EUROPEAN COMMUNITIES AND ITS MEMBER STATES – TARIFF TREATMENT OF CERTAIN INFORMATION TECHNOLOGY PRODUCTS
(WT/DS375, WT/DS376, WT/DS377)

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF THE UNITED STATES OF AMERICA AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

JULY 20, 2009

1. At the center of this dispute lie certain tariff concessions made by the EC and its member States in their Schedules of Concessions to the GATT 1994 (the "EC Schedules") with respect to three ITA products: set top boxes which have a communication function, flat panel display devices, and multifunctional digital machines. The question before this Panel is whether the EC and member State measures — specifically, those identified by the complainants in their panel request and subject to the Panel's terms of reference — result in tariff treatment that is inconsistent with those concessions and Article II:1(a) and (b) of the GATT 1994.

2. In its submissions to date, the United States has explained each of the measures identified in the panel request and provided evidence of how they operate. The United States has quoted language from the measures at issue — language which the EC itself has characterized as "categorical" — that directs customs authorities to impose duties on any product that has one or more of the particular arbitrary characteristics outlined in the measures. The United States has submitted BTI, which support the conclusion that *in every case*, when a product has the particular arbitrary characteristics outlined in the measures, EC customs authorities apply duties to it. The EC's protestations to the contrary, the United States has also explained in detail the concessions at issue, and how the measures result in the imposition of duties on products that are entitled to duty-free treatment under the terms of concessions in the EC Schedules. As explained in the U.S. submissions, these concessions include the headnote in the EC Schedules, providing for duty-free treatment of products "wherever...classified," as well as descriptions associated with individual tariff lines bound at zero duty. Using the principles of treaty interpretation reflected in the Vienna Convention, the United States has explained how the products in question fall within the ordinary meaning of the terms of the concessions when read in context and in the light of the object and purpose of the GATT 1994. Those products are therefore entitled to duty free treatment. Yet they are denied duty free treatment as a result of the measures. Consequently, the measures are inconsistent with GATT 1994 Article II:1(a) and (b) and the EC Schedules of Concessions.

3. Beyond claiming confusion about the claims and measures at issue, the EC's response continues to be premised on four key propositions: first, that the complainants' claims and the measures at issue are not clear, principally because they have failed to define in sufficient detail the "products at issue" in the dispute; second, that its measures mean something other than what they say; third, that the concessions complainants have identified have no meaning or should otherwise be ignored in favor of concessions on entirely different products; and fourth, that the headnote, and thus the commitment to provide duty free treatment to Attachment B products "wherever...classified", is meaningless. Each of these propositions is wrong as a matter of fact or law or both. When they are rejected, there is nothing left to the EC's defense.

4. The EC's professed confusion about the core elements in the case — elements articulated by three different WTO Members and endorsed by a number of third parties — strains credibility. At heart, the EC position appears to be premised on its incorrect view that, in addition to demonstrating that its measures result in the breach of specific concessions, the complainants must provide a detailed definition of a specific "product category" in order to prevail, and that only by showing that EC customs authorities improperly impose duties on *all* products in this category can complainants demonstrate that the EC is in breach of its obligations. As the United States explained in its second written submission, this argument is without basis. It turns the test for demonstrating an "as such" breach on its head, and appears to be nothing more than an attempt to introduce an additional legal hurdle to establishing a breach of Article II — one already discredited by the Appellate Body in *EC–Computer Equipment*. The fact that the EC in that dispute was raising an argument in relation to Article 6.2 does not support the conclusion that the Appellate Body's reasoning is inapplicable in this case.

5. Second, the EC utterly ignores the text of its own measures. The EC focuses instead on statements contained in two court decisions, vague generalities regarding its approach to classification, and equally vague assertions regarding the legal effect of the measures in question. For example, with respect to MFMs, not once in its entire rebuttal submission does the EC refer to the 12 page per minute criterion contained in the text of the EC Combined Nomenclature for subheading 8443 31 — the measure that is the subject of the terms of reference of this Panel and that EC customs authorities use to disqualify products from duty-free treatment. Its response instead centers around a so-called "case-by-case" analysis or a standard described by the ECJ in 2009 in the *Kip* case — a case that did not itself address the measures before this Panel, articulating a standard that is nowhere evidenced in those measures, in an opinion by an EC court evaluating particular EC actions in light of the EC classification laws before it, not the EC's WTO tariff obligations. The EC does not even attempt to reconcile the measure as it exists — the CN — and the observations of the court in *Kip*. In response to a direct question from the Panel, it fails even to offer an explanation of why the 12 page per minute criterion was selected. As explained in the U.S. submissions, the EC's argument regarding FPDs, relying on the court opinion in *Kamino*, is equally at odds with its own measures and divorced from reality.

6. Regarding the theory that the FPD and MFM measures are "effectively inapplicable" due to court opinions, as noted above, the United States has provided evidence showing that the court opinions, while providing some useful illustrations of the flaws in the EC's logic, do not themselves nullify the measures. The measures *remain in effect*. The EC's repeated assurances that it may at some future date repeal the measures simply serves as further evidence of that reality. Likewise, as for the EC's theory that some of the measures are "effectively inapplicable" due to changes in the EC's domestic nomenclature in 2007, while the EC claims that it would be "difficult" to apply some of the measures due to renumbering and other changes, the United States has presented BTI indicating that member States have *in fact* continued to apply them notwithstanding those changes. The EC has offered little or no response, stating rather incongruously that the BTI "refer" to the regulations as "authority" but do not "apply" them. As for the EC's claim that the CNENs are not binding, it acknowledges that they are "important tools for the interpretation of the CN" and that "customs authorities naturally have to" consult them, and again offers no credible explanation in

response to the evidence before the Panel concerning their legal effect, including BTI demonstrating that member States have in fact referred to CNENs as a legal "classification justification" for decisions to classify products in dutiable headings, and the EC's own reliance on CNENs for compliance with DSB recommendations and rulings in a prior dispute.

7. Finally, while the EC at times suggests that there exists some purported flexibility in the measures themselves, it has offered *no evidence* indicating that the measures do anything other than what they say: direct EC customs authorities, in what the EC itself describes as "categorical" language, to impose duties on products with the specified technical characteristics. The EC has submitted no evidence thus far showing that *any* customs authority in the EC has treated as duty-free *any* product with the characteristics specified in its measures. The United States, on the other hand, has provided ample evidence demonstrating that they in fact operate exactly as written, and deny products duty-free treatment merely because they have certain arbitrary attributes. In this regard, the United States has quoted language from the measures and submitted an assortment of BTI, in response to which the EC has identified no language in the measures that would permit the opposite conclusion, nor any BTI classifying products with the specified attributes in a duty free tariff line. Thus, all of its theories and rhetoric notwithstanding, the measures are in effect and result in the application of duties to products that should be duty free.

8. Third, the EC ignores the concessions the complainants argue it has breached, in favor of other concessions for products not subject to this dispute, an assortment of completely irrelevant documents it claims inform the "surrounding circumstances" of its concessions, and what it claims to be the classification "practice" of WTO Members. In the process, it advances a range of arguments that simply do not accord with basic principles of treaty interpretation reflected in the Vienna Convention.

9. Regarding the headnote, the EC ignores the commitment set forth in the headnote to its Schedule — a key innovation of the ITA — to provide duty-free treatment to the descriptive list of products specified in Attachment B of the ITA "wherever...classified." The EC persists in its Second Submission to take the view that the headnote is "exhausted," and thus has no meaning, despite the fact that, as noted, its interpretation is flatly inconsistent with basic principles of treaty interpretation.

10. In addition, it now claims that there is some difference in the argument advanced by the complainants with respect to the structure of the concession in the headnote. To be clear, with regard to the headnote, the United States is in agreement with the other complainants — all agree that the headnote is a separate concession from the individual tariff line provisions in the EC Schedules, all agree that the HS is not relevant context for interpreting the Attachment B product descriptions referenced in the headnote, all agree that the table does not limit the scope of Attachment B descriptions to particular enumerated subheadings but rather is illustrative, and all agree that there is no difference even in the product descriptions for the products at issue in this dispute in Attachment B proper and those transposed into the table in the EC Schedules. Even the EC appears to agree with this last point. Furthermore, the United States shares the other

complainants' view that the EC position — that the headnote is "exhausted" — is untenable, as it is contrary to the principle that entire provisions of agreements should not be rendered inutile.

11. The United States in its submissions has explained why the EC's interpretation of the headnote cannot be accepted. In response, the EC simply again recites its legal theory of "exhaustion," without explaining why it is appropriate to read the headnote out of its Schedule — and instead, remarkably, argues that the tariff subheadings next to the product definitions in the table under the headnote "cannot be read out from" its Schedule. Of course, this is not what the complainants do — as each has explained, the subheadings in the EC's Schedules indicate where the EC classified the products in question at the time the ITA was concluded, and are useful *illustrations* of the types of products covered by the product definitions. Indeed, with respect to STBs, the United States has pointed out that one subheading in the EC's Schedules associated with the Attachment B description of STBs shows that the EC itself considered STBs with tuners among the products covered by the Attachment B description. Plainly, in the view of the United States, the table has meaning — it simply does not have the meaning that the EC advances.

Set top boxes which have a communication function

12. As noted previously, a discussion of products is relevant in two respects for purposes of this proceeding: the products that are subject to duties under the measures, and whether at least some of those products are entitled to duty-free treatment under the concessions. If some products subject to duties under the measures are entitled to duty free treatment under the concessions, those measures must be found inconsistent with Article II of the GATT 1994. The United States has amply explained the products subject to duties under the measures and why they are entitled to duty-free treatment under the concessions. As the Appellate Body concluded in *EC—Computer Equipment*, there exists no obligation to provide a detailed definition of a "product category" in order to prevail under Article II.

13. On the effect of the CNEN, as noted previously, the United States has submitted extensive evidence demonstrating the legal effect of CNENs, including that with respect to STBs, to which the EC has provided no convincing response to date. Nothing in the EC's statement responds to those points; instead, the EC has simply persisted in making the same arguments it advanced in its previous submissions. The EC in its second submission cites to an ECJ opinion simply stating that if the content of a CNEN is not consistent with the CN "it could not be taken into consideration." Based on this opinion, the EC argues that CNEN do not have "mandatory power". Of course, the mere possibility that a measure in effect today *could* hypothetically be found inconsistent with a Member's domestic law in the future does not bar it from now being challenged "as such". This argument equally begs the question of whether the STB CNEN is *in fact* inconsistent with the CN such that it could not be taken into consideration; the EC has nowhere even argued that this is so. By contrast, the evidence offered by the United States is clear regarding the effect of the CNEN: that it results in the imposition of duties on STBs which have a communication function merely because they have a particular type of modem or incorporate a device performing a recording or reproducing function.

14. Throughout its submissions, the EC persists in arguing that the phrase "which have" in the STB concession *limits* the concession to STBs which have *only* a communication function; and thus, that STBs that serve any purpose other than "communication" are excluded. As we have previously explained, the word "only" does not appear in the relevant text. As the United States has also noted, this position can be reconciled neither with the terms of the concession nor with the EC's own actions in 2000, when it modified its Schedule. The EC in its Second Submission offers a new interpretation of the modification it made in 2000 (one which, on careful review of the EC implementing measure, the modification, and the Schedule, does not appear to be correct), but, moreover, which again cannot be reconciled with its argument that there is a substantive difference between "which have" and "with".

15. In its Second Submission, the EC concedes that it added the line covering STBs "with" a communication function to the list of lines associated with the STB description in Attachment B. If STBs "with" a communication function were something different than STBs "which have" a communication function, why would the EC have used "with" in its *own* description of a product that it *concedes* it associated with the Attachment B description? The EC offers no explanation. There appears to be one point on which the United States and the EC can now agree: the Attachment B description of STBs from the ITA was not modified as a result of the EC's change to its Schedule. This fact, however suggests, not that these products are excluded from the Attachment B concession, but rather that the EC *recognized* that the products it described as "set top boxes with a communication function" in 2000 were covered by the Attachment B description as agreed upon in 1997 — that "set top boxes with a communication function" were among the STBs referenced in the ITA description of "set top boxes which have a communication function." Furthermore, it shows that STBs with a tuner — i.e., STBs with a function of receiving television signals — were included in the EC's own understanding of the Attachment B concession. Again, as the United States has explained in previous submissions, the EC position that "which have" means "which have *only*" cannot be reconciled with the terms of its concessions, nor with its own actions in 2000. The EC argument boils down to this: a product it concedes is a "set top box" and which it concedes has a "communication function" is nonetheless not covered by its concession. This position cannot be sustained.

16. In its Second Submission, the EC changes course, offering a number of arguments regarding the term "modem" which contradict the position it set forth in its own measure, and are particularly revealing of the fundamental flaws in its position. First, it may be recalled that, in its measure, the EC describes modems as follows: "[m]odems modulate and demodulate outgoing as well as incoming data signals...enabl[ing] bidirectional communication for the purposes of gaining access to the Internet." The measure then asserts that ISDN, WLAN and Ethernet modems are not modems because they "do not modulate and demodulate signals." The United States showed in its answers to the Panel's questions that this statement is simply incorrect.

17. Remarkably, the EC in its Second Submission changes its tune — apparently realizing the fallacy in its measure, it *does not dispute* that the devices in fact modulate and demodulate signals. Rather, it introduces an entirely new requirement for a device to be considered a modem: the device

must not only modulate and demodulate signals, but must do so from *analogue* to *digital*, and not only allow a computer to gain access to the Internet, but allow access through a *telephone* line. The EC position is simply at odds with the meaning of the term "modem". It is at odds even with the definition the EC *itself* used in its own measure. And it creates an utterly arbitrary dividing line that even the EC's own measure does not support — cable modems, for example, do not communicate through a telephone line, yet the EC considers cable modems to be "modems". If as the EC has argued this morning, modems must convert analog to digital and must use telephone lines, then why does the EC measure consider cable modems to be modems? The EC offers no response.

18. With respect to ISDN modems, the EC describes six documents from the Internet that it claims support its view that ISDN modems are not "modems". Only two of the documents even arguably address the question of whether ISDN modems are "modems" — the remainder simply describe how ISDN modems work. As for the two, one does not explain why an ISDN modem is not "technically" a modem — the United States by contrast has submitted sources stating that ISDN modems *are* "technically" modems, and further explaining, based on standards from the IEEE, how they modulate and demodulate signals. The other source is quoted out of context — in fact, the author earlier offers a definition of modulation that is identical to that provided by the United States. Furthermore, the source was identified by the EC through a search of GoogleBooks; another search of GoogleBooks reveals that it selectively cited to this source and omitted a number of sources confirming that ISDN modems are modems.

19. The EC then points to a document ostensibly prepared by Japan during the ITA negotiations containing *one product example* of an STB — to argue that the word "modem" must instead be used "in the same sense as used by that document." Yet the document does not even contain a definition of the term modem. The EC's argument simply comes down to this: rather than assume that negotiators used the term "modem" properly, the EC asks this Panel to *assume* that the negotiators used it improperly. This position simply strains credulity. Even the EC uses a technical definition of "modem" in its measure that encompasses all of the devices at issue.

20. Thus, with respect to STBs, the conclusion is clear: for the devices subject to duty because they have a hard disk, the EC concedes that they are "set top boxes" and "have a communication function" and has otherwise failed to show that there are limits to the concession that would exclude such devices from its terms. On devices subject to duty because they have certain modems, the EC has simply reversed course in the face of facts that it cannot dispute, but its new position still does not address, let alone overcome, the complainants' argumentation.

21. On the Article X claim, the EC continues to rely on the notion that a measure cannot be in effect merely because the EC has not taken a ministerial step. We have responded to this point in our second submission. Evidence shows that member States relied on the measure to classify products and were encouraged to do so by the Customs Code Committee before that step was taken. Thus the EC's position is simply contradicted by the facts.

Flat Panel Display Devices

22. First, the EC continues to protest that it does not understand the "scope" of the U.S. claim, because it believes the United States has not provided a detailed definition of the "product." Again, the United States has been clear: under the measures, customs authorities in the EC and its member States impose duties on any FPD with DVI and any FPD capable of receiving signals from a device other than a computer. As a result, the EC and its member States have breached their obligations to provide duty free treatment to flat panel display devices for products falling within the ITA, wherever classified (as contained in the headnote), as well as their obligation to provide duty-free treatment to "input or output units" of ADP machines. The question is not whether a particular product is within the so-called "scope of the claim" — the question is whether the EC *measures* result in the imposition of duties on products that are entitled to duty free treatment under its *concessions.* The United States has explained in detail how they do so in its submissions. With respect to the purported obligation to first define the product, the Appellate Body in *EC–Computer Equipment* rejected the same argument the EC now advances, and it should again be rejected by this Panel.

23. Regarding the measures, the EC in its Second Submission again claims that, notwithstanding what the measures say, they do not require its customs authorities to impose duties on all products with DVI or all products capable of receiving signals from a device other than a computer. Again, the EC relies on *Kamino* to argue that its measures have changed, now citing to portions of the *Kamino* opinion in which the court critiques the Commission's arguments that devices capable of connecting to something other than a computer cannot be classified in subheading 8471 60 and that "the number and type of sockets with which monitors are equipped cannot, alone, constitute decisive criteria" for the classification of monitors. Notably, many of the arguments the court criticizes are among those the EC has continued to advance in this proceeding, including the EC's reliance on the HS Explanatory Notes to defend its measures. Nothing in the quoted portions of the opinion, however, indicate that, as a consequence of the issuance of the opinion, the HS2007 CNEN (in whole or in part) is no longer in effect in the EC. As the United States has repeatedly explained, while *Kamino* illustrates a number of the flaws in the EC's reasoning, the court did not address the measures at issue in this dispute (its reference to the ENs relates to the *2004* version of the ENs), nor did it modify those measures, nothing in the record supports the conclusion that it did, and the EC's own account of its process for "reviewing" the measures demonstrates that they remain in effect.

24. The EC also now appears to rely on the "mutatis mutandis" reference in the CNEN to subheading 8528 51 00, to suggest that the criteria identified by complainants may not in fact be incorporated into the CNEN for that subheading. Specifically, the EC points to the fact that when the CNEN was placed in the HS2007 nomenclature, the detailed criteria were set out in subheading 8528 41 00, and rather than repeat those criteria verbatim in subheading 8528 51 00, the CNEN for subheading 8528 51 00 indicates that the criteria apply "mutatis mutandis". Based on this, the EC suggests that perhaps the criteria complained of do not apply to imports of flat panel display devices but only to CRT monitors. Of course, the EC does not go so far as to assert that the DVI criterion or the criterion regarding connectability are not in fact reflected in the CNEN for subheading 8528 51 00; it merely states that "it is necessary to distinguish between the technical criteria that are relevant

only in relation to CRT technology."

25. In fact, the BTI on the record demonstrate that member States have in fact applied both the DVI and the connectability criteria in classifying goods under 8528 51 00 (and the EC in another dispute has referred to the CNEN as ensuring uniform classification of LCD monitors). The record does not support any conclusion other than that "mutatis mutandis" simply means that technically inapplicable language such as the criteria specifically identified as describing monitors "of the CRT type" would not be reflected in the CNEN for purposes of subheading 8528 51 00.

26. Finally, with respect to the FPD regulations, the EC simply repeats its argument that the regulations have "effectively lost their applicability" as a result of the implementation of HS2007, simply due to changes in the nomenclature. It offers no response to the evidence provided by the United States, including evidence showing that regulations using pre-HS2007 nomenclature have been relied upon by EC customs authorities in decisions issued since HS2007 was adopted. It is also somewhat remarkable that the EC insists that *regulations* using pre-HS2007 nomenclature have no effect today, even as it persists in arguing that *court opinions* using pre-HS2007 nomenclature and interpreting pre-HS2007 measures, such as *Kamino*, have profound effects on measures drafted in HS2007 nomenclature.

27. Regarding the concessions, in its Second Submission the EC again advances an interpretation that does not correspond to the text. In this case, the EC attempts to use "context," to read language into the flat panel display device commitment that it does not contain. Not only does the EC claim that language in the CRT monitor provision regarding the exclusion of televisions must be read into the FPD provision, it also asserts that this language must be read to "necessarily" exclude video monitors (even though even the CRT provision does not refer to video monitors). Quite simply, a proper interpretation of the CRT provision as "context" to interpret the FPD concession supports the opposite conclusion: had the negotiators intended the language in the CRT provision to apply to all provisions of Attachment B, they would not have placed it in the CRT provision only, and had they intended to include "video monitors" in that exclusion, they would have done so expressly.

Multifunction Digital Machines

28. First, as noted earlier, the EC's second submission is strikingly bereft of any discussion of its measures, in particular the CN provisions that result in the imposition of duties on any indirect process MFM capable of reproducing more than 12 pages per minute. As the United States has explained, these measures are in effect. As a result of the measures, the EC imposes duties on any indirect process MFM capable of reproducing more than 12 pages per minute, and any MFM without a facsimile feature, regardless of the number of pages per minute it can reproduce. In so doing it subjects to duties certain "input or output units" and "facsimile machines." The United States has explained why the devices in question fall within the concessions under subheading 8471 60 or 8517 21. The only response the EC offers is that, to fall within 8471 60, the devices must be "solely or principally" used in an ADP system, as provided in note 5 to Chapter 84. Contrary to what the EC suggests, the United States has discussed note 5 in its submissions and has provided

evidence showing that the printer function is the most significant function. Rather than contend with this evidence, the EC instead claims that it is entitled to impose duties on MFMs because they are "photocopiers." As the United States has explained, MFMs operate through a scanner and print module (print engine and print controller), and in some cases, incorporate a modem allowing them to transmit facsimiles. They are not "photocopiers". Moreover, *nowhere* has the EC explained why the mere fact that a device is capable of reproducing more than 12 pages per minute means that it is *always* a "photocopier" and *never* an "input or output unit" or "facsimile machine." Likewise, nowhere has the EC explained why the mere fact that a device that connects to a computer or network but lacks a facsimile feature is always a "photocopier" and never an "input or output unit." Yet this is precisely what the EC measures provide.

29. With regard to the EC's argument that the devices in question are in fact "photocopiers" classifiable in HS96 subheading 9009 12, the United States notes with interest the EC's newfound desire to focus first on the text of HS heading 9009 in conducting its analysis rather than subheading 9009 12. As the Panel may recall, this is precisely the approach the United States used to demonstrate that the EC's position cannot be sustained. As the United States also explained in its Second Submission, the EC's argument in fact is not supported by the terms of the heading. An MFM is not an "indirect process photocopier." It does not use light to produce a copy, but rather to collect digital data. It does not incorporate "an optical system" — rather it consists of a scanner and print module.

30. The EC does not in its second submission respond to most of the arguments the United States has made to date on MFMs, including: (1) that the number of pages per minute that a device produces has *absolutely no bearing* on the ordinary meaning of "input or output unit," nor any significance from a practical standpoint, and that most MFMs currently sold which connect to computers are capable of producing copies at a rate of more than 12 pages per minute; (2) that the printer unit is by far the largest component of the MFM, is able to operate independently from the scanner or fax unit, and represents the largest portion of the cost of manufacturing a typical MFM; and that typical MFM users print far more often than they make digital copies; and (3) that heading 8471 expressly covers combined devices, and therefore simply combining a print module and scanner — two devices covered by heading 8471 — provides no basis to exclude the end product — an MFM — from that heading. (The EC does respond to the purported U.S. argument that CCD is not a "light sensitive surface"; however, the United States never in fact made that argument.)

31. The EC argues, for example, that "all the evidence made available to the Panel by the parties and third parties points to the conclusion that prior to the conclusion of the ITA, all WTO members, and not just the European Communities, classified digital copiers under HS96 9009." If one were to read the EC's statements that follow, one might believe that some Members were in fact classifying all *MFMs* in heading 9009 during the ITA negotiations. Yet a more careful look at the material cited in fact reveals that this characterization of Members' positions is, at best, profoundly misleading.

32. First, the EC asserts that Chinese Taipei, along with Singapore, has "recognized explicitly that, prior to the conclusion of the ITA, it classified all digital copiers as photocopying apparatus

under HS96 9009." The EC cites for this conclusion a response to a question from the EC regarding the classification of what the EC described as "*single-function* digital copiers" — *i.e.*, devices that *are not* MFMs, the product at issue in this dispute. In fact, with respect to MFMs, Chinese Taipei states that it classified the devices on a "case by case basis" and Singapore states that it classified devices based on the physical component which imparted the device its essential character. Thus these answers do not support the conclusion that there exists a "practice" with respect to classification of MFMs, nor do the materials cited otherwise support the conclusion that the EC measure is consistent with its obligations. Certainly nothing in the materials indicates a "practice" akin to what the EC measure provides — imposing duties on *any* indirect process MFM capable of reproducing more than 12 pages per minute, or *any* indirect process MFM without a facsimile function, as its measure provides.

33. The second item the EC cites to is the supposed classification practice of the United States. However, the EC's evidence that the United States had a "practice" of treating MFMs as photocopiers under heading 9009 is an assortment of classification opinions issued by the United States that *do not* classify products in heading 9009 *or even refer* to heading 9009. The EC in fact points to nothing more than two opinions predating the ITA negotiations — while ignoring the large number of opinions before the Panel in which U.S. Customs and Border Protection (CBP) treated MFMs as "input or output units" of subheading 8471 60.

34. Finally, the third item that the EC attempts to rely on is the *absence* of classification practice, in particular that of Japan and certain third parties. Regarding Japan, the EC again refers to a proposal Japan made during the ITA II negotiations — as the United States explained in its Second Submission, it was recognized that a number of products proposed for inclusion in ITA II may already have been covered by the ITA. Thus a negotiating proposal says little about what was covered by the concessions at issue in this dispute, and certainly does not indicate a "common, concordant, and consistent" practice even on the part of Japan, the Member putting forward the proposal. Likewise, the absence of evidence regarding classification by third parties or other WTO Members cannot support the conclusion that there exists a "common, concordant, and consistent" practice on the part of other WTO Members. Even with respect to the EC's "practice", the evidence demonstrates inconsistencies. In sum, the EC fails to demonstrate that there exists a "practice" among WTO Members, much less one that supports its interpretation of the concession.