

ANNEX B

SUBMISSIONS OF JAPAN

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ANNEX B-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION BY JAPAN

I. INTRODUCTION

1. Japan's first written submission in *EC – Tariff Treatment of Certain Information Technology Products* sets forth the legal arguments challenging European Community ("EC") tariffs with regard to three categories of information technology products – multifunctional digital machines ("MFMs") with and without digital connectivity, flat panel display devices for automatic data processing machines, and set top boxes ("STBs") with a communication function. Specifically, Japan argues that any assessment of duties against these products would be inconsistent with EC obligations under its schedule of tariff concessions, and would thus be inconsistent with Articles II:1(a) and II:1(b) of GATT 1994.

2. For each of these three products, Japan presents its arguments on the meaning of the language in the relevant tariff concessions. Japan ascertains the meaning of this language – both the ordinary meaning of the language of specific concessions, and the meaning of that language in the context of the other language in the EC's schedule of tariff concessions. Japan believes the language of the relevant tariff concession leaves no doubt that these products should be duty free. To find otherwise would ignore the language of the concession, and would unjustifiably undermine the important trade liberalization represented by the Ministerial Declaration on Trade in Information Technology ("ITA") signed in 1996.

II. EC MEASURES CONCERNING MULTIFUNCTIONAL DIGITAL MACHINES ARE INCONSISTENT WITH EC OBLIGATIONS UNDER ARTICLES II:1(A) AND II:1(B) OF THE GATT 1994

3. The first category of products, MFMs, fall into two distinct groupings, with different tariff concessions relevant to each. MFMs are digital devices that generally incorporate an input unit (a scanner unit to convert information into digital input for the device) and an output unit (a printer unit that allows the digital output from the device to be printed). Japan uses the term "MFMs" to refer to machines that, in addition to printing, may be used for scanning, digital copying, or facsimile transmission. Some MFMs have the ability to connect with a computer or computer network. The other MFMs do not have this computer connectivity, operate primarily in connection with a telephone line, and are generally known commercially as facsimile machines.

A. MFMS WITH DIGITAL CONNECTIVITY MUST BE ACCORDED DUTY-FREE STATUS

4. MFMs are digital devices that generally incorporate both an input unit and an output unit. Once a document has been converted into digital information, that information can be stored, manipulated on the computer, transmitted over phone lines, or sent over the Internet. MFMs with digital connectivity are subject to tariff concessions that the EC made under heading 84.71 and subheading 8471.60, which are listed in Attachment A to the ITA. The EC bound the duty rate for those products under heading 84.71 and subheading 8471.60 at zero. However, the EC has been imposing duties on these products.

5. Japan believes the ordinary meaning of the language of EC concessions confirms that MFMs with digital connectivity must belong in heading 84.71 and therefore must be accorded duty-free status. The failure to do so is inconsistent with Articles II:1(a) and II:1(b) of the GATT 1994 as less

favorable than the treatment accorded to MFMs with digital connectivity under Schedule LXXX of EC tariff concessions.

6. The ordinary meaning of "units" in heading 84.71 and "output units" in subheading 8471.60 confirms that MFMs with digital connectivity belong in heading 84.71. Whether the Panel considers the ordinary sense or the technology sense of these words, both point unambiguously to the conclusion that MFMs that can print digital output from a computer must fall under heading 84.71. This printing function of MFMs confirms that MFMs are "output units – printers" within the ordinary meaning of these terms.

7. Conversely, the ordinary meaning of "photocopying" in heading 90.09 equally confirms that MFMs cannot fall under this heading. "Photocopying" represents a fundamentally different technology. Unlike MFMs, which are based on digital technology and which can thus connect to and interact with computers, photocopiers are based on optical technology. A photocopier makes copies based on light reflected from an original document. A photocopier is not a digital device and cannot connect to a computer. Photocopiers fall under Chapter 90 for optical products because they are a fundamentally different technology. The fact that MFMs cannot fall under the ordinary meaning of heading 90.09 reinforces the conclusion that MFMs in fact belong under heading 84.71.

8. These arguments about the ordinary meaning of key terms are confirmed by the factual context of MFMs and photocopiers. Unlike photocopiers, MFMs do not need an original document to make a copy. MFMs can receive digital data from a computer or other sources, and printout that data, with or without an original. Unlike photocopiers, the operation of MFMs is not limited by the persistence of the image. MFMs can save the digital data and use it now or use it later, while photocopiers can only function as long as the light is reflecting off the original document. Unlike photocopiers, MFMs can share the data creating an image. MFMs can easily share data with the computer or send it over networks, while photocopiers can use the reflected light to make copies. Finally unlike photocopiers, MFMs can manipulate the digital data that creates the printout. MFMs operate based on digital data, and therefore have all of the flexibility that digital data provides. These technological differences highlight the tremendous differences between "output units" and "photocopiers."

9. Beyond the ordinary meaning "output units" and "photocopying", the broader context in which these terms appear reinforces the conclusion that MFMs with digital connectivity must fall within heading 84.71. The phrase "output units" in subheading 8471.60 falls among other subheadings that cover all types of computers, and all types of computer "units" – whether separately or in various combinations. When the various subheadings of heading 84.71 are read as a whole, it is hard to image a broader description of products based on digital technology and working with computers than the description of each subheadings of heading 84.71.

10. Conversely, the context of heading 90.09 equally confirms that this heading could not possibly apply to a digital product like an MFM with computer connectivity. The other headings of chapter 90 all describe optical products, which explains why "photocopying" – based on optical technology – falls in chapter 90. Photocopiers cannot connect to computers, are not based on digital technology, and therefore cannot possibly cover MFMs that do connect to computers are based on digital technology.

11. Japan believes that ordinary meaning of the terms "output units" and "photocopying" read in context can resolve this dispute by itself, but interpretative materials from the Harmonized System also confirm this interpretation. Note 5 to Chapter 84 defines a broad scope for devices that are "units" as "printers" that output computer data. Particularly, Note 5(D) specifically addresses certain

types of computer "units" and confirms that "printers" (a specifically enumerated type of "output unit" in the EC schedule of concessions) must be classified in heading 84.71 as long as those "printers" are connectable to a computer and can accept digital data.

12. Similarly, the Harmonized System materials concerning heading 90.09 confirm what the ordinary meaning of "photocopying" would suggest – that photocopiers are technologically different than computer "output units." The Harmonized System Explanatory Notes for heading 90.09 confirm that "indirect process" electrostatic photocopying involves projecting an optical image onto a photosensitive drum or plate as an intermediary, and then making photocopies onto plain paper from the photosensitive drum. This commentary confirms that "indirect process" had a very specific and narrow meaning when it was used in the EC Schedule, and in no way could be construed to apply to MFMs that are based on digital, not optical technologies.

13. Finally, the object and purpose of the EC concessions would be best served by a confirmation of the duty-free treatment of MFMs as computer "output units". The WTO Agreement seeks to reduce tariffs and barriers to trade, an object and purpose which the ITA embraced and furthered by eliminating tariffs on information technology products. The concessions on heading 84.71 covered all computer "units" and used that term broadly and inclusively. Nothing in the ordinary meaning or the context of the language in heading 84.71 suggests that the term computer "units" should be read narrowly as only applying to certain products or certain generations of computer "units". In sharp contrast, the language in heading 90.09 refers to a very specific non-digital technology that was not part of the concessions in the ITA. It would be inconsistent with the object and purpose of the WTO Agreement to allow the narrow scope defined by the language of heading 90.09 to expand in such a way as to exclude from duty free treatment products such as MFMs that fall squarely within the scope of the broad language of the original concessions on heading 84.71.

B. MFMS WITH FACSIMILE CAPABILITY BUT WITHOUT DIGITAL CONNECTIVITY MUST SIMILARLY BE ACCORDED DUTY-FREE STATUS

14. MFMs with facsimile capability but without digital connectivity are subject to tariff concessions that the EC made under heading 85.17 and subheading 8517.21, which are listed in Attachment A to the ITA. The EC bound the duty rate for those products under heading 85.17 and subheading 8517.21 at zero. However, the EC has been imposing duties on these products.

15. Japan believes the ordinary meaning of the language of EC concessions confirms that MFMs with facsimile capability, but without digital connectivity, must belong in heading 85.17 and therefore must be accorded duty-free status. The failure to do so is inconsistent with Articles II:1(a) and II:1(b) of the GATT 1994 as less favorable than the treatment accorded to such MFMs under Schedule LXXX of EC tariff concessions.

16. The ordinary meaning of "facsimile machines" in subheading 8517.21 confirms that MFMs with facsimile capability, but without digital connectivity, belong in heading 85.17. Whether the Panel considers the technology sense or the ordinary sense of these words, both point unambiguously to the conclusion that MFMs that send and receive facsimiles (but do not have computer connectivity that would place them in heading 84.71) must fall under heading 85.17.

17. Conversely, the ordinary meaning of "photocopying" in heading 90.09 equally confirms that MFMs – with or without digital connectivity – cannot fall under this heading. "Photocopying" represents a fundamentally different technology. Unlike MFMs, which are based on digital technology and which use digital technology to send and receive messages over the telephone lines, photocopiers operates based on optical technology. The fact that MFMs cannot fall under the

ordinary meaning of heading 90.09 reinforces the conclusion that MFMs with facsimile capability, but without digital connectivity, in fact belong under heading 85.17. These arguments about the ordinary meaning of key terms are confirmed by the very different underlying technologies of MFMs and photocopiers.

18. Japan believes that the ordinary meaning of the terms "facsimile machines" and "photocopying" read in context can alone resolve this dispute, but that interpretative materials from the Harmonized System confirm this interpretation. In particular, Harmonized System Explanatory Notes ("HSEN") to Chapter 85 provides useful interpretative guidance. This HSEN explains the scope of "facsimile machines," and confirms its focus on its sending and receiving messages over telephone lines using digital technology. This HSEN reinforces the distinction between the digital technology for all MFMs, and the optical technology for photocopiers.

19. Finally, the object and purpose of the EC concessions would be best served by confirming the duty-free treatment of these MFMs as "facsimile machines". The WTO Agreement seeks to reduce tariffs and barriers to trade, an object and purpose that the ITA embraced and furthered by eliminating tariffs on information technology products. The concessions on heading 85.17 covered all "facsimile machines" and used that term broadly and inclusively. Nothing in the ordinary meaning or the context of the language in heading 85.17 or subheading 8517.21 suggests that the term "facsimile machines" should be read narrowly as only applying to certain products or certain generations of "facsimile machines". In sharp contrast, the language in heading 90.09 refers to a very specific non-digital technology that was not part of the coverage of the ITA. It would be inconsistent with the object and purpose of the WTO Agreement to allow the narrow scope of the language of heading 90.09 to expand in such a way as to exclude from duty free treatment products such as MFMs that fall squarely within the scope of the broad language of the original concessions on heading 85.17.

III. EC MEASURES CONCERNING FLAT PANEL DISPLAY DEVICES "FOR" AUTOMATIC DATA PROCESSING MACHINES ARE INCONSISTENT WITH THE EC'S OBLIGATIONS UNDER ARTICLE II:1(A) AND II:1(B) OF GATT 1994

20. This dispute also covers "flat panel display devices," including the liquid crystal display ("LCD") type commonly referred to as "LCD monitors". Flat panel display devices, including LCD monitors, for automatic data processing ("ADP") machines are listed in Attachment B to the ITA, which incorporates them in EC's Schedule LXXX and makes them entitled to duty-free treatment. In the alternative, flat panel display devices for ADP machines are subject to tariff concessions that the EC made on those products under heading 84.71 and subheading 8471.60, which are listed in Attachment A to the ITA. The EC bound the duty rate for those products under heading 84.71 and subheading 8471.60 at zero. However, the EC has been imposing duties on these products. It should be noted that while Japan's submission focuses on LCD monitors with a "digital visual interface" or DVI, the scope of this dispute comprises flat panel display devices "for" ADP machines, the most common type of which are LCD monitors with DVI.

21. As with the MFMs discussed earlier, Japan believes this dispute is about the meaning of specific language in EC tariff concessions. Japan believes the ordinary meaning of the language of EC concessions confirms that LCD monitors with DVI must be accorded duty-free status. The failure to do so is inconsistent with Articles II:1(a) and II:1(b) of the GATT 1994 as less favorable than the treatment to be accorded to LCD monitors with DVI pursuant to Schedule LXXX of EC tariff concessions.

22. The EC incorporated a headnote referencing the list of specific products in Attachment B to the ITA, as part of its Schedule LXXX. One of these products is "flat panel display devices

(including LCD...) for products falling within this agreement...". An LCD monitor with DVI is a display device "for" an ADP machine, and ADP machines are indisputably products falling within the ITA. Therefore, LCD monitors with DVI are explicitly covered by the concessions of Schedule LXXX and entitled to duty-free treatment.

23. The history of the LCD monitors used in computers provides facts that confirm this ordinary meaning that LCD monitors with DVI are "for" computers. LCD monitors were being used for computers long before the ITA, and the DVI technology simply made the connection between LCD monitors and computers more direct – allowing a digital-to-digital transfer of signals, without any need to go through any conversion from an analogue signal. Many LCD monitors are "for" a computer, and an LCD monitor with DVI is undeniably "for" a computer.

24. The ordinary meaning of this phrase – LCD monitors "for" computers – is reinforced by the context in which this phrase was used. Attachment B also discusses projection-type flat panel displays. The sole requirement to projection-type flat panel displays to be duty free is that such devices "can" display digital information from a computer, and that in no way precludes multiple uses for these devices. The context provided by this other display device confirms that it is only necessary for LCD monitors "for" computers to be capable of receiving a digital signal from a computer to be eligible for duty-free treatment. Had any other limitations been contemplated, Attachment B would not have used the broad term "for" and the language on LCD monitors would have included some limitation. It does not.

25. Further contextual understanding can be seen in the treatment of network equipment in Attachment B. This provision specifically requires that such equipment be "dedicated for use solely or principally" with computers. This provision shows that where the parties sought to limit the use of the equipment to that dedicated to computers, they knew how to do so; the fact that they used the simple word "for" in the flat panel devices provision indicates that they did not intend such a limitation.

26. In the alternative, Attachment A to the ITA provides an independent legal basis to treat LCD monitors with DVI as duty-free. Attachment A is a list of HS headings and subheadings covered by the concessions of Schedule LXXX. Included in this list are heading 84.71 and subheading 8471.60. The ordinary meaning of the terms of heading 84.71 and subheading 8471.60 requires the classification of LCD monitors with DVI under these categories, resulting in their duty-free treatment under Schedule LXXX.

27. The context of the terms in heading 84.71 and subheading 8471.60 supports this conclusion. The parties sought to provide for broad inclusion of products used in connection with ADP machines. Nothing in this context imposes any limitation of the concessions to output devices that are used exclusively as outputs of ADP machines.

28. The Notes to Chapter 84, and particularly Note 5 to Chapter 84, provide helpful information for understanding the language of heading 84.71. Note 5(C) to Chapter 84 states that "separately presented units of an automatic data processing machine are to be classified in heading 84.71". This broad and inclusive provision requires LCD monitors with DVI, as "units of" an ADP machine, to be classified in heading 84.71.

29. In addition, Note 5(B) to Chapter 84 says that for purposes of heading 84.71, a unit is to be regarded as part of an ADP system if it is "solely or principally" used in connection with an ADP

system.¹ The ordinary meaning of the term "principally" is that the monitors may have uses other than output devices of ADP machines. The very language of the statements made by the EC in its regulations - in particular Council Regulation (EC) No 493/2005 of 16 March 2005 – concedes that LCD monitors with DVI are "mainly" used in connection with ADP machines. Hence, the basis of the EC's classification of LCD monitors as outside heading 84.71 is self-contradictory and wrong.

30. The object and purpose of the EC concessions would be best served by confirming the duty-free treatment of LCD monitors with DVI. The WTO Agreement seeks to reduce tariffs and barriers to trade, an object and purpose which the ITA embraced and furthered by eliminating tariffs on information technology products. The concessions for those products specifically listed in Attachment B and for those products listed in Attachment A covered by heading 84.71 on all computer "units" were broad and inclusive. Nothing in the ordinary meaning or the context of this language suggests that it should be construed narrowly as only applying to LCD monitors used only for computers, and excluding other LCD monitors. It would be inconsistent with the object and purpose of the WTO Agreement to allow the EC to graft this limitation onto tariff concessions that have no such limitation.

31. Since the EC's measures provide for the classification of LCD monitors with DVI under 84.71 only if they receive signals solely from an ADP machine and cannot receive signals from any other source, these measures are inconsistent with the concessions set forth in Schedule LXXX which is an integral part of the GATT 1994, and which incorporated Attachment B and Attachment A to the ITA.

IV. EC MEASURES CONCERNING SET TOP BOXES WITH A COMMUNICATION FUNCTION ARE INCONSISTENT WITH EC OBLIGATIONS UNDER ARTICLES II:1(A) AND II:1(B) OF THE GATT 1994

32. STB 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. STBs with a communication function are listed in Attachment B to the ITA, which incorporates them in EC's Schedule LXXX and makes them entitled to duty-free treatment. In the alternative, those STBs are subject to tariff concessions that the EC made on those products under subheading 8517.50, 8517.80 and 8525.20, which are listed in Attachment A to the ITA. The EC bound the duty rate for those products under above-mentioned subheadings at zero. However, the EC has been imposing duties on these products.

33. Japan believes that the language in the EC tariff concession is dispositive to this dispute. Japan believes that this language requires that all STBs which have a communication function be granted duty-free treatment, regardless of where the STBs are classified under the tariff nomenclature.

34. The ordinary meaning of the phrase "set top boxes which have a communication function" confirms this interpretation. The meaning of this language is broad, covering those STBs whose purpose or intended role is the transmission or exchange of information, without any limitation on the type of information exchanged. This language certainly includes STBs with modems for gaining access to the Internet, which the EC concedes in the Explanatory Notes to the Combined Nomenclature ("CNEN") as "set top boxes". The language also includes other methods of receiving signals, and nothing in the language supports the EC's reading that an STB with a communication

¹ Note 5(B) was reconfigured in 2007, with the "solely or principally" language becoming a part of Note 5(C). The language concerning "separately presented units" remained in the new Note 5(C). To avoid confusion, we refer to the subsections of Note 5 as they existed at the time the ITA was negotiated and the concessions at issue were made. This means that we will refer to the "solely or principally" rule as being part of note 5(B).

function may not be equipped with a hard disk or other "recording or reproducing" apparatus. The EC measure is contradictory and illogically ignores the ordinary meaning of the language of the EC concession.

35. This ordinary meaning is reinforced by the specific headnote that confirms any product listed in Attachment B must be granted duty free treatment regardless of where the product is classified under the tariff nomenclature.

36. Beyond the meaning of "set top boxes which have a communication function", the broader context of the phrase confirms that the EC Concessions includes all STBs with a communication function. An examination of other devices covered in Attachment B shows that the drafters provided clear statements where they intended to limit the functions of an apparatus; no such limitations exist with regard to STBs. The separate treatment provided for in headings for products able to perform different functions, indicates that where no such differentiated treatment exists, such as here, devices able to perform more than one function should not be treated differently.

37. Finally, the object and purpose of the EC Concessions are best served by continued duty-free treatment of STBs with a communications function. In addition to furthering the reduction of tariffs and expansion of trade, the ITA aimed to encourage technological development. It would be inconsistent with this objective to reduce tariffs on a product, only to permit the reimposition of those tariffs simply because of an evolution in that product.

ANNEX B-2

EXECUTIVE SUMMARY OF THE ORAL STATEMENT BY JAPAN AT THE FIRST SUBSTANTIVE MEETING

I. INTRODUCTION

1. Before we launch into the details of the arguments in this dispute, Japan would like to make a few general observations. First, this dispute is fundamentally about the meaning of the specific language in the EC schedule of tariff concessions. The EC's arguments in this dispute will try to shift the focus away from the language itself, and direct our attention to interpretative tools rather remote from the language.

2. Second, as provided by the Appellate Body in *EC – Computer Equipment*, the scope of tariff concessions should not be determined in light of "legitimate expectations". The language must govern. The EC's first written submission, however, rests rather heavily on its "expectations" at the time of the concessions, by referring to the products at issue as "new products" and "multifunctional products."

3. Finally, the expectations of the opportunity for future negotiations do not change the meaning of the tariff concessions at issue. When reviewing the EC arguments in this case, Japan has been struck by how little attention the EC paid to the language of the concessions themselves, and how much discussion the EC devoted to the mechanisms for future negotiations.

4. Japan presents its arguments on the meaning of the language in the relevant tariff concessions. Japan believes the language of the relevant tariff concessions leaves no doubt that these products should be duty-free.

II. EC MEASURES CONCERNING MULTIFUNCTIONAL DIGITAL MACHINES ARE INCONSISTENT WITH EC OBLIGATIONS UNDER ARTICLE II:1(A) AND II:1(B) OF GATT 1994

5. Multifunctional digital machines – so-called "MFMs" – fall into two distinct groupings, with different tariff concessions relevant to each. MFMs are digital devices that generally incorporate an "input unit" and an "output unit".

6. Commercial MFMs fall into two groups. Some MFMs have the ability to connect with a computer or computer network. Other MFMs do not have this computer connectivity, and instead operate primarily in connection with a telephone line, and are generally known commercially as facsimile machines. Because these products are covered by different tariff concession, we discuss each separately.

A. MFMS WITH DIGITAL CONNECTIVITY MUST BE ACCORDED DUTY-FREE STATUS

7. Japan believes the ordinary meaning of the language of the EC concessions on heading 84.71 confirms that MFMs with digital connectivity fall within the scope of the tariff concessions and therefore must be accorded duty-free status.

1. Meaning of "Units" and "Photocopying"

8. The ordinary meaning of "units" in heading 84.71 and "output units" in subheading 8471.60 confirms that MFMs with digital connectivity belong in heading 84.71. Whether the Panel considers the ordinary sense or the technology sense of these words, both point unambiguously to the conclusion that MFMs that can print digital output from a computer must fall under heading 84.71. This predominant printing function of MFMs confirms that MFMs are "output units – printers" within the ordinary meaning of these terms.

9. The term "photocopying" in heading 90.09, as properly viewed as context for heading 84.71, confirms that digital copiers are not covered under heading 90.09, and therefore only heading 84.71 covers MFMs. Photocopiers fall under Chapter 90, which is for optical products, because "photocopying" represents a fundamentally different technology from MFMs. Unlike MFMs with digital connectivity, which are based on digital technology and which can thus connect to and interact with computers, photocopiers are based on analogue or optical technology. A photocopier makes copies based on light reflected from an original document.

10. We urge the Panel to stop and reflect on the language at issue. The EC largely refuses to discuss the ordinary meaning of the key phrase "output units" in subheading 8471.60. Instead the EC jumps to the word "photocopying" in heading 90.09 and argues this term must include so-called digital copying. However, "photocopying" has a much more specific and narrow meaning.

11. Finally, these arguments about the ordinary meaning of key terms are confirmed by the factual context of MFMs and photocopiers. Unlike photocopiers, MFMs operate based on digital data, and therefore have all of the flexibility that digital data provide. MFMs can receive digital data from computer or other sources, print digital data even without an original document, save digital data and use it now or later without limitation of persistence of the image, share digital data with computers or sending it over networks and manipulate digital data that create printout. The technological differences highlight the tremendous distinctions between "output units" and "photocopiers," and help confirm the ordinary meaning of these terms.

12. As stated by the Appellate Body in *EC – Chicken Cuts*, "in characterizing a product for purposes of tariff classification, it is necessary to look exclusively at the "objective characteristics" of the product in question when presented at the border." Instead of doing so, the EC's argument appears to use its own arbitrary criteria for characterizing the product.

2. The terms of the EC Schedule as further context

13. The above interpretation of the ordinary meaning of heading 84.71 is supported by that of other terms in the EC Schedules as context. The EC believes that MFMs fall within the scope of the following language of subheading 9009.12: "Electrostatic photocopying apparatus ... operating by reproducing the original image via an intermediate onto the copy (indirect process)." However, the phrase "via an intermediate onto the copy (indirect process)" in subheading 9009.12 refers to a very specific technology and a very specific type of device. The text of subheading 9009.12 refers to operations that reproduce the original image via an intermediate onto the copy. The terms "image" and "copy" are both in a singular form, indicating that photocopying apparatus should reproduce a single copy from a single original image. In contrast, digital copying machines can reproduce many copies from a single set of digital data scanned and stored in memory from an original document.

14. Further, the phrase refers to a single "intermediate" – an intermediate – not an unlimited series of devices operating in conjunction to create or transfer digital data. This use of "an intermediate"

makes no sense when discussing a digital MFM, since there is no single "intermediate," or for that matter no intermediate or intermediates at all.

15. The key phrase also refers to a specific "indirect process". This phrase does not cover a wide range of multiple processes that each may collectively operate "indirectly." This "indirect process" cannot go beyond the scope of a "photocopying" process described as "operating by reproducing the original image via an intermediate onto the copy". Therefore "indirect process" does relate to photocopying, but not to digital copying. The issue here is the "indirect process electrostatic photocopying", which involves projecting a single optical image onto a photosensitive drum or plate as a single intermediate, and then making a single photocopy onto plain paper from the photosensitive drum.

16. Nor is Japan's interpretation of the ordinary meaning of "indirect process electrostatic photocopying" particularly novel or controversial. Indeed, the EC itself used precisely the same interpretation in October 1995 to conclude that digital copiers were not indirect process photocopiers within the meaning of subheading 9009.12.

17. Beyond the ordinary meaning of the phrases "output units" and "photocopying," the context in which these terms appear reinforces the conclusion that MFMs with digital connectivity must fall within heading 84.71. The phrase "output units" in subheading 8471.60 falls among other subheadings of heading 84.71 that cover all types of computers, and more importantly all types of computer "units" – whether separately or in various combinations.

3. HS and its rules

18. In light of the clarity of the language in the concessions themselves, the analysis of the HS and its related rules is of little practical value; indeed, such an analysis simply confirms the ordinary meaning of the language in the concessions. As an initial matter, we must emphasize that the decision by the European Court of Justice in the *Kip* case, while useful in a number of respects in highlighting flaws in the EC's position, is merely the EC's interpretation of the HS under its domestic law within its jurisdiction. This decision in no way binds this panel. That being said, the EC's discussion of the *Kip* case leaves out two very important points. First, the EC ignores that the commentary by the ECJ that "those machines are likely to be of a kind used principally in an automatic data-processing system," recognizing the key importance of this digital interface and computer connectivity in assessing these products. Second, the ECJ properly noted that the MFMs at issue "comprise, in a single housing, a laser printer module and a scanner module." The EC in its first written submission, however, arbitrarily divides the printer module into a print engine and print controller. This bifurcation ignores the reality that a print engine without a print controller cannot function.

19. The EC's argument that the tariff concession on heading 84.71 excludes MFMs with digital connectivity rests largely on its arguments about Note 5(B). Yet, these arguments fail to pay sufficient attention to Note 5(D). As stated in Japan's first written submission, with respect to "printers", it is Note 5(D), rather than Note 5(B), that is relevant.

20. Similarly the HS Explanatory Note – HSEN – concerning heading 90.09 confirm what the ordinary meaning of "photocopying" would suggest – that photocopiers are technologically different from computer "output units." The HSEN for heading 90.09 confirms that "indirect process" electrostatic photocopying involves projecting an optical image onto a photosensitive drum or plate as an intermediate, and then making a photocopy onto plain paper from the photosensitive drum.

21. The EC also argues that General Interpretative Rule 3(c) governs in this case based upon the ECJ's determination in the *Kip* case. However, before reaching GIR 3(c), GIR 3(b) must be considered. For purposes of the analysis under GIR 3(b), MFMs with digital connectivity are considered to be composed of the two key components – a printer module and a scanner module – and it is the printer module that gives MFMs their essential character because of the predominant printing function of MFMs. Moreover, both of the two key components – a printer module and a scanner module – belong to the same heading (i.e., 84.71). Therefore, GIR 3(c) and heading 90.09 are not applicable to this analysis.

4. Object and purpose

22. Finally, the object and purpose of the EC concessions would be best served by a confirmation of the duty-free treatment to the MFMs as computer "output units". The WTO Agreement seeks to reduce tariffs and barriers to trade and it would be inconsistent to allow the narrow scope defined by the language of heading 90.09 to expand in such a way as to exclude products such as MFMs that fall squarely within the scope of the broad language of the original concessions on heading 84.71 from duty-free treatment.

23. The EC argues that Japan has focused on the object and purpose of the ITA, not the WTO Agreements. In fact, Japan's first written submission explained how the object and purpose of the WTO Agreements and GATT 1994 apply here.

B. MFMS WITH FACSIMILE CAPABILITY BUT WITHOUT DIGITAL CONNECTIVITY MUST SIMILARLY BE ACCORDED DUTY-FREE STATUS

24. Japan believes the ordinary meaning, both in the technology sense and in the ordinary sense, of the language of EC concessions confirms that MFMs with facsimile capability, but without digital connectivity, must belong in heading 85.17 and therefore must be accorded duty-free status.

25. Conversely, the ordinary meaning of "photocopying" in heading 90.09 equally confirms that MFMs – with or without digital connectivity – cannot fall under this heading. "Photocopying" represents a fundamentally different technology from MFMs. These arguments about the ordinary meaning of key terms are confirmed by the very different underlying technologies of MFMs and photocopiers.

26. The EC argument on these products is basically that digital copying is a form of photocopying, and so heading 90.09 can apply. For the reasons discussed earlier, this EC argument has no foundation.

III. EC MEASURES CONCERNING FLAT PANEL DISPLAY DEVICES "FOR" AUTOMATIC DATA PROCESSING MACHINES ARE INCONSISTENT WITH THE EC'S OBLIGATIONS UNDER ARTICLE II:1(A) AND II:1(B) OF GATT 1994

27. Japan would like to begin its statement on flat-panel display devices – FPD devices – by refocusing the discussion on the issue before the Panel. As is the case for MFMs, the issue in this dispute is interpreting the language of the EC's relevant tariff concession, i.e., whether the concession grants duty free-treatment to the FPD devices at issue, rather than a classification question of whether the FPD devices at issue are "computer monitors" or rather are television or video monitors.

28. When the ITA was signed in 1996, the signatory countries pledged to provide duty-free treatment to a wide range of products related to information technology. These commitments were

embodied in two separate Attachments, which the EC explicitly incorporated as a part of the EC's Schedule of Concessions, and the contents of both attachments are equal obligations to provide duty-free treatment of the EC under GATT 1994 and the WTO Agreements. In this case, the FPD devices at issue are clearly covered by both Attachment A and Attachment B. The EC has claimed in this case that the product covered by the complaining parties in this case is not clear. But the product is the same in all complaining parties' submissions: FPD devices, including LCD monitors, "for" automatic data processing – ADP – machines and other ITA products. Such devices are included in the description in Attachment B of the EC's concessions, "flat panel display devices... for products falling within [the ITA]". Any flat-panel device with an interface permitting it to receive signals from a computer, and capable of operating with a computer, is within this description. The products that Japan describes most frequently in its request are LCD monitors with a DVI. It is the DVI that permits the display device to receive and display signals from an ADP machine, or computer. The DVI therefore makes the display device an FPD "for" a computer, provided the device is capable of operating with a computer.

29. Counter to the concessions in its schedules, the EC's regulations have denied duty-free treatment for some FPD devices and "suspended" duties for others. But the suspension is temporary and must be explicitly renewed by the EC; moreover, the suspension can be withdrawn at any time. The uncertainty of the situation is itself a burden on commerce, and is inconsistent with the EC's obligation to provide unfettered duty-free treatment for these products.

30. The EC claims that its obligations in its Schedule of Concessions to provide duty-free treatment do not extend to FPD devices capable of operating with an ADP machine so long as they can display signals from sources other than computers, because such FPD devices did not exist at the time the concessions were made. However, the EC has been able to point to nothing in the language of the concessions themselves, as expressed in either Attachment A or Attachment B, which would limit the concessions to products in existence at the time the concessions were made.

31. The EC then goes on to say that such FPD devices at issue in this dispute constitute an entirely "new product, ...the multifunctional LCD monitor." However, the relevant question is whether the EC's relevant tariff concession grants duty-free treatment to such FPD devices, and the panel's examination must be conducted objectively in light of the text and context of the tariff concession. As stated above, this textual approach means that a Member's own perception on whether a product is "new" is irrelevant in interpreting the term of the tariff concession. Considering the existence of various FPD devices, Japan considers that at the time the concessions were negotiated, it was widely foreseen and indeed expected that FPD devices for ADP machine could be able to receive a signal from other devices.

32. The ordinary meaning of the language used in both Attachment B and Attachment A, as incorporated in the EC's Schedule, is broad enough to encompass any FPD devices capable of operating with a computer, even if they have the ability to display signals from products other than computers. With respect to Attachment B, there is nothing in this language that says that the FPD devices must be "exclusively" or "solely" for the computer.

33. The EC attempts to graft a restrictive clause onto the language of the Attachment B commitment by referring to restrictive language in Attachment B relating to cathode-ray tube (CRT) "monitors". But a CRT monitor is a different product from FPD devices; the former is an analogue device using CRT technology while the latter is a digital device with a thinner profile. If the language on CRT monitors demonstrates anything, it demonstrates that when the drafters of the language in Attachment B wanted to restrict a product under the agreement to products used exclusively with a computer, they were fully aware how to do so. Japan also would like to point out that the note on

"monitors" excludes only "televisions". The EC's assertion that the note also excludes "video monitors" is without foundation.

34. The ordinary meaning of the language in Attachment A, as incorporated into the EC Schedule, is also broad and encompassing like the language in Attachment B. Attachment A provides, in subheading 8471.60, for duty free treatment for "input or output units" of a computer. There is no doubt that FPD devices that have a digital-video interface that permits them to display signals from a computer are "output units" of a computer.

35. The EC cites, as part of its "context" for Attachment B, one part of the HSEN that it claims requires that FPD devices under heading 84.71 be exclusively used with computers. But the EC itself admits that the HSEN themselves are of limited value, and that if the HSEN contradicts the language of an HS heading or Chapter Note, the heading or Chapter Note prevails. But it is not at all clear that the HSEN cited by the EC restricts the meaning of heading 84.71 in the way the EC claims. The HSEN does not exclude all non-computer display functions from display units that otherwise display computer signals.

36. The EC also looks to Note 5 of Chapter 84 of HS96 to support its positions. That Note has two paragraphs, (B) and (C), which relate to FPD devices. The EC does not directly address paragraph (C), which applies to "separately presented units" although that paragraph on its face requires that FPD devices that are output units "of" computers should be classified under heading 84.71, and hence free of duty.

37. Instead, the EC looks to Note 5 (B), which applies to units that are imported as parts of a "system". Even that paragraph, however, only requires units to be "solely or principally" used for computers in paragraph (B)(a). Here, the EC acknowledges, in light of the ECJ's decision in the *Kamino* case, that its measures are inconsistent with the language of Attachment A incorporated in its Schedule of Concessions and agrees to "review" the regulations further. This Panel must make clear that the EC's measures are inconsistent with the EC's obligations under its Schedule of Concessions and recommend the EC to bring its measures into compliance with those obligations.

38. Japan's reading of the language of the concessions is, moreover, consistent with the object and purpose of the WTO Agreements and the GATT 1994.

IV. EC MEASURES CONCERNING SET TOP BOXES WITH A COMMUNICATION FUNCTION ARE INCONSISTENT WITH EC OBLIGATIONS UNDER ARTICLE II:1(A) AND II:1(B) OF GATT 1994

39. Please allow us to reiterate that the language in the EC tariff concessions is dispositive to this dispute. This language requires that all STBs which have a communication function be granted duty-free treatment, wherever classified. The broad ordinary meanings of the phrase "set top boxes which have a communication function" confirm this interpretation.

40. The context of the phrase confirms that the EC's concessions include all STBs with a communication function. An examination of other devices covered in Attachment B, as incorporated in the EC Schedule, shows that the drafters provided clear statements where they intended to limit the functions of an apparatus; no such limitations exist with regard to STBs.

41. Finally, the object and purpose of the WTO Agreements are best served by continued duty-free treatment of STBs with a communications function.

ANNEX B-3

**EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION
BY JAPAN**

**I. FOR ALL OF THE PRODUCTS AT ISSUE, THE PANEL SHOULD BEAR IN MIND
KEY INTERPRETATIVE PRINCIPLES**

**A. THE CENTRAL IMPORTANCE OF THE LANGUAGE OF THE CONCESSION, INTERPRETED IN
ACCORDANCE WITH THE *VIENNA CONVENTION***

1. Japan firmly believes that recognizing this dispute as a question of the proper scope of tariff concessions – and framing the analysis in that way – is very important. The key distinction is recognizing the central role of the language of the concession itself.

2. The question for the Panel's consideration remains whether the products at issue fall within the scope of the relevant EC Schedule of Concessions. The Panel must examine the language of the concession and decide on the meaning of that language, considering the ordinary meaning read in context and in light of the object and purpose of the treaty in accordance with the Vienna Convention of the Laws of Treaties (hereinafter "*Vienna Convention*"). In course of this examination, first, the focus must be on the language, and the product at issue must be tested against that language. Second, the focus must be on the language used in the concession itself. Third, the focus must be on the meaning of the language in both its ordinary sense from standard usage and ordinary dictionaries, but also its technology sense from usage in a technology context and from technology dictionaries. Fourth, context matters a great deal, but all context is not equal: for example, HS rule that speaks directly to the meaning of language used in a heading would have more interpretative weight, however, the HS rule that does not so would have less interpretative weight. Finally, the object and purpose of the *WTO Agreements* and the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") reinforces Japan's interpretation based on the ordinary meaning of the language of the concession.

**B. THE HS HAS INTERPRETATIVE RELEVANCE, BUT ONLY TO THE EXTENT IT HELPS CLARIFY THE
MEANING OF THE TEXT OF THE CONCESSIONS MADE PURSUANT TO ATTACHMENT A**

3. The HS has interpretative relevance in this dispute. The interpretative relevance, however, will vary depending on the particular item from the HS being considered, and for what purpose it is being considered. First, HS materials that speak directly to the meaning of the language of a concession – HS section and chapter notes addressing the language of the concessions as well as HSEnS addressing the language – are highly relevant. That being said, such HS materials, no matter how direct, cannot override the text of the language in the concession itself.

4. Second, HS materials that do not speak directly to the meaning of the language in a specific heading, or even a range of headings, but only provide guidance for how to pick between two competing headings, have much less relevance. Third, the relevance of the HS materials extends only to concessions that relied upon the HS framework; accordingly, the HS does not provide any context for the language made pursuant to Attachment B in this dispute.

C. THE ITA HAS INTERPRETATIVE RELEVANCE, BUT ONLY TO THE EXTENT IT HELPS CLARIFY THE MEANING OF THE TEXT OF THE CONCESSIONS AT ISSUE

5. The EC has tried to argue that the tariff concessions negotiated through the ITA must be narrow, and the parties must have intended to add new products later. Yet, the ITA is not treaty text for the purpose of interpreting the EC concessions and although it could be relevant as context under the *Vienna Convention*, such context is only relevant to the extent it helps interpret the language of the concessions at issue.

6. The EC argues that the Panel must consider the products at issue with reference to paragraph 3 of the ITA Annex, which expresses the expectation for future negotiations. Japan believes that paragraph 3 is largely irrelevant to the present dispute. Paragraph 3 of the ITA simply states the obvious thing that parties to the ITA recognized in general terms that they might have future negotiations.

D. THE EXPECTATIONS OF THE PARTIES ARE IRRELEVANT TO INTERPRETING THE PROPER SCOPE OF THE TARIFF CONCESSIONS AT ISSUE

7. The EC's expectations at the time of the concessions serve no interpretive purpose. First, the Appellate Body has made clear that subjective expectations are irrelevant to interpreting the meaning of a tariff concession, and that what matters is the language of the concession and the objective characteristics of the product at issue.¹ Second, the EC repeatedly turns improved versions of existing products into "new" and "unforeseen" products, when in fact the products, properly understood, were neither new nor unforeseen.

E. THE LANGUAGE OF A CONCESSION WILL OFTEN COVER A PRODUCT REGARDLESS OF THE TECHNOLOGICAL DEVELOPMENTS THAT MAY OCCUR REGARDING THAT PRODUCT

8. The EC devoted considerable attention to explain the technological development of the products at issue, a point that has little relevance to the actual dispute. The objective characteristics of the products, not their evolution over time, thus remain the key considerations.

9. The EC argues that certain products may cross into two headings, or may even "cease to exist" and may be replaced by a new product. But the EC makes two legal errors. First, the EC assumes that the language of the concession no longer applies when the product evolves. The language of concessions will often have been drafted specifically to avoid reference to specific technologies or specific objective characteristics that might change over time. Second, whether a product "ceases to exist" depends as much on the language of the concession.

F. NEGOTIATING HISTORY AND THE CLASSIFICATION PRACTICE OF CERTAIN MEMBERS HAVE LITTLE INTERPRETATIVE RELEVANCE IN THIS DISPUTE

10. Japan believes that the Panel should give little if any weight to extraneous information provided by the EC not relevant to interpretation of the concessions at issue. First, the EC attempts to direct the Panel's attention away from the actual language of the text of the EC's Schedule, and instead towards the negotiating history of the ITA. Only the language actually included in the final text matters, not materials regarding the complex and uncertain path to create the final text. Even less relevant is the classification practice of certain WTO members. These materials do not reflect in any way on the agreement made by the WTO Members. Such classification practices do not rise to the

¹ Appellate Body Report, *EC – Computer Equipment*, para. 80.

level of "subsequent practice" under Article 31.3 (b) of the *Vienna Convention* because too few countries are involved and that practice is not consistent.

II. THE EC MEASURES CONCERNING MULTIFUNCTIONAL DIGITAL MACHINES ARE INCONSISTENT WITH EC OBLIGATIONS UNDER ARTICLES II:1(A) AND II:1(B) OF THE GATT 1994

A. THE PRODUCTS AND MEASURES AT ISSUE

11. At the outset, we note that the EC has not raised any objections to our arguments about the definition of the products at issue with respect to MFMs. We also note there is no major dispute among the parties on the measures and tariff concessions at issue. The EC has argued that only the current version of the CCT is at issue in this dispute. Yet, these prior measures still have effect and unless and until these measures are formally withdrawn, Japan considers them still to be in effect for purposes of this WTO dispute. Even their repeal will not alone cure the WTO inconsistency of imposing duties on MFMs that should be duty free.

B. THE EC LARGELY IGNORES THE ORDINARY MEANING OF THE LANGUAGE OF THE CONCESSIONS AT ISSUE IN THIS DISPUTE, THE LANGUAGE OF HEADING 84.71

12. The EC tries to avoid discussing the language of the concessions at issue, and never really explains why MFMs that connect to ADPs do not fall under heading 84.71. We note the EC has provided no examination at all of the ordinary meaning of the key concession at issue here – the concession on heading 84.71. The ordinary meaning of the language in heading 84.71 covers MFMs with digital connectivity. As Japan has explained at length, MFMs with digital connectivity fall squarely within the ordinary meaning of a "unit" of a computer, as an "input or output unit". Whether one considers the ordinary sense of these words or the technological sense of these words, they both point to the same ordinary meaning. This language captures devices such as MFMs that operate in an integrated manner with computers, using digital technology to "input" information as well as to "output" information. The EC never really challenges this argument because it cannot.

13. The printing and other functions of MFMs confirm that they are "output units" of an ADP. These objective characteristics of the MFMs allow one to conclude that MFMs are properly considered to be "output units" under subheading 8471.60 and more specifically "printers" under subheading 8471.60.40. The objective physical characteristics demonstrate that MFMs are first and foremost "printers" that may have other functions. But these other functions do not change the basic physical characteristics that make such devices "printers". The historical development of MFMs further confirms that they are "output units" of ADPs, and were well known at the time of the concessions of heading 84.71.

C. THE CONTEXT PROVIDED BY HEADING 90.09 CONFIRMS THAT DIGITAL COPYING IS NOT A FORM OF PHOTOCOPYING, AND THEREFORE CONTRARY TO THE EC ARGUMENTS MFMS CANNOT FALL WITHIN THE SCOPE OF HEADING 90.09.

14. The claim in this dispute is that the concession on heading 84.71 covers MFMs. The EC tries to rebut this claim by shifting the focus to heading 90.09, and tries to turn this dispute into a classification question, which it is not. Nothing in the language or context of heading 90.09 or subheading 9009.12 supports the conclusion that MFMs can possibly fall within their scopes.

15. The EC has misinterpreted the term "photocopying" in heading 90.09. The use of light in a digital copier does not make that device into a "photocopying apparatus". The EC largely ignores the

critical role of the digital file in an MFM, which is dramatically different than that of the reflected light used in an analogue photocopier. This distinction changes the objective characteristics and operations of the device. The EC's contextual distinctions are similarly flawed, as it confuses the difference between having an optical system and using the optical system to make the copy. In MFMs, the optical system is used to scan and convert the document into digital data, which can be stored and manipulated. In photocopiers, the optical system creates an image with no purpose other than produce a photocopy. If the photocopy is not created, the light image simply disappears.

16. The EC has also misinterpreted the detailed language in subheading 9009.12 and does not pay sufficient attention to the precise meaning of the structure or language of this heading. In addition to the fact that heading 90.09 does not cover MFMs as discussed above, the language of subheading 9009.11 and subheading 9009.12 both exclude MFMs. MFMs do not reproduce the optical image of an original document directly onto the paper, as required by subheading 9009.11. Nor do MFMs reproduce the optical image onto the paper in the specific manner described in subheading 9009.12, namely the "one image" to make "one copy" correspondence that characterizes photocopying technology. The EC further misinterprets as overly-broad the phrase "indirect process" in subheading 9009.12. This phrase refers to a specific technology well known in 1996 that describes analogue photocopying, not the broader concept of indirect process.

17. The HSEN for heading 90.09 confirms the ordinary meaning of "photocopying" and "indirect process" as excluding MFMs with digital connectivity. The HSEN that describes analogue photocopying technology was not changed in 1996 – even though digital copying technology was then well developed. "Photocopying" as defined by the HSEN does not include digital copying; a CCD array does not constitute a "light sensitive surface." This phrase refers to a single surface that can receive the optical image of an original document, as distinguished from the numerous diodes that convert photons of light into electrical impulses in a CCD array.

D. THE OTHER INTERPRETATIVE MATERIALS PRESENTED BY THE EC EITHER ARE IRRELEVANT WITH OR SUPPORT JAPAN'S INTERPRETATION

18. The EC offers a number of other arguments for interpreting the language of heading 90.09. The classification practice of a handful of member countries has little interpretative relevance under the *Vienna Convention*, and certainly the EC's own practice – which is what is being challenged in this dispute as WTO inconsistent – has no relevance. The Appellate Body has made clear that subsequent practice only has interpretive weight when it is the consistent practice of many countries.² Too few countries are involved and the present practice is too inconsistent to satisfy this standard.

19. The WCO political votes on classification also have no interpretative relevance under the *Vienna Convention*, but the detailed factual and legal discussion provided by the WCO Secretariat as background for those debates and votes provides a neutral perspective that a panel may find useful and persuasive, much as a panel may find the reasoning of any earlier panel persuasive.

20. The negotiating history of the ITA also has very little, if any, interpretative weight here. The conditions for invoking Article 32 of the *Vienna Convention* have not been met here. Even if it were considered, the negotiation history provides little support for the EC interpretations in this dispute.

21. The EC arguments about the HS07 nomenclature actually support Japan's position. Subsequent events, such as the changes in the EC Schedule to reflect the changes as part of the HS07 amendments, cannot change the scope of the concession, but may only be used to supplement one's

² Appellate Body Report, *EC – Chicken Cuts*, para. 276.

understanding of the meaning of the language used in the original concessions. The way in which the HSEN 07 distinguishes "photocopying" and "digital copying" is completely consistent with Japan's interpretation of these two phrases, as it simply reinforces and makes explicit the distinction. Further, the EC's emphasis on the new phrase "for each copy" misses the mark, because this new language in the HSEN simply reflects a concept already inherent in the language used in subheading 9009.12 of the HS06 nomenclature.

E. EVEN IF HEADING 90.09 WERE TO COVER DIGITAL COPYING, MFMS WITH COMPUTER CONNECTIVITY WOULD STILL FALL WITHIN HEADING 84.71

22. Even if the Panel were to assume hypothetically that heading 90.09 can include the digital copying function of MFMs, that does not end the analysis. MFMs are much more than digital copiers. The MFMs at issue in this dispute connect either to computers, computer networks, or telephone networks, and are not stand alone devices. Properly understood, these MFMs fall under heading 84.71 (or perhaps heading 85.17) even if the digital copying function alone might fall under heading 90.09.

23. The EC effort to elevate the primacy of the digital copying function and to downplay the more fundamental features of MFMs with digital connectivity represents fundamentally flawed treaty interpretation for several reasons. Japan and the other complaining parties have provided the ordinary meaning of "units thereof" in heading 84.71 and "input or output units" in subheading 8471.60. The EC has ignored the ordinary meaning of these key terms. The ordinary meaning of this language covers MFMs with digital connectivity, but is in no way limited to specific technologies.

24. In interpreting the ordinary meaning of this language under the above stated assumption, the HS can provide an interpretative guidance. The Appellate Body has used the HS materials holistically, drawing upon them and giving them weight based on their connection to the interpretative guidance at hand.³

25. Note 5(D) of Chapter 84 strongly supports treating MFMs with digital connectivity as "output units" and "printers" under subheading 8471.60. An MFM is fundamentally a "printer," and the meaning of "printer" is not limited to single function printers. When thinking about the nature of a multifunctional device, it is entirely proper to think of that device as being the machine that performs the principal function of the device. This perspective fundamentally contradicts the EC interpretation that a "printer" can only be a single function printer.

26. The MFMs are essentially a printer because, as Japan has demonstrated at length, MFMs at issue: (1) are designed and built around a printer unit that allows the outputting of information from the computer; (2) have a printer unit that is the largest and most important component; (3) have a printer unit that can operate independently of any other devices on the MFM; and (4) have a printer unit that represents the largest portion of the cost. Under these facts and circumstances – completely unaddressed by the EC argument – the MFM is essentially a "printer".

27. Note 5(B) to Chapter 84 does not change and in fact supports this interpretation. Even if Note 5(B)(a) applies (and we believe that under Note 5(D) it does not apply), MFMs with digital connectivity are in fact "of a kind solely or principally used" with computers. The intrinsic qualities of MFMs are basically those of a printer, and the existence of an incidental copying function does not change this reality. Moreover, empirical evidence confirms that the printing function (and particularly

³ Appellate Body Report, *EC – Chicken Cuts*, paras. 219-229.

the printing and scanning function together) vastly exceeds the digital copying function of such devices.

28. GIR 3(b) in fact supports this interpretation, and renders GIR 3(c) unnecessary and irrelevant. The "essential character" of the MFM is that of a printer, and the two key components of MFMs – printer module and scanner module – both fall under the "input or output units" of heading 84.71. It make no logical sense to argue that an incidental feature of combining printing and scanning – the additional ability to make digital copies – somehow trumps the "essential character" of printing and somehow gives the MFM a new essential character.

29. Nothing in the ECJ decision in *Kip* changes this analysis. A decision under EC domestic law, *Kip* is of very limited relevance anyway. That limited relevance is to confirm that current EC practice is deeply flawed, and impermissibly ignores heading 84.71, and to confirm that most MFMs in fact probably fall within the rule of Note 5(B) as "of a kind solely or principally used" with computers, as specified in Note 5(B)(a).

F. MFMS WITH FACSIMILE FUNCTION BUT WITHOUT DIGITAL CONNECTIVITY ARE ALSO ENTITLED TO DUTY-FREE TREATMENT UNDER APPLICABLE EC CONCESSIONS.

30. This dispute involves two categories of MFMs – those that are input/output units of computers covered by the EC concession on subheading 8471.60 and those that are facsimile machines covered by the EC concession on subheading 8517.21. The key difference is the connectivity to a computer. As a practical matter, a multifunctional device is either a printer or a facsimile machine.

31. As with MFMs with digital connectivity, the EC never really addresses the language of the key concession at issue, the concession on heading 85.17. Rather than address the language and its ordinary meaning, the EC simply jumps ahead to assume that both heading 85.17 and heading 90.09 are equally applicable, and therefore GIR 3(c) must apply.

32. Yet the premise of this argument – that heading 90.09 applies at all – is flawed. The earlier arguments that MFMs based on digital technology cannot fall under heading 90.09 apply equally to both MFMs with digital connectivity and those with a facsimile function. All MFMs – whether connectable to a computer or not – use digital technology to scan documents and use digital technology whether printing computer output or printing out an incoming facsimile. None of these MFMs use the "one original-one copy" technology that characterizes analogue photocopying.

III. THE EC MEASURES CONCERNING FLAT PANEL DISPLAY DEVICES "FOR" ITA PRODUCTS ARE INCONSISTENT WITH EC'S OBLIGATIONS UNDER ARTICLES II:1(A) AND II:1(B) OF THE GATT 1994.

A. THE PRODUCTS AND MEASURES AT ISSUE.

33. The EC has argued that the complaining parties have not sufficiently made a *prima facie* case. Yet in doing so, the EC is trying to limit this dispute improperly to a case-by-case assessment of specific models and import transactions, when the dispute is really about EC measures that treat many flat panel display ("FPD") devices as dutiable products that should be duty-free under the applicable EC concessions.

34. The Appellate Body stated quite clearly that "Article 6.2 does *not* explicitly require that the products to which the 'specific measures at issue' apply be identified."⁴ Rather, it is sufficient to define the type of products that fall within the language of the concession. Contrary to the EC argument, Japan has in fact specifically defined the product at issue: "flat panel display devices" capable of operating with a computer or some other non-computer ITA products.

35. Contrary to the EC argument, Japan has identified the features that necessarily lead to a WTO inconsistency. Japan has made clear the scope of the concessions. Indeed, the scope of the concessions on FPD devices made pursuant to Attachment A and Attachment B can be defined based on the language of those concessions. The concession pursuant to Attachment A covers those FPD devices that qualify as "output units" of computers. The concession pursuant to Attachment B covers those FPD devices that are capable of operating with any ITA product, which includes those capable of operating with a computer. Japan has also made clear the scope of the FPD devices improperly subject to duties based on the EC measures at issue. Having described the scope of the duty-free concessions, and having shown that many FPD devices that are in fact properly within the scope of the concessions but are being systematically excluded from duty-free treatment, Japan has made out a *prima facie* case for its "as such" claim in this dispute.

36. The EC erroneously argues that the current suspension of duties eliminates the inconsistency between its measures and the concessions under the WTO. The EC's suspension of duties is temporary and conditional; in contrast, the EC's concessions on FPD devices are neither temporary nor conditional. The violation of Article II of the GATT 1994 thus remains and has not been eliminated.

B. RELATIONSHIP OF THE CONCESSIONS PURSUANT TO ATTACHMENT A AND ATTACHMENT B.

37. Obligations in tariff concessions made pursuant to the description of products in Attachment A and those made pursuant to the description of products listed in and for Attachment B are legally independent of each other, and both must be respected.

C. CONTRARY TO THE EC ARGUMENT, THE CONCESSIONS PURSUANT TO ATTACHMENT B COVER FLAT PANEL DISPLAY DEVICES "FOR" PRODUCTS COVERED BY THE ITA, INCLUDING FLAT PANEL DISPLAY DEVICES CAPABLE OF OPERATING WITH A COMPUTER, REGARDLESS OF WHETHER THEY CAN RECEIVE A SIGNAL FROM OTHER DEVICES.

38. The EC tries to narrow the scope of its concession pursuant to Attachment B and argues that the limitations that applied to CRT monitors must now apply to FPD devices. Yet the EC cannot reconcile this argument with the ordinary meaning of the text of the concession. The key term is "for," and when a FPD device will be deemed to be for a computer or other ITA products, it should be subject to a duty-free treatment. The EC's interpretation of "for" to mean "only for" or "mainly for" gives the word a restrictive meaning that has no basis in the ordinary meaning of the term.

39. Nor does the EC contextual argument help. The EC draws the incorrect conclusion from the concession on CRT monitors, which highlights the absence of the very carve-out⁵ the EC wishes to read into the concession on FPD devices made pursuant to Attachment B. Similarly, the limitation to

⁴ Appellate Body Report, *EC – Computer Equipment*, para. 67.

⁵ At its heart the EC argument is that because the concession on CRT monitors carved out those devices that could receive a signal from other non-ITA products (such as TVs), and because FPD devices have now largely replaced CRT monitors, then the limitations that applied to CRT monitors must now apply to FPD devices. See, para. 144 of Japan second written submission.

devices "solely or principally" for a certain use in the concession on "network equipment" pursuant to Attachment B, and the use of the word "can" on "[p]rojection type flat panel display devices" reinforces Japan's interpretation of "for" as meaning any device capable of operating with a computer or other ITA product. Having made these carve-outs and limitations for other products, the absence of any such carve out for FPD devices speaks to the importance about the ordinary meaning of that language in context.

40. Furthermore, the HS materials do not affect this analysis because the HS does not apply to concessions made pursuant to Attachment B.

41. The other EC arguments do not save its flawed interpretation of the concessions. The *Kamino* decision just underscores the legal errors of the current EC measures. Moreover, the EC arguments on object and purpose of the *WTO Agreements* and GATT 1994 highly serve to the extreme unpredictability of the EC approach. Rather than focus on the meaning of the language, which is stable over time, the EC tries to shift the focus to the changing products and technologies. This unpredictability in the EC approach is utterly at odds with the object and purpose of the *WTO Agreements* and GATT 1994.

D. THE CONCESSIONS PURSUANT TO ATTACHMENT A ALSO COVER FLAT PANEL DISPLAY DEVICES CAPABLE OF OPERATING WITH A COMPUTER EVEN IF THEY CAN RECEIVE SIGNALS FROM OTHER DEVICES.

42. The language of the concession pursuant to Attachment A defines a scope, and does not include the limiting language the EC tries to graft onto this scope. The concession provides duty-free treatment under heading 84.71 for units "of" ADP machines ("thereof"). As Japan has noted throughout its submissions in this case, there is no language of limitation in either heading 84.71 or subheading 8471.60 on the use of the term "thereof". At a minimum, a unit that is principally used with an ADP machine is a unit "of" an ADP machine, even if it has alternative uses.

43. Japan believes that the ordinary meaning of the language of heading 84.71 encompasses FPD devices that interface with an ADP machine. Heading 84.71 covers "units" for computers, and subheading 8471.60 specifically covers both "input or output units". These terms have ordinary meaning that must be considered in both the dictionary sense of these words and the technology sense of these words. The EC therefore cannot explain why a device that is principally used with a computer but also has additional capabilities is not a "unit" of an ADP machine within the ordinary meaning of the language in heading 84.71.

44. Furthermore, there is no doubt that in the holistic interpretation of the ordinary meaning of the words of a concession, context always needs to be examined. Although the EC provided extensive citation and recitation of HS materials, the EC overlooks the binding chapter and section notes, and instead focuses on the non-binding HSEN. The problem with this approach is that the EC's reliance on the part of the HSEN in question contradicts the binding Note 5 to Chapter 84, and therefore must be rejected.

45. Japan submits that Note 5(C), which relates to FPD devices, applies because it discusses "separately presented units of an automatic data processing machine." This paragraph provides the broadest possible reading of heading 84.71, as it includes any unit "of" an ADP machine. Note 5(B) also provides important contextual guidance here for interpretation of the concessions pursuant to Attachment A. Note 5(B) only requires units to be of a kind "solely or principally" used for computers in paragraph (B)(a). Although the HSEN cannot override the HS note, the EC relies so heavily on one limited portion of the HSEN that it appears to interpret the HSEN to prevail over the

text of this binding chapter note. Indeed, this contradiction lead the ECJ in the *Kamino* case to conclude that the EC measures, responsible for classifying FPD devices under subheading 8471.60 only if they receive signals exclusively from computers, are "in most cases too rigid...."⁶

46. The EC also urges resort to GIR 3(c), observing that in most cases it is impossible to identify the principal function of a given monitor. But GIR 3 does not apply at all if the interpretative question can be resolved by reference to the language of the heading, read in context. The EC's resort to GIR 3 reflects its refusal to consider the ordinary meaning of the language in the heading.

47. The EC's arguments about object and purpose of the *WTO Agreements* and GATT 1994, the classification practices of other countries, and the negotiating history of the ITA should be rejected for the reasons already discussed above.

IV. THE EC MEASURES CONCERNING SET-TOP BOXES WITH A COMMUNICATION FUNCTION ARE INCONSISTENT WITH EC OBLIGATIONS UNDER ARTICLE II:1(A) AND II:1(B) OF THE GATT 1994

A. THE PRODUCTS AND MEASURES AT ISSUE

48. The EC seems to believe that identification of a specific category of STBs that has a communication function or even the specific models of STBs that have a communication function would be necessary. The EC simply mischaracterizes Japan's claim; this claim is not about the tariff treatment of a specific model of STBs, but about a number of criteria used by the EC to determine the tariff treatment of a category of products, namely STBs which have a communication function.

49. The EC claims that the Complainants "fail to explain what constitutes the EC concession [with respect to set-top boxes] and where it is provided for." The EC's claim is hardly understandable given that Japan has clearly stated that the concession is included in the EC Schedule itself and not in the ITA.

50. The EC further claims that the Complainants refer to the "headnote" but do not explain "what the headnote means for the rest of the EC Schedule, including the codes that were notified to WTO." The "headnote" is central in the EC Schedule because it is through the headnote that the EC committed to grant duty-free treatment to all products described in or for Attachment B to the ITA, wherever the product is classified.

51. Again, Japan would like to emphasize that it is irrelevant that in some instances application of the challenged measures may lead to a WTO consistent outcome. Indeed, to succeed in an "as such" claim, it is sufficient to demonstrate that *any aspect* of the criteria set out in the measures that are being challenged will necessarily lead to a violation of the EC's obligations under its Schedule and consequently, Article II of the GATT 1994.

52. The EC claims that "it does not exclude any STBs from duty-free treatment due to the presence of a hard disk or other apparatus." But as stated in the CNEN, the mere presence of a hard disk or DVD drive in a STB which has a communication function leads to the exclusion of that STB from duty-free treatment.

⁶ EC first written submission, para. 167.

B. CONTRARY TO THE EC ARGUMENT, THE CONCESSIONS PURSUANT TO ATTACHMENT B COVER SET TOP BOXES WHICH HAVE A COMMUNICATION FUNCTION.

53. The concession concerning STBs that have a communication function has been made by the EC in its Schedule. The ordinary meaning of the terms of the concession does not imply any exclusion from the scope of the concession on STBs which have a communication function merely because the STBs at issue have a recording or reproducing function.

54. According to the EC, the product covered by the concession cannot assume the existence of additional features and technical elements. Yet, as long as the product meets the description of a "set top box which has a communication function," it must receive duty-free treatment, regardless of any additional feature or functionalities it may also have.

55. The EC attempts to draw conclusions from the fact that no CN code was provided under headings 85.21 and 85.28, which has an equivalent effect to submitting the tariff lines which define the scope of the commitments. If CN codes were intended to define the scope of the concession, however, it would have been unnecessary to include the headnote that explicitly provides for duty-free treatment wherever the product is classified.

ANNEX B-4

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT BY JAPAN AT THE SECOND SUBSTANTIVE MEETING

I. MULTI-FUNCTIONAL DIGITAL MACHINES

1. MFMs with digital connectivity to computers fall squarely within the scope of the terms "units thereof" in heading 84.71, and particularly the terms "output units" in subheading 8471.60 and "printers" in subheading 8471.60.40. This interpretation results from reading these terms in their context, including the language of heading 90.09 and subheading 9009.12, which indicates that MFMs do not "photocopy" within the meaning of heading 90.09.

2. We would like to make a few broader observations about the EC arguments on MFMs. First, the EC arguments largely ignore one of the defining objective characteristics of the MFMs with digital connectivity – their capacity to operate with computers, a capacity that rests on the fact that MFMs use digital technology enabling them to input and output digital data. Unlike the analogue photocopiers covered by heading 90.09, MFMs are very much digital devices. This important difference is why the language of heading 84.71 speaks of "units thereof," with the "thereof" linking the device back to the computer.

3. Indeed, the EC argument in the alternative that MFMs would fall under subheading 8472.90 if they are somehow not "photocopying apparatus" just highlights the myopia of the EC argument. MFMs without computer connectivity and without any facsimile function fall outside heading 84.71 and into heading 84.72 because such MFMs are not capable of operating with computers. This alternative EC argument disregards the capacity of the MFMs at issue to operate with computers, the common and critical characteristic of the products falling within heading 84.71.

4. Second, the EC arguments largely ignore all of the other objective characteristics of the MFMs and instead focus on the single function of "copying". In doing so, the EC improperly shifts the focus from the intrinsic physical characteristics of the device – the printer unit and the scanner unit – and instead focuses on one of the ways in which the device operates. The Appellate Body has stressed the importance of the "objective characteristics" of the item subject to a tariff concession. Copying is not an intrinsic physical characteristic of MFMs – it is an additional and incidental function that results from the combined operation of the true intrinsic physical characteristics of the MFM, the printer unit and the scanner unit.

5. Third, the EC talks about making its determinations on a case-by-case basis, but the EC measures do not make case-by-case determinations. Subheading 8443.31.10 preserves duty-free treatment only for those MFMs with a facsimile function and an output speed of 12 pages per minute or less. This use of the 12 page per minute output rule to determine that most if not all MFMs are in fact subject to duties demonstrates the extent to which the EC is not truly interested in making case-by-case determinations.

A. MEANING OF "PHOTOCOPYING" – MFMS ARE NOT "PHOTOCOPYING APPARATUS"

1. **Heading 90.09**

6. The EC defense has been and continues to be basically that MFMs are in fact "photocopying apparatus," and thus are properly subject to duties under HS96 heading 90.09. The EC improperly stretches the term "photocopying" to cover two very distinct technologies: analogue photocopying and digital copying. Even if the function of these two technologies is the same – to make copies – the objective characteristics of the devices relying on these two technologies are very different, and these differences relate specifically to the language of subheading 9009.12. A device based on analogue photocopying technology does not create digital files, and cannot possibly be an input or output unit of a computer. These technical details – these objective characteristics of the devices – are very much relevant in light of the language of the tariff concession on subheading 9009.12.

7. Consider a few examples of these technical details. An analogue photocopier must make its copy immediately from the original paper document, or not at all. In contrast, an MFM creates a digital file from the original paper document, which can be used now, or can be stored for printing out later. Moreover, the reflected light in an analogue photocopier has one use – to make that photocopy at that moment, while the digital file created in an MFM, in contrast, has myriad uses.

8. The copying technology is fundamentally different, even if the devices use a similar print technology. The EC acknowledges that photocopying is the instant reproduction of an original image. The digital copy is not necessarily instant and the image reproduced by digital copying is not the "original" image. Because a digital copy is produced from a digital file, and not just a reflection of the original image itself as in photocopying, the original image is artificially changed or reconstituted in order to make it clearer and sharper before being printed. Since an image produced onto a copy paper has been artificially changed and reconstituted before the printing process, it is therefore no longer identical to that of the original paper document.

9. The EC argues that the existence of stand-alone digital copiers supports its argument that MFMs are really photocopiers. Contrary to the EC's argument, the device in Exhibit EC-64 appears to be a "black and white laser printer" – a device with computer connectivity and without a scanner – and not a stand alone digital copier. But more fundamentally, stand-alone digital copiers in fact highlight the importance for proper tariff classification of the digital connectivity, a key objective characteristic of the MFMs at issue here. A printer unit combined with digital connectivity becomes a "printer," which is capable of operating with a computer, and which is covered by heading 84.71 as an "output unit". A scanner unit combined with digital connectivity becomes a "scanner," which is also capable of operating with a computer, and which is also covered by heading 84.71 as an "input unit". It is the digital connectivity that makes these items input and output "units" of a computer. A combination of such stand-alone devices – the printer unit without digital connectivity and the scanner unit without digital connectivity – can make them digital copiers, and they cannot fall under heading 84.71. But this dispute is not about stand-alone digital copiers, devices that would fall under subheading 8472.90 if they do not have any facsimile capability. Such devices have very different objective characteristics than the MFMs with digital connectivity at issue.

10. The EC has explicitly confirmed that "digital copiers incorporate not just one, but two different optical systems," in paragraph 114 of its oral statement. This characterization contradicts the language of heading 90.09, which says "photocopy apparatus incorporating an optical system." This difference in the number of "optical system(s)" between "photocopying apparatus" and digital copiers produces another technological difference in their objective characteristics, which necessarily excludes digital copiers from the scope of heading 90.09.

2. Subheading 9009.12

11. The language of subheading 9009.12 provides important context for the term "photocopying apparatus" in heading 90.09. In the course of interpreting the language of a tariff concession under the Vienna Convention, the language of the headings and subheadings must read holistically.

12. First, consider the structure of heading 90.09 and how subheading 9009.12 fits within that heading. Heading 90.09 has three categories at the five digit level, only one of which could possibly cover the MFMs at issue in this dispute: Five-digit subheading 9009.1, which covers "electrostatic photocopying apparatus". The EC has stressed the electrostatic printing technology of MFMs, and notes that "other photocopying apparatus" is also subject to a concession guaranteeing duty-free treatment. The more detailed languages of subheadings 9009.11 and 9009.12 refer to specific technologies – "direct process" and "indirect process" respectively – and thus serve to describe exhaustively rather than illustratively the scope of "electrostatic photocopying apparatus". The exhaustive nature of these subheadings also makes clear that subheading 9009.12 has no role as a "catch-all" category that captures any "photocopying apparatus" using an "electrostatic" mechanism, other than a "direct process" one. Since MFMs do not meet either of these definitions set forth in these subheadings, "photocopying" as used in heading 90.09 cannot cover MFMs.

13. Now let us turn to the language of the EC tariff concession on subheading 9009.12 read in the context of the rest of heading 90.09. Japan's argument is not only that the terms "image" and "copy" have been used in the singular form, but rather that the apparatus covered by subheading 9009.12 in fact can operate only by reproducing a single image onto a single copy each time, no matter how many copies of a document are produced. However, digital copiers produce multiple copies from a single original image. In this connection, it should be noted that in the EC's current national tariff schedule of HS 2007 CN 8443.31.91 also uses singular and plural forms precisely to match the technology being described: "[m]achine performing a copying function by scanning the original and printing the *copies* by means of an electrostatic print engine."

14. Japan has also noted the meaning of the term "intermediate," and the relationship of this term to the underlying technology used in analogue photocopying. The EC is trying to read the term "intermediate" too broadly: the "electrostatic drum" in an MFM may be an intermediate, but it is not "the" intermediate in the sense of subheading 9009.12. According to the language of subheading 9009.12, indirect electrostatic photocopying machines must have a single intermediate. The EC erroneously cites to the adjectival form of "intermediate," which does not apply here. The noun form of this term refers to "an intermediate person or thing" – in other words, a singular intermediate. On the contrary, the digital copying process does not have a single "intermediate" and instead requires multiple devices, such as the CCD image sensor in the scanning engine and the laser beam in the printing engine, both of which do not exist in the analogue photocopiers.

15. The EC arguments try to exploit the fact that MFM printing technology uses an electrostatic print engine. The EC argument, however, treats the use of electrostatic print engine as sufficient for copying devices to be "photocopying apparatus". The EC conveniently disregards the text of the tariff concession on subheading 9009.12, which explicitly recognizes only one "intermediate" in the process.

16. Moreover, the EC argument confuses the distinction between how the image is being "copied" and how it is being printed. As stated before (in paragraph 8), digital copying does not reproduce the original image onto the copy, and is therefore not consistent with the language of subheading 9009.12. There is no process to reconstitute and improve the original image as part of the "indirect process electrostatic photocopying," which confirms that digital copying involves different objective

characteristics from "photocopying". Lastly, the EC accuses Japan of reading words into subheading 9009.12, but it is the EC that mistakenly reads this language in isolation. One must read "photocopying" in heading 90.09 and "indirect process" in subheading 9009.12 together holistically, not in isolation.

3. HSEN

17. The Harmonized System Explanatory Note ("HSEN") for heading 90.09 confirms that "photocopying" does not include digital copying. The HSEN is relevant for understanding the ordinary meaning of the language used in heading 90.09 and subheading 9009.12. First, the EC apparently has no response to our argument that since the language of this HSEN was originally drafted, it had not been changed until the HS 2007 text newly created subheading 8443.31 on MFMs at issue and abolished the entire heading 90.09.

18. Second, the HSEN confirms Japan's reading of "reproducing" in the sense of "projecting" the original image, and Japan's reading of "an intermediate" as meaning the photosensitive "drum (or plate)". The language of this HSEN does not contradict the language of subheading 9009.12 and can be used as important contextual guidance for what the language of subheading 9009.12 means. Third, the HSEN quite specifically explains that "the optical image is projected onto a drum (or plate.)" Thus the HSEN gives very specific contextual guidance for exactly what "via an intermediate" in subheading 9009.12 really means. This meaning is completely consistent with Japan's interpretation of subheading 9009.12.

4. Classification Practice

19. As confirmed by Appellate Body in *EC – Chicken Cuts*, subsequent practice should be examined based only on the consistent practice of a wide range of WTO Members. The EC only addresses the "practice" of a handful of countries, only shows that supposed practice over a narrow period of time, and admits the "practice" has not been consistent.

20. Indeed, the EC has drawn an erroneous inference concerning Japan's classification practice from Japan's informal proposal to the ITA Committee for the ITA II negotiation in 1997. This proposal was submitted not to clarify Japan's duty treatment of MFMs, but particularly to address the EC's imposition of duties on MFMs. Thus, it is not at all suggestive of any inference regarding the customs practice on MFMs at that time. Also, the EC has seriously mischaracterized US classification practice. Indeed, even the EC's own practice has been inconsistent, as illustrated by the EC BTI's issued in 1996 that classified MFMs under heading 84.71. Such classification "practices" cannot be given any interpretative significance under the *Vienna Convention*. We also note that the EC cites a Japanese negotiating proposal on ITA II in 1997 as somehow being relevant here. As a legal matter, this proposal has no significance for the interpretation of the treaty at issue in accordance with the *Vienna Convention*.

5. Conclusions about "photocopying"

21. Japan believes its arguments stand on their own merit, and should convince the panel. But Japan also believes the panel can and should consider the neutral discussion of these issues by the WCO Secretariat. First, we recognize the WCO Secretariat materials are not binding, but the argument and logic are quite persuasive and can be considered. Second, the EC criticism is largely that the WCO Secretariat adopted too static a view of the language of the HSEN for heading 90.09 and thus did not allow for subsequent technological developments, which is a rather ironic argument given the EC position on other products that have undergone technological development. Third, the

EC criticism is largely that the WCO Secretariat put too much emphasis on the HSEN for heading 90.09 and not enough on the language of heading 90.09 itself. Yet as we have shown above, from the viewpoint of tariff concessions, the language of heading 90.09 and subheading 9009.12 are in fact consistent with and supported by the HSEN for heading 90.09.

B. MEANING OF "OUTPUT UNIT" – MFMS ARE "OUTPUT UNITS"

22. Having clarified the limited meaning of the term "photocopying," this discussion brings us back to the key issue for this dispute – the scope of the concession the EC granted on products within the scope of heading 84.71. The starting point must therefore be the language of the concession at issue. Other treaty text – in other words, the language of other concessions – must also be considered as context. Contrary to the EC argument, Japan does not deny that HS interpretative materials are context under the *Vienna Convention* for purposes of interpreting this concession. Chapter Notes, as part of the overall context, can inform an interpretation based on the ordinary meaning of the concession. But Chapter Notes cannot require any interpretation that disregards the text of the concession itself.

23. Contrary to the EC focus on Note 5(B) in isolation, Japan considers all of Note 5 in its interpretation. In particular, Note 5(D) makes clear that the rule of Note 5(B)(a) – on which the EC relies so heavily – simply does not apply to those "output units" that are "printers" within the meaning of CN 8471.60.40 in the EC's Schedule.

24. The EC insists that MFMs cannot be "printers" because MFMs are multifunctional. Here, we simply note that the EC has largely ignored the factual arguments Japan has presented that MFMs have the objective characteristics that make them essentially a "printer" with some additional features. The EC has also ignored the contextual guidance provided by Note 3 to Section XVI that confirms a multifunctional machine should be treated as a "machine which performs the principal function" – which, for MFMs, is being used as a "printer."

25. The EC asserts the Complainants have provided no evidence on the principal function of MFMs. At the outset, we note that whether a product falls within the scope of a tariff concession is determined by the objective characteristics of the product. Further, Japan has provided evidence demonstrating that the EC argument fails on two different levels. First, if the printing unit is the central component of an MFM and if printing is the principal function, then the MFMs can and should be deemed to be "printers". Second, even if MFMs are not "printers," they do in fact meet the rule of Note 5(B)(a). The principal use is as a "printer," which is an "output unit" for use with a computer. Another very common use of MFMs is as a scanner, which is an "input unit" also for use with a computer. MFMs with digital connectivity are thus in fact for use "solely or principally" in a computer system, and thus meet the requirement of Note 5(B)(a). In the end, however, the Panel should keep in mind that Note 5 to Chapter 84 is not treaty text.

26. Ignoring all of these arguments, the EC simply stresses the copying function of MFMs. The tariff concession focuses on the objective characteristics of the device. The fact that the printer unit and scanner unit can also be used together to provide an additional and incidental function of digital copying does not change the objective characteristics of the MFM.

C. MFMS WITH FACSIMILE FUNCTION BUT WITHOUT DIGITAL CONNECTIVITY

27. For MFMs with facsimile function but without digital connectivity, the printer unit and the scanner unit are both essential for the device to operate as a facsimile machine. The fact that the

printer unit and scanner unit can also be used together to create the additional and incidental function of digital copying does not change the objective characteristics of the MFM as a facsimile machine.

28. The EC relies heavily on classification practice, but ignores the implications of the inconsistent practice within a country such as the United States. Such inconsistent practice by a handful of WTO Members hardly provides strong support for the EC position. Further, the EC argument about the need to use Note 3 to Section XVI to pick between subheading 8517.21 and subheading 8472.90 reflects a continuing misunderstanding about the objective characteristics of these MFMs that are the subject of the relevant concessions. For an MFM that cannot connect to a computer but that does have a facsimile function, the printer unit and the scanner unit become key components that are essential for the device to operate as a facsimile machine.

29. Besides, the EC overlooks the fact that subheading 8472.90 is a residual line for general office machines, compared to subheading 8517.21 which is specific line for facsimile machines. MFMs with facsimile function but without digital connectivity have the specific characteristic as a facsimile machine.

II. FLAT PANEL DISPLAYS

A. THE RELATIONSHIP BETWEEN THE TWO CONCESSIONS AT ISSUE

30. Unlike MFMs, which are subject only to the concession pursuant to Attachment A, FPDs are subject to two distinct concessions – those pursuant to Attachment A and also those pursuant to Attachment B. The concession pursuant to Attachment A applies to those products that fall within specific HS codes. The concession pursuant to Attachment B serves the very different function of capturing products that could not be completely described by existing HS codes, and therefore required a narrative explanation to ensure that the full scope of the product would be covered by the duty-free concession. Each concession must be considered.

31. The concession pursuant to Attachment A covers only FPDs that are "output units" of computers. The notion of an "output unit" being "of" a computer in the language of heading 84.71 and subheading 8471.60 must be considered against the context of Note 5(B) to Chapter 84, which explains that a "unit" is part of a computer system if that unit is "solely or principally" used in a computer system.

32. The concession pursuant to Attachment B covers FPDs "for" computers or "for" other ITA products. Unlike the concession pursuant to Attachment A, the concession expressly includes FPDs for products other than computers and includes any FPD that is "for" a computer or some other ITA products. This term "for" is to be read outside the context of Note 5(B) because Note 5 relates only to the language of heading 84.71 and does not relate to the narrative descriptions provided in those concession pursuant to Attachment B. This difference reinforces the need to interpret the term "for" as it is, particularly since the "sole or principal" use test set forth in Note 5(B) does not apply. Japan has argued that the term "for" in the Attachment B concession read in its proper context means "capable of operating with." Other concessions that do have other criteria or limitations underscore the absence of any other criteria or limitation in the concession on FPDs pursuant to Attachment B.

33. Complainants are not trying to read the illustrative CN headings out of the EC concession – they are included as part of a proper holistic interpretation of treaty text. Complainants simply reject the EC argument that these CN headings somehow narrow or exhaust the narrative description provided in the EC concessions.

34. The EC's argument about the scope of the "safety net" concession tries improperly to introduce some external concept to limit the scope of the concession pursuant to Attachment B. The phrase in the headnote to the concession pursuant to Attachment B in the EC's Schedule – "to the extent not specifically provided for in this Schedule" – indicates that the scope of the concessions pursuant to Attachment B covers the products specified by the narrative description, even if those products are not specified as duty-free items anywhere else in the whole EC's Schedule.

B. PRIMA FACIE CASE

35. The EC insistence that the claims are somehow still vague flows from their erroneous view that complainants must identify all models of the products that are improperly subject to duties. We need not do so. Once we have established that some products are necessarily subject to duties improperly, we have made out our case. The complainants have two separate claims for FPDs – a claim based on the concession pursuant to the Attachment A on subheading 8471.60, and a separate claim based on the concession pursuant to Attachment B for "flat panel display devices".

C. PRODUCTS AT ISSUE

36. The EC protests that it does not know what products are subject to this dispute. Japan and the other complainants have been quite clear on this point from the beginning of this dispute, and the panel need only confirm that the EC has improperly imposed duties on some FPDs that are in fact within the scope of the duty-free concessions.

37. The EC also protests that products classifiable under some other heading might fall within this definition. But how products may be "classified" under HS rules does not determine the issue in a dispute over tariff concessions. By design, the concession pursuant to Attachment B includes certain FPDs that do not fall within the concession pursuant to Attachment A. This overlap does not render the concession pursuant to Attachment A irrelevant, since heading 84.71 covers a wide variety of "output units," and not just FPDs.

38. The EC seems to argue Japan's view of the scope of concessions pursuant to Attachment B is too broad and includes non-ITA products. But this argument exaggerates Japan's view. The concept of "capable of operating with a computer" means more than whether the device can merely receive signals from computers. This phrase means that the FPDs "for" personal computers, for example, must be designed to be used with computers, thereby providing an acceptable level of operational quality. Even with a DVI connector installed, FPD monitors that can receive and display television signals are not necessarily going to be "for" a computer. Further, it might be less likely that FPD monitors with a HDMI connector would be capable of operating with a computer or other ITA products, because the HDMI connector is designed primarily for audio-visual data. Nevertheless, the type of connector is not decisive; it is the capabilities of the device that determines whether a particular FPD monitor falls within the scope of the concession or not.

39. The EC is classifying as dutiable products that in fact fall within the scope of the concessions pursuant to Attachment B, simply because the EC thinks these products should be classified in some other headings. The EC measures in dispute deem the capability of receiving data from any source other than computers to be sufficient to establish that FPDs are dutiable products not covered by the EC concessions. The EC ignores other factors that might demonstrate that the FPDs at issue are in fact fully capable of operating with a computer, and thus entitled to duty-free treatment, and instead subjects the FPDs at issue to duties.

40. If the EC changes its current WTO inconsistent criteria, and introduces new criteria, those new criteria may be addressed in compliance panels. In the meantime, the Panel can and should decide the obvious WTO inconsistencies at issue.

D. MEASURES AT ISSUE

41. The EC measures act as if there were only the concessions pursuant to Attachment A, and then read that single concession more narrowly than it should be read. The EC takes the language from Note 5(B) (a) to Chapter 84 regarding a FPD at issue as a "unit" of a computer if it is "solely or principally" used in a computer system and then strips away the word "principally" without any proper legal basis. Therefore, the EC measure is inconsistent with concessions covered by either Attachment A or Attachment B.

42. The EC measures also allow other features to trump the ability of FPDs to be operating with a computer. A product that would otherwise be duty-free somehow loses its duty-free status if it adds some additional capability. But that is not how the wording of the concessions works. If the FPD is capable of operating with a computer (or some other ITA product), it is covered either by Attachment A or Attachment B, or perhaps both.

1. The current CN

43. Let us consider each of the EC measures in turn. Read in isolation, the current CN2009 seems to reflect the concession pursuant to Attachment A since there is no duty on CN 8528.51.00 for monitors other than cathode-ray tube monitors, of a kind solely or principally used in an automatic data processing system of heading 84.71. But as the EC itself acknowledges, the CNEN to CN 8528.51.00 narrows the scope of this tariff line in a way that is inconsistent with the concession pursuant to Attachment A.

44. Moreover with regard to the FPDs at issue, the current CN does not reflect the concession pursuant to Attachment B, which includes products beyond those used "solely or principally" in a computer system. This is particularly the case when the current CN is read together with the CNEN and the EC Regulations. The EC stresses "foreseeability" and states that it did not foresee this outcome. However, the legal issue here is the scope of the concession as it is written. The EC measure does not even try to identify or delineate which FPDs are "for" ITA products, other than FPDs that are "solely or principally" used in a computer system. Once Japan has explained clearly that some FPD monitors capable of operating with a computer or other ITA products are covered by any dutiable CN, then Japan has established its *prima facie* case.

2. CNEN (*Kamino case*)

45. Let us now turn to the CNEN that provides concrete rules for interpretation of the CN at issue here. The EC tries to defend this highly problematic measure, the CNEN, by arguing "this criterion under the CNEN cannot today be considered as any more probative than others set out in the applicable Explanatory Notes."¹ The EC apparently believes the decision by the ECJ in *Kamino* somehow saves its measure. We strongly disagree. First, we note that the *Kamino* case, a judgment delivered after the establishment of this Panel, does not have any direct relevance for this case. Second, Japan is not aware of any change in EC practice after *Kamino*, nor has the EC provided documentation of any change in its practice.

¹ EC second written submission, para. 60.

3. Classification Regulations

46. The EC tries to defend these measures by saying they are under review. Yet these regulations remain in effect until they are formally repealed. This Panel can and should find them to be WTO inconsistent.

III. SET TOP BOXES

47. Regardless of how large the capacity of such a storage device installed in STBs might be, such storage capacity is fully covered by the "communication function" of the device. Consider, for example, the e-mail box. The e-mail account needs a significant storage capacity for effective functioning. This significant storage function is thus needed for the communication purpose of the STB, because a recipient would fail to receive e-mails without this storage function in the e-mail system. Japan is aware that the storage capacity enables such STBs to store recorded video. Yet as the EC concedes, the devices are still STBs which have a communication function. These devices are entitled to duty-free treatment wherever classified.
