ANNEX A

SUBMISSIONS OF THE UNITED STATES

ANNEX A–1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION BY THE UNITED STATES

1. The Information Technology Agreement (ITA) remains a crowning achievement of the post-Uruguay Round WTO system, widely hailed for eliminating duties on a vast range of information technology (IT) products and promoting the spread of innovative technologies throughout the developed and developing world. As a result of the ITA, the European Communities ("EC"), in its WTO Schedule of tariff concessions, committed to permit the importation of certain IT products duty-free. This dispute centers on recent actions by the EC and its member States to methodically dismantle tariff commitments that they made as part of the ITA.

I. SET-TOP BOXES WITH A COMMUNICATION FUNCTION

2. "Set top boxes with a communication function" are included in both Attachment A and Attachment B of the ITA. Under GATT 1994 Article II:1 and pursuant to the headnote, the EC is obliged to accord duty-free treatment to set top boxes with a communication function – as defined in Attachment B of the ITA – *wherever they are classified*. Following implementation of the ITA, set top boxes with a communication function imported into the EC were generally classified in CN line 8528 71 13 or its predecessor lines, and entered duty-free. However, as a result of the STB CNEN Amendments approved in 2006 and 2007, which impose a variety of arbitrary technical restrictions on qualifying for duty-free treatment, the EC and its member States began applying duties of 14% to set top boxes with a communication function.

3. Under the amendments, any set top box having a communication function – *i.e.*, a microprocessor based device, incorporating a modem for gaining access to the Internet and capable of interactive information exchange – is excluded from the duty-free heading and subject to a 13.9% duty – merely if it also happens to have a hard disk. These actions do not accord with the commitment in the EC Schedule to provide duty-free treatment to set top boxes with a communication function, wherever classified. The EC Schedule provides a definition of a "set top box with a communication function." This definition is reflected in ITA Attachment B. Under the terms of the Schedule, when a device has the following three characteristics, it is a set top box with a communication function (and thus is to be accorded duty-free treatment): (1) it is a microprocessor-based device; (2) incorporating a modem for gaining access to the Internet; and (3) having a function of interactive information exchange.

4. The devices the EC subjects to duties are "set top boxes with a communication function," and the EC has conceded as much. They are microprocessor-based devices (i.e., devices based on an electronic circuit (or chip) performing functions with assistance of internal memory). They incorporate modems for gaining access to the Internet, and have a function of interactive information exchange. Indeed, the EC concedes in the CNEN that devices subject to duties are "set top boxes," and also has acknowledged that they have a communication function.

5. In effect, the EC appears to read its obligations as if the definition in Attachment B and its WTO Schedule contained an additional requirement that, in order for a device to be considered a set-top box with a communication function, it must not be equipped with a hard disk. In no respect does the text of the EC Schedule support the view that STBs with a communication function may no longer qualify as such merely due to the presence of a hard disk or other "recording or reproducing" apparatus. Rather, the text sets forth three straightforward criteria – if present, the product qualifies as a set top box with a communication function, and is entitled to duty-free treatment.

6. This interpretation of the EC's tariff concession is consistent with, for example, the view of the Group of Experts in the GATT dispute *Greek Increase in Bound Duty*. As was the case with respect to gramophone records, ITA participants did not qualify the words "set top box with a communication function" other than by specifying the three attributes described above. Thus, by arbitrarily excluding set top boxes with a communication function from duty-free treatment due to the presence of a hard disk or other apparatus, the EC and its member States have acted inconsistently with their obligations.

7. The amendments to the EN for 8528 71 13 additionally operate to exclude from duty-free treatment devices that have particular types of modems. STBs with a communication function that do not have "modems" as the EC defines the term receive a 14% duty. Thus, under the EC measure, a set top box with a communication function is disqualified from duty-free treatment merely because it gains access to the Internet with a device that operates through an Ethernet or network connection, a wireless based connection (i.e., WLAN or "wireless LAN"), or a digital communications network (ISDN), using an RJ-45 connector, rather than an RJ-11 connector. The EC also states that STBs of the duty-free tariff line must incorporate a video tuner, and that "IP-streaming boxes" – STBs which use decoders and other technology instead of a tuner to enable a television set to display television signals sent by the service provider – are classified in a dutiable tariff line, notwithstanding the fact that these devices have all the attributes of a set top box with a communication function.

8. Both from a technical standpoint and based on the ordinary meaning of the terms in its Schedule, the EC measure is contradictory and lacks basis in logic. First, there is no basis to conclude, based on the ordinary meaning of the terms, that devices that communicate using ISDN-, WLAN- or Ethernet technology are not "set top boxes which have a communication function" – devices which, among other things, "incorporat[e] a modem for gaining access to the Internet." A "modem" is equipment that connects data terminal equipment to a communication line. Devices that operate through an Ethernet or network connection, a wireless based connection (i.e., WLAN or "wireless LAN"), or a digital communications network (ISDN) are modems — they connect the set top box to a communication line and convert signals produced by one type of device to a form compatible with another.

9. In the amended CNEN, the EC claims that these devices "perform[] a similar function to that of a modem" but "do not modulate and demodulate signals," and therefore are not entitled to duty-free treatment. Even as a technical matter this assertion is incorrect. Each of the devices in question modulates and demodulates signals — that is, they vary some characteristic of the electrical signal as the information to be transmitted on the communication medium varies, which is precisely what enables the device to communicate with another source.

10. The context in which the term "modem" appears in the EC Schedule (which under Article 31(1) of the Vienna Convention is also relevant to its interpretation) provides further support for this reading of the text. The text does not limit the term "modem" to devices of a particular type, and indeed the phrase "communication function" is broad. In this context, modems, of any type, which enable a set top box to gain access to the Internet, qualify as such. By arbitrarily singling out devices with certain types of modems (and certain connectors), the EC measure results in the imposition of 14% duties on set top boxes with a communication function.

11. Furthermore, as a technical matter, it is meaningless to rely on the type of connector – RJ-11 versus RJ-45 – as a basis to distinguish between the categories of devices that the EC claims are and are not modems. Indeed, cable modems (which the EN recognizes as a type of modem) typically have an RJ 45 connector. By treating the presence of an RJ 45 connector as indicative of whether or not the product has a modem, the EC measure results in the application of duties to products that even in

the EC's view have modems. Likewise, by excluding all devices that do not have a tuner – and, in particular, STBs with a communication function that receive signals via Internet Protocol (TCP/IP) – the EC imposes duties on STBs covered by its tariff concessions. An IPTV STB converts the television signals sent by the service provider to video and sound that can be displayed on a television – the mere fact the STB receives the signal over a broadband connection and does not rely on a tuner provides no basis to conclude that it is something other than a set top box with a communication function.

12. The commitments at issue were incorporated into the EC Schedule as a result of the conclusion of the ITA, and indeed, the headnote in the EC Schedule expressly refers to the ITA. Article 1 of the ITA in turn provides that Members' tariff regimes should "evolve" in a manner that "enhances market access for information technology products". This context further supports the conclusion that the EC's interpretation of the commitments in its Schedule is incorrect. Nor would it accord with other language contained in the Preamble to the ITA, including the stated desire of participants to "achieve maximum freedom of world trade in information technology products" and to "encourage the continued technological development of the information technology industry on a world-wide basis." In this regard, as explained previously, the negotiators of the ITA were well aware of the issue of technological development, and the possibility that customs authorities might reclassify merchandise covered by the Agreement. The text of the ITA – including Attachment B – and the EC tariff concessions incorporated into its Schedule as a result – including the ITA headnote affirming that certain products receive duty-free treatment "wherever...classified" – are written to ensure that duty-free treatment would be maintained, even as, for example, technology evolved and a single digital product came to have additional purposes previously assigned to other products. Indeed, under the headnote to the Schedule, these products are entitled to duty-free treatment "wherever classified" – even when the addition of functions or technologies such as a hard drive results in reclassification within the EC CN, the EC is obliged to maintain the tariff treatment contemplated by the Schedule for any device meeting the description of a "set top box with a communication function". It has failed to do so.

13. In addition to its obligation under the headnote to provide duty treatment to set top boxes with a communication function "wherever...classified", the EC also committed to provide duty-free treatment to goods described by individual tariff lines in its Schedule. In order to implement its obligations under the ITA, the EC bound three subheadings at zero duty that the EC identified as including STBs with a communication function, within the meaning of Attachment B. Each of these tariff lines has a bound duty rate of zero in the EC Schedule. In 2000, the EC modified its Schedule to add another tariff line – 8528 12 91 – which it also identified as including set top boxes with a communication function within the meaning of Attachment B, and which it bound at zero duty. The EC's failure to provide duty-free treatment to set top boxes with a communication function is also inconsistent with its obligation to provide duty-free treatment to the goods described in these tariff lines.

14. The CNEN amendments discussed above were approved by the Tariff and Statistical Nomenclature Section of the Customs Code Committee (Customs Committee) in October 2006 and May 2007, respectively. Yet the EC failed to publish the amendments in its official journal until May 2008, over a year after the amendments had been approved. This delay is not consistent with GATT 1994 Article X:1. These amendments, which plainly pertain to the classification of products for customs purposes, and affect the rates of duty for those products, were not published "promptly" as required by GATT 1994 Article X:1. Indeed, they did not appear in the EC's official gazette for over a year after approval, making it virtually impossible for affected companies and other Members to access them in a reasonable manner.

15. At the same time, member States were applying duties on imports of set top boxes with a communication function using the reasoning set forth in the amendments. Article 12(5) of the Community Customs Code provides that BTI shall cease to be valid "where it is no longer compatible with the interpretation of one of the nomenclatures referred to in Article 20(6)." Indeed, according to BTI Guidelines, "Member States should not issue new BTIs that are contradictory to a legal measure which has been voted in the Customs Code Committee, *even if this measure is not yet published*." Consistent with this view, during a discussion at the October 2007 meeting of the Customs Code Committee of "the use of statements in the minutes of the Committee and the application of voted measures before their publication," the Chairman noted that "as soon as the Committee has rendered an opinion on the classification of a specific type of product, no BTI should be issued contrary to that opinion and... this opinion should be respected by all member States. It follows from the above that as soon as an opinion has been voted, member States can issue BTIs for the products concerned, *even before the measure has been adopted by the Commission and published in the Official Journal*."

16. The EC's action is also inconsistent with GATT 1994 Article X:2. The CNEN constitutes a "measure of general application" – it is applied by EC and member State customs authorities in determining classification for all importers of flat panel display devices. The application of the CNEN resulted in the reclassification of STBs from a duty-free tariff line into a tariff line with duties of up to 14%, and thereby the CNEN "effect[ed] an advance in a rate of duty...on importers." The EC's failure to promptly publish these measures, while imposing duties on importers using the reasoning contained in them, created an untenable situation for importers and Members alike. Through its actions, the EC failed to accord to traders the treatment to which they are entitled, and thus the EC acted inconsistently with GATT 1994 Articles X:1 and X:2.

II. CERTAIN FLAT PANEL DISPLAY DEVICES

17. Flat panel display devices are included in both Attachment A and Attachment B of the ITA. Attachment B describes certain flat panel display devices as "Flat panel display devices (including LCD, Electro Luminescence, Plasma, Vacuum-Fluorescence and other technologies) for products falling within this agreement, and parts thereof." Based on the ordinary meaning in context of the terms in the EC's Schedule, LCD monitors are "flat panel display devices...for products falling within this agreement." In the ITA, the parenthetical following the terms "flat panel display devices" specifically identifies LCD flat panel display devices as one example of a flat panel display device. Computers ("automatic data processing machines") are among the "products falling within" the ITA. LCD monitors "for" computers are therefore among the devices covered by the EC's commitment with respect to flat panel display devices. Therefore, under the headnote, the EC and its member States are obliged to accord duty-free treatment to flat panel display devices for ITA products, and in particular LCD monitors, *wherever they are classified*.

18. Under the EC measures, any device with DVI is excluded from its tariff concession, ostensibly because in the EC's view it is not for a computer. Yet this single physical attribute provides little if any information about whether a FPD is "for" products falling within the ITA. DVI is a standard *computer* connector. As explained in paragraphs 45-55, supra, DVI was developed as a standard connector for the computer industry to allow computers to transmit digital signals to a display device. Approximately half of all LCD monitors have a DVI connector. Indeed, some devices with a DVI connector must be connected to a computer in order to receive video signals. For example, certain monitors with DVI are configured to accept a single signal and a single bandwidth. As their product manuals indicate, these devices *cannot* operate without a computer to convert the signal from one frequency to another. Yet even these devices are subject to duties in the EC simply because they have DVI.

19. Furthermore, by relying on individual technical characteristics to exclude devices simply because they *might* be used with something other than a computer, the EC and its member States fail to accord duty-free treatment to LCD monitors "for" a computer. As noted above, under the EC and member State measures, even if a monitor is mainly for use with an automatic data processing machine, it is dutiable if it is merely *capable of* being connected to a non-ADP machine. The text, however, contains no such limitation. Rather, the commitment uses the general term "for" – "a function word to indicate purpose." Indeed, the EC's own position on how the devices are used is contradictory – while the EC states in Regulation 493/2005 that LCD monitors are "mainly used as output units of automatic-data processing machines", it then finds that the devices are not "principally" used in an automatic data processing system. In essence, the EC has concluded that the devices in question both are and are not principally for use with a computer, and in either event, are not entitled to duty-free treatment. Similarly, the EC's reliance on a "sole *or principal*" use standard cannot be reconciled with its repeated assertion that monitors "capable" of connecting to a device other than a computer are not entitled to duty-free treatment. Thus, the EC's position, even setting aside the ordinary meaning of the tariff concession and simply focusing on its own description of its measures, accords neither with logic nor the facts.

20. By providing duty-free treatment only to devices that are "solely" for use with a computer (and even excluding devices that *are* solely for use with a computer merely because they have a DVI connector), the EC and its member States fail to accord duty-free treatment to many LCD monitors that are "for" ITA products.

21. As noted previously, Article 1 of the ITA provides that Members' tariff regimes should "evolve" in a manner that "enhances market access for information technology products." The tariff commitments in the ITA were designed to ensure that duty-free treatment would be maintained, even as new technologies, such as DVI, developed. Flat panel display devices for ITA products are entitled to duty-free treatment "wherever classified" – even when the addition of technologies such as DVI results in reclassification within the EC CN, the EC and its member States are obliged to maintain the tariff treatment contemplated by the Schedule for any device meeting the description of a "flat panel display device for" an ITA product. They have failed to do so.

22. In addition to its obligation under the headnote to provide duty-free treatment to flat panel display devices for ITA products "wherever...classified", the EC and its member States also committed to provide duty-free treatment to goods identified in individual tariff lines in the Schedule. In particular, tariff line 8471 60 90 (HS96) describes "input or output units, whether or not containing storage units in the same housing, other, other." LCD monitors are "input or output units" of this tariff line. The mere fact that a device uses a DVI connector to transmit the information displayed does not render it something other than an input or output unit.

23. Beyond the language used in the individual tariff line, other relevant context supports the conclusion that an LCD computer monitor, whether or not equipped with DVI and whether or not *solely* capable of being used with a computer, meets the description in 8471.60 (HS96). Heading 84.71 includes several subheadings that describe different types of computers, computer systems, and devices used in connection with computers, including printers, scanners, and other devices. Each one of these subheadings was included in the ITA, and all were included in the EC schedule of concessions. All types of computers and all types of computer units – separately or in various combinations – fall within heading 84.71. All of these items were included in the concessions negotiated and codified in the EC Schedule. Nothing in the language or structure of heading 84.71 would support the conclusion that by virtue of the presence of a DVI connector, monitors fall outside the scope of heading 84.71 and its associated tariff commitments. Nor does the language or structure of heading 84.71 limit coverage to LCD monitors that can *only* receive input from an ADP machine.

24. Note 5(B-C) to Chapter 84 of HS(1996) confirms that the *mere possibility* that a monitor could be connected to something other than an automatic data processing machine is not sufficient to exclude it from heading 8471. Rather, a device that is *either* "solely" *or* "principally" used in an automatic data processing system may be considered a "unit" for purposes of heading 8471. Under the EC and member State measures, however, as explained above, any device that is not "solely" for use with an ADP machine (and indeed some devices that are "solely" for use with an ADP machine) are excluded from heading 8471 and from duty-free treatment.

25. Therefore, in addition to failing to adhere to their obligations under the headnote incorporated into the EC Schedule by virtue of Attachment B, by imposing duties on these products, the EC and its member States have acted inconsistently with its obligation to provide duty-free treatment for products described in tariff line 8471 60 90 (HS96) of the EC Schedule.

26. The EC and its member States have also provided less favorable treatment within the meaning of Article II:1(a) of GATT 1994 to products subject to the temporary duty suspension. By providing flat panel display devices of 19 inches or less with a duty suspension, rather than permanent duty-free treatment, the EC and its member States provide treatment "less favorable" than that provided in its Schedule for these devices as well. The headnote to the EC Schedule provides that the duties on Attachment B products, such as flat panel display devices, shall be "bound and eliminated". The duty suspension, however, is temporary – as the regulation states, it is provided "for a limited period" only, lasting at most two years at a time. Furthermore, it is conditional: it may be terminated unilaterally at such time that the EC considers that the conditions for its continuation are no longer fulfilled. These conditions, it should be noted, are not contained in the EC Schedule.

27. The EC's failure to provide permanent duty-free treatment to the products adversely affects imports – for instance, companies have no certainty that LCD monitors will receive duty-free treatment upon importation into the EC, particularly as the termination date of the duty suspension draws near. After the duty suspension has terminated (as is currently the case), they are subject to duties. As with divergent tariff classification, the EC's use of duty suspensions rather than permanent duty-free treatment adversely affects the trading environment in the EC, and results in less favorable treatment than the bound duty-free treatment accorded by the EC Schedule.

III. CERTAIN MULTIFUNCTION DIGITAL MACHINES

28. Multifunction digital machines – devices that perform multiple functions such as printing, facsimile transmission, scanning, and digital copying – were included in Attachment A of the ITA, which provides for duty-free treatment for a wide range of computer peripherals and facsimile machines, including goods of subheading 8471.60 (HS96) ("Automatic data processing machines and units thereof" … "Input or output units, whether or not containing storage units in the same housing,") and subheading 8517.21 (HS96) ("Electrical apparatus for line telephony … and telecommunications apparatus for carrier-current line systems or for digital line systems" … "Facsimile machines").

29. Through these commitments, the parties agreed to treat as duty-free both (1) computer ("automatic data processing machine") peripherals ("input or output units") such as printers and scanners; and (2) facsimile machines. Pursuant to the ITA, the EC modified its Schedule to bind the duty rate for these products at zero. As a result of these tariff concessions, multifunction digital machines are entitled to duty-free treatment.

30. The EC and its member States impose duties on certain MFMs which are "input or output units". An "input or output" unit is a device which "accepts new data, sends it into the computer for processing, receives the results, and translates them into a useable medium." Multifunction digital

machines which connect to computers are input or output units – they, for example, receive signals from the computer and provide the results to the user in the form of a printed page, and take information from a hard copy and process it into an electronic file provided to the computer for storage or transmission, or to be converted into a printed image and deleted.

31. The number of pages per minute that a device produces has *absolutely no bearing* on the ordinary meaning of "input or output unit," nor any significance from a practical standpoint – most MFMs currently sold which connect to computers are capable of producing copies at a rate of more than 12 pages per minute. Instead, the ordinary meaning of the term focuses on the manner in which a device interacts with a computer. Thus, a page per minute standard, such as that adopted by the EC, does not provide a meaningful basis on which to identify "input or output units" eligible for duty-free treatment. The terms of heading 8471 and its subheadings provide strong contextual support for the conclusion that MFMs with computer connectivity are included within the scope of the EC's tariff concession for "input or output units". First, as noted above, the ITA covered a wide range of computer peripherals, including printers and scanners, as well as facsimile machines and some photocopiers. All types of computers and all types of computer units – separately or in various combinations – fall within heading 84.71 (HS96), all of which was included in the EC's ITA tariff concessions. MFMs operate by combining a scanner and a printer – both devices covered by heading 8471 and included in the ITA. The notion that two devices that are computer units covered by heading 8471 (HS96) and entitled to duty-free treatment would no longer be entitled to duty-free treatment merely because they are combined into a single product (and one that itself constitutes a computer unit) does not accord with a proper reading of heading 8471. Nothing in the language or structure of heading 84.71 (HS96) would support excluding MFMs – devices combining a scanner and printer, used in connection with computers both for inputting data through scanners and for outputting data through the printer unit – from the scope of heading 84.71 (HS96).

32. Furthermore, the terms of heading 9009 – the provision in which the EC claims these devices fall – in fact supports the conclusion that the tariff concession in line 8471.60 (HS96), not heading 90.09 (HS96), covers MFMs. In particular, heading 9009 uses the term "*photo*copying." MFMs are not "photocopiers". First, MFMs perform a range of functions, including scanning and printing, that are not performed by a photocopier. The printer function of the device is in many respects the most significant. While an MFM also typically performs a copying function, the manner in which it does so sets it apart from a "photocopier" in important ways. Digital copiers do not perform the function of *photo* copying – they do not use light to reproduce an image. Other relevant headings in Chapter 90 are consistent with this interpretation of the term "photocopying" – all of which refer to optical and photographic technologies. Each of these headings, like heading 9009, pertains to optical technologies – not digital devices such as an MFM.

33. Insofar as it may be considered relevant context, the HS provides additional support for the above interpretation of heading 8471. Consistent with note 5 to Chapter 84 of the HS, the multifunction digital machines in question are of a kind solely or principally used in an automatic data processing system, are connectable to the central processing unit (CPU) of an automatic data processing machine, and are able to accept or deliver data in a form (codes or signals) which can be used by the system. The Harmonized System Explanatory Note ("HSEN") to heading 90.09 (HS96) is also consistent with the interpretation of the term "photocopying" advanced above. An MFM is not a "photocopier" as this term is defined in the HSEN – an optical image of the original document is not projected onto a photosensitive surface to produce a copy. Therefore, these devices do not fall within heading 90.09 (HS96).

34. As has been noted with respect to the other ITA products of concern in this dispute, the ITA provides relevant context for interpreting the obligations at issue. As such, it equally supports the

conclusion that the obligation in the EC Schedule with respect to heading 8471, and subheading 8471.60 in particular, includes MFMs. In particular, Article 1 of the ITA provides that Members' tariff regimes should "evolve" in a manner that "enhances market access for information technology products." Given this language, it is appropriate to interpret the ITA tariff concessions reflected in the EC Schedule broadly, including the concessions for heading 8471. In view of this and the clear language of the commitments described above, MFMs which are connectable to computers fall within the EC concession for "input or output units".

35. As part of its tariff concessions following conclusion of the ITA, the EC provided for duty-free treatment for all products in heading 85.17, including "facsimile machines" of tariff line 8517 21 00. Certain facsimile machines – in particular devices that do not have the ability to connect to a computer or computer network, but have a scanner device and are able to reproduce more than 12 pages per minute with that device – have been subjected to duties of 6%. The facsimile machines in question have scanners, which are used to convert an original document into digital data that can be sent as a facsimile. As explained previously, while these devices may be able to digitally reproduce files, none of them perform a *photo*copying function. Thus, devices combining a printer, scanner, and facsimile machine, which are not covered by heading 8471, are otherwise covered by the terms of heading 8517, as "facsimile machines".

ANNEX A-2

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT BY THE UNITED STATES AT THE FIRST SUBSTANTIVE MEETING

1. This dispute centers on concessions made in connection with and following the conclusion of the Information Technology Agreement, or ITA. The ITA remains a major achievement of the post-Uruguay Round WTO system. Through the ITA, Members eliminated duties on a wide range of information technology products, in order to foster development, innovation, and the spread of technology across the globe. In the Preamble of the Agreement, Ministers acknowledged these vital goals.

I. EC IMPLEMENTATION OF ITA AND IMPOSITION OF DUTIES ON ITA PRODUCTS

2. One of the ITA's more significant features is a dual approach to product coverage: using tariff nomenclature as well as general product descriptions (Attachment B) to ensure duty-free treatment for information technology products "wherever...classified." Products may be covered by one or both of Attachments A and B. As a result of the ITA, the EC and certain of its member States modified their Schedules of Concessions in two ways: first they bound at zero duties on individual tariff items and second, they incorporated a headnote to their Schedules providing for duty-free treatment for Attachment B products "wherever...classified". In the process, the EC and its member States bound themselves to provide duty free treatment to a wide range of IT products, including the three products at issue in this case: set top boxes with a communication function, flat panel display devices, and multifunction digital machines. Yet, notwithstanding these express commitments, the EC and its member States (hereafter, "EC") now imposes duties on these products.

3. They have done so through a steady stream of measures singling out arbitrary technical characteristics to exclude a product from duty free treatment – such as the presence of a hard disk or the type of modem technology a product uses to communicate, the presence of a DVI interface, or the ability to reproduce more than 12 pages per minute. As products with these particular technical characteristics become increasingly ubiquitous, the effect of the measures becomes more pernicious. Half of LCD monitors today are equipped with a DVI plug, and therefore they in the EC's view fall outside the coverage of their concessions resulting from the ITA. A large and growing majority of MFMs can reproduce more than 12 pages per minute – *ergo*, they are subject to EC duties. Set top boxes increasingly use newer modem technologies or incorporate a hard disk and are thus according to the EC excluded from its duty-free obligations. Under the EC measures, the more industry innovates — even incremental improvements such as faster print speed or a new connector cable — the more duties will be levied on IT products entering the EC. As we will discuss, this approach is flatly inconsistent with the letter of the EC's WTO tariff schedule. It is also a perverse upending of the ITA and inconsistent with Ministers' stated intent to "encourage continued technological development."

II. OVERVIEW OF KEY THEMES IN EC SUBMISSION

4. Before responding to the EC's arguments on particular products, I would like to begin by briefly discussing three key themes evident in the EC's response, reflecting an overarching effort on the EC's part to distract from the core legal issues at hand: first, professing confusion about what products are at issue, when the measures themselves define the products; second, professing confusion about what concessions are at issue, despite individual tariff lines and a headnote that are identified clearly in the panel request and complainants' submissions; and third, professing uncertainty about the

measures at issue, claiming variously that the measures do not mean what they say because of CN amendments, court judgments, temporary duty suspensions, et cetera. What the EC never does in its 148 page submission, however, is face up squarely to the complainants' challenge of its measures and defend them on their own terms.

5. First, there is the matter of the product. Throughout its submission, the EC claims confusion about the products at issue in the dispute, and on this basis proceeds to recast the dispute as one over entirely different products than the ones the complainants have identified in their panel request and submissions. The EC's apparent confusion is curious, given that the EC's own measures define the scope of products that they improperly assume to be dutiable. In any event, the complainants have been clear. To supplement our discussion of the EC measures, we have offered detailed descriptions and supporting evidence concerning each of the products affected by those measures: (1) set top boxes which have a communication function – a type of electronic apparatus that sits atop (or below) a TV with the ability to communicate over the Internet, (2) multifunction digital machines – computer peripherals that can scan, print, copy and/or fax; and (3) flat panel display devices for computers – computer displays using technology such as LCD allowing them to achieve a thinner profile than conventional cathode ray tube monitors. These are the products described in and affected by the EC measures – not, as the EC claims, video recorders, or photocopiers, or so-called "multifunction monitors."

6. Beyond simple obfuscation, the EC's apparent insistence on a model-by-model description of each product appears either intended to convert this case into a classification matter (which it decidedly is not) or to set an impossibly high burden for demonstrating an "as such" breach of Article II. This is a tariff dispute. The question is whether the measures result in imposition of a tariff that is not consistent with Article II. To show that the measures are "as such" inconsistent, we are not required to demonstrate that they result in duties on every single model of FPD, STB, or MFM that crosses the EC border – rather, we need to show that the measures necessarily lead EC customs authorities to impose duties on one or more products subject to their commitments. As the United States demonstrated in its submission, by excluding from duty free treatment *any* FPD, or STB, or MFM, with a given technical characteristic – such as DVI, or a particular type of modem or presence of a hard drive, or the ability to reproduce more than 12 pages per minute – the measures result in the imposition of duties on products covered by the EC's duty-free tariff obligations. Thus, the EC measures do not accord with Article II.

7. Second, the EC ignores the text of the concessions at issue, contrary to the customary rules of interpretation reflected in the Vienna Convention on the Law of Treaties (VCLT). Sometimes it does so in favor of other concessions describing products that are not at issue in this dispute (such as CRT monitors or photocopiers). In other cases, it focuses on various extraneous material – miscellaneous ITA committee meeting documents, uninformative negotiating material, or assorted US customs classification opinions. Most of this material is simply irrelevant to interpreting the text at issue, and more careful review makes clear that none in fact even supports the EC interpretation. In the one instance in which the EC takes interest in the actual text of a concession that is the subject of this dispute – the Attachment B description of set top boxes – its argument is flatly contradicted by the text of a related concession it made in 2000. As we will shortly describe, "set top boxes *with* a communication function" was a concession that *the EC itself* drafted and formally added to its Schedule in 2000. The complainants have misquoted nothing; it is the EC that appears intent on disregarding the terms of its commitments.

8. The EC avoids directly addressing other important text in its Schedule: its commitment, made to implement ITA Attachment B, to provide duty free treatment to the products in question "wherever…classified." As the United States explained in its First Submission, this sentence was

incorporated into the EC's Schedules of Concessions, as a headnote. The concession in question was repeatedly quoted throughout the US submission and is contained in Exhibit US-7. Thus, when the United States and the co-complainants refer to this commitment, there should be no confusion about where the obligation rests. The commitment is explicit in the EC's Schedules. Rather than discuss the relevant concession, the EC claims confusion and instead focuses on particular tariff lines or provisions relating to entirely different products. Neither the concessions in particular tariff lines nor those for other products substitute for the overarching obligation to provide duty-free treatment to the Attachment B products in question "wherever …classified". Furthermore, while the EC concedes that the logic of the Harmonized System is not relevant to interpreting Attachment B concessions, it nonetheless relies on the HS throughout its submission – even when discussing Attachment B.

9. Finally, throughout its submission, the EC attempts to distract from the very actions that prompted this dispute: the Regulations, Explanatory Notes, provisions of the CN, et cetera, that have resulted in WTO-inconsistent tariff treatment. Instead, it describes the recent extension of a temporary duty suspension on monitors without even responding to complainants' claim that a temporary duty suspension provides less favorable treatment than that required by the EC's Schedule. It offers – and mischaracterizes – a handful of US customs classification opinions. Perhaps most remarkably, it attempts to defend its actions with two recent ECJ opinions that decidedly do not support the EC's position. The United States invites the Panel to review those opinions, some of the more salient elements of which are excerpted by Singapore in its third party submission. With regard to the measures at issue, the EC variously claims that they are not binding, that, owing to clarifications of "current EC law" provided by the ECJ, they do not mean what they say, that they have "effectively" lost their relevance due to modifications of the CN, or that the EC is "reviewing" them and may make "adjustments." If anything, these statements merely suggest that even the EC recognizes the flaws inherent in its own measures.

10. With these general themes in mind, I will now proceed to discuss the US claims regarding set-top boxes, responding to significant assertions by the EC. After that, I will turn briefly to highlight some of the more significant issues relating to FPDs and MFMs.

III. SET TOP BOXES "WITH" A COMMUNICATION FUNCTION (AND SET TOP BOXES "WHICH HAVE" A COMMUNICATION FUNCTION)

11. As the United States explained in its first submission, set top boxes which have a communication function were included in the ITA. In the headnote to its Schedules, the EC committed to provide duty-free treatment to these products "wherever...classified." Furthermore, it bound at zero duty four individual tariff lines which it identified as including the STBs described in Attachment B. As explained in the US submission, three of those lines were bound in 1997; the fourth was added in 2000, covering set top boxes "with" a communication function. However, as a result of the EC measures, any such device with a hard disk is no longer entitled to duty-free treatment when imported into the EC. Likewise, any such device with an Ethernet, WLAN, or ISDN modem, including any device that does not have a tuner, is subject to duties.

12. The EC first claims that the CNEN that led to this result is not binding. While we of course would be pleased if the CNEN did not apply, ample evidence submitted by complainants – including BTI, statements of the Customs Code Committee, ECJ opinions, and the EC's own statements in previous WTO disputes – demonstrates its legal effect. Following the CNEN, member State customs authorities consistently impose duties on any device with a hard disk or the particular modems described above. In some cases, they have even cited to the Customs Code Committee decision approving the CNEN as a basis for their action. The EC offers no evidence to the contrary. Related to its argument that the CNEN is non-binding, the EC asserts in this proceeding that the presence of a

hard disk can be a "significant" element in its consideration of where to classify a product, but is not "taken in isolation of the other elements." Yet again, the EC points to no instance since the CNEN was issued in which an STB with a hard disk has been accorded duty-free treatment by the EC. We can only conclude that this is because the CNEN has had its intended effect. The EC also points to nothing in the plain language of the CNEN that supports its insinuation that the presence of a hard disk is not dispositive – to the contrary, as the United States explains in its written submission, the text of the CNEN provides that if a set-top box contains a hard disk it is to be classified in a dutiable category. And this is precisely what EC customs authorities have done – any device with a hard disk is classified in the dutiable heading, regardless of other "objective characteristics" the product may have.

13. Beyond claiming (without support) that the measure does not result in the imposition of duties on STBs, the EC now attaches great significance to the use of the phase "which have" rather than "with" in Attachment B. It argues that this limits the concession to products that are *solely* comprised of the three characteristics enumerated after the colon in Attachment B. First, contrary to what the EC suggests, the United States has accurately quoted Attachment B in our submission. Furthermore, the substantive distinction between "with" and "which have" the EC now claims exists is without basis. The EC *itself* recognizes this. It added a tariff line to its Schedule in 2000, which it bound at zero, covering – and I quote – "set top boxes *with* a communication function." In that tariff line, *the EC itself* used the phrase "set top boxes *with* a communication function." Thus, the EC's Schedule also contains a concession with respect to "set top boxes *with* a communication function." Moreover, the EC indicated that goods meeting the Attachment B description of set top boxes were classified in that tariff line. If "which have" had the meaning the EC now attaches to it, this begs the question of why the EC itself opted to use "with" in place of "which have" when modifying its Schedule in 2000.

14. More remarkably, in addition to ignoring the text of its Schedule as modified in 2000, the EC claims that the 2000 modification covered a product not included in the ITA. It does so notwithstanding the fact that its own notification repeatedly refers to the product at issue as an "ITA product" and attaches the tariff line in question to the description of STBs in Attachment B. The EC now argues that set top boxes with a tuner "were not initially supposed to be covered by the ITA," and claims that it provided duty free treatment to this "new" product merely in response to a request from the United States. (I would note that this argument is rather ironic, given that, as the United States explained in its submission, the EC is also denying duty-free treatment to STBs *without* a tuner – the IP-streaming STB.) In any event, these assertions are quite simply contradicted by the facts, and in particular the notification submitted by the EC in 2000 and contained in Exhibit US-26. We would encourage the Panel to review this document. Furthermore, even if there were a substantive distinction between "which have" and "with" (and there is not), with the resulting modification to its Schedule, the EC is obliged to provide duty free treatment to set top boxes *which have* a communication function, by virtue of the headnote and Attachment B, *and* is obliged to provide duty-free treatment to set top boxes *with* a communication function by virtue of the tariff concession it made for tariff line 8528 71 13. Both phrases are in its Schedule, and therefore both may be used to describe the EC's obligations.

15. This begs the question of why the EC now goes to such lengths to disavow the action it took in 2000. Considering the rest of its argument, the reason is clear. The EC's acknowledgment in 2000 that STBs with tuners were covered by Attachment B is at odds with its assertion today that, if a device has components beyond the three elements contained in the Attachment B description, it is excluded from the ITA. Just as a device with a tuner may meet the terms of the description of an STB in Attachment B, even though the text does not specify tuners as one of the required attributes of an STB, a device with a hard disk or different type of modem may meet the terms of Attachment B, provided it has the three attributes specified therein.

16. The EC proceeds to protest that covered devices "cannot endlessly assume other additional features and technical elements" – yet this misses the point, and distorts the US position. The STBs in question do not "endlessly assume" additional features or technologies. They are STBs which have a communication function, within the ordinary meaning of the concession: they are microprocessor-based devices, incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange. For the EC, it is irrelevant that they have all of these essential attributes. The presence of but one additional feature – a hard disk – or the fact that they rely on a different modem technology is, according to the EC, a basis to deem them a "new" product and exclude them from duty-free treatment. Thus, the issue in this dispute is not, as the EC claims, whether a device is 1% STB and 99% "other." Under the EC measures, customs authorities look no further than the presence of a hard disk or a particular type of modem to exclude the devices from duty-free treatment.

17. The EC's position regarding modems illustrates how far from its "99%" hypothetical the measures in question in fact operate. For example, the EC concedes that, just like some of the devices it considers modems, an ISDN modem communicates using a telephone line. Yet, according to the EC, because it uses a technology "allowing for a faster transfer" than other telephony-based modems, it is not a modem. On that basis alone, it excludes any device with an ISDN modem from duty-free treatment. Yet, as explained in the US submission, all the devices in question, including ISDN modems, meet the ordinary meaning of the term "modem" – they modulate and demodulate signals. As this example illustrates, we are not confronted with devices so far afield even from those on the market when the concession was negotiated as to pose the difficult questions the EC claims are now presented. The devices in question contain fairly simple but important improvements over those that were available on the market at the time the ITA was negotiated – faster modem technologies, a hard disk. Most importantly, they meet the description in the text of the concession. The EC's tariff concessions do not disappear merely because a technology improves. Rather, provided the product in question meets the terms of the text, it is covered by the concession.

18. As with the other claims at issue in this dispute, the EC introduces various other ancillary material in what can only be described as an attempt to distract from the ordinary meaning of the core obligations at issue. First, in an apparent attempt to suggest that the scope of the concession is more limited than the ordinary meaning of the text itself, the EC describes a number of documents that were prepared during the negotiations. Some of these items describe proposals made during the negotiations, others offer an example of a product – WebTV – that Japan suggested would be covered. On the basis of this document, the EC claims that this proposal meant that only "WebTV-like" products were covered by the final concession. Yet another document appears to reflect notes prepared by an EC delegate which the EC asserts represents a failed proposal to modify the text of the concession from "which have" to "with". Strangely enough, after introducing these documents, the EC concedes that none sheds any light on the meaning of the actual terms used in the concession to which participants ultimately agreed.

19. Nevertheless, it must be emphasized that this material is at most negotiating history. The EC, in an attempt to elevate its importance, characterizes it as "surrounding circumstances" and claims that it may be used to understand the *ordinary meaning* of the text. This interpretative sleight of hand cannot be accepted: It is well established that, under VCLT Article 32, negotiating history and the circumstances of conclusion of a treaty may only be resorted to in order to confirm the ordinary meaning, or where the ordinary meaning is ambiguous or leads to a manifestly absurd or unreasonable result. The EC has failed to demonstrate that either is the case here, and therefore, even if it qualifies as negotiating history, the material in question is irrelevant.

20. With regard to the material the EC offers as context, here again, the EC attempts to read a concession out of the Agreement by relying on the tariff lines it and other participants identified in 1997 (as lines in which they classified the product) to define the universe of products covered today. The EC misses the point: Attachment B products receive duty-free treatment "wherever…classified." ITA participants did not limit the obligation to a single tariff line or group of tariff lines. Nor did they all specify the same lines in which the product was at the time classified. To narrow the concession based on participants' notification of the lines in which the products at the time were classified is to render the headnote inutile. That is, if the tariff lines themselves defined the scope of the commitment, it would have been unnecessary for participants to include the Attachment B headnote in their Schedules. They simply could have bound the relevant tariff lines at zero. Clearly, they did not do so.

21. Finally, as the EC correctly notes, the United States, like the other complainants, has not argued that the EC's classification of the products in question is otherwise inconsistent with its classification law. That is because classification is a question for the EC and its courts to decide; it is not a matter for this Panel to resolve. Yet the EC frequently confuses the issue of tariff treatment with that of classification. For example, the EC's assertion that it would not be feasible for its customs authorities to rely "solely on the narrative descriptions in the ITA" to classify goods is a *non sequitur*. The headnote to the EC's Schedule provides that the EC must provide duty free treatment to set top boxes with a communication function wherever classified. How the EC accomplishes that task is for it to decide, provided it does so in a manner consistent with its WTO obligations. It has failed to do so in this case.

22. **Article X**: As the United States explained in its submission, the set top box CNEN has not only resulted in the imposition of duties on STBs covered by the EC's duty-free concession, contrary to Article II. In addition, the EC did not publish it for over a year after it was approved, and applied it to collect the WTO-inconsistent duties even before it was published. The EC's response to the US claim regarding Article X, and Article X paragraphs 1 and 2, is equally unavailing. The EC claims that CNENs are not binding and that in any event votes of the Customs Code Committee are "merely a step in the procedure" for adopting CNENs. With regard to the former issue, the legal and practical consequences of CNENs are clear and I would refer the Panel to my earlier remarks on that subject. On the latter, the EC asks this Panel to disregard repeated statements by the chair of the Customs Code Committee to the contrary, as well as the BTI Guidelines, and begs the question of why member States would refer to the action of the Customs Code Committee in their decisions (and indeed why one would refer to it as a "decision"). The express reliance of member States on the CNEN, in combination with the General Interpretative Rules and CN, demonstrate that the GIRs and CN alone did not guide member State decisions.

23. Moreover, the fact that some member States were classifying devices in the dutiable heading before the CNEN was voted on does not support the conclusion that the vote itself had no impact on classification in the EC. If anything, it merely demonstrates that some member States had been acting inconsistently with Article II even before the CNEN was issued. With the CNEN, the EC, as well as all the member States, have come to act inconsistently with Article II. In effect, the EC attempts to hide behind the WTO-inconsistent actions of certain member States to suggest that its own WTO-inconsistent action has no consequence. This position is contradicted by multiple statements of the Customs Code Committee, the references in the BTI issued by member States, and the EC's own statements in other settings, and should not be accepted by this Panel.

24. Finally, regarding the EC procedural account of the measure's adoption: publication of the minutes of the Customs Code Committee meeting on the Internet is not, as the EC claims, sufficient to satisfy the obligation in Article X to publish the measure. The minutes of the meeting do not contain

the measure itself nor do they even contain enough detail to allow a trader to know what rule is in effect. Furthermore, the EC's claim that it waited until May 2008 to publish the final measure due to the possibility of additional elements being added to it is premised on the notion that it could not have published those elements that were in effect before applying them. This is quite simply wrong. Even if the EC intended to adopt additional restrictions on duty-free treatment for STBs, it need not have waited for an entire year to publish those already in effect, or to have imposed duties on imports based on those decisions prior to their publication. Nor is doing so consistent with the obligations contained in Article X.

IV. FLAT PANEL DISPLAY DEVICES

25. As it did with STBs, the EC mischaracterizes the products at issue – focusing on the so-called "multifunctional monitor" and pointing to other concessions in its Schedule rather than the text of the concessions complainants have identified. This is a dispute about the tariff treatment of flat panel display devices for computers. The EC measures subject those devices to duties, whenever they have a DVI interface or are capable of connecting to a device other than a computer. This is not a dispute concerning so-called "multifunctional monitors," as the EC claims in its submission. Indeed, it is unclear what the EC even means by "multifunctional monitor." Whatever that term means, it fails to capture the FPDs affected by the EC's measures, such as those that are primarily used with computers. In fact, the EC measures even result in duties on devices that are physically incapable of being used without a computer – simply because they have DVI.

26. Furthermore, the EC has failed to demonstrate that there is any ambiguity about the FPD concession. Instead, the EC again distracts, by focusing on an irrelevant discussion in the ITA Committee regarding whether "parts" were covered by the concession. *This* dispute pertains to finished products and on that question the EC itself has taken the view that the ITA provision does apply.

27. Moreover, while the EC attempts to attribute great significance to the CRT monitor concession in its Schedule, the concession at issue is that pertaining to flat panel display devices. Neither the United States nor any of the other complainants have contested in this dispute the EC's treatment of CRT monitors. The EC claims that "it is not particularly important to distinguish between immediate and broader context," contradicting the approach that has been endorsed by the Appellate Body on multiple occasions. The concession it discusses explicitly pertains to a device not at issue in this case: monitors using CRT technology. The EC does not explain why the CRT monitor concession is relevant "context" for the FPD concession, nor why a sentence in that provision which does not appear in the FPD concession should nonetheless be read into the FPD concession.

28. Taken together, the EC's mischaracterization of the product as a "multifunctional monitor", its insinuation that the FPD concession only covers parts, and its discourse on CRT monitors, lead to one conclusion: the EC is attempting to argue that the CRT monitor commitment is the *only* commitment in Attachment B on "ADP monitors," suggesting that in its view it has no obligation under its headnote to provide duty free treatment to *any* LCD monitors. This position is simply at odds with the text of the concessions.

29. With respect to complainants' claim on the EC's tariff concession for subheading 8471 60 – i.e., "input or output units" of ADP machines – the EC simply passes over the ordinary meaning of the terms used therein. The EC asserts that "there is no need to examine the arguments of the complainants in respect of the ordinary meaning of the tariff term." Thus, it does not even attempt to explain why it believes that FPDs do not fall within the ordinary meaning of terms used in the tariff concession. It fails to explain why, for example, FPDs with a DVI connector, or FPDs merely capable

of connecting to a device other than an ADP system, necessarily fall outside of that concession. Instead, it discusses the text of various *different* concessions not relevant to complainants' claim, and ignores the challenged measures entirely. In so doing, it fails to respond to complainants' claims.

V. MULTIFUNCTION DIGITAL MACHINES

30. Finally, with respect to multifunction digital machines, the EC's position appears to be as follows: notwithstanding the fact that printers, scanners, and fax machines are all covered by the ITA, when these products are combined into a single unit, that unit becomes a photocopier and falls outside of the ITA, rather than an "input or output unit" or "facsimile machine". From a technical perspective as well as based on the ordinary meaning of the text of the concessions, this position is unfounded.

31. As with the other claims in this dispute, the EC does not mount a direct defense to the claim on multifunctional digital machines. Instead, the EC again seeks to point the Panel's attention to other terms in its Schedule and inapposite, ancillary materials – rather than grappling with the language of the EC measures and the text of the EC concessions that are subject to this dispute. For instance, remarkably, the EC's argument on "ordinary meaning" is dedicated not to the ordinary meaning of the phrase "input or output unit" – the concession complainants have identified as subject to this dispute – but to an entirely different concession, that with respect to photocopiers.

32. Digital copiers are not "photocopiers". Only by characterizing the scanner as a system of "lamps, lenses, and mirrors", ignoring the fact that an MFM does not use light to produce a copy but rather to collect digital data, and incorrectly asserting that an MFM projects the image of the original document onto a photosensitive surface, can the EC reach the opposite conclusion. To be clear, an MFM operates as follows: a scanner records individual points of light reflected from the image as it is scanned, the scanned image is sent to the print controller, and is either stored as a file or is processed by the print controller and sent to a print engine.

33. The EC makes much of the fact that in the lexicon of sales brochures and other nontechnical sources, the term "photocopying" has acquired a popular usage that extends beyond its technical meaning to include the act of reproducing documents on an MFM. This is akin to the popular usage of the term "typing" to describe the act of word-processing on a computer, notwithstanding the fact that no typewriter is involved. This popular meaning has no relevance to a proper interpretation of the text of the concession, which is based on technical terminology.

34. Furthermore, as with the other products, the EC again relies on various ancillary documents in an attempt to support its position. As a threshold matter, unless the EC demonstrates that the ordinary meaning of the concession in context is ambiguous or leads to an absurd result, or is confirming the ordinary meaning, there is no basis under the Vienna Convention to resort to the various supplementary material it provides. The EC has not done so. Even were the material relevant, it does not support the proposition that the EC advances.

35. Finally, while the EC offers a lengthy defense of the standard articulated by the European Court of Justice in *Kip* for determining whether a product is classifiable in the duty-free heading, it ignores the actual measure in dispute in this case: the provisions in the CCT imposing duties on any device capable of copying more than 12 pages per minute (and, indeed, some devices regardless of their speed). It nowhere explains how that measure is consistent with its obligations (or even with the *Kip* standard), and indeed concedes that it may need to be amended. This aspect of the EC's submission is most telling of all. In effect, the EC's argument may be read as an admission that the 12 page per minute standard constitutes an utterly arbitrary criterion that results in the imposition of

duties on a significant share of MFMs on the market today, contrary to EC and member State obligations.

VI. CONCLUSION

36. Throughout its submission, the EC reveals its view that *any* change to a device results in a "new product" excluded from the ITA. This view is unsupported by the text of the concessions at issue. Furthermore, if this position were accepted, virtually no products on the market today would be covered by the ITA. Products have improved over time, incorporated advanced features or improved technologies, yet they still fall within the ordinary meaning of the original concessions. As the co-complainants have explained in their submissions, the prospect of technological change was well understood by the negotiators of the ITA. Had they believed that such change would rapidly eviscerate the commitments made, as the EC appears to believe, one may question why so many Members to this day attach such significance to the Agreement. Indeed, just two years ago, the ITA was characterized as a "major success since the establishment of the WTO." This sentiment cannot be reconciled with the EC's belief that, with every technological improvement, every new feature added, products fall out of the scope of the concessions, such that, from the moment the ink dried on the page, the list of ITA-covered products has been steadily dwindling to nothing.

ANNEX A-3

CLOSING ORAL STATEMENT BY THE UNITED STATES AT THE FIRST SUBSTANTIVE MEETING

1. In this closing statement I would like to highlight briefly a few aspects of our discussion over the past several days that in our view are of particular importance to resolving this dispute.

2. To evaluate this case one must first evaluate the text – the text of the measures that complainants have claimed give rise to a breach and the text of the concessions complainants argue have been breached. One must reason from the text.

3. First, with respect to the measures. Throughout its argument, the EC ignores the text of its own measures. It claims that classification is done on a case by case basis, and that no single attribute is dispositive, but that is not what the measures say. At times it appears to be defending two ECJ opinions that were issued a few months ago – but these opinions, while helpful illustrations of the numerous flaws in the EC measures, are not the measures themselves. The measures at issue are those identified in the panel request. They are in effect. The ECJ opinions did not result in their withdrawal or modification. The EC may be in the process of modifying them or considering modifying them, but it has not done so. Moreover, the measures mean what they say. They require customs authorities to impose duties on products with particular arbitrary technical attributes. For example, the STB CNEN states and I quote – "Set-top boxes which incorporate a device performing a recording or reproducing function (for example, a hard disk or DVD drive) are excluded from this subheading" (the duty-free subheading); it then identifies the dutiable subheading as the subheading in which the product is classified. We have provided ample evidence, including a number of BTI, to demonstrate that the CNEN has resulted in the application of duties to any STB with these attributes. The EC has offered no evidence to the contrary.

4. With respect to the concessions, the Vienna Convention recognizes the central importance of the text, in particular in Article 31(1) which provides that an interpreter consider "the ordinary meaning" of the terms of the treaty in context and in light of its object and purpose. As the complainants and virtually all of the third parties have stressed, proper application of the Vienna Convention is essential in interpreting the concessions at issue in this dispute. Yet, as we noted in our opening statement, the EC continues to avoid the text of the concessions the complainants have identified as covering the products in question. It has not offered an interpretation of the meaning of the text "flat panel display devices for products falling within" the ITA. It has not offered an interpretation of the meaning of "input or output unit." We can therefore only assume that the EC accepts the argument of the complainants regarding the ordinary meaning of those phrases, both with respect to flat panel display devices and with respect to multifunction digital machines.

5. As for the meaning of the set top boxes concessions, the theory the EC offers is supported neither by the text of Attachment B nor by the EC's modification in 2000. We do encourage the Panel to review that document. The EC's claim that it does not have a concession on STBs "with" a communication function, that there is a substantive difference between "with" and "which have", and that STBs with tuners were excluded from the Attachment B description of STBs is wrong and flatly contradicted by the 2000 modification.

6. What does the EC ask you to evaluate other than the text? Instead of the text, it would prefer a hypothetical discourse on "functionality," on classification, on various documents that say nothing about the meaning of the treaty.

7. As our remarks throughout this session suggest, the EC's discussion of "function" is particularly troubling, and therefore I want to spend a moment on it. The EC in essence appears to believe that, regardless of the text, if a device comes to perform a function that is also performed by a product for which the EC has not made a concession as a result of the ITA, that device becomes the non-ITA product and falls out of the EC's duty-free commitments. This position is completely at odds with the text of the concessions. I would like to spend a moment on it because it has deeply troubling implications for the Agreement as a whole.

8. Our position is simple. What a product does is only relevant to determining whether or not it is covered by a particular concession if the meaning of the text of the concession specifies that a product must do something to qualify or is disqualified if it does something else. One must look at the text. And looking at the text of the concessions at issue, none define the products in the manner suggested by the EC.

9. For example, the FPD concession states that an FPD must be "for" a product falling within the agreement. "For" is a function word indicating purpose. The "purpose" in question is use with another ITA product, e.g., a computer. The text of the concession does not, for example, exclude an FPD "for" watching video or an FPD "for" television. Indeed, as some of the Chairman's comments today suggest, today many people use their computers to watch video or even television. The question, again, is whether it is for another ITA product. The EC measures provide that any FPD with DVI and any FPD capable of receiving signals from something other than a computer is dutiable. As we have argued, this rule necessarily results in the application of duties to FPDs that are "for" computers. Just because something has a DVI plug, just because it could be connected to a device other than a computer, does not mean it isn't "for" a computer.

10. Likewise, with respect to STBs, the concession covers STBs "which have a communication function." Here, function is relevant only insofar as the STB must have a communication function – and to know whether it has that function, it must meet the criteria listed after the colon. The text does not provide that an STB may "only" have a communication function to qualify. It must be an STB, and it must have a communication function. That is all. On the first criterion, I would emphasize that the EC itself describes the products excluded from duty-free treatment as STBs. Thus we are not talking about microwaves (as the EC posited yesterday) or video recorders. How do you know an STB is an STB? By looking at the ordinary meaning of the term and the objective characteristics of the product in question.

11. To the EC, characteristics specified by the agreement text are not relevant. It is all about function. The EC approach, however, does not respect the text of the agreement. The text of the EC concessions was not written so as to enumerate even all of the functions that the products existing at the time of the ITA's conclusion had. For example, an STB may have the function of receiving television signals, as we discussed earlier. The text doesn't say anything about receiving television signals. Does this mean that these STBs were not covered? No. Indeed, the EC in 2000 modified its Schedule to add a new line containing these STBs and specifically attached this line to the Attachment B description.

12. The fact is that the ITA covers products. It does not cover "functions" in the abstract, as the EC at times suggests. Therefore, for example, when the EC says that the ITA excluded televisions it cannot mean that the ITA excluded all devices on which you can watch TV. Watching TV on your computer may rot your mind and keep you from getting your work done, but the ITA does not penalize you for using your computer to do so, nor does it allow participants to impose duties on computers that allow you to do so. Indeed, the ITA expressly includes computers with TV tuners in them. There is no such thing as an ITA-covered function and a non-ITA-covered function.

13. What lesson can one draw from this example? One must look at the text of the relevant EC concession to determine whether a product is covered. Function is only relevant insofar as the text of the relevant EC concession in the Schedule places requirements on function.

14. I would note that the implications of the EC position are serious and cannot be ignored. A key product that lies at the heart of the ITA is the computer. Think of all of the functions that computers perform – for example, you can listen to music on your computer, watch TV or DVDs, record video, do your taxes. Does that mean that a computer is now a stereo, a television, a video recorder – an accountant? Acceptance of the EC position would eviscerate the tariff concessions resulting from the ITA.

15. It may be for these reasons that so many Members have taken a keen interest in this dispute, and why so many, including developing country Members, expressed their concerns so eloquently yesterday in defense of complainants' position regarding the EC approach. The ITA concessions were and remain a critical tool in encouraging development, technological innovation, and expansion of trade.

16. On behalf of the United States, I would like to thank you for this opportunity to present our views on some of the important issues presented by this case, and for your time, hard work, and patience. I would also like to thank the Secretariat for the time they have dedicated to this dispute; we greatly appreciate your work. We look forward to answering your written questions; to submitting our rebuttal submission; and to seeing you again at the second panel meeting.

ANNEX A-4

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION BY THE UNITED STATES

I. EC INTERPRETATION OF THE HEADNOTE AS "EXHAUSTED" BY OTHER PROVISIONS

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

II. DEFINING THE PRODUCT: THE UNITED STATES HAS ADEQUATELY IDENTIFIED THE PRODUCTS AT ISSUE

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

III. TO DEMONSTRATE THAT THE MEASURES ARE " AS SUCH" INCONSISTENT, THE UNITED STATES NEED NOT PROVE THAT MEASURES RESULT IN A BREACH IN THEIR EVERY APPLICATION

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

IV. SET TOP BOXES WHICH HAVE A COMMUNICATION FUNCTION

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

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

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

7. At the heart of the EC's argument is the notion that it is entitled to impose duties on products that are set top boxes, and that have a communication function, merely because they also have a recording function. This position simply does not accord with the ordinary meaning of the text of the concessions, in context, and in light of the object and purpose of the GATT 1994. While the EC

spends a great deal of time explaining its *classification* practice, nowhere does it even attempt to explain how imposition of duties on these devices is consistent with the terms of its *tariff concessions*.

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

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

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

11. Just as the Amended CNEN directs customs authorities to impose duties on any STB which has a communication function, merely because it has a hard disk or other device "performing a recording or reproducing function", the EC measure provides that STBs equipped with ISDN, Ethernet or WLAN ("wireless LAN") modems are not entitled to duty-free treatment. The EC does not dispute that these devices are *per se* excluded from duty-free treatment. With respect to " cable modems" the EC argument is technically flawed and reveals fundamental contradictions in its own interpretation of the term " modem." First, as a technical matter, as the United States explained in detail in its answers to Panel questions, ISDN, Ethernet, and WLAN devices are "modems". The EC by contrast offers *no evidence* to support its various assertions regarding modems.

12. The mere fact that a device modulates and demodulates digital signals without converting analogue to digital signals does not support the conclusion that a device is not a " modem." **The text does not limit the term "modem" to devices of a particular type, and indeed the phrase "communication function" is broad.** With regard to the EC's assertion that only devices that "send and receive data in the form of audible tones transferred by telephone lines" are modems, again, nothing in the text of the concession, including the ordinary meaning of the term "modem", when read in context, supports the EC position, nor has the EC offered any evidence to support its claim. Third, while the EC concedes that at least some of the devices at issue are "technologies for gaining access to

the Internet", the EC asserts that Ethernet and WLAN devices are not modems because they do not allow "direct" access to the Internet. Here again, no evidentiary support is offered for the EC position, and as a factual matter, the EC is simply incorrect.

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

V. FLAT PANEL DISPLAY DEVICES

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

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

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

believes that any device on which one can watch television or video is per se excluded from its obligations, this cannot be reconciled with the text of its concessions.

17. Specifically with regard to LCD monitors with DVI, the EC defends its approach on the grounds that "the presence of a DVI connector indicates the presence of certain electronic components inside the monitor that allows the LCD monitor to function with many different devices that are not covered by the ITA." Some devices with a DVI connector are *incapable* of functioning with anything other than a CPU. Thus, contrary to what the EC argues, the fact that a device has a DVI connector does *not* "indicate[] the presence of certain electronic components inside the monitor that allows the LCD monitor to function with many different devices not covered by the ITA." Second, the EC is incorrect in asserting that DVI is a connector that was not developed for computers. The EC claims that this view is supported by the fact that DVI is "display technology independent" and that therefore it was "foreseen to function with monitors using the CRT or LCD or other technologies." Of course, the fact that DVI was not designed for a particular display technology begs the question of whether the connector was in fact designed for computers (and, as is clear from the ITA itself, CRT as well as LCD technology is used in computer monitors). Third, the EC offers a number of unsubstantiated and factually incorrect assertions regarding the use of DVI in consumer electronics devices, in an attempt to support its presumption that monitors equipped with DVI are "multimedia" devices. The only difference between DVI-I and DVI-D is that DVI-I accepts both analog and digital signals and DVI-D accepts only digital signals. Moreover, even if the prevalence of particular interfaces in non-ADP devices could be enough to support a *per se* rule such as that established by the EC (which it could not), the fact is that *virtually no* consumer electronics devices are today equipped with DVI, whether DVI-D or DVI-I; a large share of computers, on the other hand, are equipped with a DVI connector.

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

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

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

leaves the meaning obscure or produces a manifestly absurd or unreasonable result. The EC has failed to demonstrate that either is the case.

21. In addition to its obligation under the headnote to provide duty treatment to flat panel display devices for products falling within the ITA, "wherever...classified", the EC also committed to provide duty-free treatment to goods described by individual tariff lines in its Schedule. In particular, the EC committed to provide duty-free treatment to "input or output units, whether or not containing storage units in the same housing...other...other", contained in HS96 8471 60. As the United States explained in its first submission, the products described above fall within the terms of this concession, based on the ordinary meaning of the text in context and in light of the object and purpose of the GATT 1994. The United States has also pointed to Chapter Note 5(B-C) to Chapter 84 of HS(1996), which provides, among other things, that devices that are either "solely" or "principally" used in an automatic data processing system may be considered a unit for purposes of the heading. The EC now claims that it is entitled to grant duty free treatment only to devices that are "solely" used with computers based on an HS Explanatory Note. In the WCO, HS Explanatory Notes cannot supersede Chapter Notes. Furthermore, the Explanatory Note does not state that the devices described therein are the only devices covered by the subheading – rather, the Explanatory Note pertains to devices that are "solely" used with computers and simply does not address devices that are "principally" used with computers.

VI. MULTIFUNCTIONAL DIGITAL MACHINES

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

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

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

25. None of the devices in question are "electrostatic photocopying apparatus." MFMs are comprised of a print module (*i.e.*, print controller and print engine), and scanner; in some cases, they also include a modem for facsimile transmission. Printers, scanners, and facsimile machines were all included in the ITA and are entitled to duty-free treatment under the terms of the EC's concessions.

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

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

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

28. Finally, as noted, the term "indirect process" is only relevant if it can be established that the product in question meets the terms of the heading. As noted in response to panel questions, even from a customs classification perspective, the EC's attempt to distinguish between inkjet MFMs and laserjet MFMs based on the print engine ignores the terms of the heading at the four-digit level, contrary to GIR 1. Furthermore, the EC analysis does not accord with GIR 3(b), which provides that composite goods which cannot be classified under GIR 3(a) "shall be classified as if they consisted of the material or component which gives them their essential character." Rather than focus on the physical *component* that gives the device its "essential character," the EC attempts to divine the "function" of the device – thus ignoring that the main components of the MFM are the *print* module, and that the "function" of copying is performed by these elements operating in conjunction with a scanner. Classification under GIR 3(b) cannot focus on the MFM's "principal function", but rather

depends on the "component" which imparts the MFM's "essential character". Contrary to this rule, the EC's analysis focuses on the type of print technology of the print engine in making its distinction at the 6-digit level for its views of heading 9009 but ignores the essential role that the print module component imparts to the complete device.

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

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

VII. EC'S FAILURE TO TIMELY PUBLISH STB CNEN

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

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

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

ANNEX A-5

EXECUTIVE SUMMARY OF THE ORAL STATEMENT BY THE UNITED STATES AT THE SECOND SUBSTANTIVE MEETING

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

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

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

4. The EC's professed confusion about the core elements in the case – elements articulated by three different WTO Members and endorsed by a number of third parties – strains credibility. At heart, the EC position appears to be premised on its incorrect view that, in addition to demonstrating that its measures result in the breach of specific concessions, the complainants must provide a detailed definition of a specific "product category" in order to prevail, and that only by showing that EC customs authorities improperly impose duties on *all* products in this category can complainants demonstrate that the EC is in breach of its obligations. As the United States explained in its second written submission, this argument is without basis. It turns the test for demonstrating an "as such"

breach on its head, and appears to be nothing more than an attempt to introduce an additional legal hurdle to establishing a breach of Article II – one already discredited by the Appellate Body in *EC–Computer Equipment*. The fact that the EC in that dispute was raising an argument in relation to Article 6.2 does not support the conclusion that the Appellate Body's reasoning is inapplicable in this case.

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

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

7. Finally, while the EC at times suggests that there exists some purported flexibility in the measures themselves, it has offered *no evidence* indicating that the measures do anything other than what they say: direct EC customs authorities, in what the EC itself describes as "categorical" language, to impose duties on products with the specified technical characteristics. The EC has submitted no evidence thus far showing that *any* customs authority in the EC has treated as duty-free *any* product with the characteristics specified in its measures. The United States, on the other hand, has provided ample evidence demonstrating that they in fact operate exactly as written, and deny products duty-free treatment merely because they have certain arbitrary attributes. In this regard, the United States has quoted language from the measures and submitted an assortment of BTI, in response to which the EC has identified no language in the measures that would permit the opposite

conclusion, nor any BTI classifying products with the specified attributes in a duty free tariff line. Thus, all of its theories and rhetoric notwithstanding, the measures are in effect and result in the application of duties to products that should be duty free.

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

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

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

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

I. SET TOP BOXES WHICH HAVE A COMMUNICATION FUNCTION

12. As noted previously, a discussion of products is relevant in two respects for purposes of this proceeding: the products that are subject to duties under the measures, and whether at least some of those products are entitled to duty-free treatment under the concessions. If some products subject to duties under the measures are entitled to duty free treatment under the concessions, those measures must be found inconsistent with Article II of the GATT 1994. The United States has amply explained the products subject to duties under the measures and why they are entitled to duty-free treatment

under the concessions. As the Appellate Body concluded in *EC – Computer Equipment*, there exists no obligation to provide a detailed definition of a "product category" in order to prevail under Article II.

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

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

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

16. In its second submission, the EC changes course, offering a number of arguments regarding the term "modem" which contradict the position it set forth in its own measure, and are particularly

revealing of the fundamental flaws in its position. First, it may be recalled that, in its measure, the EC describes modems as follows: "[m]odems modulate and demodulate outgoing as well as incoming data signals...enabl[ing] bidirectional communication for the purposes of gaining access to the Internet." The measure then asserts that ISDN, WLAN and Ethernet modems are not modems because they "do not modulate and demodulate signals." The United States showed in its answers to the Panel's questions that this statement is simply incorrect.

17. Remarkably, the EC in its second submission changes its tune – apparently realizing the fallacy in its measure, it *does not dispute* that the devices in fact modulate and demodulate signals. Rather, it introduces an entirely new requirement for a device to be considered a modem: the device must not only modulate and demodulate signals, but must do so from *analogue* to *digital*, and not only allow a computer to gain access to the Internet, but allow access through a *telephone* line. The EC position is simply at odds with the meaning of the term "modem". It is at odds even with the definition the EC *itself* used in its own measure. And it creates an utterly arbitrary dividing line that even the EC's own measure does not support – cable modems, for example, do not communicate through a telephone line, yet the EC considers cable modems to be "modems". If as the EC has argued this morning, modems must convert analog to digital and must use telephone lines, then why does the EC measure consider cable modems to be modems? The EC offers no response.

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

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

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

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

II. FLAT PANEL DISPLAY DEVICES

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

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

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

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

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

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

III. MULTIFUNCTION DIGITAL MACHINES

28. First, as noted earlier, the EC's second submission is strikingly bereft of any discussion of its measures, in particular the CN provisions that result in the imposition of duties on any indirect process MFM capable of reproducing more than 12 pages per minute. As the United States has explained, these measures are in effect. As a result of the measures, the EC imposes duties on any indirect process MFM capable of reproducing more than 12 pages per minute, and any MFM without a facsimile feature, regardless of the number of pages per minute it can reproduce. In so doing it subjects to duties certain "input or output units" and "facsimile machines." The United States has explained why the devices in question fall within the concessions under subheading 8471 60 or 8517 21. The only response the EC offers is that, to fall within 8471 60, the devices must be "solely or principally" used in an ADP system, as provided in note 5 to Chapter 84. Contrary to what the EC suggests, the United States has discussed note 5 in its submissions and has provided evidence showing that the printer function is the most significant function. Rather than contend with this evidence, the EC instead claims that it is entitled to impose duties on MFMs because they are "photocopiers." As the United States has explained, MFMs operate through a scanner and print module (print engine and print controller), and in some cases, incorporate a modem allowing them to transmit facsimiles. They are not "photocopiers". Moreover, *nowhere* has the EC explained why the mere fact that a device is capable of reproducing more than 12 pages per minute means that it is *always* a "photocopier" and *never* an "input or output unit" or "facsimile machine." Likewise, nowhere has the EC explained why the mere fact that a device that connects to a computer or network but lacks a facsimile feature is always a "photocopier" and never an "input or output unit." Yet this is precisely what the EC measures provide.

29. With regard to the EC's argument that the devices in question are in fact "photocopiers" classifiable in HS96 subheading 9009 12, the United States notes with interest the EC's newfound desire to focus first on the text of HS heading 9009 in conducting its analysis rather than subheading 9009 12. As the Panel may recall, this is precisely the approach the United States used to demonstrate that the EC's position cannot be sustained. As the United States also explained in its second submission, the EC's argument in fact is not supported by the terms of the heading. An MFM is not

an "indirect process photocopier." It does not use light to produce a copy, but rather to collect digital data. It does not incorporate "an optical system" – rather it consists of a scanner and print module.

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

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

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

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

34. Finally, the third item that the EC attempts to rely on is the *absence* of classification practice, in particular that of Japan and certain third parties. Regarding Japan, the EC again refers to a proposal Japan made during the ITA II negotiations – as the United States explained in its second submission, it was recognized that a number of products proposed for inclusion in ITA II may already have been covered by the ITA. Thus a negotiating proposal says little about what was covered by the concessions at issue in this dispute, and certainly does not indicate a "common, concordant, and

consistent" practice even on the part of Japan, the Member putting forward the proposal. Likewise, the absence of evidence regarding classification by third parties or other WTO Members cannot support the conclusion that there exists a "common, concordant, and consistent" practice on the part of other WTO Members. Even with respect to the EC's "practice", the evidence demonstrates inconsistencies. In sum, the EC fails to demonstrate that there exists a "practice" among WTO Members, much less one that supports its interpretation of the concession.