjunction with cable TV services). Unless a user activates the communication function (by subscribing to cable

⁵²This is the case even with the product on which the EC has focused in this proceeding. See Explorer 8300 DVB Set-Top With Modem Specification Sheet, pp. 2-4 (Exhibit US-102) (describing a wide range of features, only one of which is recording).

⁵³Gerard O’ Driscoll, *The Essential Guide to Set-top Boxes and Digital TV* (2000), p. 39 (Exhibit US-123) (“The capacity of the hard drive is measured in gigabytes and may be used by subscribers to store personal documents, favorite Internet sites, and e-mail.”).

⁵⁴See Exhibit EC-43 (BTI describing device as a “set top box”) and US-102 (product manual describing device as “set top with modem”).

⁵⁵Exhibit US-102, p. 1.

TV services), the recording function cannot operate.⁵⁶ It is thus clearly distinguishable from, for example, a videocassette recorder.

33. Second, the EC's position is divorced from the text of its own measure,⁵⁷ which does not by its terms distinguish between devices that have a "main purpose" communication function and a "main purpose" recording function — rather, it states that *any device* with "a recording function" (main or secondary) is necessarily excluded from duty-free treatment.⁵⁸ (Equally, it may be noted that while the EC claims that under its measure it does not impose duties on devices with small hard disks, its assertion simply suggests yet another arbitrary aspect to the EC's analysis and is supported only by an exhibit containing two printouts of Philips products from a web site — not by any opinion of an EC customs authority in fact applying its measure.⁵⁹) Indeed, the various other characteristics — such as the presence of a keyboard or a remote controller — which the EC at one point in its responses claims it might rely on to classify a product that has a significant hard disk,⁶⁰ are nowhere contemplated in the measure, which simply provides that any STB with a recording device is excluded from the duty-free subheading.

34. 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". As will be explained in the

⁵⁶See Exhibit US-122.

⁵⁷Regarding the role of the Panel in interpreting EC measures, see note 2, *supra*.

⁵⁸Amended STB CNEN, p. 8.

⁵⁹EC Oral Statement, para. 30, Exhibit EC-46, and Exhibit SGP-4.

⁶⁰EC Answers to Panel Questions, para. 234.

section that follows, the concession in question is by its terms not limited to “main purpose communication function” devices. The EC’s imposition of duties on all set top boxes with a communication function and a hard disk does not accord with its obligations under the GATT 1994.

35. Finally, it should be noted that while the EC has at times asserted that the CNEN “is not legally binding in the EC legal order” in an apparent attempt to downplay the significance of the measure, in response to a question from the Panel the EC concedes that the CNEN is an “important tool[] for the interpretation of the CN” and that “customs authorities naturally *have to*” consult it in deciding on classification of individual products.⁶¹ Indeed, as the United States has noted, the CNEN has a range of important legal effects — for example, once the CNEN is adopted, BTI that contradicts the guidance set forth in a CNEN is no longer valid.⁶² Beyond consistently imposing duties on any device that possesses the technical characteristics identified in the CNEN,⁶³ member States have cited to the Customs Code Committee decision approving the CNEN as a basis for their action.⁶⁴ Thus, there appears to be no dispute that the CNEN has legal effect and that member State customs authorities are expected to comply with it.⁶⁵

⁶¹EC Answers to Panel Questions, para. 103 (emphasis added).

⁶²*E.g.*, U.S. Answers to Panel Questions, para. 43; *see also, e.g.*, European Commission, Administrative Guidelines on the European Binding Tariff Information (EBTI) System and Its Operation (October 28, 2004), art. 11 (stating that “[a] BTI ceases to be valid...[w]here the BTI is no longer compatible with the interpretation of one of the customs nomenclatures, e.g., following amendments to the CN Explanatory notes...”) (Exhibit US-18); *see also* Community Customs Code, article 12.5(a)(ii) (Exhibit US-19).

⁶³U.S. First Submission, paras. 90-91.

⁶⁴U.S. First Submission, para. 48 n.59; Exhibit US-28.

⁶⁵Indeed, as noted in the U.S. Answers to Panel Questions, para. 44, the EC relied on the fact that it was issuing the FPD CNEN, among other measures, to support its claim that it had

b. EC Position Does Not Accord with the Text of the Concession

36. 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*.⁶⁶

37. Beginning with the headnote, under the EC's Schedule, the EC is obliged to accord duty-free treatment, *wherever classified*, to:

“[s]et top boxes which have a communication function: a microprocessor-based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange.”

First, there is no dispute that the devices in question are “set top boxes” — not microwaves or airplanes or automobiles. Throughout its measure, the EC describes the products in question as

complied with the DSB recommendations and rulings in *EC–Customs* regarding uniformity of administration of its customs laws with respect to the classification of LCD monitors. If member State customs authorities are not expected to follow a CNEN, this begs the question of how the EC is ensuring uniform administration as required by GATT 1994 Article X, consistent with the DSB's recommendations and rulings in *EC–Customs*.

⁶⁶Thus, for example, the EC's argument that it “classifies correctly” is irrelevant, EC First Submission, para. 278-284, as is its assertion that complainants consider that “a recording or reproducing function can never be used as a means of determining where a product should be classified.” The EC's obligation is to provide duty-free treatment to set top boxes “wherever...classified.” From the standpoint of Article II, the United States is indifferent to how the EC uses recording for classification purposes, provided it accords duty-free treatment to all set top boxes which have a communication function. Statements such as these merely flow from the EC's attempt to read the headnote as a nullity and to convert this dispute into a classification matter rather than a dispute regarding tariff treatment.

“set top boxes.”⁶⁷ As the United States explained in its First Submission, a set top box is an electronic apparatus that connects to a communication channel, such as a phone, ISDN (integrated services digital network) or cable television line, and produces output on a conventional television screen.⁶⁸ These devices enable a television set to receive and decode digital television (DTV) broadcasts and are often referred to as “cable boxes” or “receivers”.⁶⁹ Likewise, as the EC puts it, “the term ‘set top box’ denotes a very broad category of products, the only common feature of which is that they have the form of a box and are placed close to a TV or a video monitor (for the use with that product for the purposes of ultimately reproducing television).”⁷⁰ Thus, 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”),⁷¹ nor does the EC dispute that the products in question meet the ordinary meaning of

⁶⁷Amended STB CNEN, p. 8.

⁶⁸U.S. First Submission, para. 42. *See also, e.g.*, Set-top boxes, Informitv glossary, <http://informitv.com/glossary/settopbox/> (describing a set top box as a “[r]eceiver device that processes an incoming signal from a satellite dish, aerial, cable, network or telephone line”) (Exhibit US-22); Set-top Boxes, ITV Dictionary, <http://www.itvdictionary.com> (“A set-top box (STB) is a device that connects to an external signal source and decodes that signal into content that can be presented on a display unit such as a TV.”) (Exhibit US-23).

⁶⁹Definition of “STB” *in* Newton’s Telecom Dictionary (10th ed. 1996), p. 1041 (Exhibit US-24).

⁷⁰EC Answers to Panel Questions, para. 194.

⁷¹It should also be noted that the EC’s characterization of the evolution of STBs is factually incorrect in a number of respects. While the EC’s claims that there was a single “product the negotiators had at hand when discussing the scope of the concession”, in fact, there were a number of different types of STBs on the market when the ITA was negotiated. *See* US Answers to Panel Questions, paras. 110-111 and Exhibits US-114, US-115, and US-116. Likewise, the EC’s assertion that STBs at the time did not have tuners is contradicted by the facts. *See* U.S. Answers to Panel Questions, para. 110 and Exhibit US-115. More

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.”⁷²

38. 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.”⁷³ 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. In fact, the EC’s own analogy demonstrates the flaws in its reasoning. According to the EC, the term “set top boxes which have a communication function” “denotes a particular category of set top boxes (just as a description of ‘cars which have a soft roof which can be folded back’ refers to a certain category of cars, namely convertibles).”⁷⁴ Yet if a convertible acquires an additional feature — such as, for example, a GPS system — would it suddenly no longer be a “car which has a soft roof which can be folded back”? This is plainly not a reasonable interpretation of the language yet it is precisely the result if the EC’s position is accepted.

39. The only textual argument the EC has advanced with respect to its Attachment B concession pertains to the use of the phrase “which have” rather than “with” in Attachment B.⁷⁵ While in its first submission the EC claimed that it had no commitment on “set top boxes with a

fundamentally, the EC argument begs the question of why, if a single product (WebTV) was the only STB intended to be covered, the concession was not drafted to refer to, for example, “WebTV devices without tuners” rather than “set top boxes”.

⁷²EC Answers to Panel Questions, para. 196.

⁷³EC Replies to Panel Questions, para. 196.

⁷⁴EC Answers to Panel Questions, para. 195.

⁷⁵EC First Submission, paras. 200, 215-217.

communication function”,⁷⁶ it now appears to recognize that this commitment exists as a result of the addition it made to its Schedule in 2000. The EC argument in its first submission that the phrase “which have” (unlike “with”) must be read to limit the concession to products that are *solely* comprised of the three characteristics enumerated after the colon in Attachment B is equally contradicted by the EC’s own argument.⁷⁷ As noted with respect to the EC’s own convertible example, even from a linguistic standpoint, the proposition that “which have” means “which have *only*” is without basis. Indeed, when the EC added a tariff line to its Schedule in 2000, covering “set top boxes *with* a communication function”, it indicated that goods meeting the Attachment B description of set top boxes were classified in that tariff line.⁷⁸ If “which have” had the meaning the EC now attaches to it, this begs the question of why the EC itself opted to use “with” in place of “which have” when modifying its Schedule in 2000.⁷⁹

40. Quite simply, nothing in the text of the concession supports the EC’s position. The text is not limited to devices that have only a communication function, or whose “main purpose” is a communication function — it simply requires that they *have* a communication function (just as “cars which have a soft roof which can be folded back” is not limited to cars that have *only* a folding soft roof, or “mainly” consist of such a roof). (And, as noted, the factual predicate of the EC position — that the “recording function” can somehow be divorced from the “communication function” such that a device could be described as 80% recording and 20% communication — is

⁷⁶Compare EC First Submission, para. 200 *with* EC Answers to Panel Questions, para. 29.

⁷⁷EC First Submission, paras. 215-218.

⁷⁸U.S. First Oral Statement, para. 15; Exhibit US-26.

⁷⁹U.S. First Oral Statement, para. 15.

utterly flawed.)

41. 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.⁸⁰ Under the EC’s theory, for these products to be covered, the text would presumably either need to specify tuners as one of the required attributes of an STB, or state that it covers devices “which have a communication function and a function of receiving television signals.” It does neither, yet in its 2000 modification to its Schedule, the EC itself acknowledged that these products fall within the terms of the Attachment B description.⁸¹

42. Only by refusing to confront the text of the concession can the EC arrive at the conclusion that it is entitled to impose duties on a “set top box which has a communication function” merely because it is capable of recording or reproducing. The EC’s caricature of complainants’ position — as implying that “any possible product in the future will be considered an ITA product, as long as its technological elements (whatever they might be) fit inside a box together with those enabling a communication function”⁸² — equally requires that one disregard the ordinary meaning of the text in favor of simplistic reductions. A set top box is not simply a “box,” as the EC elsewhere appears to recognize⁸³ — thus “any possible product” that “fits inside a box” is not necessarily a set top box, meeting the terms of the concession. The position of complainants is

⁸⁰U.S. First Oral Statement, para. 15.

⁸¹Exhibit US-26.

⁸²EC Answers to Panel Questions, para. 198.

⁸³EC Answers to Panel Questions, para. 194 (stating that set top boxes “have the form of a box and are placed close to a TV or a video monitor (for the use with that product for the purposes of ultimately reproducing television)”).

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. Thus the issue is not about distinguishing set top boxes from microwaves (or horses from horse carriages or any of the other hypotheticals the EC has offered thus far): *all parties agree that the devices are set top boxes which have a communication function.* While the EC claims that, in its view, “features and technologies can be added to a set top box as long as they do not change the very nature of the product under examination,”⁸⁴ it has nowhere explained how the products covered by the CNEN have changed such that they no longer meet the terms of the concession.⁸⁵ The only relevant question is whether there is a basis for the EC to exclude the devices from its duty-free concession, notwithstanding the fact that they are set top boxes which have a communication function. Based on the text, interpreted consistently with the Vienna Convention, the answer to this question is no.

c. The EC’s Efforts to Rely on Alleged “Negotiating History” and “Commercial History” of STBs Are Equally Without Merit

43. 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 31.⁸⁶ From this, the EC suggests that

⁸⁴EC Answers to Panel Questions, para. 222.

⁸⁵Nor has the EC explained why, if the “very nature” of the product was changed, the CNEN still describes the product as a “set top box.”

⁸⁶EC First Submission, paras. 219-236.

the concession on STBs (notwithstanding its use of a term that the EC concedes denotes a “broad category of products”⁸⁷) is in fact limited to a single product — WebTV.⁸⁸ 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 (including the notion that, at the time of the negotiations, “the only really successful” STB with a communication function was so-called “Internet on TV”).⁸⁹

44. 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 31.⁹⁰ They are nothing more than an attempt by the EC to distract.

45. These documents are discussed in the EC’s first written submission as part of its analysis of the “ordinary meaning” of the treaty. The EC claims that they are relevant to understanding the “surrounding circumstances” which in turn, based on a quote from *EC–Chicken Cuts*, it believes provides a basis to use what is at most negotiating materials to inform “ordinary

⁸⁷EC Answers to Panel Questions, para. 194.

⁸⁸EC First Submission, para. 235 (“Certain types/categories of set top boxes (WebTV-like) were included in the ITA while other types/categories were clearly intended to be excluded.”).

⁸⁹*E.g.*, EC First Submission, para. 221-223 (no citations for assertions that “STBs existing in 1996 can be generally divided into two main categories”, for descriptions of the categories, or for assertion that WebTV was “[t]he only really successful project of this kind”). In fact, the record shows that there were a range of STBs having a communication function, which were being marketed and sold at the time of the ITA. U.S. Answers to Panel Questions, paras. 110-111; Exhibits US-114, US-115, and US-116.

⁹⁰U.S. Answers to Panel Questions, paras. 30-31.

meaning.”⁹¹ The systemic implications of elevating miscellaneous documents residing in a single Member’s files to the status of “surrounding circumstances” cannot be ignored. Any such document could be deemed relevant to divining the “ordinary meaning” of the text of a treaty, and not merely, as provided in Article 32, to confirm the meaning resulting from application of Article 31 or when the meaning is obscure or manifestly absurd or unreasonable. In effect, doing so would read Article 32 out of the VCLT entirely.⁹² Indeed, the two reports the EC cites in defense of its position refer to VCLT Article 32, not Article 31⁹³ — as noted, the EC has not demonstrated that the meaning resulting from Article 31 is obscure or manifestly absurd or unreasonable, or that the documents “confirm” the meaning resulting from Article 31.

46. Rather, the EC uses the material to advocate a *different* meaning than the text itself provides. Moreover, the documents in this case, unlike the material referenced in the disputes identified by the EC,⁹⁴ were prepared by individual Members and as such do not represent a common view of even some of the parties, and were neither available to all ITA participants nor even to all the parties in this dispute.⁹⁵ Furthermore, as explained above, the EC’s emphasis on

⁹¹EC First Submission, para. 233 (document discussed as “surrounding circumstances” in Part IV.B.1 of EC Submission, entitled, “Ordinary meaning of the narrative description”).

⁹²See U.S. First Oral Statement, para. 21.

⁹³*Canada – Dairy (AB)*, para. 138; *Korea – Beef (Panel)*, para. 540.

⁹⁴EC Answers to Panel Questions, paras. 43-44.

⁹⁵Unlike *Canada – Dairy* and *Korea – Beef*, the documents do not show a common understanding or meeting of the minds between the parties. They are position papers offered by one or another party or negotiator’s notes from one party’s files. Likewise, the documents circulated to the Quad were not known even to all of the complainants in this dispute (with respect to the negotiator’s notes, none of the complainants to this dispute were privy to the EC negotiator’s personal files). Furthermore, there is no indication of whether the other Members agreed on the representations in those documents.

these documents begs the question of whether there is in fact a substantive distinction between “which have” rather than “with” — as explained above, the fact that the text of the headnote uses the phrase “which have” rather than “with” is of no substantive consequence, and indeed the EC itself equated the two when it modified its Schedule to incorporate a concession for “set top boxes with a communication function.”

47. Finally, the material the EC cites as context and “subsequent practice” — in particular the HS subheadings in which participants at the time classified the product in their domestic schedules — is equally irrelevant and premised on its flawed interpretation of the headnote as “exhausted” by particular classifications.⁹⁶ Set top boxes which have a communication function are of course included in the headnote to the EC Schedule, which provides for duty-free treatment to enumerated products “wherever...classified.” Furthermore, ITA participants recognized that Attachment B products would be classified differently by different Members. Thus, where some Members classified the product at the time cannot be read to limit the concession to particular subheadings — the obligation remains to provide duty-free treatment “wherever...classified.”⁹⁷ The EC’s argument that it “effectively ... enlarg[ed] its commitment” in 2000 when it modified its Schedule to incorporate the provision for “set top boxes with a communication function” is equally a *non sequitur* — the terms of the headnote were unchanged in 2000, as was the text of Attachment B of the ITA. The only new concession in the EC

⁹⁶For a discussion of the flaws in the EC’s interpretation of the headnote, see Part II.A, *supra*.

⁹⁷As noted in the U.S. Oral Statement, the specific lines the EC identifies do not even support its position. The EC notes, for example, that heading 8525 included set top boxes incorporating wireless modems, yet it considers devices with WLAN modems excluded from its concession. U.S. Oral Statement, para. 23.

Schedule is that, in addition to the headnote, the EC committed to provide duty-free treatment to goods described by the text associated with line 8528 21 91 (“set top boxes with a communication function”). As noted, the EC’s attempt to reframe its actions in 2000 as an “enlargement” of its Attachment B commitment belies the fact that those actions (in particular, its acknowledgment that STBs with tuners are covered by the Attachment B description) cannot be reconciled with the interpretation of the headnote it now advances.⁹⁸

2. EC Imposes Duties On Set Top Boxes Merely Because They Use Certain Types of Modems To Communicate

48. 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.

49. The EC does not dispute that these devices are *per se* excluded from duty-free treatment. Moreover, in its answers to the Panel’s questions, the EC now takes the position that the provision in its measure allowing for duty-free treatment for devices equipped with “cable modems” applies only to cable modems with RF connectors that connect to a cable line.⁹⁹ The EC position is premised on a fundamentally flawed technical interpretation of the term “modem” as well as a misreading of the text of the concession. With respect to “cable modems” the EC argument is technically flawed and reveals fundamental contradictions in its own interpretation of the term “modem.”

⁹⁸U.S. Oral Statement, para. 19.

⁹⁹EC Answers to Panel Questions, para. 203.

50. 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” — equipment that connects data terminal equipment to a communication line.¹⁰⁰ They connect the set top box to a communication line and convert signals produced by one type of device to a form compatible with another.¹⁰¹ They “modulate and demodulate” signals. To demonstrate this, the United States has presented extracts from contemporaneous dictionaries, from secondary sources specializing in telecommunications, and from IEEE standards, explaining how the devices in question modulate and demodulate signals to enable connection to the Internet. The EC by contrast offers *no evidence* to support its various assertions regarding modems.¹⁰²

51. Among the more significant unsupported claims by the EC are that (1) only devices that convert analog to digital signals are modems; and (2) only devices that “send and receive data in

¹⁰⁰U.S. Answers to Panel Questions, paras. 101-103. Definition of “Modem” *in* The IEEE Standard Dictionary of Electrical and Electronics Terms (6th ed. 1996), p. 660 (defining modem as “[a] contraction of Modulator-DEModulator, an equipment that connects data terminal equipment to a communication line.”) (Exhibit US-67). While the IEEE definition of “modem” is in a number of respects more precise, even the OED definition provided by the EC is not by its terms limited to modems that operate through telephone lines — rather devices that connect a computer to a telephone line are identified as *one example* of a modem. Furthermore, as explained in answers to Panel questions, it is not necessary to resort to VCLT Article 31.4 merely to rely on a definition of a term from a technical dictionary. The “ordinary meaning” of a technical term may equally be found in technical dictionaries (the OED is not the only repository of ordinary meanings). U.S. Answers to Panel Questions, paras. 33-36.

¹⁰¹Definition of “Terminal Adaptor” *in* Newton’s Telecom Dictionary (24th ed., 2008), p. 922 (Exhibit US-68) (“A Terminal Adaptor, also known as an ISDN Modem, is an interface device that essentially is a protocol converter that serves to interface non-ISDN devices (e.g., PCs, fax machines and telephone sets) to an ISDN BRI (Basic Rate Interface) circuit...”). A wireless broadband modem operates in a manner similar to a cable modem, but receives and transmits signals without wires over various frequency bands. Wireless Broadband Modems, International Engineering Consortium, www.iec.org (Exhibit US-69).

¹⁰²EC Answers to Panel Questions, paras. 205-209.

the form of audible tones transferred by telephone lines” are modems; and (3) corollary to its argument regarding the meaning of the term “incorporate”, that only devices that enable “direct” access to the Internet qualify as modems.¹⁰³ Again, the EC offers *no evidence* to support any of these assertions, and in fact they are each contradicted by the evidence provided by the United States.

52. With regard to the first assertion, 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.” As the evidence demonstrates, Ethernet, ISDN, and WLAN modems are all “modems”, all modulate and demodulate signals,¹⁰⁴ and all enable a user to connect to the Internet. The text does not limit the term “modem” to devices of a particular type, and indeed the phrase “communication function” is broad. In this context, modems, of any type, which enable a set top box to gain access to the Internet, qualify as such. Indeed, at the time the ITA was concluded, the term “modem” was understood to apply to a range of modem devices, including digital devices, such as ISDN and LAN modems.¹⁰⁵

53. With regard to the EC’s second 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

¹⁰³EC Answers to Panel Questions, para. 205 (“Ethernet and W-LAN are merely interfaces, i.e., technologies which connect an apparatus, such as an STB or a computer, to another apparatus, namely a modem. They themselves are not modems, however.”).

¹⁰⁴U.S. Answers to Panel Questions, paras. 101-103; Exhibits US-70, US-71, US-109, US-110, US-111, and US-112.

¹⁰⁵See Exhibits US-67, US-68, and US-72. The EC’s characterization of an ISDN modem as something other than a modem is, again, based on absolutely no evidentiary support. *See e.g.*, EC Answers to Panel Questions, paras. 207-209.

context, supports the EC position, nor has the EC offered any evidence to support its claim. The fact that an Ethernet or WLAN device connects to the Internet through a medium other than a telephone line does not render it something other than a modem. Indeed, setting aside its overly restrictive view of the types of cable modems covered by the concession, the EC appears to concede that some cable modems are covered, and notes that they “use[] an RF connector for connecting to the TV cable line (TV coaxial cable).”¹⁰⁶ The EC acknowledges that these devices do not rely on telephone lines to transmit signals, yet incongruously the EC considers them to be “modems”.

54. Third, while the EC concedes that at least some of the devices at issue are “technologies for gaining access to the Internet”,¹⁰⁷ the EC asserts that Ethernet and WLAN devices are not modems because they do not allow “direct” access to the Internet.¹⁰⁸ Here again, no evidentiary support is offered for the EC position, and as a factual matter, the EC is simply incorrect.¹⁰⁹ As with its other assertions, this claim also suffers from serious logical flaws. Nothing in the ordinary meaning of the term “modem” requires that a device “directly” access the Internet. In point of fact, short of constructing and interconnecting one’s own network, no STB user is able

¹⁰⁶EC Answers to Panel Questions, para. 203.

¹⁰⁷EC Answers to Panel Questions, para. 199 (ISDN (Integrated Services Digital Network) technology and the ADSL (Asymmetric Digital Subscriber Line)).

¹⁰⁸EC Answers to Panel Questions, para. 205 (“[C]omputers or STBs equipped with Ethernet or W-LAN interfaces can connect to an internal network, but if that network is not itself connected to internet (through a modem), these computers or STBs will not have access to internet. It is modems which connect to the internet, not those kinds of interfaces.”); EC Oral Statement, para. 40.

¹⁰⁹Set top boxes with an Ethernet modem may connect via the RJ-45 connector directly to a network port in a user’s wall, in the same manner as the EC describes a cable modem with RF connector linking to a cable port in the wall. See Exhibits US-124 and US-125 (manuals for set top boxes providing instructions on connecting an RJ-45 interface to a network port in the wall).

to access the Internet “directly” from his or her home as the EC suggests. Rather, virtually all users rely on the transmission of signals through the local network of an Internet Service Provider (ISP)—by means of a satellite receiver, mobile wireless spectrum and transmission equipment, a copper telephone line, coaxial cable or fiber optic cable—which in turn connects to a Network Access Point, Internet Exchange Point, or other peering point and on to the Internet backbone.¹¹⁰ Thus, while the EC seems to accept that STBs with modems that rely on telephone or cable networks for Internet access are covered by its concessions, it arbitrarily considers STBs that rely on other types of networks for Internet access to be excluded. There is no basis in the text of the concession nor simple logic for the EC to draw this distinction.

55. While the EC attempts to use the fact that ISDN modems existed during the ITA negotiations to argue that the negotiators intended a restrictive interpretation of the term “modem,” their existence in fact supports the opposite conclusion. Had the concession been limited to certain modems, it would have been drafted to reflect that limitation (such as by inserting the term “conventional” or “telephony-based”). Fundamentally, the EC position is unsupported by evidence, is flatly contradicted by the evidence before the Panel, and as such cannot be accepted.

56. With regard to cable modems, while the EC states that a set-top box with a cable modem

¹¹⁰See Jonathan E. Nuechterlein & Philip J. Weiser, *Digital Crossroads: American Telecommunications Policy in the Internet Age* 131-32 (2005) (Exhibit US-126); Newton’s *Telecom Dictionary* 525, 629, 708 (24th Ed. 2008) (defining “Internet Exchange” (IX), “Network Access Point” (NAP), and “peering point”) (Exhibit US-127). NAPs were the original, government-sponsored “point[s] of access into the Internet used by ISPs,” but have been largely superseded by IXs and other commercial peering points. See Exhibit US-127, p. 629; US-126, p. 132.

that connects to a telephone or TV cable line is covered by its concessions, it claims that the same set-top box is not covered if the cable modem gains access to the Internet through an Ethernet/RJ-45 interface, because according to the EC, such products only connect to the Internet through another device.¹¹¹ This assertion again is not relevant to whether the product meets the term of the concession. Set-top boxes that use a modem with an RJ-45 connector can connect to the Internet, including by connecting directly to a network port on the wall.

57. Rather than considering whether an STB incorporates a device that modulates and demodulates signals, or even whether the device enables interactive information exchange, the EC instead draws utterly arbitrary distinctions between devices based on factual misstatements and criteria found nowhere in the text of the concession. As the United States has explained in its submissions, the devices at issue are all “modems.”¹¹² If an STB contains such a device, it “incorporates” a modem and as such is entitled to duty free treatment.

58. 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.¹¹³ 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

¹¹¹EC Answers to Panel Questions, para. 203 (“A cable modem connects to a computer through an RJ-45 connector. The RJ-45 connector is also commonly used to connect apparatus inside a LAN (local area network) but not to a telephone line or to a TV cable line. If the set top box contains an internal cable modem, it uses an RF connector for connecting to the TV cable line (TV coaxial cable).”).

¹¹²*E.g.*, U.S. First Submission, para. 100; U.S. Answers to Panel Questions, paras. 101-103.

¹¹³Amended STB CNEN, p. 9.

connect to the Internet through an Ethernet modem, nor indeed can its position be reconciled with the text of its tariff concessions. Indeed, it is particularly striking that the one device that the EC argues in this proceeding was contemplated at the time the ITA was concluded — an STB having a function of interactive information exchange *without* a tuner — is in the EC’s view today excluded from the obligation for the very reason that it does not have a tuner.¹¹⁴ The mere fact the STB receives the signal over a broadband connection and does not rely on a tuner provides no basis to conclude that it is something other than a set top box with a communication function. As explained above and in responses to the Panel’s questions, and as confirmed by evidence before the Panel, an Ethernet modem *is* a modem and the EC has offered no evidence that would demonstrate otherwise.¹¹⁵

3. The ITA Is Relevant Context And Does Not Support The EC Interpretation

59. All parties, including the EC, agree that the ITA is relevant context within the meaning of Vienna Convention Article 31, for purposes of interpreting the terms of the concessions at issue.¹¹⁶ While the ordinary meaning of the text of the Schedule is straightforward, this context lends even further support for the conclusion that the EC measures are not consistent with its obligations.

60. As the United States has explained, Article 1 of the ITA provides that Members’ tariff regimes should “evolve” in a manner that “enhances market access for information technology

¹¹⁴EC First Submission, para. 248.

¹¹⁵See U.S. Answers to Panel Questions, para. 102; Exhibit US-110.

¹¹⁶*E.g.*, EC Answers to Panel Questions, para. 2; U.S. Answers to Panel Questions, paras. 3-4.

products”.¹¹⁷ Likewise, in the Preamble to the ITA, participants expressed their desire to “achieve maximum freedom of world trade in information technology products” and to “encourage the continued technological development of the information technology industry on a world-wide basis.”¹¹⁸ The EC’s interpretation — that as technology advances and a digital product acquires additional features previously associated with other products, the digital product is no longer entitled to duty-free treatment — simply does not accord with these principles.

61. The EC suggests that the Preamble is in fact simply referencing what the EC describes as “procedures provided for in the ITA for liberalization and future expansion of trade in information technology (including through future negotiation)”¹¹⁹ — yet this represents an impossibly restrictive view of the language at issue. If the only mechanism envisioned in the ITA to encourage continued technological development was a new negotiation of product coverage each time technological improvements occur, the ITA would do nothing to promote technological development — rather, such restrictive coverage would *discourage* companies from incorporating new features into the products, as doing so would come at the cost of duty-free access to markets. In fact, as explained, the ITA contains a number of mechanisms to encourage technological development, including broad product coverage and Attachment B, and thus the concessions at issue, including the Attachment B headnote, must be read consistently with the language referenced above.¹²⁰

62. Likewise, the EC claim that the ITA was negotiated “based upon a primarily

¹¹⁷U.S. First Submission, para. 28.

¹¹⁸ITA, preamble.

¹¹⁹EC Answers to Panel Questions, para. 14.

¹²⁰See U.S. First Submission, para. 108.

classification ... rather than a technical approach” is contradicted by the fact that the Attachment B concessions in question were *not* drafted using HS terminology.¹²¹ Attachment B states that it provides duty treatment to products “wherever...classified in the HS,” thus indicating — contrary to the EC’s assertion — that the particular classification of a good is *not* relevant to the scope of the concession.¹²²

B. EC and Member State Measures Breach Article II:1(a) and (b) With Respect To Set-top Boxes with a Communication Function Described by Certain Individual Tariff Lines

63. In addition to its obligation under the headnote to provide duty treatment to set top boxes with a communication function “wherever...classified”, the EC also committed to provide duty-free treatment to goods described by individual tariff lines in its Schedule, three of which were included in Attachment A and one of which was incorporated into the EC Schedule in 2000.¹²³ In addition to the lines included in Attachment A, the EC now concedes that it has an obligation to accord duty-free treatment to the goods described in the 2000 concession.¹²⁴ That concession extends to “Reception apparatus for television, whether or not incorporating radio broadcast receivers or sound or video recording or reproducing apparatus ... -- Colour ... --- Other ... ----

¹²¹EC Answers to Panel Questions, para. 61.

¹²²The EC concedes that it sought the views of stakeholders, including technical experts in industry, in evaluating product coverage. EC Answers to Panel Questions, para. 62. *See also* U.S. Answers to Panel Questions, para. 39.

¹²³For a complete description of the concessions, *see* U.S. First Submission, paras. 109-110.

¹²⁴EC Answers to Panel Questions, para. 29 (noting that “it has exhaustively defined the products covering the definition through the identification of three HS/CN headings (with a fourth heading[] added in 2000”); EC ITA Schedule Modifications; Committee on Market Access, Rectifications and Modifications of Schedules, Schedule CXL - European Communities, G/MA/TAR/RS/74 (15 December 2000) (Exhibit US-26).

Other ... ----- Apparatus with a microprocessor-based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange, capable of receiving television signals (“Set-top boxes with a communication function”). As explained above, the devices in question are microprocessor-based devices, incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange. These devices are also capable of receiving television signals — as explained in the U.S. First Submission, the devices enable a television set to receive and decode digital television (DTV) broadcasts.¹²⁵

64. Nothing in the text of the concession support the conclusion that it only covers STBs with certain types of modems or excludes STBs that are equipped with a device performing a recording or reproducing function, such as a hard disk. In fact, with respect to recording or reproducing, the premise of the EC’s argument — that the mere fact that a device is equipped with recording or reproducing apparatus disqualifies it from heading 8528 — cannot be reconciled with the text of the heading in its Schedule, which expressly covers devices “whether or not” equipped with such apparatus.¹²⁶ Therefore, in addition to failing to adhere to their obligations under the headnote, by imposing duties on these products, the EC and member States have acted inconsistently with their obligation to provide duty-free treatment for products described in tariff line 8528 12 91 and three other lines of the Schedule.

C. EC and Member State Measures Also Result in Duty Treatment Less

¹²⁵See U.S. First Submission, para. 61.

¹²⁶See HS96 8528 (covering television receivers “*whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus...*”) (Emphasis added.).

Favorable than that Provided in the EC Schedule for Set-top Boxes with a Communication Function, Contrary to Article II:1(a)

65. As noted in the U.S. First Submission, because the EC and its member States have acted inconsistently with Article II:1(b) by imposing ordinary customs duties on “set top boxes with a communication function” in excess of the bound rate established in their Schedule, the measures also result in duty treatment less favorable than that provided in the EC Schedule, contrary to Article II:1(a) of GATT 1994.¹²⁷ The EC has not indicated that it disagrees with the proposition that if its measures breach Article II:1(b), they also breach Article II:1(a) of GATT 1994.

IV. THE EC AND ITS MEMBER STATES ACT INCONSISTENTLY WITH GATT 1994 ARTICLE II:1(A) AND (B) IN IMPOSING DUTIES ON CERTAIN FLAT PANEL DISPLAY DEVICES

66. As with set top boxes, the EC Schedule provides for duty-free treatment for flat panel display devices in two respects.¹²⁸ First, it contains a headnote, providing for duty-free treatment “wherever...classified” to products described in or for Attachment B, including “flat panel display devices for products falling within” the ITA. Second, it provides for duty-free treatment for “input or output units” (HS96 8471 60). Also as with set top boxes, the United States clearly identified and quoted both concessions, with citations to their location in the EC Schedule (which was submitted as an exhibit), and the United States provided a graphical summary of the concessions (again quoting each concession with citation) with the U.S. First Oral Statement. Thus, the EC’s protestations to the contrary, the specific concessions that the United States considers the EC to have breached should be clear: its commitment to provide duty-free

¹²⁷ *Argentina – Footwear (AB)*, para. 45.

¹²⁸ See U.S. First Submission, paras. 55-57.

treatment to flat panel display devices “for” products falling within the ITA

“wherever...classified” (the ITA headnote) and its duty-free concession for “input or output units.”¹²⁹

A. EC and Member State Measures Result in the Application of Ordinary Customs Duties “In Excess of” the Bound Duty Rate Provided in the EC Schedule for Flat Panel Display Devices, Contrary to Article II:1(b)

67. As the United States explained in its first submission, following the ITA, EC customs authorities generally classified flat panel display devices such as LCD monitors in CN 8528 51 00 and its predecessor lines, subject to zero duty. However, as a result of regulations and a CNEN adopted between 2004 and 2007, the EC and its member States began classifying certain FPDs in what is now CN 8528 59 90 and applying duties of 14% to these devices. As with STBs, the EC erroneously asserts that it did not “reclassify” these products. The evidence demonstrates, however, that due to the measures identified by the United States, products that were once classified in the duty-free subheading by EC customs authorities were

¹²⁹With regard to the headnote, as the United States noted in its First Submission, the text of Attachment B was modified to reflect a handful of technical clarifications made after the conclusion of the negotiations and before the submission of implementing schedules. These technical changes included two changes to the flat panel display device description: the insertion of “device” and the incorporation of a reference to “Vacuum-Fluorescence” technology. Contrary to the EC’s suggestion in its Answers to Panel Questions, there is nothing to support the assertion that the document attached as Exhibit US-36 was merely an “unused draft” — the document itself is formatted as an official WTO document, has an assigned document number, and is nowhere identified as a draft, and the fact that participants agreed to changes to Attachment B (changes that are consistent with those in the tables in their Schedules following the headnote) is also noted in G/L/159/Rev.1. See Exhibit US-37 (“In the plurilateral technical discussions held before 31 January 1997, it was agreed to amend the description of the products in attachment B and this amendment is already reflected in the schedules of participants.”). More fundamentally, the EC does not dispute that the changes to the FPD concession are “part of the final agreement.” EC First Submission, para. 186.

placed in the

dutiable heading, merely because they had DVI or were otherwise considered “capable” of connecting to a device other than a computer.¹³⁰

68. As it has done with STBs, the EC responds to the U.S. claim regarding FPDs by (1) ignoring the text of the measures at issue (in this case, in favor of a European court opinion that is not itself a measure at issue in this dispute, did not address the measures (though illustrates their flaws), and has not resulted in their modification); and (2) ignoring the text of the concession at issue (in favor of a different concession relating to CRT monitors). We address each of these points in turn below.

1. The EC Response Ignores the Text of its Own Measures

69. As the United States has explained in its First Submission and in its Response to Panel Questions, the EC measures provide that any device with DVI and any device capable of displaying signals from a source other than a computer are to be classified in a dutiable heading. For example, the March 2005 Regulation states that LCDs “mainly used as output units of automatic data-processing machines...are ... not covered by” the ITA or the EC decision implementing the ITA under EC law.¹³¹ Likewise, the December 2005 Regulation provides that LCD monitors with “a DVI interface enabling the product to display signals received from an automatic data processing machine” are to be classified in a dutiable heading because they are

¹³⁰*Compare* DEM/3236/05-1, DEM/3237/05-1, and DEM/3238/05-1 (BTIs issued by member States based on the CNEN, classifying devices with DVI in duty-free subheading) *with* IE-06-NT-0504-01, IE-06-NT-0504-02, and IE-06-NT-0504-03 (BTIs issued by member States based on the CNEN, classifying devices with DVI in dutiable subheading) (Exhibit US-50).

¹³¹U.S. First Submission, para. 123 (quoting March 2005 FPD Regulation).

“capable of displaying signals from various sources.”¹³² The FPD CNEN provides *inter alia* that monitors of the duty-free subheading “cannot...be connected to a video source such as a DVD recorder or reproducer...be fitted with interfaces such as DVI-D, DVI-I...be used in systems other than automatic data-processing systems” and can “only” accept a signal from a CPU of an ADP machine.¹³³ As the United States explained in its Answers to Panel Questions, the EC itself has elsewhere acknowledged that the December 2005 FPD Regulation and FPD CNEN have led its customs authorities consistently to classify FPDs with DVI in a dutiable subheading.¹³⁴ All of these measures are still valid and have legal effect, as explained in U.S. Answers to Panel Questions.¹³⁵

70. 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.¹³⁶ 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

¹³²U.S. First Submission, para. 126 (quoting December 2005 FPD Regulation).

¹³³U.S. First Submission, para. 126 (quoting FPD CNEN).

¹³⁴Statement of the European Communities at the December 11, 2006 meeting of the Dispute Settlement Body, WT/DSB/M/223, para. 8 (reporting that “[t]he EC was already in compliance with the Panel’s finding on the tariff classification of LCD monitors with DVI... Uniform classification of this product in the EC was ensured *inter alia* by the adoption of Commission Regulation 217[1]/2005, which had been followed by the repeal of the Dutch Decree and the German Binding Tariff Information (BTI) referred to in the Panel report in support of the Panel’s findings of violation. Moreover, the Commission had prepared an Explanatory Note on the classification of LCD monitors, which would be published before the end of the year”).

¹³⁵U.S. Answers to Panel Questions, paras. 44-45.

¹³⁶EC Answers to Panel Questions, para. 91.

been *necessarily* dispositive.”¹³⁷ First, it may be noted that the EC hedges by qualifying this statement with the term “necessarily,” thus not excluding the possibility that DVI was in fact dispositive in all cases. Moreover, 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. (And it should be noted that the EC concedes that with respect to item 2, DVI *is* dispositive of classification.¹³⁸) Furthermore, in its First Submission the EC remarkably claims that item 1 implies that it would classify a device “capable of receiving signals” from something other than a computer in a duty free subheading. In fact, 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 — it is described as having a “mini D-sub 15 pin interface only”. This begs the question of *how* the EC concluded that such a device is in fact capable of receiving signals from a source other than a computer, when it does not appear to have any means of connecting to something other than a computer.

71. 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. The mere fact that the EC describes the products as having other characteristics in addition to DVI in certain items in the Regulations does not support the conclusion that DVI was merely a “strong indicator” that the product was

¹³⁷EC Answers to Panel Questions, para. 91 (emphasis added).

¹³⁸EC Answers to Panel Questions, para. 91.

dutiable; indeed, member State customs authorities, when relying on the Regulations in issuing classification decisions, have in some cases referred to *no* characteristic other than the presence of DVI as the basis for classification in the dutiable subheading.¹³⁹ Likewise, the EC’s reliance on item 1 of the December 2005 Regulation — describing a device with nothing more than a standard VGA computer connector —to support its claim that devices “capable” of connecting to sources other than a computer might be entered duty-free simply offers another illustration of the extent to which the EC measures are divorced from technological reality.

72. Furthermore, the EC’s response ignores the text of the CNEN *entirely*,¹⁴⁰ which could not be clearer. The CNEN states that monitors of the duty-free subheading “cannot...be connected to a video source such as a DVD recorder or reproducer...be fitted with interfaces such as DVI-D, DVI-I...be used in systems other than automatic data-processing systems” and can “only” accept a signal from a CPU of an ADP machine.¹⁴¹ This language demonstrates that, more than merely a “strong indicator”, the presence of DVI, or the ability otherwise to connect to a source other than a computer, in fact is decisive, resulting every time in classification in the dutiable heading. And, as noted in response to Panel Questions, like the STB CNEN, the FPD CNEN has legal effect; indeed, the EC has even referred to it as a measure bringing it into conformity with the recommendations and rulings of the DSB in *EC–Customs*.¹⁴²

¹³⁹See, e.g., IE06NT-14-501-01 (referring to December 2005 Regulation as a basis for classifying product in dutiable heading and stating only that the good is “a 23" flat panel display for an ADP machine. This device also has DVI which enables it to receive video signals”); IE06NT-14-501-02 (same); IE06NT-14-501-03 (same) (Exhibit US-50).

¹⁴⁰EC Answers to Panel Questions, paras. 88-93.

¹⁴¹U.S. First Submission, para. 126 (quoting FPD CNEN).

¹⁴²US Answers to Panel Questions, para. 62.

73. As for the EC’s discussion of its position since *Kamino*, three observations may be made. First, the EC’s assertion that “as a matter of EC law today” DVI “no longer has the same probative value as before the judgment in the *Kamino* case and the measures subject to this case are applied accordingly”, is made with absolutely no support.¹⁴³ 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.¹⁴⁴ If EC law today is as provided under *Kamino* simply as a result of the decision itself, there would be no need for the EC to take further action to give effect to that decision — by the EC’s own admission, that is not the case.

74. Second, while *Kamino* addresses EC law, the Panel is tasked with evaluating the consistency of the EC measures with its WTO obligations. While *Kamino* offers a number of useful illustrations of the logical deficiencies of the EC measures, it ultimately does not answer the legal question before this Panel: whether the EC’s measures are consistent with its WTO obligations. Furthermore, the EC is still, as it describes it, in the process of reviewing the decision, and it is unclear what changes to EC law it will consider sufficient to implement *Kamino*. Those changes may or may not be sufficient to render its measures consistent with GATT Article II.

75. Third, quite simply, while the *Kamino* decision illustrates some of the flaws in the EC’s

¹⁴³EC Answers to Panel Questions, para. 91.

¹⁴⁴See U.S. Answers to Panel Questions, para. 45; Exhibit US-99.

reasoning, the decision itself is not a measure within the Panel’s terms of reference.¹⁴⁵ *Kamino* is not a measure before the panel (it is not mentioned in document WT/DS375/8, which sets forth “the matter referred to the DSB” by the United States), and as the United States has explained and the EC concedes,¹⁴⁶ *Kamino* has not resulted in modification of the measures before the Panel (whatever the EC’s future intentions may be).

76. Finally, as is particularly evident in its response to a question from the Panel regarding the treatment of a 20 inch LCD monitor with DVI,¹⁴⁷ the EC at times attempts to defend its measures based on the existence of a temporary duty suspension that was not in effect at the time the Panel was established and is therefore not within its terms of reference, and moreover is not legally sufficient to provide the treatment required under Article II.

77. As the United States explained in its First Submission, a temporary duty suspension is insufficient to accord the treatment required under Article II. Whereas the headnote to the EC Schedule provides that the duties on Attachment B products, such as flat panel display devices,

¹⁴⁵*Dispute Settlement Body: Minutes of the Meeting Held on 23 September 2008*, WT/DSB/M/256, para. 52; *Note by the Secretariat: Constitution of the Panel Established at the Request of the United States, Japan, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu*, WT/DS375/9, WT/DS376/9, WT/DS377/7, circulated 26 January 2009, para. 2 (terms of reference identified as “the matter referred to the DSB by the United States, Japan, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu in document WT/DS375/8, WT/DS376/8, and WT/DS377/6”). See also WT/DS375/8, WT/DS376/8 and WT/DS377/6 (setting forth measures that are the subject of the dispute).

¹⁴⁶EC First Submission, para. 167; EC Answers to Panel Questions, para. 91; U.S. Answers to Panel Questions, para. 45.

¹⁴⁷With respect to that product, the EC also appears to be factually incorrect in asserting that only if a 20 inch monitor has a particular screen aspect ratio would it be *classified* as a video monitor or television. Even if a product is subject to the temporary duty suspension, it remains classified as a video monitor. See Exhibit US-45 and US-77.

shall be “bound and eliminated,”¹⁴⁸ the duty suspension is temporary, provided “for a limited period” only¹⁴⁹ (at most two years), and conditional on, among other things, the absence of production in the EC.¹⁵⁰ Under EC law, “lasting” duty-free treatment is only provided through amendments to the autonomous duty rate in the CCT.¹⁵¹ Thus, companies can have no confidence in knowing whether the temporary duty suspension will remain in effect, and indeed, the EC allowed it to lapse for over three months during the pendency of this proceeding. As such, the temporary duty suspension results in treatment “less favourable” than the duty-free concession provided in the EC Schedule, adversely affecting the trading environment in the EC.¹⁵² On these points, the EC has offered no response.¹⁵³

¹⁴⁸EC ITA Schedule Modifications, Section 2, p. 1.

¹⁴⁹March 2005 FPD Regulation, p. 1.

¹⁵⁰Commission communication concerning autonomous tariff suspensions and quotas, O.J. C 128 (April 25, 1998), p. 2 (paras. 2.2.1 and 2.3.2) (noting that duty suspensions “constitute an exception to the normal state of affairs” and are “reviewed regularly with the possibility of deletion on request of a party concerned”); *id.*, p. 4 (para. 3.2) (“...no suspension will be proposed in the following situations: ... where identical, equivalent or substitute products are manufactured in sufficient quantities within the Community or by producers in a third country with preferential tariff arrangements if they are known to the parties concerned. ...”) (Exhibit US-85).

¹⁵¹Commission communication concerning autonomous tariff suspensions and quotas, O.J. C 128 (April 25, 1998), p. 2 (para. 2.3.2) (“In exceptional cases, where a continuation of a suspension implies the lasting need to supply the Community with certain products at reduced or zero rates ... the Commission may propose an amendment to the autonomous duty of the Common Customs Tariff.”) (Exhibit US-85).

¹⁵²*EC–Customs (Panel)*, para. 7.304 n.579 (“[T]he fact that traders may be subject to the same duty (or, for that matter, no duty) whether the LCD monitors they are importing into the European Communities are classified under heading 8471 or 8528 does not detract from our conclusion that the trading environment has been affected as a result of the divergent tariff classification.”).

¹⁵³The EC First Submission contains only the conclusory statement that, because of the duty suspension “the applicable tariff would still be zero and no breach of Article II of the [GATT] 1994 would occur.” EC First Submission, para. 63. Nowhere does the EC respond to

78. It is also important to note that the temporary duty suspension does not cover all products covered by the EC’s tariff concession — the suspension itself relies on a handful of equally arbitrary criteria (such as size) to differentiate between products that are entitled to duty free treatment and those that are not. For example, with respect to size, the EC concedes that “there has been and could still be large flat panel monitors that are designed specifically to be used with a computer” — yet under the terms of the EC measures, those products would in all cases be subject to a duty if they were equipped with a DVI interface or were able to connect to a device other than a computer.¹⁵⁴ For those products that fall outside of the duty suspension — including products meeting the terms of the tariff concessions at issue — the EC assesses and collects duties.

79. Finally, the temporary duty suspension that the EC relies on to defend its measures was not even in effect at the time the Panel was established and is not within its terms of reference. In its response to a Panel question regarding the treatment of a 20 inch LCD monitor with DVI, the EC relies on a temporary duty suspension adopted in March 2009.¹⁵⁵ In Council Regulation (EC) No. 493/2005 of 16 March 2005, the EC stated that flat panel display devices of 19 inches or less were also not subject to its obligations in the ITA, but temporarily suspended the application of import duties on these devices until 31 December 2006.¹⁵⁶ The duty suspension was extended until 31 December 2008 by Council Regulation (EC) No. 301/2007 of 19 March

the legal argument offered by the United States as to why this is not in fact so.

¹⁵⁴EC Answers to Panel Questions, para. 189.

¹⁵⁵EC Answers to Panel Questions, para. 93.

¹⁵⁶March 2005 FPD Regulation, p. 1.

2007.¹⁵⁷ This is the only duty suspension that is within the Panel’s terms of reference, and it does not cover a monitor greater than 19 inches, such as the device described in the Panel’s question. The measure referenced by the EC is a different measure that was adopted (after a three month lapse in the 2008 suspension) in March 2009, long after the Panel was established. Therefore, under the EC measures for purposes of the terms of reference of this Panel, contrary to what it suggests in response to the Panel’s questions, the EC applies duties to any 20 inch LCD monitor with DVI.

2. EC’s Interpretation Of Its Concessions Is Flawed

80. With regard to the concessions at issue, the EC response is premised on continued disregard of the text of the concession at issue in favor of other concessions that by their terms deal with products not relevant to this dispute. Beginning with the headnote, the EC Schedule provides for duty free treatment “wherever...classified” for:

flat panel display devices (including LCD, Electro Luminescence, Plasma, Vacuum-Fluorescence and other technologies) for products falling within this agreement, and parts thereof.¹⁵⁸

As the United States has explained, the products affected by the EC measures are “flat panel display devices.”¹⁵⁹ While the EC in its First Submission incorrectly claims that the United States did not examine the ordinary meaning of the term,¹⁶⁰ objects to some definitions offered (without

¹⁵⁷Council Regulation (EC) No. 301/2007 amending Annex I to Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and on the Common Customs tariff, O.J. L 81, p. 11-12 (March 22, 2007) (Exhibit US-45).

¹⁵⁸ITA, Attachment B.

¹⁵⁹U.S. First Submission, para. 121; Exhibit US-76.

¹⁶⁰See U.S. First Submission, para. 121 (discussing the ordinary meaning of the term, with citation to two dictionaries defining it).

explanation) while ignoring others entirely,¹⁶¹ and finally asserts that the “ordinary meaning of the term is...of very limited importance,”¹⁶² it ultimately endorses Chinese Taipei’s view that a flat panel display device “is a thin display screen employing plasma, LCDs and other technologies for use with computers or other apparatus.”¹⁶³ The products in question equally fall within this definition — they are thin LCD display screens, and as will be explained shortly, they are for use with computers.

81. 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.”¹⁶⁴ Nor does the EC appear to dispute that computers are among the products falling within the ITA.¹⁶⁵ From this, it follows logically that an FPD that is

¹⁶¹For example, in addition to the Microsoft Computer Dictionary, which the EC claims without explanation is “tainted by the intervening technological developments,” EC First Submission, para. 110, the United States provided a definition of “flat panel display” from the McGraw Hill Dictionary of Scientific and Technical Terms (1994). U.S. First Submission, para. 121 n.166.

¹⁶²EC First Submission, para. 115.

¹⁶³EC First Submission, para. 112. While in its First Submission, the EC noted a discussion among ITA participants on whether the concession in question covered semi-finished goods, the EC appears to agree that the present dispute does not pertain to semi-finished goods, and therefore it would seem that all parties agree that the materials provided by the EC on that issue are irrelevant to the matter before this Panel. EC Answers to Panel Questions, para. 168 (“[I]t would seem to the European Communities that no legal argument is advanced claiming that the European Communities would be in breach of its obligations in respect of semi-finished flat panel display devices.”). Furthermore, even a cursory review of the table following the headnote in the EC Schedule, and in particular the HS provisions the EC identified in connection with the Attachment B description, reveals that the EC itself considered the description to cover finished goods. For example, it identified subheading 8471 60 as a subheading covering goods meeting the Attachment B description. Subheading 8471 60 by its terms covers finished goods, not parts.

¹⁶⁴EC Answers to Panel Questions, para. 185.

¹⁶⁵*E.g.*, EC First Submission, para. 19.

“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. The EC states that it is “not ... particularly important” to distinguish between immediate and broader context, and advances the following “contextual” argument.¹⁶⁶ First, based on its theory that the headnote is “exhausted,” the EC claims that its concessions are limited to those associated with individual tariff lines in the table that follows the headnote.¹⁶⁷ Second, the EC claims that language appearing in *an entirely different concession* addressing CRT monitors that does *not* appear in the FPD concession somehow should be read to limit the concession for FPDs, such that an FPD that is “for” a computer is nonetheless excluded from the concession if it is capable of displaying video.¹⁶⁸ It appears to be on this basis alone that the EC both endorses the same definition of “for” as complainants, yet nonetheless claims that complainants’ interpretation of “for” is “overly broad.”¹⁶⁹

82. The United States has addressed the first assertion regarding the role of the headnote in Part II.A, *supra*, noting that the position of the EC is at odds with the text and, in rendering an entire provision of its Schedule a nullity, basic principles of treaty interpretation. On the second assertion regarding the other tariff concession, three observations may be made. First and foremost, unlike the FPD provision, the CRT monitor concession is expressly limited to a single

¹⁶⁶EC First Submission, para. 121.

¹⁶⁷EC First Submission, paras. 124-129.

¹⁶⁸*E.g.*, EC First Submission, paras. 128-132.

¹⁶⁹EC Answers to Panel Questions, paras. 27-28.

technology — CRT monitors — which are not at issue in this dispute.¹⁷⁰ The “exclusion” is not, therefore, a “general” exclusion. Had it been intended as a general exclusion, it could have been incorporated into Attachment B independently from any particular concession. If anything, a logical conclusion from the context would be that an exclusion incorporated only into one provision limited to one type of product does not apply to another provision dealing with another type of product. Nor is the sentence drafted to be read independently from the CRT monitor line — rather, it includes the term “therefore,” indicating that the exclusion is to be read in conjunction with the description of the CRT monitor that preceded it.

83. 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. To do so, the EC argues that, based on the single sentence quoted above, “televisions and — in the view of the European Communities — *monitors able to function as televisions because of their ability to receive and process television[] or video signals*” are per se excluded from the ITA.¹⁷¹ Of course, this assertion is

¹⁷⁰The EC argument that the fact that the CRT line states that the televisions excluded “includ[e] HD televisions,” suggests that it extends to FPDs, merely because some LCD devices are HD-capable and it would “make no sense” to exclude just some HD-capable devices, is equally inapt. See EC Answers to Panel Questions, para. 170. Nothing in the reference to “HD televisions” indicates that the drafters intended to refer to *all* HD-capable devices, nor would it necessarily be illogical to exclude some and not others. Again, the provision in which the reference appears is contained in the concession for *CRT* monitors. As discussed above, it is not drafted as a general exclusion.

¹⁷¹EC Answers to Panel Questions, para. 170; EC Oral Statement, para. 25 (incorrectly claiming that “Attachment B contains a definition of ‘monitors’ that *explicitly* excludes *video*

factually flawed and proves far too much. *Any* computer monitor is able to process video signals, since that is what computer monitors do and have always done (any device that visually displays information must be able to receive and process video signals). As for receiving television signals, only monitors equipped with a tuner are capable of doing that, and the products that receive duties under the EC measures are not limited to monitors with tuners.

84. 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.¹⁷² The ITA provision on computers, for example, expressly covers computers able to receive and process television or other video signals:

The agreement covers such automatic data processing machines whether or not they are able to receive and process with the assistance of central processing unit telephony signals, television signals, or other analogue or digitally processed audio or video signals.¹⁷³

85. In sum, the EC argument — that, because the CRT monitor provision states that televisions are excluded, all products on which video can be displayed are excluded from all of the EC’s ITA concessions — is illogical, would have serious implications for other concessions in the agreement, and does not accord with principles of treaty interpretation reflected in the

monitors and televisions from the scope of the obligations”) (emphasis added). *See also* EC First Submission, para. 65 (claiming that because DVI “makes use of VESA specifications” and “VESA stands for Video Electronics Standards Association,” all products with DVI are video monitors). Regarding VESA, the organization, among other things, “supports and sets industry-wide interface standards for the *PC, workstation, and computing environments.*” VESA, About VESA (Exhibit US-128) (emphasis added).

¹⁷²U.S. Closing Statement, para. 12.

¹⁷³ITA, Attachment B (Exhibit US-1).

Vienna Convention.

86. In addition to its flawed legal characterization of the concession, the EC argues that the products in question are not covered by the concession, relying on an inaccurate description of the history of the development of the so-called “multifunctional monitor” and a number of factual misstatements, including with respect to DVI, which are often supplied without citation or support, and are in all events contradicted by record evidence.¹⁷⁴

87. As with set top boxes, the EC originally attempted to rely on what it calls the “surrounding circumstances” to suggest that the concession for FPDs is narrower than what the text provides, and that the product at issue is a “new” product — a so-called “multimedia” or, alternately, “multifunctional” monitor that did not exist with the ITA was negotiated.¹⁷⁵ The EC now states that it “is not arguing that only those products and models that use the precise technology present in 1996 would be covered by the concessions made pursuant to the ITA” and that “[t]here is no general rule according to which the ITA concessions would either be entirely open to technological developments or that they would only be limited to the products and technology existing at the time. This depends on the precise product at issue and the way in which the relevant concessions are drafted.”¹⁷⁶ Yet this begs the question of why, in the view of the EC, the mere fact that the DVI connector was developed (shortly) after the ITA was concluded is relevant to determining whether devices equipped with DVI technology are covered

¹⁷⁴*E.g.*, EC First Submission, paras. 71-92; EC Answers to Panel Questions, para. 169-170. As explained, the dispute is not limited to so-called “multifunctional” or “multimedia” monitors. U.S. Oral Statement, para. 30; U.S. First Submission, paras. 129-134.

¹⁷⁵EC First Submission, paras. 71-92; EC Answers to Panel Questions, para. 169-170.

¹⁷⁶EC Answers to Panel Questions, para. 172.

by the concession.¹⁷⁷ Equally, it begs the question of the relevance of the EC’s description of the development of so-called “multimedia monitors” to interpreting the concession. As the United States has noted, LCD monitors were well-known when the ITA was negotiated;¹⁷⁸ more importantly, the products in question meet the terms of the concession, and are thus entitled to duty-free treatment.¹⁷⁹

a. By Subjecting To Duties Any Product With DVI, The EC Acts Inconsistently With Its Obligations

88. Specifically with regard to LCD monitors with DVI, as explained above, the EC measures by their terms require customs authorities to impose duties on any device equipped with DVI. As the United States explained in its First Submission, the fact that a flat panel display device has DVI provides no basis to conclude that it is not “for” a computer.¹⁸⁰ By subjecting any product that has DVI to duties, the EC acts inconsistently with its obligation to accord duty-free treatment to “flat panel display devices for products falling within the ITA,” inconsistent with its Schedule and Article II:1(a) and (b).

89. 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.”¹⁸¹ A more careful review of the facts, however, demonstrates that this is not the case, and even if it were the

¹⁷⁷EC First Submission, para. 87.

¹⁷⁸*E.g.*, U.S. Answers to Panel Questions, para. 92.

¹⁷⁹*See* U.S. First Submission, paras. 140-143.

¹⁸⁰U.S. First Submission, paras. 129-131.

¹⁸¹EC Answers to Panel Questions, para. 91.

case, it would not show that the measures are consistent with the EC’s obligations.

90. First, as the United States has explained, some devices with a DVI connector are *incapable* of functioning with anything other than a CPU.¹⁸² 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.”¹⁸³ To illustrate this point, the United States provided the operating manual for one such product – the Apple Cinema Display.¹⁸⁴ As the operating manual states, this product *cannot* operate without a CPU.¹⁸⁵ The EC’s only response to this evidence has been to note that the product name uses the term “Cinema” and to state that “under EC law as in force today” these devices would be subject to duty as video monitors.¹⁸⁶ The fact is that, notwithstanding the fact that it is equipped with a DVI connector, the device *must* be used with a CPU, and the EC is unable to offer any evidence otherwise. The fact that the EC continues to argue that these products would be subject to duty “under EC law as in force today” is telling — it demonstrates that, EC protestations to the contrary, DVI in fact *remains* dispositive under EC law today, and that, as a result of its arbitrary criteria, the EC does in fact impose duties even on devices that are “solely” for use with an ADP system.¹⁸⁷ Furthermore, the EC states that it agrees with complainants that “monitors that can solely connect to a computer”

¹⁸²U.S. First Submission, para. 130.

¹⁸³EC Answers to Panel Questions, para. 91.

¹⁸⁴Exhibit US-78.

¹⁸⁵Exhibit US-78.

¹⁸⁶EC First Submission, para. 169 and n.90.

¹⁸⁷The record demonstrates that EC customs authorities have subjected these very products to duties merely because they are equipped with DVI. *See* Exhibit US-50.

are “within the scope of the concessions made in respect of ‘flat panel display devices....’”¹⁸⁸

Thus, there appears to be no debate that in this respect the EC is acting inconsistently with its obligations.

91. 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.”¹⁸⁹ 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). On this question, the evidence is clear. As the next sentences in the report of the industry consortium that developed DVI state:

The interface is primarily focused at *providing a connection between a computer and its display device*. The DVI specification meets the needs of all segments of the PC industry (workstation, desktop, laptop, etc.) and will enable these different segments to unite around one monitor interface standard.¹⁹⁰

92. 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.¹⁹¹ Notwithstanding the

¹⁸⁸EC Answers to Panel Questions, para. 176.

¹⁸⁹EC Answers to Panel Questions, para. 164.

¹⁹⁰DDWG Paper, p. 1 (Exhibit US-35) (emphasis added).

¹⁹¹See EC Answers to Panel Questions, para. 163 (While DVI-I is “arguably primarily for computers”, “[t]he DVI-D standard is typically used in consumer electronics applications.”); *Id.*, para. 166 (“[E]ven if the DVI standard was developed first by the computer industry for computer purposes, given its capability to be used with both analog and digital signals, it was adopted within a year by the consumer electronics sector for an array of consumer electronics host products such as set-top boxes, DVD players and game consoles.”)

fact that neither the EC measure nor the BTIs make any distinction between DVI-I and DVI-D in the application of duties to FPDs,¹⁹² the EC now claims that one connector is used mainly with computers and the other with consumer electronics.¹⁹³ Even as a factual matter, this is incorrect. 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.¹⁹⁴ 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.¹⁹⁵

b. By Subjecting To Duties Any Product Capable Of Accepting Signals From A Device Other Than A CPU, The EC Acts Inconsistently With Its Obligations

93. As explained in the First Submission and in responses to Panel questions, the U.S.

¹⁹²See e.g, FPD CNEN (“monitors of this subheading cannot...be connected to a video source such as a DVD recorder or reproducer....be fitted with interfaces such as DVI-D, DVI-I...be used in systems other than automatic data-processing systems”) (Exhibit US-49); *see also* NLRTD-2007-000535 and NLRTD-20070999536 (classifying FPDs with DVI-I under the dutiable subheading) (Exhibit US-50).

¹⁹³EC Answers to Panel Questions, para. 163.

¹⁹⁴“How Computer Monitors Work”, pp. 8-10 (“DVI-digital (DVI-D) is a digital-only format. It requires a video adapter with a DVI-D connection and a monitor with a DVI-D input. The connector contains 24 pins/receptacles in 3 rows of 8 plus a grounding slot for dual-link support. For single-link support, the connector contains 18 pins/receptacles. DVI-integrated (DVI-I) supports both digital and analog transmissions. This gives you the option to connect a monitor that accepts digital input or analog input. In addition to the pins/receptacles found on the DVI-D connector for digital support, a DVI-I connector has 4 additional pins/receptacles to carry an analog signal.”) (Exhibit US-34).

¹⁹⁵A search of one popular retail web site for DVD players with DVI found that, out of more than 1500 DVD players sold on the site, only 11 products have a DVI interface. Likewise, when the site was searched for camcorders with DVI, out of the more than 1300 camcorders sold on the site, no products meeting that description were found. Exhibit US-129.

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).¹⁹⁶ 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. The concession uses the term “for” — not “only for.” The EC has failed to explain how the term “only” can be read into the concession when it nowhere appears in the text; its argument again appears to rest on nothing more than language contained in the concession on CRT monitors, which as noted are not the subject of this dispute. The fact that an FPD can accept a signal from both an ADP and non-ADP machine does not alone permit the conclusion that it is not “for” a computer. Yet the EC in all instances treats such devices as dutiable. In so doing, its measures are inconsistent with its obligations under Article II.

3. The ITA Is Relevant Context And Does Not Support The EC Interpretation

94. As explained in Part III.A.3, *supra*, all parties, including the EC, agree that the ITA is relevant context within the meaning of Vienna Convention Article 31. For an explanation of how the ITA further supports the interpretation of the concessions advanced above, the United States refers the Panel to Part III.A.3, *supra*.

4. Ancillary Material Relied Upon By The EC Is Not Relevant And Does Not Support Its Position

95. 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

¹⁹⁶U.S. First Submission, paras. 132-134; see also U.S. Answers to Panel Questions, para. 84.

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.¹⁹⁷ 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.

96. Regarding the supposed classification practice of the United States and other ITA participants, the EC refers to two documents. The first pertains to U.S. classification of LCD *modules* — a product that is not the subject of this dispute.¹⁹⁸ The second is a single classification ruling by CBP, which offers nothing more than an illustration of a customs authority applying the “principal use” test, considering the objective characteristics of a product (something that is nowhere allowed under the EC measures, which as explained above, automatically disqualify any device with DVI or capable of receiving signals from something other than a computer from duty-free treatment).¹⁹⁹ As such, it provides no support for the EC view that its measures are consistent with its obligations, nor does it indicate any particular “practice” on the part of the United States regarding monitors.²⁰⁰ Likewise, the EC’s description of where other ITA participants classified FPDs is irrelevant — as noted above, Attachment B concessions were drafted with the understanding that not all participants classified the product in question in the same lines, and the

¹⁹⁷EC First Submission, para. 174-189.

¹⁹⁸See Exhibit EC-18.

¹⁹⁹See Exhibit EC-19.

²⁰⁰For the reasons described in Part V.A.2.d, *infra*, the documents also do not demonstrate a “practice.”

concession applies to a product “wherever...classified.”²⁰¹ The EC argument is again premised on its theory that the headnote is “exhausted” by individual tariff lines; as explained in Part II.A., that theory is untenable.

97. As for the negotiating documents the EC has submitted — proposals pertaining to ITA II, U.S. landscape papers, and various other material from the negotiations — none is relevant to the interpretative issue presented.²⁰² 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.²⁰³ The rest of the negotiating material referenced simply beg the question of what products were ultimately covered by the concessions (a question that can instead be answered upon review of the text of the concessions as explained above), and for reasons previously described by the United States, does not constitute negotiating history.²⁰⁴ 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.²⁰⁵ The EC has failed to demonstrate that either is the case.

²⁰¹See Part II.A., *supra*.

²⁰²EC First Submission, paras. 178-188.

²⁰³In fact, ITA II negotiators recognized that several products proposed for inclusion in ITA II may in fact have been part of ITA I. See WTO, Proposed Additions to Product Coverage: Compilation of Participants’ Submissions: Note by the Secretariat, G/IT/SPEC/15, pp. 23-24 (24 February 1998) (notation next to product descriptions indicating that certain products are “already covered by the ITA”) (Exhibit US-130).

²⁰⁴See Part III.A.1.c., *supra*.

²⁰⁵See Part III.A.1.c., *supra*.

B. EC and Member State Measures Breach Article II:1(a) and (b) With Respect To “Input or Output Units” Described By 8471 60 90 And 13 Other Duty-Free Tariff Lines

98. 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.

99. 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 1994.²⁰⁶ They are “input or output units” — devices which “accept[] new data, send[] it into the computer for processing, receive[] the results, and translate[] them into a useable medium.”²⁰⁷ The EC to date has offered no analysis of the ordinary meaning of the terms of its Schedule that would support the conclusion that only devices that are *solely* capable of receiving input from an ADP machine are covered by this concession. As for the context, the United States has described the wide range of computer products included in heading 8471, the entirety of which was covered by the ITA and is subject to zero duty in the EC Schedule, further supporting the conclusion that the concession for “input or output units” was not limited to a narrow range of such units.²⁰⁸ The language and structure of heading 8471 does not

²⁰⁶U.S. First Submission, paras. 135-139.

²⁰⁷U.S. First Submission, para. 136; Exhibit US-82.

²⁰⁸U.S. First Submission, para. 137.

limit itself to monitors that can only receive input from an ADP machine. The only contextual argument the EC offers is with respect to concessions that are not relevant — in particular, the concession on CRT monitors in the headnote and the provisions in its Schedule for “video monitors”. As noted above, the devices in question are not video monitors, and the mere fact that they have a DVI connector or can connect to something other than a computer does not qualify them as such.²⁰⁹

100. 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.²¹⁰ 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.²¹¹ As a threshold matter, in the WCO, HS Explanatory Notes cannot supersede Chapter Notes.²¹² 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. The EC’s suggestion that, using an Explanatory Note, one can read the term “principally” out of the Chapter Note does not

²⁰⁹See Part IV.A, *supra*.

²¹⁰U.S. First Submission, para. 138.

²¹¹EC First Submission, para. 157-58.

²¹²See *e.g.*, EC Answers to Panel Questions, para. 76 (quoting note to GIR 1 stating that “the terms of the headings and any relative Section or Chapter Notes are paramount, i.e. they are the first consideration in determining classification.”); *China – Auto Parts (U.S.) (Panel)*, para. 7.380 (“As commented by the WCO Secretariat and pointed out by the complainants, classification should be based, first, on the terms of the headings, relevant Section or Chapter Notes pursuant to GIR 1 and provided such headings or Notes do not otherwise require, according to the provisions of GIRs 2-6.”).

accord even with its own description of how the HS should be applied to evaluate a product.²¹³

C. EC and Member State Measures Also Result in Duty Treatment Less Favorable than that Provided in the EC Schedule for Flat Panel Display Devices, Contrary to Article II:1(a)

101. As noted in the U.S. First Submission, because the EC and its member States have acted inconsistently with Article II:1(b) by imposing ordinary customs duties on certain flat panel display devices in excess of the bound rate established in their Schedule, the measures also result in duty treatment less favorable than that provided in the EC Schedule, contrary to Article II:1(a) of the GATT 1994.²¹⁴ Furthermore, as explained in the U.S. First Submission and as discussed in Part IV.A.1, *supra*, because the EC provides only a temporary duty suspension to certain flat panel display devices, conditioned on various criteria not included in its Schedule and subject to periodic lapse, its measures result in duty treatment that is “less favourable” than that provided in its Schedule to these products as well, contrary to Article II:1(a).

²¹³EC Answers to Panel Questions, para. 81 (stating that the first element to be applied is “the wording of heading 8471 together with Note 5 to Chapter 84”).

²¹⁴*Argentina – Footwear (AB)*, para. 45 (“Paragraph (a) of Article II:1 contains a general prohibition against according treatment less favourable to imports than that provided for in a Member’s Schedule. Paragraph (b) prohibits a specific kind of practice that will always be inconsistent with paragraph (a): that is, the application of ordinary customs duties in excess of those provided for in the Schedule.”).

V. EC AND ITS MEMBER STATES ACT INCONSISTENTLY WITH GATT 1994 ARTICLE II:1(A) AND (B) IN IMPOSING DUTIES ON CERTAIN MULTIFUNCTION DIGITAL MACHINES

102. As the United States explained in its first submission, multifunction digital machines were included in Attachment A of the ITA, under the provision for “input or output units, whether or not containing storage units in the same housing” (subheading 8471.60) and the provision for “facsimile machines” (subheading 8517.21). As a result of these commitments the EC modified its Schedule to provide for duty-free treatment for both computer peripherals, such as printers and scanners, and facsimile machines.

A. EC and Member State Measures Result in the Application of Ordinary Customs Duties “In Excess of” the Bound Duty Rate Provided in the EC Schedule for “Input or Output Units” and “Facsimile Machines”, Contrary to Article II:1(b)

103. While MFMs entering the EC were classified in subheadings 8471.60 or 8517.21 when the ITA was concluded, shortly thereafter the EC adopted a series of measures that resulted in the reclassification of MFMs and the imposition of duties.²¹⁵ The first of these regulations, Regulation (EC) No 517/1999 provided that “a multifunctional apparatus (so-called ‘digital copier’)” capable of “scanning, printing, faxing” and what it termed “photocopying (indirect process)” would be classified in what was then tariff line 9009 12 00 as “photocopying apparatus incorporating an optical system...operating by reproducing the original image via an intermediate onto the copy (indirect process).”²¹⁶ This provision carries a 6% duty. In measures that followed, including the January 2005 Customs Code Committee statement, and a 2006 regulation, the EC

²¹⁵See U.S. First Submission, paras. 75-83.

²¹⁶Exhibit US-59.

again classified the devices into the dutiable heading, until finally, in October 2006, the EC amended the CN/CCT to provide that all non-inkjet devices capable of copying and faxing, with an output speed of more than 12 pages per minute, would be dutiable, and furthermore that all devices that copy and print (without a fax feature) would be dutiable *without regard to their output speed*.²¹⁷ As explained in U.S. answers to Panel questions, each of the measures described above is still valid and has legal effect.²¹⁸ The EC’s assertion that it did not “reclassify” products is, again, incorrect — due to the measures, products that were once classified in the duty-free subheading by EC customs authorities were placed in the dutiable heading.²¹⁹

104. As with STBs and FPDs, the EC’s response to the U.S. claims regarding MFMs, at the first Panel meeting and in answers to the Panel questions continue to ignore (1) the text of the measures at issue (again in favor of an European court decision that is not itself a measure at issue, did not address the measures (though illustrates their flaws), and has not resulted in their modification); and (2) the text of the concession at issue (in favor of a different concession relating to photocopiers). We address each of these points in turn below.

1. The EC Response Ignores The Text Of Its Own Measure

105. 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”²²⁰, as with FPDs,

²¹⁷See U.S. First Submission, paras. 78-83.

²¹⁸U.S. Answers to Panel Questions, paras. 46-47.

²¹⁹*Compare* Exhibit US-106 (BTI issued by member States classifying MFMs in duty-free subheading prior to and during ITA negotiations) with Exhibit US-62 (BTIs issued by member States classifying MFMs in dutiable subheading after imposition of measures).

²²⁰EC Answers to Panel Questions, para. 105. As noted in the U.S. Answers to Panel Questions, the difficulty the EC claims that member State customs authorities would encounter in applying the regulations under the new CN codes is clearly not insurmountable — since the CN

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. There is no provision in the EC CN allowing for devices that have a “secondary copying function” to be classified in a duty-free line. Quite simply, the CN creates a clear division between those goods that are dutiable and those that are not, based *only* on copy speed (and for devices without a facsimile function, based only on the fact that they can print and copy).

106. 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). The Panel asks the same question that the complainants and traders have had in this regard — what is the rationale for the seemingly arbitrary threshold of 12 pages per minute and how did the EC arrive at it.²²¹ The EC provides an interesting response. It does not even explain how it arrived at the 12

was modified, member States have in fact issued BTI relying on the prior regulations. U.S. Answers to Panel Questions, para. 46; Exhibit US-62.

²²¹See Panel Question 40.

page per minute threshold; it instead suggests that classification rules dictate a certain outcome but that the threshold has been included in the 2007 CN to “mitigate the consequences of the application” of the classification rules in “certain cases where the copying function is clearly secondary to the faxing function.”²²² Why consequences need to be “mitigated,” and how the threshold actually distinguishes those “certain cases” where copying function is “clearly” secondary, is all unclear. The EC goes on elsewhere in its response to Panel questions to assert, without support or explanation, that the 12 page per minute criterion provides for duty free treatment for devices “in which the copying function may be deemed secondary.”²²³ 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.

107. Finally, the EC misstates the issue before the Panel, as “whether ADP MFMs in which the copying function is equivalent or of greater importance than the ADP functions are covered by the concession” for “input or output units” — rather, the issue is whether the EC measures are consistent with its obligations.²²⁴ The standard the EC describes is nowhere found in those measures, and therefore is irrelevant. To demonstrate that the EC measures are inconsistent with its obligations, complainants need not show that a standard not in its measures is WTO-inconsistent, or that the EC measures are inconsistent with its obligations every time they are applied, but rather that the measures result in a breach.²²⁵

²²²EC Answers to Panel Questions, para. 142.

²²³EC Answers to Panel Questions, para. 147.

²²⁴EC Answers to Panel Questions, para. 148.

²²⁵EC Answers to Panel Questions, para. 148.

2. EC’s Interpretation Of Its Concessions Is Flawed

108. 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.

a. The EC Acts Inconsistently With Its Obligation To Grant Duty Free Treatment To “Input Or Output Units”

109. Briefly, MFMs that connect to a computer or network are “input or output units”²²⁶ — they “accept[] new data, send[] it into the computer for processing, receive[] the results, and translate[] them into a useable medium.”²²⁷ The EC has offered no analysis of the ordinary meaning of the terms of its Schedule that would support the conclusion that only devices that can reproduce fewer than 12 pages per minute are covered by this concession. As for the context, the United States has described the wide range of computer peripherals included in heading 8471, the entirety of which was covered by the ITA and is subject to zero duty in the EC Schedule, suggesting that the concession for “input or output units” was not limited to a narrow range of such units.²²⁸ The only contextual argument the EC offers is with respect to concessions that are not relevant — in particular, the concession on photocopiers.²²⁹ As discussed previously and reviewed below, the MFMs subject to duty under the EC measures are not photocopiers, and the mere fact that they

²²⁶U.S. First Submission, paras. 135-139.

²²⁷U.S. First Submission, para. 206; Exhibit US-83.

²²⁸U.S. First Submission, paras. 155-56.

²²⁹*E.g.*, EC Answers to Panel Questions, para. 122; EC First Submission, para. 385.

can reproduce more than 12 pages per minute does not qualify them as such.²³⁰

b. EC Acts Inconsistently With Its Obligation To Accord Duty Free Treatment To “Facsimile Machines”

110. In addition to MFMs that connect to a computer, many MFMs which do not connect to a computer and have a facsimile function are “facsimile machines” — they are devices in which “a transmitter scans a photograph, map, or other fixed graphic material and converts the information into signal waves for transmission by wire or radio to a facsimile receiver at a remote point.”²³¹

As with the “input or output units” described above, the mere fact that a device can reproduce more than 12 pages per minute provides no information about whether or not it is a facsimile machine. Yet the EC treats any such device as dutiable (as a “photocopier”) if it is capable of reproducing more than 12 pages per minute. Again, the EC has provided no explanation of why the products do not meet the ordinary meaning of the term, other than to argue that they fall within the term “photocopier”.

c. MFMs are not “electrostatic photocopying apparatus...incorporating an optical system...operating by reproducing the original image via an intermediate onto the copy (indirect process)”

111. As discussed in the U.S. First Submission, and consistent with the views expressed by the WCO Secretariat in its 2001 comments, none of the devices in question are “electrostatic photocopying apparatus.”²³² 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.

²³⁰See Part V.A.2.c, *infra*.

²³¹U.S. First Submission, para. 167; Exhibit US-92.

²³²U.S. First Submission, paras. 157-60; U.S. Answers to Panel Questions, para. 73.

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.²³³ 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.²³⁴ 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.²³⁵ 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,"²³⁶ or "formed by the action of light,"²³⁷ or "created on a sensitized surface...by the action of radiant energy."²³⁸ 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

²³³U.S. First Submission, para. 155.

²³⁴Exhibit US-90.

²³⁵U.S. First Submission, para. 158; Exhibit US-90.

²³⁶EC First Submission, para. 369 (citing New Shorter Oxford English Dictionary definition of "photocopier").

²³⁷EC First Submission, para. 369 (citing Merriam-Webster online dictionary definition of "photocopy").

²³⁸EC First Submission, para. 369 (citing Sci-Tech Dictionary definition of "photocopying process")

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.²³⁹ For example, the articles in Exhibit EC-68 in many cases have nothing to do with MFMs, also use the term “digital copier” or “copier” to describe the product, or otherwise offer no information about whether the process performed by the devices they are describing is in fact “photocopying”.²⁴⁰ Likewise, akin to how the term “typing” is used colloquially to describe word processing on a computer, the sales brochures merely demonstrate that the term “photocopying” has acquired a colloquial usage that extends beyond its technical meaning; they do not address whether the devices in question are “photocopying apparatus incorporating an optical system” as provided in the text of heading 9009.²⁴¹

112. 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.”²⁴² Contrary to what the EC claims, a scanner is not a system of “lamps, lenses, and

²³⁹EC First Submission, para. 375.

²⁴⁰Exhibit EC-68 (random selection of newspaper articles with the word “photocopier” in headline).

²⁴¹U.S. Oral Statement, para. 38.

²⁴²Harmonized Commodity Description and Coding System, Explanatory Notes (2d ed., 1996), p. 2 (Exhibit US-57). Regarding the EC’s assertion that the HSEN is not relevant because

mirrors”²⁴³ – 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).”²⁴⁴ A photocopier, on the other hand, uses an optical image formed by a lens or mirror system from reflected, refracted, or diffracted light waves.²⁴⁵ As for the EC’s assertion that heading 9009 does not require that photocopiers have an optical system,²⁴⁶ by its terms the only photocopiers included in heading 9009 are “photocopying apparatus incorporating an optical system or of the contact type” — unless the EC is prepared to establish that the devices in question are “of the contact type”, the only relevant question is whether they are “photocopying apparatus incorporating an optical system”.²⁴⁷ As explained, they are not.

113. 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

it was drafted before digital copiers were available, *see* U.S. Answers to Panel Questions, para. 75. Regarding the EC’s assertion that the revisions to the HSEN in 2007, in particular the addition of “for each copy” support its interpretation that the 1996 HSEN covered MFMs, EC Answers to Panel Questions, paras. 125-127, contrary to what the EC suggests, the change was not an acknowledgment that the prior HSEN defined photocopiers in “broader terms.” In fact, the EC argument reads the statement out of the context of the many other changes that were made to the HSEN. In any event, its position on the significance of the 2007 HSEN is contradicted by its assertion elsewhere that “subsequent versions of the HS are not relevant for the interpretation” of EC concessions, and that it would “be inappropriate to rely on the wording of those subheadings (let alone on the Explanatory Notes to those subheadings) in order to redraw retrospectively the scope of concessions made at a time where no WTO member could have had any inkling of the changes in question.” EC First Submission, para. 407-408.

²⁴³EC First Submission, para. 376.

²⁴⁴Exhibit EC-65, p. 1.

²⁴⁵Exhibit US-90.

²⁴⁶EC First Submission, para. 377.

²⁴⁷Contact-type photocopying apparatus operate by bringing the original into contact with the sensitive surface to be printed. The copy is always actual size. See Explanatory Note 9009 (B) (HS96).

importance” than, for example, the printing or other functions performed by the machine.²⁴⁸ 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.²⁴⁹ 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*. Indeed, even the concept of “copy speed” is not meaningful — the machines in question perform all tasks at the speed dictated by the print engine.²⁵⁰

114. 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 1.²⁵¹ In addition, while the EC claims that the U.S. approach would result in the classification of some MFMs as “other office machines” when in its view these devices “have more in common” with a photocopier, its own approach means that laser MFMs and inkjet MFMs are classified differently just because they use different print technologies. The

²⁴⁸EC First Submission, para. 421.

²⁴⁹As noted, in some cases, the device may also include facsimile apparatus (in particular, a modem).

²⁵⁰The only task whose timing may be affected by other factors is facsimile transmission speed — that said, incoming faxes would be printed at the same rate as any other document produced by the device.

²⁵¹U.S. Answers to Panel Questions, para. 78.

similarities between these two devices are much more apparent than as between standalone digital MFMs and photocopiers, yet the EC theory requires that the devices be classified in different categories. 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.²⁵² 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.

d. Supporting material relied upon by the EC is not relevant and does not support its position

115. 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

²⁵²Contrary to what it suggests in its oral statement, EC Oral Statement, para. 61, the EC does not explain why GIR 3(b) cannot be applied to MFMs.

“subsequent practice” for purposes of Vienna Convention Article 31. Indeed, in previous disputes, the EC has objected to reliance on “the subsequent practice of one party alone” to “determine the interpretation of a treaty” and has noted the importance of establishing “consistent practice,” both by the Member whose practice is at issue and at the multilateral level.²⁵³ The Appellate Body agreed with the EC, stating that, “To our mind, 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.”²⁵⁴ In this case, the EC has demonstrated neither a consistent practice on the part of the EC or the United States that supports its position, nor that such a practice was shared by other WTO Members.

116. 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,”²⁵⁵ the evidence before the Panel in fact shows that EC customs authorities issued decisions classifying MFMs in heading 8471 60 during the ITA negotiations.²⁵⁶ 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

²⁵³*EC – Chicken Cuts (AB)*, para. 253.

²⁵⁴*EC – Chicken Cuts (AB)*, para. 259; *see also id.*, para. 266 (“In our view, these statements cannot be read to justify exclusive reliance on the importing Member's classification practice.”). Furthermore, in *EC – Chicken Cuts*, the panel attached significance to the fact that the EC was the only importer of the goods in question — that is not the case with respect to any of the products at issue in this dispute.

²⁵⁵EC First Submission, para. 385.

²⁵⁶See Exhibit US-106 (three decisions issued by EC customs authorities, two issued in early 1996 and one in mid-1997, classifying MFMs in 8471 60).

based solely on the reference to note 3 in those decisions as a legal basis for the action).²⁵⁷

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.”

117. 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).²⁵⁸ 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.²⁵⁹ 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. For the reasons noted in Part III.A.1.c, *supra*, the documents support neither point.

3. The ITA Is Relevant Context And Does Not Support The EC Interpretation

118. As explained in Part III.A.3, *supra*, all parties, including the EC, agree that the ITA is

²⁵⁷Exhibit EC-74; see also U.S. Answers to Questions of the EC, paras. 1-8.

²⁵⁸EC First Submission, paras. 400-403.

²⁵⁹*See* Exhibit US-94, p. 30.

relevant context within the meaning of Vienna Convention Article 31. For an explanation of how the ITA further supports the interpretation of the concessions advanced above, the United States refers the Panel to Part III.A.3, *supra*.

B. EC and Member State Measures Also Result in Duty Treatment Less Favorable than that Provided in the EC Schedule for MFMs, Contrary to Article II:1(a)

119. As noted in the U.S. First Submission, because the EC and its member States have acted inconsistently with Article II:1(b) by imposing ordinary customs duties on certain MFMs in excess of the bound rate established in their Schedule, the measures also result in duty treatment less favorable than that provided in the EC Schedule, contrary to Article II:1(a) of GATT 1994.²⁶⁰

VI. EC’S FAILURE TO PUBLISH AMENDED STB CNEN IS INCONSISTENT WITH GATT ARTICLE X:1 AND 2

120. As the United States explained in its First Submission, the CNEN amendments discussed above were approved by the Tariff and Statistical Nomenclature Section of the Customs Code Committee (Customs Committee) in October 2006 and May 2007, but were not published in the EC’s official journal for over a year, until May 2008.²⁶¹ This action does not accord with GATT 1994 Article X:1, which requires that:

administrative rulings of general application...pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges... shall be published *promptly* in such a manner as to enable governments

²⁶⁰*Argentina – Footwear (AB)*, para. 45 (“Paragraph (a) of Article II:1 contains a general prohibition against according treatment less favourable to imports than that provided for in a Member’s Schedule. Paragraph (b) prohibits a specific kind of practice that will always be inconsistent with paragraph (a): that is, the application of ordinary customs duties in excess of those provided for in the Schedule.”).

²⁶¹U.S. First Submission, paras. 112-119.

and traders to become acquainted with them.²⁶²

121. As the United States has demonstrated, the measure in question is an “administrative ruling of general application...pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges...”²⁶³ While the EC again attempts to downplay the importance of CNENs in the EC system, claiming that they are “non-binding” and have an “essentially and inherently informative character”, as explained above, CNENs in fact have important legal effects (including the fact that they can require revocation of preexisting BTI), member States routinely refer to them as a basis for classification, and as the EC now concedes, the CNEN is an “important tool[] for the interpretation of the CN” and “customs authorities naturally *have to*” consult it in deciding on classification of individual products.²⁶⁴

122. As for whether the measure was published “promptly,” 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.²⁶⁵ 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.²⁶⁶ Furthermore, while the EC points to additional work the Commission planned with

²⁶²GATT 1994 Article X:1 (emphasis added).

²⁶³U.S. First Submission, para. 114.

²⁶⁴See paragraph 35, *supra*.

²⁶⁵EC First Submission, para. 308-309.

²⁶⁶*E.g.*, Customs Code Committee – Tariff and Statistical Nomenclature Section (Heads of Tariff), Summary Report of the 433rd meeting of the Committee held on 22 October 2007, p. 5 (emphasis added) (Exhibit US-20) (Chairman of CCC stating that “as soon as the Committee

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:²⁶⁷ 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.²⁶⁸ 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.²⁶⁹

has rendered an opinion on the classification of a specific type of product, no BTI should be issued contrary to that opinion and... this opinion should be respected by all member States. It follows from the above that as soon as an opinion has been voted, member States can issue BTIs for the products concerned, *even before the measure has been adopted by the Commission and published in the Official Journal.*”) It should be noted that, contrary to what the EC suggests, nothing in the record of the discussion suggests that this comment was limited to a subset of measures in the BTI Guidelines — the Chairman’s statement by its terms refers to measures “before” they have been adopted by the Commission, and the title of the discussion is “voted measures” generally. See also Customs Code Committee – Tariff and Statistical Nomenclature Section (Heads of Tariff), Summary Report of the 395th meeting of the Committee held on 4-5 May 2006, p. 8 (Exhibit US-74) (Chairman urging member States to “wait to issue BTIs until the case is concluded”). Furthermore, also contrary to what the EC suggests, EC Answers to Panel Questions, para. 319, the United States has not cited to the Chairman’s statement as a measure itself, but rather as evidence of when the measure in question — the CNEN amendments — came into effect.

²⁶⁷EC First Submission, para. 303-305.

²⁶⁸As the documents in Exhibit EC-90 indicate, the only change to the measure made between the 2007 vote and its publication in May 2008 was the deletion of the phrase “by accessing any IP address” in the paragraph on Internet access. See Exhibit EC-90 (TAXUD/667/2006Rev4 (January 2008), p. 3).

²⁶⁹The EC concedes that five BTI submitted as evidence to the Panel were issued between the vote and publication classifying STBs in the dutiable heading, and that four of the five BTI refer to the CNEN as a “justification” for the classification. EC First Submission, para. 324 (“BTIs listed in #5, #6, #7, and #9 contain in the heading “Classification Justification” a reference to the draft and unadopted EC EN (one national customs authority even refers to these as a ‘decision’ of the CCCE).”).

123. 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.”²⁷⁰

124. As the United States explained in its First Submission, and as the preceding discussion suggests, EC customs authorities also relied on the CNEN amendments to impose duties on products before the amendments were published.²⁷¹ In so doing, the EC acted inconsistently with GATT 1994 Article X:2, which requires that:

No measure of general application taken by any contracting party effecting an advance in a rate of duty or other charge on imports under an established and uniform practice...shall be enforced before such measure has been officially published.

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.²⁷² In response, in addition to claiming that the

²⁷⁰The EC assertion that if the measure was given effect before publication, this could be challenged before the ECJ, is a *non sequitur*. EC First Submission, para. 324. The issue before this panel is whether the measure was published consistently with the EC’s WTO obligations, not whether the measure may additionally give rise to inconsistencies with EC law.

²⁷¹See U.S. First Submission, para. 116.

²⁷²See U.S. First Submission, para. 118.

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.²⁷³

125. In short, by failing to “promptly” publish the CNEN and by failing to publish it before it came into effect, the EC deprived importers of an important element of due process — the ability to see a measure before it is used to raise duties on imports — and acted inconsistently with GATT 1994 Articles X:1 and X:2.²⁷⁴

²⁷³See U.S. Answers to Panel Questions, para. 44 (quoting Statement of the European Communities at the December 11, 2006, meeting of the Dispute Settlement Body). WT/DSB/M/223 (15 January 2007), para. 8.

²⁷⁴*EC-Customs (Panel)*, para. 7.107 (noting that “the title as well as the content of the various provisions of Article X of the GATT 1994 indicates that that Article, at least in part, is aimed at ensuring that due process is accorded to traders when they import or export”).

VII. CONCLUSION

126. For the reasons set out above, the United States respectfully requests the Panel to find that:

- (1) the EC and its member States have applied and continue to apply duties to STBs with a communication function, flat panel display devices, and MFMs at rates in excess of those set forth in their Schedules, inconsistent with Articles II:1(a) and (b) of the GATT 1994;
- (2) the application and continued application of these duties by the EC or any member State is inconsistent with Articles II:1(a) and (b) of the GATT 1994;
- (3) the Amended STB CNEN, individually and in conjunction with the CN, as such and as applied by EC and member State customs authorities is
 - (a) inconsistent with GATT 1994 Article II:1(b) as they subject imports of set top boxes with a communication function to ordinary customs duties in excess of those set forth in the EC's Schedule; and
 - (b) inconsistent with GATT 1994 Article II:1(a) as it affords imports of set top boxes with a communication function less favorable treatment than that provided for in the EC's Schedule;
- (4) the March 2005 FPD Regulation, April 2005 FPD Regulation, December 2005 FPD Regulation, and Amended FPD CNEN, individually and in conjunction with the CN, as such and as applied by EC member State customs authorities are:
 - (a) inconsistent with GATT 1994 Article II:1(b) as they subject imports of flat panel display devices to ordinary customs duties in excess of those set forth in the EC's Schedule; and

- (b) inconsistent with GATT 1994 Article II:1(a) as they afford imports of flat panel display devices less favorable treatment than that provided for in the EC's Schedule;
- (5) the 1999 MFM Regulation, 2005 MFM Decision, 2006 MFM Regulation, individually and in conjunction with the CN, as such and as applied by EC and member State customs authorities are:
 - (a) inconsistent with GATT 1994 Article II:1(b) as they subject imports of MFMs to ordinary customs duties in excess of those set forth in the EC's Schedule; and
 - (b) inconsistent with GATT 1994 Article II:1(a) as they afford imports of MFMs less favorable treatment than that provided for in the EC's Schedule; and
- (6) the EC has failed to publish promptly measures pertaining to the classification of STBs, inconsistent with Article X:1 of the GATT 1994, and the EC and its member States have enforced measures increasing the duty on such product before the measures have been officially published, inconsistent with Article X:2 of the GATT 1994.

127. Accordingly, the United States also respectfully requests that the Panel recommend, pursuant to Article 19.1 of the DSU, that the EC and its member States bring these measures into conformity with the covered agreements.