

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

WT/DS375, WT/DS376, WT/DS377

**ANSWERS OF THE UNITED STATES OF AMERICA
TO THE PANEL'S QUESTIONS TO THE PARTIES
IN CONNECTION WITH THE FIRST SUBSTANTIVE PANEL MEETING**

June 3, 2009

LIST OF EXHIBITS

<u>EXHIBIT NUMBER</u>	<u>EXHIBIT NAME</u>
95	Singapore Ministerial Declaration, WT/MIN(96)/DEC (18 December 1996)
96	WTO Council for Trade in Goods, Implementation Of The Ministerial Declaration On Trade In Information Technology Products, G/L/160 (April 2, 1997)
97	International Law Commission, Draft Articles on the Law of Treaties with Commentaries (1966)
98	IEEE, "About IEEE", http://www.ieee.org/web/aboutus/home/index.html
99	Case C-463/98, Cabletron Systems Ltd. v. The Revenue Commissioners, E.C.R. I-3495 [2001] Case C-339/98, Peacock AG v. Hauptzollamt Paderborn, E.C.R. I-8947 [2000]
100	Definition of "device" in New Shorter Oxford English Dictionary (3rd ed., 1993), p. 655
101	Definition of "unit" in New Shorter Oxford English Dictionary (3rd ed., 1993), pp. 3491-92
102	Illustrations of STBs
103	Illustrations of FPDs
104	Illustrations of MFMs
105	Brochures for Brother MFC-4000 and MFC-4500
106	MFM BTI
107	WCO Secretariat, Classification of Multifunctional Digital Copiers, NC0300E1 (26 October 2000)
108	Xerox WorkCentre PE16 Multifunction Printer http://www.office.xerox.com/multifunction-printer/multifunction-under-30ppm/workcentre-pe16/enus.html (accessed June 1, 2009)
109	ITU-T Recommendation G.711: General Aspects of Digital Transmission Systems. Terminal Equipments: Pulse Code Modulation of Voice Frequencies
110	IEEE Std 802.3-2005
111	IEEE Std 802.11b-1999
112	IEEE Std 802.11a-1999

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113	Definition of “incorporate” <i>in</i> New Shorter Oxford English Dictionary (3rd ed., 1993), p. 1342
114	Scientific-Atlanta 1996 Annual Report
115	Explorer 2000 Installation and Operation Guide
116	Gerard O’Driscoll, The Essential Guide to Digital Set-Top Boxes and Interactive TV, (2000), pp. 91-92

TABLE OF REPORTS CITED

<i>Argentina – Footwear (AB)</i>	Appellate Body Report, <i>Argentina – Measures Affecting Imports of Footwear, Textiles Apparel and Other Items</i> , WT/DS56/AB/R, adopted 22 April 1998
<i>China – Auto Parts (U.S.) (Panel)</i>	Panel Report, <i>China – Measures Affecting Imports of Automobile Parts</i> , WT/DS340/R, adopted 12 January 2009, as modified by the Appellate Body Report, WT/DS340/AB/R
<i>China – IPR</i>	Panel Report, <i>China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights</i> , WT/DS362/R, adopted 20 March 2009
<i>EC – Bananas III (AB)</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997
<i>EC – Computer Equipment (Panel)</i>	Panel Report, <i>European Communities – Customs Classification of Certain Computer Equipment</i> , WT/DS62/R, WT/DS67/R, WT/DS68/R, adopted 22 June 1998, as modified by the Appellate Body Report, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R
<i>EC – Customs Matters (Panel)</i>	Panel Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/R, adopted 11 December 2006, as modified by the Appellate Body Report, WT/DS315/AB/R
<i>EC – Hormones (AB)</i>	Appellate Body Report, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998
<i>EC – Hormones (Panel)</i>	Panel Report, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/R, WT/DS48/R, adopted 13 February 1998, as modified by the Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R
<i>Greek Increase in Bound Duty</i>	GATT Group of Experts Report, <i>Greek Increase in Bound Duty</i> (unadopted report, 9 November 1956), L/580

<i>Mexico – Rice (Panel)</i>	Panel Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice; Complaint with Respect to Rice</i> , WT/DS295/R, adopted 20 December 2005, as modified by the Appellate Body Report, WT/DS295/AB/R
<i>US – Certain EC Products (AB)</i>	Appellate Body Report, <i>United States – Import Measures on Certain Products from the European Communities</i> , WT/DS165/AB/R, adopted 10 January 2001
<i>US – Gasoline (AB)</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996

I. THE INFORMATION TECHNOLOGY AGREEMENT

Q1. (All parties) The Panel notes that the Information Technology Agreement (“ITA”) is mentioned by the complainants along with the WTO and the GATT when discussing “object and purpose” within the meaning of Art. 31.1 of the Vienna Convention on the Law of Treaties (“Vienna Convention”). Does this mean that the complainants consider the ITA itself to be a “treaty” within the meaning of Art. 31.1 of the Vienna Convention?

1. The ITA is not the “treaty” at issue in this dispute — rather, the “treaty” (in the Vienna Convention sense of the word) at issue in this dispute is the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”), including the EC’s Schedules of Concessions. However, the ITA may nonetheless be relevant to an analysis of the “object and purpose” of the GATT 1994 (including the EC’s Schedules). Documents other than the text of the treaty itself may assist in determining the “object and purpose” of a treaty.

2. As explained below in response to Question 2, the ITA is an instrument “related” to the GATT 1994. Thus, the ITA (including its “object and purpose”) may also be relevant to understanding the “object and purpose” of that treaty, within the meaning of Article 31(1) of the Vienna Convention. And, as Japan and Chinese Taipei have noted, the objectives enshrined in the ITA echo and reinforce those of the GATT 1994.¹

Q2. (All parties) In interpreting the European Communities’ concessions in this case, what relevance and weight should be placed on the provisions contained in the ITA, including the preamble? Under what provision of the Vienna Convention would these be relevant?

3. The ITA is relevant “context” for interpreting Members’ Schedules, within the meaning of Article 31(2)(b) of the Vienna Convention, as an “instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.” First, the ITA qualifies as an “instrument which was made by one or more parties in connection with the conclusion of the treaty” — after Members agreed to the ITA, they modified their GATT 1994 Schedules of Concessions in accordance with the process set forth in the ITA Annex to reflect the agreed-upon ITA concessions. Thus, the ITA is an instrument made in connection with conclusion of the treaty (the agreed-upon concessions incorporated into Members’ Schedules).

¹*E.g.*, First Written Submission of Japan (May 5, 2009) (“Japan First Submission”), para. 211-12, 288-289 (noting that “[t]he overarching object and purpose of the WTO Agreement and the GATT 1994 has been reinforced in the specific context of the ITA.”); *compare* ITA, Preamble (“desiring to achieve maximum freedom of world trade in information technology products”) with GATT 1994, Preamble (the “security and predictability of the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade”).

4. Second, the ITA was “accepted by the other parties as an instrument related to the treaty.” WTO Members acknowledged the relationship between the ITA and the GATT 1994 in several ways, including by formally accepting the modifications to Members’ Schedules made shortly after the ITA’s conclusion, which expressly refer to the ITA in the cover notes accompanying the modifications and in the text of the modifications themselves (including the Attachment B headnote).² In addition, in the Ministerial Declaration at Singapore, Members took note of the ITA and welcomed the agreement on tariff elimination on an MFN basis for information technology products.³

Q3. (All parties) To what extent, if any, does “technological development” of products affect the determination of the scope of tariff treatment included in WTO concessions:

(a) in relation to tariff treatment in general involving any product;

(b) in relation to ITA-related tariff concessions. In particular, what significance, if any, does the phrase “... and other technologies ...” found in Attachment B’s description of flat panel display devices have with respect to “technological development” and innovation?

5. Tariff concessions, including those incorporated into a Member’s Schedule as a result of the ITA, apply to all products — regardless of technological development — that meet the terms of the concession, interpreted based on its ordinary meaning in context and light of the agreement’s object and purpose. This is consistent with the findings of the panel in the GATT 1947 dispute *Greek Increase in Bound Duty* – later-developed, long-playing gramophone records were found to be covered by the description of “gramophone records” in Greece’s schedule of concessions, and therefore the panel found Greece to have acted inconsistently with Article II when it imposed higher duties on long-playing records.⁴

6. Of course, technological change, among other factors, can affect how an individual Member *classifies* a product in its domestic tariff nomenclature, and this may in turn give rise to disagreements over the tariff treatment accorded to the product in question. Indeed, the United States and the European Communities were in the midst of just such a disagreement when the

²See e.g., European Communities, Rectifications and Modifications of Schedules, Schedule CXL - European Communities, G/MA/TAR/RS/16 (2 April 1997) (Exhibit US-6) (stating that the modifications “incorporate the commitments under the ITA”).

³Singapore Ministerial Declaration, WT/MIN(96)/DEC (18 December 1996), para. 18 (Exhibit US-95).

⁴*Greek Increase in Bound Duty*, pp. 168-70.

ITA was being negotiated.⁵ The ITA included several mechanisms to address this problem, including a broad scope of coverage (extending to residual subheadings and the inclusion in some cases of entire headings), and the descriptive approach to product coverage adopted in Attachment B of the ITA.

7. The latter mechanism was incorporated into Members' Schedules through the addition of the Attachment B headnote. Under the headnote, products enumerated in Attachment B are entitled to duty-free treatment "wherever...classified."⁶ This provides additional assurance that if technological change or other developments result in a different classification, Members will continue to accord duty-free treatment to the ITA product.

8. The importance Members placed on preserving tariff treatment in the face of technological change is evident throughout the ITA, and is reflected in the text of associated tariff concessions. Thus, for example, the flat panel display device concession is not limited to specific technologies. Likewise (and contrary to what the EC measures provide), the set top box concession does not specify particular modem technologies that a device must have, but rather simply requires that a device have a "modem for gaining access to the Internet". This approach is consistent with the Preamble to the ITA, in which participants expressed their desire to "encourage the continued technological development of the information technology industry on a world-wide basis."⁷ If technological development were sufficient basis to deny duty-free treatment to ITA products, the ITA would not be "encourag[ing] continued technological development" and would be working against its own purposes.

Q4. We take note of the following passage of the ECJ case C-67/95 Rank Xerox case decision (Exhibit TPKM-63):

"22. It is irrelevant that the indirect process common to the two machines relies on modern technology. The Court held in [...] Analog Devices [...], that, even though it cannot be denied that technical developments in the industrial sector concerned justify the drawing up of a new customs classification, it is for the competent Community institutions to take account thereof by amending the Common Customs Tariff. In those circumstances, failing such an amendment, the interpretation of the tariff cannot vary as and when technology changes." (emphasis added)

In the case at hand, parties have different views on the relative importance of technological development leading to a new product as a factor in the assessment of

⁵EC – Computer Equipment, WT/DS62/1.

⁶Exhibit US-6.

⁷ITA, Preamble (Exhibit US-1).

the scope of tariff commitments.

(a) (European Communities) Please, explain whether the ECJ's rationale in Case 122/80 Analog Devices is in line with your position on the relative importance of technological development. Could the above rationale apply mutatis mutandis in the context of ITA commitments to indicate that until Participants clarify the scope of a given commitment (using the ITA negotiating mechanisms), the interpretation of that commitment "cannot vary as and when technology changes."

(b) (Complainants) Please comment.

9. The ECJ's statement in *Analog Devices* is consistent with the view that if a product falls within the description contained in the text of a given concession, the product is subject to that concession, regardless of technological change. Thus, the mere fact that a product has newer features or uses different technologies than what was available on the market at the time the concession was negotiated, is not a basis to exclude it from duty-free treatment. In this case, as complainants have demonstrated, each of the products in question falls within the ordinary meaning of the text of the concessions, in context and in light of the object and purpose of the GATT 1994.⁸

10. That said, it should also be emphasized that the court in this case was commenting on EC classification law, *not* the scope of the EC's WTO obligations. It is well-established that a Member's classification law, and even the HS, cannot add to or diminish its WTO tariff concessions.⁹ WTO Schedules of Concessions are an integral part of the WTO treaty and, like other terms of the treaty, are interpreted using customary rules of treaty interpretation reflected in the Vienna Convention on the Law of Treaties. If it is the case that, under EC law, the CCT must be amended to ensure that the proper tariff treatment is accorded to products that meet the terms of its concessions, but have been reclassified simply owing to new features or technologies, this does not mean that the EC is excused from its WTO obligations; rather, it merely suggests that the EC must amend the CCT to accord the proper tariff treatment to those products.

Q5. (All parties) Are the product narratives contained in Attachment B of the ITA incorporated into the European Communities' WTO Schedule, or are the obligations found in the narrative descriptions of the products contained in the European Communities' Schedule. To the extent that there are any discrepancies between the

⁸See U.S. First Submission, paras. 84-111, 120-168.

⁹*China – Auto Parts (U.S.) (Panel)*, para. 7.188 (“[E]ven if we were to base our ruling in the present section of these Reports on the alleged rights under the HS, which we are not, we would be guided by our duty not to ‘add to or diminish the rights and obligations provided in the covered agreements.’”) (citing DSU art. 3.2).

two, which should prevail?

11. The narrative descriptions of products contained in Attachment B are referenced in the headnote to the EC's Schedule, which states as follows:

“With respect to *any product described in or for Attachment B to the Annex to the Ministerial Declaration on Trade in Information Technology Products (WT/MIN(96)/16)*, to the extent not specifically provided for in this Schedule, the customs duties on such product, as well as any other duties and charges of any kind (within the meaning of Article II:1(b) of the General Agreement on Tariffs and Trade 1994) shall be bound and eliminated, as set forth in paragraph 2(a) of the Annex to the Declaration, wherever the product is classified.” (Emphasis added.)

12. The text of the headnote expressly directs the reader to Attachment B to the ITA. Thus, in interpreting the headnote, the Panel must look at Attachment B of the ITA and the product descriptions contained therein to determine the scope of the concession. This is consistent with the approach of previous panels and the Appellate Body evaluating whether a Member has acted consistently with provisions of the WTO Agreements that reference other agreements, such as the Lome Convention.¹⁰

13. This headnote is followed by a separate provision, which contains a table listing various products included in Attachment A-2 and Attachment B of the ITA and the tariff subheadings in which the products were at the time classified by the EC. Importantly, this table is *a separate provision* from the above headnote. This is confirmed by the fact that the headnote ends with a period, not a colon, the two are separated by a heavy black line, and the table is nowhere referenced in the headnote.¹¹ Had the drafters intended to refer to the list of products in the table, they would have so stated, such as by referring to “any product described in the table below”,

¹⁰*EC – Bananas III (AB)*, para. 167 (finding that “[t]he Panel was correct in stating... ‘We note that since the GATT CONTRACTING PARTIES incorporated a reference to the Lome Convention into the Lome waiver, the meaning of the Lome Convention became a GATT/WTO issue, at least to that extent. Thus, we have no alternative but to examine the provisions of the Lome Convention ourselves in so far as it is necessary to interpret the Lome waiver.’... We, too, have no alternative.”). *See also EC – Hormones (AB)*, paras. 173-76 (discussing Codex standard in connection with analysis of SPS Article 3.3, which refers to “relevant international standards, guidelines, and recommendations”, defined in Annex A of the SPS Agreement as, for food safety, standards, guidelines and recommendations listed by the Codex Alimentarius Commission); *EC – Hormones (Panel)*, paras. 8.56-8.63 (same, in connection with SPS Article 3.1).

¹¹*See* Exhibit US-6.

rather than by referring to Attachment B itself.

14. The United States is aware of no discrepancies between the table in the EC's Schedule and Attachment B. As noted, Attachment B was modified to reflect certain technical corrections pursuant to WT/MIN(96)/16/Corr.1 (13 October 1997), and those technical corrections are also reflected in the table.¹²

Q6. (Complainants) The European Communities has stated that if the concessions are in the ITA itself, then concessions must be given identical interpretation in relation to all signatories to the ITA. However, if the concessions are in the WTO Member's Schedule (e.g. the EC Schedule) and have been identified with a given HS/CN code, then WTO Members have agreed that some differences were an inherent part of the concessions that were made pursuant to Attachment B (see European Communities' first written submission, paragraph 60). Do the complainants agree with this position? Please elaborate.

15. As a threshold matter, the factual premise of the EC's argument — that there are differences in the text of the concession at issue — is incorrect. The concession is in the headnote to the EC's Schedule. It provides for duty-free treatment to products identified in Attachment B "wherever...classified." That concession is repeated essentially verbatim in virtually all ITA participants' Schedules.¹³

16. With regard to the chart that follows the headnote, as the United States has explained, the chart is a *separate* provision of the EC Schedule. In it, the EC identified the subheadings in which it at the time classified the goods in question. Two observations may be made in this regard.

17. First, participants recognized that there were (and could continue to be) differences in

¹²See U.S. First Submission, n.70 and Exhibits US-36 and US-37.

¹³See response to Question 9. Japan's headnote is worded somewhat differently than that contained in other participants' Schedules, though the differences further illustrate why the HS codes cannot be read as superseding or, as the EC puts it, "exhaust[ing]" the headnote. Japan's Schedule does not contain a list of HS codes. Instead of incorporating Attachment B by reference (as is done in the EC and US Schedules, among others), Japan's Schedule itemizes in separate lists the product descriptions contained in Attachment A-2 and B (again, without reference to HS codes) and states that those products are entitled to duty-free treatment "wherever...classified." Not only would the EC's reading render its headnote inutile, it would suggest that Japan undertook more extensive obligations in implementing its ITA concessions than the other participants since it did not specify particular codes for Attachment B products.

classification under national law of Attachment B products; notwithstanding these differences, they wanted to ensure that duty-free treatment was accorded to the products in question *wherever classified*. The mere fact that participants classified the products differently cannot alter the meaning of the tariff concession, which is to provide duty free treatment to the products described in Attachment B “wherever...classified.”

18. Second, the EC’s position appears to reflect its view that the headnote was somehow “exhausted” by other provisions in the Schedules and that the “wherever...classified” language has no meaning.¹⁴ This reading of the headnote as without any meaning or consequence quite simply does not accord with the text, with logic, nor with the principle, oft-cited by panels, the Appellate Body, and even the EC in previous disputes, that a treaty interpreter should not “adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.”¹⁵

Q7. (All Parties) What is the purpose and interpretative relevance of the HS codes that appear next to the products listed in WTO Schedules?

19. The list of HS codes in the EC’s Schedule contains the codes that the EC identified at the time as covering products included in Attachment A-2 and Attachment B of the ITA. At the time the ITA was concluded, participants agreed to “provide a list of the detailed HS headings involved for products specified in Attachment B.” ITA, Annex, para. 2. Participants agreed to attach this list to their Schedules. ITA, Annex, para. 2(b)(ii). Because Attachment B products were listed using product descriptions not based on customs nomenclature, the list was a device used by participants to ensure that the products received duty-free treatment upon implementation of participants’ ITA commitments.

20. Thus, the list in the EC’s Schedule reflects the EC’s views on where the products in question were covered at the time the ITA was concluded. As such, it may be relevant context for interpreting the EC’s concessions under the headnote. Importantly, however, it is not a part of the Attachment B headnote itself, which provides for duty free treatment for Attachment B products “wherever...classified.” See U.S. response to Question 5. To read the list as the EC proposes, would — as the EC itself acknowledges — “exhaust” the headnote, rendering it a

¹⁴Opening Statement of the European Communities at the First Meeting of the Panel (May 12, 2009) (“EC Oral Statement”), para. 19 (claiming that “[i]n other words, the commitments are in fact made twice and the EC believes that they exhaust the ‘headnote’”, and stating that the “EC does not understand what the ‘headnote’ and the ‘wherever classified’ language can add to the commitments the EC made by indicating specific headings next to the product definitions in this case”).

¹⁵*E.g., US – Gasoline (AB)*, p. 23.

nullity.¹⁶ Had the drafters intended to define the scope of the Attachment B concessions only through the descriptions associated with individual HS tariff lines, they need not have included the headnote at all and could simply have provided for duty free treatment for the relevant lines. They did not, however, do so. Rather, ITA participants took the additional step of adding the headnote to their Schedules, providing for duty-free treatment for Attachment B products “wherever...classified.” This provision must be given meaning.¹⁷ As the United States has explained, this headnote means that the products enumerated in Attachment B must be given duty-free treatment, even if the Member chooses to classify them in tariff lines for which its bound duty is greater than zero.¹⁸

Q8. (All Parties) Could the parties confirm that the concessions made by the European Communities pursuant to the ITA, which are relevant to this case, are those contained in documents WT/Let/156, WT/Let/261 and G/MA/TAR/RS/74? If they are not, please explain why not and indicate the correct documents.

21. The key concessions for purposes of this dispute are contained in documents WT/Let/156 and G/MA/TAR/RS/74. WT/Let/261 contains various other revisions to the EC Schedules relating to its ITA concessions which are not directly relevant to this dispute.

Q9. (Complainants) Do you have in your respective WTO Schedules a “headnote” identical to that found in the EC WTO Schedule? If not, what are the differences?

22. The U.S. Schedule has a headnote that is virtually identical to that contained in the EC Schedule. The only difference between the two is that the U.S. headnote states that it applies with respect to “any product described on” Attachment B, whereas the EC headnote states that it applies with respect to “any product described in or for” Attachment B.

Q10. (All Parties) Regarding the section in the WTO Schedules of ITA Participants reflecting Attachment B of the ITA, please answer the following:

(a) Is the effect of the headnote to incorporate Attachment B of the ITA in its entirety into each of these Schedules?

23. See response to Question 5.

¹⁶EC Oral Statement, para. 19 (claiming that “[i]n other words, the commitments are in fact made twice and the EC believes that they exhaust the ‘headnote’”).

¹⁷US – Gasoline (AB), p. 23 (noting that one must not “adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility”).

¹⁸U.S. First Submission, paras. 21-32.

(b) What is the significance of the phrases “to the extent not specifically provided for in this Schedule” and “wherever the product is classified” found in the headnote to these Schedules? Furthermore, how do these phrases relate to each other? Has this wording any implication for the order in which the Panel must look at the case?

24. The phrase “to the extent not specifically provided for in this Schedule” is an acknowledgment of the fact that products may be covered by either or both Attachment A and Attachment B, and therefore may be covered by a concession associated with a particular tariff line or by the Attachment B description, or both. Thus, even if duty-free treatment is not specifically provided for in a Member’s Schedule in a tariff line in which an Attachment B product is classifiable, that Member must nonetheless accord duty-free treatment to the product in question if it meets the Attachment B description.

25. Likewise, the phrase “wherever the product is classified” means that the product must be accorded duty-free treatment wherever the Member chooses to classify it in its customs tariff under national law. A Member is not excused from providing duty-free treatment to an Attachment B product merely because it is classifiable in a dutiable heading.

26. With regard to the order of analysis, neither phrase specifies a particular order of analysis. Rather, they simply reflect the fact that there exists a dual approach to coverage. As a practical matter, it is logical to begin the analysis with the Attachment B concession because the product descriptions in question use general terminology that (as the table contained in the EC’s Schedule indicates) often span multiple tariff subheadings. It would be burdensome or even impracticable to first review every duty-free subheading in which the product may be classifiable, and unnecessary given that the product will be entitled to duty-free treatment even if it is not classifiable in those subheadings, provided it meets the Attachment B description. Furthermore, as all parties recognize, while the HS may be relevant for interpreting a concession associated with an HS subheading, the HS is not relevant for purposes of interpreting Attachment B descriptions.¹⁹ As a matter of efficiency and to avoid confusing the analysis of an Attachment B obligation with HS nomenclature (as the EC often appears to do in its First Submission),²⁰ it is appropriate to begin the analysis with the Attachment B headnote.

¹⁹First Written Submission of the European Communities (March 5, 2009) (“EC First Submission”), para. 140 (stating that with respect to Attachment B “the product would still need to be classified as covered by one of the product descriptions, albeit not always with the assistance of the logic contained in the Harmonized System”).

²⁰EC First Submission, paras. 146-159 (discussing HS in connection with FPD claim), 278-284.

(c) Attachment B's heading and the headnote found in these Schedules contain, respectively, the phrases "wherever they are classified in the HS" and "wherever the product is classified". Do you attach any significance to the differences in these phrases?

27. This difference in terminology may simply reflect the fact that the headnote in Members' Schedules provides for duty-free treatment wherever a product is classified *by that Member*. The language does not limit the concession to particular HS lines.

(d) What is the purpose and interpretative relevance of the HS codes that appear next to the products listed in concessions made pursuant to Attachment B?

28. See response to Question 7.

Q11. (All parties) Attachments A and B of the ITA both contain certain express quantitative specifications in the description of certain products listed therein. For example: "portable digital ADP machines, weighing not more than 10 kg ..." (HS96 8471 30 in Attachment A) or "Monitors: display units of ADP machines ... with a dot screen pitch smaller than 0,4 mm ..." (in Attachment B). For products described in the Attachments A and B of the ITA that do not have such specifications, is it legitimate for a Member to introduce quantitative specifications in its national nomenclature ("domestic Schedule") implementing such attachments? If so, how should Participants ensure that such inclusion is done in a manner that is objective and also preserves the scope intended in those Attachments of the ITA?

29. There is no basis for a Member to exclude products from duty free treatment that meet the terms of the concession in the Schedule merely because they do not fall within certain quantitative specifications. As the concessions quoted in the example indicate, where a concession is limited to devices meeting certain quantitative specifications, the drafters did so explicitly. Of course, a Member does not act inconsistently with Article II if it includes quantitative specifications in its national nomenclature, provided it preserves the tariff treatment required under its Schedule. Therefore, for example, with respect to "flat panel display devices for products falling within" the ITA, a Member could create separate subcategories for flat panel display devices for ITA products that are greater or less than a certain size, provided both subcategories are duty-free.

Q12. (All parties) Does the ITA have a documented negotiating history? If so, what is it? Which of these documents, if any, that constitute "preparatory works" within the meaning of Article 32 of the Vienna Convention are relevant for the interpretation of concessions in this case?

30. While of course a number of documents were prepared by various Members in the process of negotiating the ITA, the ITA does not have a formal “negotiating history.”²¹ Nor do any of the documents submitted by the EC constitute “preparatory work” within the meaning of Article 32 of the Vienna Convention.

31. While the material provided by the EC from its files is in writing, it was not accessible and known to all the original parties.²² Indeed, much of it appears to derive from discussions between the United States and the EC, or between the Quad countries, and to date the documents have been confined to the personal files of EC negotiators. As such, it should not be accorded weight in interpreting the obligations at issue, even as a secondary resource under VCLT Article 32.²³ Even were it appropriate to consider, as a factual matter, the documents are for the most

²¹The only records from the ITA negotiations that the participants directed the WTO Secretariat to maintain were those referenced in note 4 of G/L/160 (Exhibit US-96). There, the WTO Secretariat was directed to “maintain a set of the informal documents exchanged by participants in consultations that led to the decisions taken at” the March 26, 1997 meeting in which, among other things, participants circulated their approved Schedules. The material spans the brief period between the conclusion of the ITA and the approval of participants Schedules. The material submitted by the EC is not contained in these documents.

²²*E.g.*, Young Loan Arbitration, 59 I.L.R. 495 (1980) (to qualify, preparatory works “must normally be restricted to material set down in writing – and thereby actually available at a later date. . . A further prerequisite if material is to be considered as a component of travaux préparatoires is that it was actually accessible and known to all the original parties”).

²³*Compare China – IPR*, para. 7.586 (noting that “[d]ocuments of the WIPO Committee of Experts, including the draft Model Provisions, were communicated to the TRIPS negotiating group and made available in the GATT Secretariat for consultation by interested delegations, but not circulated, in June 1988,” and that therefore “the negotiators of the TRIPS Agreement were aware of the explanatory observation by the International Bureau of WIPO addressing ‘commercial scale’”). There is no evidence that the documents submitted to the EC were communicated to all ITA participants or made available for consultation by interested delegations.

part irrelevant (as, curiously, the EC itself at times concedes when introducing the material²⁴) and, in any event, do not support the conclusions the EC attempts to draw from them.

Q13. (All parties) The complainants make a contextual argument that “residual Subheadings” included in Attachment A of the ITA (and incorporated into the WTO Schedules of Participants), such as the HS96 Subheading 8471 90 (“Other”), means that a “broad” concession was intended. Do the parties consider that the existence of “residual Subheadings” could also mean that Participants anticipated “technological developments” in regard to product scope?

32. The scope of the ITA, including its extension to residual subheadings and the inclusion in some cases of entire headings within its coverage, is one of the tools participants used to ensure that duty free treatment would be maintained even if, for example, technological developments occurred that resulted in reclassification of products. As the United States has explained, another device used in this regard was the Attachment B headnote and the dual approach to product coverage it reflects.²⁵ Likewise, the participants' desire to maintain coverage in the face of technological change is evidenced by the Preamble to the ITA, which states that the agreement was intended to “encourag[e] innovation and the spread of technology throughout the world” and in paragraph 1 of the ITA, which provides that participants' trade regimes “should evolve in a manner that enhances market access opportunities for information technology products.”²⁶

II. GENERAL QUESTIONS

Q14. (All parties) Japan has made arguments on the meaning of certain terms of the concessions under this dispute, not only based on the “ordinary meaning” of these terms, but also based on their “technological sense”. Japan claims that “[t]ariff concessions about technology products can best be understood by considering the technology sense of the words of those concessions” (Japan's first written submission, paragraph 85). In addition, at least one other party has similarly suggested that the

²⁴EC First Submission, para. 233 (“[The EC] is well aware that multilateral negotiations are a very dynamic process in which it is usually quite difficult to capture the collective will of the negotiators in any given document. For this reason, the EC has not presented the above documents necessarily to offer arguments based specifically on one or another product description which was used at a given time. Such a discussion with the complainants would inevitable lead to an endless spiral of exchanges, with each party presenting yet another series of negotiating documents shedding slightly different light on the process.”).

²⁵U.S. First Submission, paras. 29-32.

²⁶ITA, Preamble, para. 5 and ITA, para. 1 (Exhibit US-1); *see also* U.S. First Submission, paras. 25-32.

Panel should take into account the “special meaning” of certain concession terms in this dispute based on Article 31.4 of the Vienna Convention. Do the parties consider that this provision would be applicable in the interpretation of some terms under analysis in this case? Does Japan’s use of “technological sense” implicitly invoke Article 31.4 of the Vienna Convention?

33. The United States, Japan, and Chinese Taipei have cited to the same dictionaries in support of their arguments regarding the ordinary meaning of the terms of the concessions at issue. There is no substantive difference in their approach. Some of the dictionaries relied upon are technical dictionaries. Complainants, for example, have referred to Newton’s Telecom Dictionary, to the IEEE Dictionary, and to the Microsoft Computer Dictionary in defining terms.

34. As a general matter, the technical dictionary definitions in question are consistent with the meaning given to the terms in question by ordinary dictionaries. Therefore, the United States has not referred to the rules reflected in Article 31.4 of the Vienna Convention as a basis to rely on those dictionaries – the “special meaning” is in general the same as the “ordinary meaning”, though the technical dictionaries may in some cases be clearer and more directly on point and therefore are useful to understanding the meaning of the terms in question.²⁷ For example, with respect to the term “modem”, the dictionary definition relied upon by the United States is that contained in a 1996 dictionary published by IEEE, a leading international consortium of electrical and electronic engineers with expertise in the telecommunications field.²⁸ The United States has relied on this resource for a definition of modem because it best reflects the international technical understanding of the term at the time the ITA was negotiated.

35. If the panel considers that it is necessary to resort to the rules reflected in Article 31.4 as a basis to rely on the technical dictionary definitions in question, it may do so. It is well-understood that the ITA is an agreement on information technology products, and uses technical terms throughout (indeed, in document G/L/160, participants agreed to consider additional

²⁷See International Law Commission, Draft Articles on the Law of Treaties with Commentaries (1966) (“ILC Commentary”), p. 222 (Exhibit US-97) (noting that Vienna Convention members recognized “that technical or special use of the term normally appears from the context and the technical or special meaning becomes, as it were, the ordinary meaning in the particular context,” and that other members did not dispute that “the technical or special meaning of the term may often appear from the context” but that members included paragraph 4 because they “considered that there was a certain utility in laying down a specific rule on the point, if only to emphasize that the burden of proof lies on the party invoking the special meaning of the term”).

²⁸IEEE, “About IEEE”, <http://www.ieee.org/web/aboutus/home/index.html> (Exhibit US-98).

procedures in the ITA review under paragraph 3 for small and medium sized participants “in light of the technical specificity of information technology products”).²⁹ With respect to Attachment B concessions, the terms used are not derived from HS terminology but rather are on their face technical (“modem”, for example, is a telecommunications term). In some cases, the terms do not even appear in their entirety in traditional dictionaries (for example, the phrase “flat panel display device” is nowhere defined in the OED). Therefore, if the technical meaning of the terms is considered a “special meaning,” it is reasonable to conclude that the parties intended this special meaning.

Q15. (All parties) Assuming that the Panel were to apply the provision of Article 31.4 of the Vienna Convention, please answer the following:

(a) Could the Panel, sua sponte, apply this provision without any Party having invoked it? The Panel in Mexico - Telecoms seemed to indicate that since the provision under interpretation was “technical” and from a “specialized service sector” it was “entitled” to examine what “special meaning” it may have in the telecommunications context (Panel Report, Mexico - Telecoms paragraph. 7.108). Could the parties please comment on this statement?

36. Yes. Pursuant to DSU article 3.2, second sentence, which provides that the dispute settlement system “serves...to clarify the existing provisions of [the covered] agreements in accordance with customary rules of interpretation of public international law,” the Panel may apply the rules reflected in Article 31.4 of the Vienna Convention without any Party invoking

²⁹G/L/160 (Exhibit US-96).

them.³⁰ (The United States would of course appreciate having the opportunity to comment on any such possible analysis that the Panel develops.)

(b) Who bears the burden to prove that a "special meaning" of a treaty term was intended?

37. If a party asserting a claim is relying on a "special meaning," then that party has the burden of demonstrating that a "special meaning" was intended.³¹

(c) If a "special meaning" is to be given to a treaty term according to Article 31.4 of the Vienna Convention, what is the relationship between this provision and the elements of the preceding paragraphs of Article 31, in particular those related to context and elements to be taken into account together with context?

38. As with a treaty term whose meaning is based on the ordinary meaning, context and the elements taken into account together with context are also relevant to interpreting a treaty term that has a "special meaning."³²

³⁰Similar issues have arisen in previous disputes. *Cf., e.g., EC – Hormones (AB)*, paras. 155-156 ("Panels are inhibited from addressing legal claims falling outside their terms of reference. However, nothing in the DSU limits the faculty of a panel freely to use arguments submitted by any of the parties — or to develop its own legal reasoning — to support its own findings and conclusions on the matter under its consideration. A panel might well be unable to carry out an objective assessment of the matter, as mandated by Article 11 of the DSU, if in its reasoning it had to restrict itself solely to arguments presented by the parties to the dispute."); *US – Certain EC Products (AB)*, WT/DS165/AB/R, adopted 10 January 2001, para. 123 (finding that Panel did not "commit[] a reversible error by developing its own legal reasoning"). In this case, all relevant factual material (*i.e.*, the definitions) has been submitted for the record by the parties (*see e.g.*, Exhibits US-22, US-23, US-24, US-33, US-63, US-67, US-70, US-76, US-82, US-83, and US-92), and the claims at issue (in particular, the claims relating to Article II and the EC's Schedules of Concessions) are within the panel's terms of reference. Indeed, the legal issue has been addressed by the parties, including in this submission (*see* response to Question 14).

³¹*See* ILC Commentary, p. 222 (noting that Vienna Convention negotiators "considered that there was a certain utility in laying down a specific rule on the point, if only to emphasize that the burden of proof lies on the party invoking the special meaning of the term").

³²*See* ILC Commentary, p. 220 (noting that the "Commission desired to emphasize that the process of interpretation is a unity and that the provisions of the article [now Article 31] form a single, closely integrated rule", and that, consistent with this approach, "the word 'special' serves to indicate its relation to the rule in paragraph 1"); *see also id.*, p. 222 (noting that Vienna Convention negotiators recognized "that technical or special use of the term normally appears

Q16. (All parties) Can it be assumed that in a sectoral negotiation, such as the ITA negotiations, a party would normally seek counsel from experts in that field, or include in its delegation experts in the field(s) covered by such an agreement. In particular, did your delegation include customs experts and/or technology experts?

39. The U.S. delegation was led by the Office of the United States Trade Representative, and included government trade policy experts with particular experience in technology matters. Information technology (IT) industry representatives were also regularly consulted to help define ITA product coverage and U.S. negotiating priorities. Customs experts were also consulted, including to ensure that commitments on ITA products were reflected in duty-free headings in the U.S. tariff schedule.

Q17. (All Parties) Could the parties please indicate their views with respect to the designation of individual European Communities member States as respondents in these disputes?

40. EC member States are Members of the WTO in their own right, with their own obligations, including under Article II. Both the EC and the member States play a role in the application of duties to products generally, and play a role in the application of duties to the products in question in this dispute.³³ The EC administers the CN and has issued the regulations and explanatory notes at issue; member States have issued BTI interpreting and applying those regulations and explanatory notes, and apply duties to the products.

41. As Members of the WTO and parties to the WTO Agreement, the EC member States have obligations under that Agreement to other WTO Members. The complaining parties in this dispute consider that the EC member States have breached those obligations. Consequently, the complainants have exercised their rights under the DSU to bring claims against the EC member States as well as against the European Communities, and the terms of reference of this Panel reflect this.³⁴ The internal legal relationship between the European Communities and the EC

from the context and the technical or special meaning becomes, as it were, the ordinary meaning in the particular context,” and that other members did not dispute that “the technical or special meaning of the term may often appear from the context”).

³³See U.S. First Submission, para. 34 (explaining the relationship between the EC and member States in administration of EC customs laws and discussing the role of EC member States in applying duties to the products at issue).

³⁴The terms of reference refer to “the matter referred to the DSB by the United States ... in document WT/DS375/8.” Document WT/DS375/8 is clear in referring to measures of the individual member States as well as of the EC itself.

member States cannot diminish the rights of other WTO Members to exercise their rights under the WTO Agreement (including rights under the DSU).³⁵

Q18. (All Parties) Do the complainants consider that all of the regulations and CN Explanatory Notes listed with respect to each product are still valid and have legal effect? Please give reasons to your responses.

42. Yes. As a threshold matter, it should be noted the EC has not stated that the regulations and CNENs are “invalid” or have “no legal effect” — rather it has claimed with respect to the CNENs that they “are not legally binding in the EC legal order” and with respect to certain of the Regulations, that they have “effectively lost their relevance” and that the EC is “in the process of repealing or replacing them as appropriate.”³⁶ As explained below, each of the measures in question is still valid and has legal effect.

43. STB CNEN. As the United States argued in its oral statement, while the EC claims that CNENs are “not legally binding in the EC legal order,” the record demonstrates that in fact they have legal effect. As explained in the U.S. First Submission, the ECJ has characterized CNENs as “an important aid in the interpretation of the CN.”³⁷ Beyond providing guidance to member States on the application of the CN, CNENs have other important legal effects — for example, once adopted, BTI that contradicts the guidance set forth in a CNEN is no longer valid.³⁸ With respect to the STB CNEN, after it was issued, member State customs authorities consistently impose duties on any device that possesses the technical characteristics identified in the CNEN.³⁹

³⁵See e.g., *EC – Computer Equipment (Panel)*, para. 8.16 (Panel found that it would consider whether Ireland and UK deviated from WTO obligations in the context of EC commitments).

³⁶EC First Submission, para. 95, 98.

³⁷U.S. First Submission, para. 39; *EC – Customs Matters (Panel)*, para. 2.39; Exhibits US-16 and US-17.

³⁸E.g., European Commission, Administrative Guidelines on the European Binding Tariff Information (EBTI) System and Its Operation (October 28, 2004), art. 11 (stating that “[a] BTI ceases to be valid...[w]here the BTI is no longer compatible with the interpretation of one of the customs nomenclatures, e.g., following amendments to the CN Explanatory notes...”) (Exhibit US-18); see also Community Customs Code, article 12.5(a)(ii) (Exhibit US-19).

³⁹U.S. First Submission, paras. 90-91.

In some cases, they have even cited to the Customs Code Committee decision approving the CNEN as a basis for their action.⁴⁰

44. FPD CNEN. As with the STB CNEN, the ECJ's pronouncements on the significance of CNENs for interpreting the CN, the consequences of issuance of the CNEN on existing BTI, and the evidence regarding the consistent classification of any device with DVI and any device capable of connecting to a device other than a computer in a dutiable heading, pursuant to the CNEN, all support the conclusion that the CNEN has legal effect.⁴¹ Indeed, in its statement on implementation of the recommendations and rulings of the panel and Appellate Body in *EC – Customs*, the EC cited to the CNEN as a measure “ensuring” uniform classification of LCD monitors. For the EC to claim that the measure has no legal effect would be utterly at odds with its reliance on the same measure in support of its assertion that it has complied with the reports in *EC – Customs*.⁴²

45. March 2005, April 2005 and December 2005 FPD Regulations. With respect to these regulations, the EC claims that because “[t]he codes as they existed at the time no longer exist,” the regulations have “effectively lost their relevance.” It should be noted that the EC cites to nothing in support of this assertion. Indeed, if the measures had no legal effect, it is unclear why the EC would be in the process of amending or revoking them, as it claims in its First Submission. The mere fact that the HS codes have changed does not under EC law prevent customs authorities from relying on regulations that predated the change in the codes.⁴³ Nor did the court in *Kamino* annul the regulations in question, and indeed, because the imports it was

⁴⁰U.S. First Submission, para. 48 n.59; Exhibit US-28.

⁴¹See Exhibit US-50; U.S. First Submission, paras. 123-128.

⁴²Statement of the European Communities at the December 11, 2006 meeting of the Dispute Settlement Body, WT/DSB/M/223 (15 January 2007), para. 8 (reporting that “[t]he EC was already in compliance with the Panel’s finding on the tariff classification of LCD monitors with DVI... Uniform classification of this product in the EC was ensured *inter alia* by the adoption of Commission Regulation 217[1]/2005, which had been followed by the repeal of the Dutch Decree and the German Binding Tariff Information (BTI) referred to in the Panel report in support of the Panel’s findings of violation. Moreover, the Commission had prepared an Explanatory Note on the classification of LCD monitors, which would be published before the end of the year”).

⁴³See FR-E4-2007-002262-R (January 31, 2007) (Exhibit US-62) (BTI issued by France on January 13, 2007 classifying a multifunctional digital machine in 8443 31 99 and referring to 1999 MFM Regulation).

considering predated the regulations it could not do so.⁴⁴ These regulations will only “disappear” from the EC legal system if they have been expressly revoked by the EC Commission or are expressly annulled by the ECJ. There is no implied annulment under EC Community law or annulment by analogy. The fact that classification regulations and CNENs continue to have legal effect as long as they have not been withdrawn also follows from Article 12(5) of the Community Customs Code, which states that BTI will automatically cease to be valid where they conflict with a classification regulation, an explanatory note or a judgment of the ECJ. As a result, absent formal annulment, revocation or amendment, traders cannot rely on conflicting BTI.

46. 1999 MFM Regulation, 2005 MFM Decision, and 2006 MFM Regulation. As noted above with respect to the FPD regulations, these measures remain in effect until annulled. The mere fact that the CN codes have changed does not lead to the conclusion that they have no legal effect. Indeed, member State customs authorities have continued to refer to these measures in BTI issued after the change in CN codes.⁴⁵

47. CN Provisions In Heading 8443. The EC does not appear to dispute that the CN provisions in heading 8443 containing, *inter alia*, the 12 page per minute limitation on duty-free treatment discussed in the U.S. First Submission, are in effect and have legal effect — indeed, subsequent versions of the CN have replicated the relevant text contained in the 2006 provisions *verbatim*⁴⁶ and there is no dispute that the CN is a legally binding instrument in the EC legal order.

Q19. (All parties) The Panel notes that the terms "device" and "unit" are used in several parts of the EC's concessions pursuant to the ITA. Do these words have the same meaning in the different phrases in which they are used, or different meanings? If the latter, why and what would be those meanings?

⁴⁴Compare Case C-463/98, Cabletron Systems Ltd. v. The Revenue Commissioners, E.C.R. I-3495 [2001] with Case C-339/98, Peacock AG v. Hauptzollamt Paderborn, E.C.R. I-8947 [2000] (Exhibit US-99) (ECJ issuing a second ruling providing that certain EC Regulations regarding the classification of network equipment were invalid, because a previous ruling with identical reasoning that post-dated the regulations only addressed entries made prior to the Regulations entering into effect and therefore could not reach the Regulations in question).

⁴⁵See FR-E4-2007-002262-R (January 31, 2007) (Exhibit US-62) (BTI issued by France on January 13, 2007 classifying a multifunctional digital machine in 8443 31 99 and referring to 1999 MFM Regulation).

⁴⁶E.g., Commission Regulation (EC) No. 1031/2008 of 19 September 2008 amending Annex 1 to Council Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, O.J. L 291, p. 537 (October 31, 2008) (Exhibit US-11).

48. No, the terms do not have the same meaning. The New Shorter Oxford English Dictionary defines “device” as “a thing designed for a particular function or adapted for a purpose; an invention, a contrivance.”⁴⁷ A “unit” is defined as “[a]n individual thing, person or group regarded as single and complete, esp. for the purposes of calculation.”⁴⁸ In fact, the use of the two different terms offers a good illustration of an important difference between Attachment A concessions and those contained in Attachment B. The term “unit” is a term that derives from HS nomenclature. The concession which uses the term “device” on the other hand is contained in Attachment B of the ITA and does not use HS nomenclature. Therefore, as all parties agree, the HS is not relevant to interpreting it.⁴⁹ Had the drafters intended to rely on the HS for purposes of Attachment B concessions, they could have used terms such as “unit” to describe flat panel display devices — in using the term “device” rather than “unit,” they avoided HS terminology and thus also avoid reference to the HS as relevant for interpreting the concession.

Q20. (All parties) Assuming that the HS96 interpretative rules are relevant as context for the interpretation of the concessions in the EC Schedule, what would be the interplay among the different rules that have been cited, e.g.: 1) GIR 3; 2) Note 3 to Section XVI; and 3) Note 5 to HS 84. In other words, when will one be applied instead of the others? Is there an order in which they have to be applied? If so, what is that order and why?

49. As a threshold matter, it must be emphasized that the HS96 interpretative rules would only be relevant for purposes of interpreting the EC’s concessions pursuant to Attachment A and reflected in HS nomenclature in its Schedule; they are irrelevant (and in fact as a practical matter make no sense) with respect to the EC’s Attachment B concessions (which are not based on HS nomenclature and provide for duty-free treatment for a product “wherever...classified”). That being the case, the following discussion pertains to the HS96 interpretative rules as relevant for interpreting those obligations incorporated into the EC’s Schedule based on HS nomenclature.

50. Under the Harmonized System, consistent with Article 3 of the HS Convention, classification is based on the Contracting Party’s obligation to use all of the headings and subheadings of the Harmonized System without addition or modification, together with their related numerical codes; and to apply the General Rules for the interpretation of the Harmonized

⁴⁷Definition of “device” in New Shorter Oxford English Dictionary (3rd ed., 1993), p. 655 (Exhibit US-100).

⁴⁸Definition of “unit” in New Shorter Oxford English Dictionary (3rd ed., 1993), pp. 3491-92 (Exhibit US-101).

⁴⁹EC First Submission, para. 140 (stating that with respect to Attachment B “the product would still need to be classified as covered by one of the product descriptions, albeit not always with the assistance of the logic contained in the Harmonized System”).

System and all the Section, Chapter, and Subheading Notes. Article 3 specifically provides that the Contracting Parties shall *not* modify the scope of the Sections, Chapters, headings or subheadings of the Harmonized System. In *China – Auto Parts*, the Panel noted that:

the text of GIR 1 indicates that the Contracting Parties to the HS are obliged to classify goods in accordance with the terms of the headings and any relevant Section or Chapter Notes and according to the provisions following GIR 1 (i.e. GIRs 2-6), provided the relevant tariff headings or Section or Chapter Notes do not otherwise require. Based on the ordinary meaning of GIR 1, we consider that all the rules under the GIR, starting with GIR 1, are relevant for classification of goods. This means, in our view, GIRs 2-6 should not be ignored simply because a good can be classified by applying GIR 1. Such an understanding would render the existence of other rules under the GIR and the phrase "and provided such headings or Notes do not otherwise require, according to the following provisions" inutile. As commented by the WCO Secretariat and pointed out by the complainants, classification should be based, first, on the terms of the headings, relevant Section or Chapter Notes pursuant to GIR 1 *and* provided such headings or Notes do not otherwise require, according to the provisions of GIRs 2-6.⁵⁰

51. Under GIR 1, customs authorities need to first examine whether the goods in question meet the terms of the heading, as well as any relevant Section Note such as Note 3 to Section XVI or any relevant Chapter Note such as Note 5 to Chapter 84. Note 3 to Section XVI, which applies to goods described in one or more headings of chapters 84 or 85, provides that: "Unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines designed for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function." Note 5 to Chapter 84 describes the requirements that must be met to classify a good as an automatic data processing (ADP) machine or as an ADP unit under heading 84.71. If a good is described by the terms of two or more headings within Section XVI, then the good must be classified in accordance with the terms of Note 3 to Section XVI. However, if good is described by the terms of a heading within Section XVI and by the terms of a heading outside of Section XVI, then the good is considered a "composite good" and a user must apply GIR 3 which states in pertinent part:

When . . . goods are *prima facie* classifiable under two or more headings, classification shall be effected as follows:

The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods. . . , those

⁵⁰*China – Auto Parts (U.S.) (Panel)*, para. 7.380.

headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

Mixtures, composite goods consisting of different materials or made up of different components . . . , which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character. . .

When goods cannot be classified by reference to 3 (a) or 3 (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

52. With regard to the concessions at issue (other than those contained in the Attachment B headnote), all of the headings under consideration are within chapters 84 and 85 and the only pertinent rules that would be applied are GIR 1, Note 3 to Section XVI, and Note 5 to Chapter 84. GIR 3 is not applied in these circumstances because there is no heading outside of chapter 84 or chapter 85 that describes the good. With respect to multifunction digital machines, contrary to the assertions by the EC, classification cannot be considered under heading 90.09 as the goods do not meet the terms of that heading.⁵¹

Q21. (All parties) In its first closing statement, Chinese Taipei stated that "the HS is clearly not relevant at all for the interpretation" of the concessions made pursuant to Attachment B of the ITA (paragraph 3; emphasis added). The other co-complainants seem to share this view. Please explain how this view accords with the fact that the heading of Attachment B seems to require the application of certain HS interpretative rules ("HS Notes 2(b) to Section XVI and Chapter 90, respectively") to parts specified in this Attachment? Could the European Communities please comment?

53. The reference in fact affirms that the HS is not relevant context for interpreting Attachment B concessions generally — where the drafters relied on HS terminology or provided for the application of HS interpretative rules, they did so expressly. The products at issue in this dispute are not parts, nor are the Attachment B concessions in question drafted using HS terminology. Therefore, as all the parties to this dispute agree,⁵² the HS is not relevant context for interpreting those concessions.

Q22. (All parties) Both parties refer to, inter alia, the China - Auto Parts case in respect of the complainants' "as such" claims. In the pleadings, there are two different characterizations of what needs to be demonstrated in order to establish an "as such" claim:

⁵¹U.S. First Submission, paras. 71, 157 -160.

⁵²EC First Submission, para. 140.

(a) The United States (in oral statement paragraph 8) states that the complainants "need to show that the measures necessarily lead EC customs authorities to impose duties on one or more products subject to the commitments" (emphasis added);

(b) The European Communities (in Oral statement paragraph 37) states that the complainants have to establish that "the challenged measures, in their every application in relation to a given product model...always and necessarily lead to a violation of the GATT 1994." (emphasis added)

Could the parties elaborate on what, in their view, needs to be proved to establish an "as such" claim?

54. To show that the EC measures are "as such" inconsistent with its obligations, the United States must demonstrate that the measures necessarily lead EC customs authorities to impose duties on one or more products subject to their commitments to provide duty-free treatment.⁵³ This approach is consistent with the view expressed by the panel in *China – Auto Parts*, and indeed the EC's reliance on that report is utterly misplaced. The panel stated in its report that the scope of its review with respect to the EC's Article II claim was "limited to the very narrow question of whether the criteria set out in the measures will necessarily lead to a violation of China's obligations under its Schedule and consequently Article II:1(a) and (b) of the GATT 1994."⁵⁴

55. Similarly, in *Mexico – Rice*, the panel cited to the Appellate Body's findings in *US – Carbon Steel*, and observed that "evidence of inconsistent legislation will typically be produced in the form of the text of the relevant legislation or legal instruments, 'which may be supported, as appropriate, by evidence of consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars' (emphasis added). *In our view, the Appellate Body was thus clearly not requiring that for an 'as such' claim to be successful, evidence is to be adduced of the application of the law by the executive authorities and the domestic courts, in each case.*"⁵⁵

⁵³*China – Auto Parts (U.S.) (Panel)*, para. 7.540; see also Third Party Written Submission of the Republic of Singapore (April 9, 2009), paras. 24-25.

⁵⁴*China – Auto Parts (U.S.) (Panel)*, para. 7.540.

⁵⁵*Mexico – Rice (Panel)*, para. 6.26 (emphasis added); see also *Argentina – Footwear (AB)*, para. 62 ("We agree with Argentina, therefore, that the application of the DIEM does not result in a breach of Article II for each and every import transaction in a given tariff category. At the same time, however, we agree with the Panel that there are sufficient reasons to conclude that the structure and design of the DIEM will result, with respect to a certain range of import prices within a relevant tariff category, in an infringement of Argentina's obligations under Article II:1

56. Contrary to what the EC suggests, the United States is not required to demonstrate that the measures in question result in the imposition of duties on every single model of FPD, STB, or MFM that crosses the EC border. Indeed, the EC's current view is even at odds with its own position in the *China – Auto Parts* case. Responding to China's argument that, in order to prove an "as such" claim, a party must "identify and prove the specific circumstances in which the measure will necessarily be inconsistent", the EC stated that it was sufficient to demonstrate, as it had, that the *criteria contained in the measure* "would necessarily lead to incorrect classification."⁵⁶ Thus, the mere fact that in some instances a measure might result in the correct duty treatment for a given model of a product did not in the EC's view save a measure from an adverse WTO finding — the fact that a measure necessarily results in incorrect duty treatment for other models of that product renders it "as such" inconsistent with Article II.

57. 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 the obligations of the EC and its member States under Article II. In particular:

58. STBs. With respect to STBs, the United States explained how the EC CNEN requires its customs authorities to apply duties to *any* STB with a communication function that also happens to have a hard disk or that is equipped with an Ethernet, WLAN, or ISDN modem. The United States has quoted specific language in the CNEN, directing customs authorities to classify any STB with these attributes in the dutiable heading.⁵⁷ Furthermore, it has submitted numerous BTI, as evidence of how the CNEN is understood by EC customs authorities: as those BTI demonstrate, *in every case*, those authorities classify these devices in the dutiable heading, without regard to other objective characteristics a product may have.⁵⁸ Second, the United States has described the concession and explained the products covered by the concession at issue, in view of the ordinary meaning of the terms used in the EC Schedule in context and light of object and purpose.⁵⁹ In this portion of its argument, the United States has demonstrated that devices with a hard disk or equipped with a particular type of modem fall within the text of the

for all tariff categories in Chapters 51 to 63 of the N.C.M.").

⁵⁶*China – Auto Parts (U.S.) (Panel)*, para. 7.540 n.869.

⁵⁷U.S. First Submission, paras. 90, 98-99.

⁵⁸Exhibit US-28.

⁵⁹U.S. First Submission, paras. 92-95, 99-105.

concession.⁶⁰ Thus, the evidence demonstrates that, by requiring customs authorities to classify any device with these characteristics in a dutiable heading, the measure necessarily results in the application of duties to products that are in excess of the EC's bindings, contrary to GATT 1994 Article II.

59. FPDs. For FPDs, the United States explained how the EC Regulations and CNEN require its customs authorities to apply duties to *any* FPD with DVI and *any* FPD capable of connecting to a device other than a computer. The United States has quoted specific language in the Regulations, providing *inter alia*, that LCD displays “mainly used as output units of automatic data-processing machines...are ... not covered by” the ITA or the EC implementing communication,⁶¹ and that LCD monitors with “a DVI interface enabling the product to display signals received from an automatic data processing machine” are to be classified in a dutiable heading because they are “*capable* of displaying signals from various sources.”⁶² Likewise, the United States has identified specific language in the FPD CNEN, providing *inter alia* that monitors of the duty-free subheading “cannot...be connected to a video source such as a DVD recorder or reproducer...be fitted with interfaces such as DVI-D, DVI-I...be used in systems other than automatic data-processing systems” and can “only” accept a signal from a CPU of an ADP machine.⁶³ Indeed, EC itself has elsewhere acknowledged that the December 2005 FPD Regulation and FPD CNEN have led its customs authorities consistently to classify FPDs with DVI in a dutiable subheading.⁶⁴ Furthermore, the United States has submitted BTI as evidence of how the Regulations and CNEN are understood by EC customs authorities: as those BTI demonstrate, *in every case*, those authorities classify FPDs with DVI and FPDs capable of

⁶⁰U.S. First Submission, paras. 92-95, 99-105; for additional illustrations of such devices, *see also* Exhibit US-102.

⁶¹U.S. First Submission, para. 123 (quoting March 2005 FPD Regulation).

⁶²U.S. First Submission, para. 126 (quoting December 2005 FPD Regulation).

⁶³U.S. First Submission, para. 126 (quoting FPD CNEN).

⁶⁴Statement of the European Communities at the December 11, 2006 meeting of the Dispute Settlement Body, WT/DSB/M/223, para. 8 (reporting that “[t]he EC was already in compliance with the Panel’s finding on the tariff classification of LCD monitors with DVI... Uniform classification of this product in the EC was ensured *inter alia* by the adoption of Commission Regulation 217[1]/2005, which had been followed by the repeal of the Dutch Decree and the German Binding Tariff Information (BTI) referred to in the Panel report in support of the Panel’s findings of violation. Moreover, the Commission had prepared an Explanatory Note on the classification of LCD monitors, which would be published before the end of the year”).

connecting to other devices in the dutiable heading, without regard to other objective characteristics a product may have.⁶⁵

60. Second, the United States has described the concession and explained the products covered by the concession at issue, in view of the ordinary meaning of the terms used in the EC Schedule in context and light of object and purpose.⁶⁶ In this portion of its argument, the United States has demonstrated that devices with DVI or capable of connecting to a device other than a computer fall within the text of the concession.⁶⁷ Thus, the evidence demonstrates that, by requiring customs authorities to classify any device with these characteristics in a dutiable heading, the measure necessarily results in the application of duties to products that are in excess of the EC's bindings, contrary to GATT 1994 Article II.

61. MFMs. The United States has cited to specific language in the CNEN requiring EC customs authorities to apply duties to *any* MFM operating with an electrostatic print engine that is capable of reproducing more than 12 pages per minute, and to any MFM that can connect to a computer but without a facsimile capability, regardless of the number of pages per minute it can reproduce.⁶⁸ Furthermore, the United States has submitted BTI as evidence of how the Regulations and CNEN are understood by EC customs authorities: as those BTI demonstrate, *in every case*, those authorities classify MFMs with these attributes in a dutiable heading, without regard to other objective characteristics the product may have.⁶⁹ Second, the United States has described the concession and explained the products covered by the concession at issue, in view of the ordinary meaning of the terms used in the EC Schedule in context and light of object and purpose.⁷⁰ In this portion of its argument, the United States has demonstrated that MFMs fall within the text of the EC concession for “input or output units” or “facsimile machine”.⁷¹ Thus, the evidence demonstrates that, by requiring customs authorities to classify any device with these

⁶⁵Exhibit US-50.

⁶⁶U.S. First Submission, paras. 120-121, 129-143.

⁶⁷U.S. First Submission, paras. 129-139; for additional illustrations of such devices, *see also* Exhibits US-78 and US-103.

⁶⁸U.S. First Submission, paras. 146-152.

⁶⁹Exhibit US-62.

⁷⁰U.S. First Submission, paras. 153-168.

⁷¹U.S. First Submission, paras. 153-168; for additional illustrations of such devices, *see also* Exhibit US-104.

characteristics in a dutiable heading, the measure necessarily results in the application of duties to products that are in excess of the EC's bindings, contrary to GATT 1994 Article II.

Q23. (All parties) A common theme of the European Communities' first oral statement is that, in making classification decisions, products must be analysed on a case-by-case basis, weighing the relative importance of various functions. In the light of the various measures identified by the complainants, how is such a case-by-case assessment to be carried out with respect to the following products, taking into account the relevant classification regulations and explanatory notes:

(a) A 20-inch LCD flat panel display device with a DVI connector

(b) A set-top box with a communication function and a 60 GB hard drive

Could different EC national customs authorities classify these products differently? Please explain.

62. With respect to product (a), based on the CN, when read in light of the Regulations and CNEN, EC customs authorities would in all cases classify the device in question in subheading 8528 59 90 (subject to a 14% duty) for the simple reason that it has a DVI connector. They would do so without regard to the other attributes that the device may have — indeed, the evidence demonstrates that it would do so even if the device *could not be used* without a CPU.⁷² Furthermore, in the context of the *EC-Customs* dispute, the EC has relied on the same measures at issue in this dispute in support of its claim that its national customs authorities classify these products uniformly.⁷³ Therefore, notwithstanding the EC's protestations to the contrary, insofar as the EC conducts a "case-by-case" analysis, the inevitable result of such analysis is that any product with DVI is automatically classified in a dutiable heading, regardless of other objective characteristics it may have.

⁷²U.S. First Submission, para.130; Exhibits US-50 and US-78.

⁷³Statement of the European Communities at the December 11, 2006 meeting of the Dispute Settlement Body, WT/DSB/M/223, para. 8 (reporting that "[t]he EC was already in compliance with the Panel's finding on the tariff classification of LCD monitors with DVI... Uniform classification of this product in the EC was ensured *inter alia* by the adoption of Commission Regulation 217[1]/2005, which had been followed by the repeal of the Dutch Decree and the German Binding Tariff Information (BTI) referred to in the Panel report in support of the Panel's findings of violation. Moreover, the Commission had prepared an Explanatory Note on the classification of LCD monitors, which would be published before the end of the year").

63. Likewise, with respect to product (b), based on the CN, in conjunction with the STB CNEN, the evidence demonstrates that EC customs authorities would in all cases classify the device in question in heading 8521 90 00, subject to a 13.9% duty, for the simple reason that it has a hard drive.⁷⁴

Could the complainants indicate how they have classified such products pursuant to and since the ITA?

64. U.S. classification of product (a) would depend on its physical characteristics as a whole. Unlike EC customs authorities, U.S. Customs and Border Protection (CBP) does not treat DVI as dispositive of classification. Depending on its physical characteristics, the product may be classified in a range of headings, including heading 8471. With respect to product (b), CBP would classify a set top box with a communication function either in duty-free heading 8525.50.10 or in duty-free heading 8528.12.92, regardless of whether it also has a hard disk.

III. MFMs

Q24. (Complainants) The complainants claim that the following four measures result in the denial of duty-free treatment to certain ADP and non-ADP MFMs: (i) Commission Regulation 517/1999, (ii) Report of Conclusions of 360th meeting of the Custom Code Committee, Tariff and Statistical Nomenclature Section, TAXUD/555/2005-EN, (iii) Commission Regulation 400/2006 and (iv) Council Regulation 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff (CCT), including all annexes thereto, as amended. The European Communities, on the other hand, considers that the only measure at issue in this dispute regarding these products is Council Regulation 2658/87, as amended. It explains that the first three measures cited above are no longer applicable as a result of the EC's implementation of the HS 2007. Do you agree? If not, please explain how the first three measures cited above are still applicable.

65. No. See response to Question 18.

Q25. (Complainants) In describing non-ADP MFMs, the three complainants indicate that these apparatus have no connectivity to a computer, including through a computer network, but rather connect to a telephone line. On the other hand, the European Communities argues that it currently provides duty-free treatment, inter alia, to (i) non-ADP MFMs without a copy function (under CN 8443 31 99); (ii) non-ADP MFMs with a copy speed of less than 12 monochrome pages per minute (under CN 8443 31 10); and (iii) non-ADP MFMs that do not use an electrostatic print engine (under CN 8443 31 99). All these CN codes fall under HS2007 Subheading 8443.31 which are, by

⁷⁴See U.S. First Submission, paras. 90-97; Exhibit US-28.

definition, apparatus "capable of connecting to an automatic data processing machine or to a network". In response to an oral question posed by the Panel during the first substantive meeting, the European Communities clarified that, for the purposes of that Subheading, a connection over a telephone line is considered a connection over a network. In the light of the above:

(a) Do you agree with the assertion by the European Communities that a connection over a telephone line is also a connection over a network? If not, how do the complainants then consider that the tariff treatment described above violates Articles II:1(a) and II:1(b) of the GATT 1994? In other words, can you explain this claim in relation to EC concessions regarding non-ADP MFMs considering that the above codes pertain to products which are "capable of connecting to an automatic data processing machine or to a network"?

66. Through its measures (including the EC CN), the EC imposes duties of 6% on non-ADP MFMs capable of reproducing more than 12 monochrome pages per minute, that use an electrostatic print engine. This includes devices that are "facsimile machines" within the meaning of the EC Schedule of Concessions (which, it may be recalled, are based on HS 1996 nomenclature, not HS 2007 nomenclature). The fact that the EC treats the connection over a telephone line as a connection over a network does not mean that it accords duty-free treatment to all such devices, or indeed to all devices covered by the duty-free obligations in its Schedule.

(b) Would wireless networks also be covered within the notion of a network?

67. In light of the HS 2007 amendments, the United States would consider a wireless network to be a "network" within the meaning of the phrase "capable of connecting to an automatic data processing machine or to a network" as used in HS subheadings 8443.31 and 8443.32.

Q26. (All parties) Did the multifunctional machines at issue in this dispute exist, or were they contemplated at the time of the ITA negotiations? Please provide evidence to substantiate your response.

68. Multifunctional machines existed at the time the ITA was being negotiated. In fact, MFMs were introduced well before the ITA, as evidenced, for example, by industry brochures

issued at the time describing products available on the market.⁷⁵ Furthermore, EC customs authorities issued rulings on MFMs prior to the conclusion of the ITA.⁷⁶

Q27. (United States) In its first written submission (paragraph 78), the United States mentions that the page-per-minute criterion was established in the 2005 Customs Code Committee Statement as "the key criterion" for determining the duty treatment of the MFMs in question. Later, the United States refers to this criterion in absolute terms when it states that this would mean that MFMs exceeding the established output speed "would per se be excluded from duty-free treatment." (paragraph 148). Could the United States explain whether it considers the page-per-minute criterion as one among other criteria, or whether it is the sole criterion, that would automatically change the classification of the product concerned?

69. For MFMs with an electrostatic print engine that can connect to a computer, the page per minute criterion automatically results in classification in a dutiable heading. For MFMs with an electrostatic print engine that cannot connect to a computer, all such devices are automatically classified in a dutiable heading, without regard to print speed. Thus, the page per minute criterion automatically results in the imposition of duties on a large share of MFMs.

Q28. (United States and Chinese Taipei) Regarding a certain comment from the WCO Secretariat:

(a) (United States) The United States quotes from WCO document NC0335E1 (paragraphs 29-30), which contains a Note from the US Customs, as if those statements were instead made by the WCO Secretariat. Please explain why you consider that such document should be characterizes in this way (see, e.g. United States first written submission, footnote 222 to paragraph 158 and Exhibit US-91).

70. The United States inadvertently submitted WCO document NC0335E1 as Exhibit US-91. The correct exhibit is WCO document NC0300E1.⁷⁷ In that document, the Secretariat of the WCO concluded that "multifunction digital copiers do not meet the terms of heading 90.09 and,

⁷⁵See e.g., Brochures for Brother MFC-4000 and MFC-4500 (describing MFC-4500 as winner of the June 1995 PC Editor's Choice award) (Exhibit US-105). The MFC-4000 was introduced at least a year prior to the introduction of the MFC-4500.

⁷⁶See e.g., UK64190 (January 1, 1996), NL66265 (March 11, 1996), NL 19970404-564-0029-0 (May 2, 1997), NL 19970404-564-0028-0 (May 2, 1997) (Exhibit US-106).

⁷⁷WCO Secretariat, Classification of Multifunctional Digital Copiers, NC0300E1 (26 October 2000) ("WCO Secretariat Report on MFMs") (Exhibit US-107).

as such, are not classifiable in that heading.”⁷⁸ The Secretariat based its conclusion on a number of factors, including a careful analysis of the physical characteristics of digital copiers in relation to the text of the heading, the development of the digital copier from the printer, and its observations regarding the likely use of such devices. For example, regarding the origins of multifunction digital copiers, the Secretariat noted that:

[R]ecent developments in information technology — particularly in the processing of digital data – have made it possible for manufacturers to enhance the capabilities of ADP printers. ... When a digital scanner is added to the printer, a “hard copy” document can be converted into digital form, and transmitted to other parts of the ADP system or network. Where the scanner is used in tandem with the print engine, the printer can print single or multiple documents from the scanned data without multiple passes by the scanner, effectively *mimicking* the function of “photocopying” through the processing of digital data.”⁷⁹

71. The Secretariat additionally observed that “It is unlikely...that any purchaser seeking scanning or photocopying capability outside of an ADP machine or system would purchase a digital multifunction copier; dedicated standalone scanners and photocopiers having similar output speeds are available in the marketplace at for lower prices....ADP printing remains the primary design feature and intended use of these goods. The mere fact that a facsimile can be used to make digital copies does not render it, in the Secretariat’s opinion classifiable as a photocopier.”⁸⁰

72. The United States regrets any inconvenience caused by the inadvertent submission of the incorrect exhibit and thanks the Panel for the opportunity to provide these clarifications.

Q29. (All parties) The "2000 WCO Secretariat Comments" set out in Exhibit JPN-10 states in paragraph 36:

"Finally, the Committee may also come to the view that the digital process is a further technological development of the 'photocopying' process. If this were the case, then classification in heading 90.09, by application of GIR1 and 3(b), would seem to be appropriate. The Secretariat would point out that, in such a case, it would be necessary to view the scanning and printing functions as being combined to form the photocopying function and that this photocopying function would then predominate over the 'faxing' function."

⁷⁸WCO Secretariat Report on MFMs, para. 27.

⁷⁹WCO Secretariat Report on MFMs, para. 16.

⁸⁰WCO Secretariat Report on MFMs, para. 23.

Could the parties please comment on this statement in general, and specifically the part that says "digital process is a further technological development of the 'photocopying' process"?

73. The Secretariat's observations in that paragraph pertain to its assessment of the reasoning the Committee would need to follow were it to conclude that devices could be classified in heading 90.09. As is evident from the Secretariat's statements elsewhere in the report, it *did not* agree with that reasoning. Indeed, in paragraphs 16 and 20, the Secretariat describes the evolution of the digital copier from the *printer*. In paragraphs 12-14, the Secretariat explains how the scanner and print engine in a digital copier do not operate in the same fashion as a photocopier. In paragraph 22-23, the Secretariat notes that the bulk of the cost of a multifunctional digital copier is attributable to the printing component, and that its intended use is mainly for printing. Finally, in paragraph 27, the Secretariat states that it "would conclude that multifunction digital copiers do not meet the terms of heading 90.09 and, as such, are not classifiable in that heading."

Q33. (Japan) In paragraph 114 of its first written submission, Japan states that "digital copiers are often described as 'scan to print' technology". Please provide evidence of this statement?

74. Exhibit US-55 describes the "scan to print" process as follows: "Digital copiers work like a computer document scanner; they store the data as a file that can then be reprinted repeatedly, altered, or saved. ...The printing mechanism of digital copiers acts like a modern laser printer".⁸¹ Company product manuals also use the "scan to print" terminology.⁸²

Q35. Regarding the relevance of the language of the HS Explanatory Note 1996 and HS Explanatory Note 2007 to the question as to whether the notion of "digital copying" is or not included in that of "photocopying":

(a) (European Communities) Japan notes that because the explanation of "indirect process" is the same in the HS Explanatory Note 1996 and HS Explanatory Note 2007 (first written submission, footnote 79 to paragraph 162), which proves that if the intention was to include "digital copying" within the meaning of "photocopying" the latter HS Explanatory Note would certainly have taken this into account. Please comment on this statement.

⁸¹Exhibit US-55 (How Digital Copiers Work).

⁸²See Exhibit US-108 (Xerox product manual describing a product with "scan-once-print-many technology and advanced scanning functions").

(b) (Complainants) The European Communities states in paragraph 384 of its first written submission that the HS Explanatory Note 1996 "does not mention digital photocopiers [...] for the simple reason that those photocopiers did not exist at the time when the Explanatory Note was drafted." Please comment on this statement.

75. As the United States has noted, the term “digital *photocopier*” is a misnomer. Insofar as the EC is referring to digital copiers, even if it is true, as the EC contends, that the language in the HS Explanatory Note dates to as early as 1966, this begs the question of whether the ordinary meaning of the provision in question covers the devices at issue in this dispute. As complainants have argued, the text of the concessions for 8471.60 and 8517.21 cover multifunction digital machines; neither the text of the heading 9009, nor the HS material associated with that heading (including the explanatory note) support the conclusion that multifunction digital machines are covered by it. Furthermore, with respect to the Explanatory Note, in editions of the HS that were prepared after digital copiers were prevalent on the market, parties to the HS (including the EC) did not modify the language in the Note in order to cover digital copiers.

Q37. (Complainants) Do the complainants agree with the following European Communities statement: "[T]he issue to be decided by the Panel is whether the MFMs currently covered by CN 8443 31 91 fall within the concessions provided in the EC Schedule for the various CN codes of Subheading 8741 60 00 and for CN 8517 21 00 or, instead, within the concession for CN 9009 12 00." (European Communities first written submission, paragraph 356)?

76. The issue for the Panel to decide is whether the EC measures result in the application of duties to multifunctional digital machines which are “input or output units” or “facsimile machines”, based on the ordinary meaning of those terms, in context and in light of the treaty’s object and purpose, and as a result are inconsistent with GATT Article II:1(a) and (b). The EC’s characterization of the issue — including its reference to *CN codes* rather than the concessions in its Schedule (contained in the product descriptions, which in turn are associated with HS1996 tariff numbers not CN codes) — belies an attempt to reframe the issue as one of classification rather than tariff treatment. As the United States explained in its First Submission, Members’ WTO Schedules of Concessions describe the *tariff treatment* Members must accord to products. Those concessions are to be interpreted using the principles of treaty interpretation reflected in the Vienna Convention. While the concessions often use HS terminology, the HS does not contain obligations with respect to tariff treatment, nor can it serve as a basis to add to or diminish the rights and obligations provided in the covered agreements.⁸³ Moreover, the CN is

⁸³U.S. First Submission, para. 24; *see also* *China – Auto Parts (U.S.) (Panel)*, para. 7.188 (“[E]ven if we were to base our ruling in the present section of these Reports on the alleged rights under the HS, which we are not, we would be guided by our duty not to ‘add to or diminish the rights and obligations provided in the covered agreements.’”) (citing DSU art. 3.2).

the EC's domestic tariff Schedule — it is a measure at issue, not the concession to be interpreted.

41. (All parties) Why was "scanning" not included in the new functions merged in HS2007 Subheading 8443 31? Is it because it is a necessary part of the "copying" function referred to in the heading?

77. The term "scanning" was not added to the HS2007 description contained in heading 84.43 or subheading 8443.31, as scanners are separately provided for under heading 84.71. Under the HS2007 text, a product could not be classified as a facsimile machine or as a device of subheading 8443 31 without the inclusion of a scanner as the scanner is the input device necessary for these products to operate.

43. (All parties) Assuming the panel were to find that "digital copying" falls within the meaning of "indirect process photocopying", what would be the relevant concession in the EC schedule for a "digital copying machine" using an engine other than an electrostatic print engine (for example, an inkjet printer), having no connectivity to a computer or to a network and no facsimile function? Would it be covered by the European Communities' concessions pursuant to the ITA? If not, what would be its bound duty?

78. It may be noted that the product described (an inkjet device without connectivity to a computer or network or a facsimile function) does not appear in fact to exist or to have ever existed, and therefore it is difficult to provide definitive views on which concession would apply. That said, if the panel accepted the view that "digital copying" falls within the meaning of "photocopying", and that devices operating with an electrostatic print engine fall within the meaning of "indirect process" photocopying (and that the devices "incorporat[e] an optical system"), the device in question would likely meet the terms of the tariff concession for "other photocopying apparatus, incorporating an optical system" of subheading 9009.21. This product would be covered by the EC's concessions pursuant to the ITA, and its bound duty rate would be 0%. The panel's question also illustrates the fallacy of the EC's position even from a customs classification perspective, insofar as the EC focuses on the technology employed by the copier's print engine (relevant only at the 6-digit subheading level) as opposed to the terms of the heading at the 4-digit level. The EC first examines a 6-digit provision, before examining whether it meets the terms of the 4-digit heading text, contrary to GIR 1.

44. (All parties) Assuming the Panel were to find that "digital copying" does not fall within the meaning of indirect process photocopying of 9009.12, what would be the relevant concession in the EC schedule for a "digital copying machine" using an electrostatic print engine, having no connectivity to a computer or to a network and no facsimile function? Would it be covered by the European Communities' concessions pursuant to the ITA? If not, what would be its bound duty?

79. A stand-alone digital copier that is not connectable to an ADP machine would likely fall within the description of “other office machines” associated with tariff lines contained in heading 84.72 of the EC’s Schedule, regardless of the technology employed by its print engine. Within heading 84.72, the product would likely fall within the residual category, 8472.90.90, which is not covered by the EC’s concessions pursuant to the ITA. The EC’s bound duty for goods of subheading 8472.90.90 is 2.2%.

45. (Complainants) Do the complaining parties consider that the European Communities has a concession on the indirect process photocopiers in 9009.12 and that the bound duty is 6%?

80. Yes. It should be noted of course that the complainants are not in this proceeding claiming that the EC has breached that concession. The concessions that the complainants consider the EC to have breached are those contained in the descriptions associated with tariff lines 8471.60 and 8517.21, respectively.

IV. FLAT PANEL DISPLAY DEVICES

Q46. (All parties) The Panel notes HS96 Subheading 8531 90 in Attachment A, Section 1 of the ITA. Is the scope of products covered by this Subheading limited by the size of the "indicator panel" incorporating an LCD? Could an LCD flat panel display device be an "indicator panel" under this code? Would it make a difference if these displays could connect to a device other than a computer?

81. Heading 85.31 provides in relevant part for: “Electric. . . visual signaling apparatus (for example, . . . , indicator panels . . .)” An indicator panel incorporating a liquid crystal device is covered under subheading 8531.20⁸⁴ without regard to size. An LCD flat panel display device could be an “indicator panel” of subheading 8531.20. The ability of the device to connect to other devices would not be relevant to determining whether it is covered by the description associated with this subheading.

Q47. (All parties) Does the European Communities have an ITA-related concession on “video monitors” and if so what is the applicable bound duty?

82. The EC concession on video monitors is contained in the description associated with subheading 8528.21. The bound rate is 14%. Of course, it should be noted that complainants are not contesting in this proceeding the EC’s treatment of video monitors, but rather “flat panel

⁸⁴We understand this question to refer to subheading 8531.20 (subheading 8531.90 pertains to “parts”).

display devices for products falling within” the ITA, within the meaning of the Attachment B headnote to the EC’s Schedule.

Q48. (Complainants) The European Communities suggests that the complainants have limited the scope of their arguments to flat panel LCD displays with a DVI interface that may be used with both automatic data-processing machines and other sources. Could the complainants please clarify if this is the case? If not, what is the scope of the product the complainants consider at issue in this dispute (as pertains to flat panel display devices)? Please explain.

83. The United States has challenged the consistency of the measures identified in its request for consultations and request for establishment of a panel with the EC’s concessions. The United States has identified at least two types of flat panel display devices that are affected by the EC measures: (1) flat panel display devices with a DVI interface (whether or not the product can be used with devices other than an automatic data processing machine);⁸⁵ and (2) flat panel display devices that are not “solely” for use with an ADP machine, but which are nonetheless “for” an ADP machine.⁸⁶

Q49. (All parties) Does the product at issue also include flat panel display devices that have an HDMI interface? Would these products be treated differently from those with a DVI interface? Please explain.

84. As explained in the U.S. First Submission, the EC measures in question would exclude all flat panel display devices from receiving duty-free treatment based on the mere fact that they are capable of connecting to a device other than a computer (whether through an HDMI interface or another technology).⁸⁷ Any such device would be subject to duties, and thus, in this respect, they would be treated no differently than a product with a DVI interface.

Q51. (All parties) Do the parties consider that both finished and semi-finished flat panel display devices are at issue in this dispute?

85. No. This dispute concerns finished flat panel display devices only.

Q52. (Complainants) The European Communities comments, "it is not clear to the European Communities whether the complainants wish to interpret the exclusion of video monitors and televisions to be limited to only those functioning with the CRT

⁸⁵See e.g., U.S. First Submission, paras. 129-131.

⁸⁶See e.g., U.S. First Submission, paras. 132-134.

⁸⁷U.S. First Submission, paras. 132-134.

***technology" see European Communities first written submission, paragraph 131).
Could the complainants comment in this regard?***

86. The EC is referring to a provision in Attachment B regarding CRT monitors, which after describing the CRT monitors that are covered by the concession, states that “This agreement, therefore, does not cover televisions.” The statement is expressly tied to the CRT monitors concession only, and cannot be read into other provisions in Attachment B to narrow the scope of other concessions at issue (and it may be noted, refers to “televisions”, not to “video monitors”). Regarding the “exclusion of video monitors and televisions,” as the United States has noted, whether a device on which one can watch television or video is covered by a particular concession depends on the terms of that concession. If a device is a “flat panel display device for products falling within” the ITA, it is covered. If it is not, and if it is not covered by any other description in the ITA, then it may not be covered. There is simply no basis to read additional limitations into the concession for flat panel display devices that do not exist in the text of that concession.

Q54. (All parties) We note that the concession in the EC Schedule concerning flat panel display devices added the word "devices", which the parties seem to agree was the result of an agreement amongst the ITA Participants. In this regard, could the parties describe what was, in their opinion, added by this word and what was the purpose of such addition? Moreover, is there a reason why the additional word was not added to the other references to flat panel display that are found in other product descriptions (e.g. ex 8479 89 and ex 8543 30, both described as "Apparatus for wet etching, developing, stripping or cleaning semiconductor wafers and flat panel displays")

87. The insertion of the term “devices” was the result of a technical clarification proposed by Switzerland shortly after the ITA was concluded.⁸⁸ If anything, the technical clarification simply makes clear that a device with a flat panel display – *i.e.*, the finished product (monitor) – and not just the display itself, is covered by the concession. The available documentation in connection with conclusion of the Agreement does not indicate why the word was not added to the other references noted.

***Q55. (All parties) The United States notes in footnote 70 of its first written submission that:
"Shortly after the ITA was concluded, participants approved a handful of technical clarifications, before the submission of implementing schedules. Among these technical clarifications were two changes to the flat panel display device language: the addition of the term 'devices' and the addition of a reference to***

⁸⁸WT/MIN(96)/16/Corr.1 (Exhibit US-36).

'Vacuum-Fluorescence' technology. See WT/MIN(96)/16/Corr.1 (13 October 1997) (Exhibit US-36)". Could the parties please refer to the legal standing of the document submitted by the United States in Exhibit US-36.

88. The document contains technical changes agreed upon by Ministers and thus reflects a consensus to correct the legal text of the ITA as indicated. As such, the ITA should be read with the changes indicated therein.

Q56. (All parties) Does the European Communities have an ITA-related concession on "video monitors" and if so what is the applicable bound duty?

89. See response to Question 47.

Q57. (Complainants) We note that in paragraph 301 of its submission Japan, bearing in mind the technological context, considers that the word "output" should be defined as "an electrical signal delivered by the computer to which the 'output' unit has been connected." Would this definition exclude other means of delivering the signal from the computer to the "output unit" (e.g. wireless signals)?

90. No. The definition that Japan paraphrases is from the New Shorter Oxford English Dictionary, which defines “output” in the most relevant context, as “an electrical signal delivered by or available from an electronic device.”⁸⁹ Wireless signals are electro-magnetic signals. Japan (and the United States) also refer to the definition of “output unit” contained in the 1994 McGraw-Hill Dictionary of Scientific and Technical Terms, which defines an “output unit” as a device that “unit that delivers information from a computer to an external device or from internal storage to external storage.”⁹⁰ These definitions do not support the conclusion that a device is excluded if it wirelessly sends or receives data to or from a computer. Likewise, the definition of “unit” contained in note 5(B-C) to Chapter 84 of HS96 does not exclude devices that receive signals wirelessly, but rather simply provides that a unit must be, among other things, “connectable” to a CPU and able to accept or deliver data in a form which can be used by the system.

Q58. (Complainants) Is it the complainants' argument that any machine or apparatus capable of connecting to a computer should be considered a "unit" under Subheading 8471.60 including, for example, a computer guided airplane or a TV that can connect to a computer? If not, what would be the criteria for considering a device a "unit"?

⁸⁹Japan First Submission, para. 301 (citing Exhibit JPN-11).

⁹⁰Exhibit US-83.

91. In previous reports, for the purpose of interpreting the text of a particular tariff commitment, the Appellate Body has stated that Harmonized System nomenclature may provide additional relevant context. Note 5(B) to Chapter 84 states that, for a product to be considered an input or output unit of an ADP machine, the machine or apparatus must be (a) of a kind solely or principally used in an ADP system, (b) connectable to the CPU either directly or through one or more units, and (c) able to accept or deliver data in a form (codes or signals) which can be used by the system. Furthermore, in accordance with Note 5(E) to Chapter 84, the machine or apparatus may not perform a specific function other than data processing. A computer-guided airplane or a TV that can connect to a computer would not be a “unit” under subheading 8471.60 insofar as they do not satisfy all of the above requirements.

Q63. (All parties) The European Communities argues that the flat panel display devices that the complainants claim are included in the concessions made pursuant to the ITA are "new products" that did not exist at the time of the ITA negotiations. The complainants disagree. What is the factual basis for your views in this regard (e.g. scientific or technical publications, pending or granted patent applications for flat panel display devices, et cetera)?

92. The United States has submitted excerpts from contemporaneous dictionaries describing the products meeting the terms used in the concessions, which demonstrate that the products in question fall within the meaning of the terms of the concession, even as those terms were understood at the time the ITA was negotiated.⁹¹ As such, they are covered by the concessions – they are not “additional products” or “new products”. Other evidence also indicates that LCD flat panel display devices were developed and marketed prior to the ITA.⁹²

Q64. (All parties) The Panel notes that the word "for" is used in numerous Headings and Subheadings of the Harmonized System (e.g. Subheading 3002.20: "Vaccines for human medicine" (emphasis added)) and the descriptions at the 8-digit level of the EC's concessions pursuant to the ITA (e.g. 8529 10 40: "--- Inside aerials for radio or television broadcast receivers, including built-in types" (emphasis added)). Should "for" be interpreted in the same manner in all the phrases where it appears in the EC schedule, including in the description of "flat panel display devices... for products falling within this agreement..."? Please elaborate.

93. “For” may have the same meaning through the EC’s Schedule, with one important caveat: in the context of the Attachment B concession, as all parties recognize, HS nomenclature is not

⁹¹U.S. First Submission, para. 121 and Exhibit US-76.

⁹²E.g., Exhibit US-32, p. 492 (describing simple matrix LCDs used in wordprocessor and early PCs in late 1980s) and 460 (noting revolution of the LCD industry in 1988 and the development of the notebook computer industry).

relevant for interpreting the concession at issue.⁹³ Therefore, to the extent that the meaning of “for” in descriptions associated with particular tariff lines is informed by HS classification rules and related material, it would not necessarily be relevant to understanding the meaning of the Attachment B concession at issue, as the meaning of the term in one context may diverge from its meaning in the other.

Q65. (All parties) For flat panel display devices, measure number 4 in the Panel request specifies Council Regulation 2658/87 and all annexes thereto, as amended. In a footnote it is stated that this includes amendments adopted pursuant to Commission Regulation 1214/2007 (CN 2008). Following circulation of the Panel request, there was an additional update in Commission Regulation 1031/2008 (CN 2009). Do all parties agree that the latter is the relevant measure in terms of this particular measure at issue?

94. As noted, the panel request specifies Council Regulation 2658/87 and all annexes thereto, as amended. Council Regulation 2658/87 is regularly amended and reissued without substantive modification to the provisions at issue as they existed at the time the panel was established. Therefore, Council Regulation 2658/87, including such subsequent amendments, is the relevant measure at issue in this dispute. This includes the amendments effected through Commission Regulation 1031/2008 (CN 2009), which have not changed the essence of the measure at issue.

Q66. (Complainants) With regard to Commission Regulation 1031/2008 (CN 2009), what precise CN code(s) is relevant for the purposes of the flat panel display devices claim? Is it CN 8528 51 00 and CN 8528 59 90?

95. Yes — CN 8528 51 00 is the duty-free code from which the products in question are excluded as a result of the Regulations and FPD CNEN, when read in conjunction with the CN. CN 8528 59 90 is the code in which the products are now classified as a result of these measures. CN 8528 59 90 carries a 14% duty.

Q67. (Complainants) Are the complainants claiming that the European Communities breaches its commitments in relation to:

(a) the requirement in CN 8528 51 00 that in order to receive duty free treatment a monitor has to be "of a kind solely or principally used in an automatic data-processing system of heading 8471"; and/or

⁹³EC First Submission, para. 140 (stating that with respect to Attachment B “the product would still need to be classified as covered by one of the product descriptions, albeit not always with the assistance of the logic contained in the Harmonized System”).

(b) the requirement in CN 8528 51 00 in combination with the explanatory note that "monitors of this Subheading cannot be connected to a video source...fitted with interfaces such as DVI...be used in systems other than automatic data-processing systems."

In other words, is the Panel called upon to determine whether a sole/principal use test is consistent with the European Communities' obligations; or is the Panel only being called upon to determine whether a sole use requirement is consistent with the European Communities' obligations?

96. The Panel is not being called upon to determine, in the abstract, whether a “sole or principal use test” is consistent with the EC’s WTO obligations. Rather, the Panel is being asked whether the EC measures are consistent with those obligations. While the CN states that monitors “solely or principally used in an automatic data-processing system of heading 8471” are entitled to duty-free treatment, as complainants have demonstrated, when read together with the EC Regulations and Explanatory Note, the EC fails to grant duty free treatment to any device that is capable of being used with something other than an ADP system and furthermore denies duty free treatment to any device with DVI, *even those that are solely for use with an ADP system*.⁹⁴ The Panel is being called upon to determine whether these measures result in treatment that accords with the obligation in the EC’s Schedule to provide duty-free treatment to “flat panel display devices for products falling within” the ITA “wherever...classified” and to “input or output units.”

Q68. In its first oral statement (paragraph 16), the European Communities claimed that "the complainants seem to seriously claim that 61 inch flat panel monitors should, apparently generally, be entitled to duty free treatment as computer monitors".

(a) (Complainants) Could the complainants comment on this statement?

97. First we would note that the EC statement is a *non sequitur*, premised on its incorrect view that, to demonstrate that the measures in question are “as such” inconsistent with its obligations, the complainants must demonstrate that 61 inch flat panel monitors should generally be entitled to duty free treatment as computer monitors. As explained in response to Question 22, that is simply not the case.

98. The EC measures provide that *any* device (1) with a DVI interface; or (2) capable of connecting to a device other than an ADP system is subject to duties. As the United States has demonstrated, some devices with DVI and some that are connectable to devices other than ADP systems fall within the meaning of the phrase “flat panel display devices for products falling

⁹⁴U.S. First Submission, para. 130; Exhibits US-78 and US-50.

within” the ITA. As such, they are entitled to duty-free treatment, yet under the EC measures, EC customs authorities necessarily subject them to duties.

99. Of course, as the Panel’s inquiry in part (b) of this question suggests, the EC’s statement belies its apparent disbelief that a 61 inch monitor *could ever* be covered by its obligations — yet size, like the other characteristics the EC measures identify, is not alone indicative of whether a device is *or is not* a *computer monitor*. Indeed, the United States has offered an example of a 30 inch device that *cannot* be used without an ADP system. There is no basis in the text or the record to presume that a particular size monitor could never meet the description of “flat panel display devices” provided for in the EC’s Schedule.

V. SET TOP BOXES WHICH HAVE A COMMUNICATION FUNCTION

Q70. (All parties) During the ITA negotiations, besides "a modem", what were the other technologies available for gaining access to the Internet? If no other technology existed at that time, why was the reference to "a modem" made in the Attachment B description of "Set top box..."? Would it have sufficed to mentioned, e.g. " ... incorporating [a device] for gaining access to the Internet ..."?

100. At the time the ITA was negotiated, several technologies were available for gaining access to the Internet, but all such devices were considered modems. “Conventional” modems converted digital signals to analog signals (and vice-versa) via a Public Switched Telephone Network, but dictionaries at the time recognized the existence of cable modems (which converted signals sent over a coaxial cable), ISDN modems (which converted signals sent over a digital channel on a telephone line), and LAN modems (which converted signals sent over a broadband Local Area Network (LAN)).⁹⁵ There was no reason to use any other word (such as “device”) instead of “modem,” as a modem is by definition, “an equipment that connects data terminal equipment to a communication line.”⁹⁶ The language following the colon (as it appears in Attachment B) clarifies the distinction between set-top boxes with a communication function and set-top boxes that lack a communication function — only those that connect to the Internet are covered, and to be able to connect to the Internet, the STB needs a modem. As explained in response to Question 72, each of the devices in question is a “modem” — it modulates and demodulates signals, enabling the user to access the Internet.

⁹⁵See Exhibits US-67, US-68, and US-72.

⁹⁶Exhibit US-67.

Q72. (Complainants) Could the parties present evidence to demonstrate that ISDN-, Ethernet or WLAN- technologies modulate and demodulate data in a similar fashion by varying characteristics of the electrical signal as the information is transmitted?

101. ISDN. ISDN transmits voice calls (analog signals) and digital signals on a digital channel (communication medium). To communicate information over an ISDN line, the characteristics of the electrical signal are varied. For instance, ISDN uses pulse code modulation to convert analog to digital signals at the transmitter (modulate) and to convert back (demodulate) the digital signals to analog at the receiver. Pulse Code Modulation is one of the most basic digital modulation schemes, where the amplitude of an analog signal is sampled and the sampling is done in uniform intervals (the amplitude is quantized uniformly).⁹⁷

102. Ethernet. Ethernet is a collection of different standards (802.3 IEEE) that specify different Ethernet implementations: Ethernet, Fast Ethernet, Gigabit Ethernet, and 10 Gigabit Ethernet. The 802.3 IEEE standard describes the different Ethernet physical layer implementations. The electrical characteristics of the signal of the communication medium are varied so as to transmit information. For instance, Fast and Gigabit Ethernet use Pulse Amplitude Modulation (PAM),⁹⁸ where at the transmitter side, data (information) are modulated for transmission according to a five-level PAM constellation, and at the receiver side, the received symbols/signals are demodulated to retrieve the data (information) according to the same five-level PAM constellation.

⁹⁷ See ITU-T Recommendation G.711: General Aspects of Digital Transmission Systems. Terminal Equipments: Pulse Code Modulation of Voice Frequencies (Exhibit US-109). Among the international standards that define ISDN, G.711 is the standard for encoding audio on a 64 kbps channel. It is a pulse code modulation scheme operating at a 8 kHz sample rate, with 8 bits per sample.

⁹⁸ IEEE Std 802.3-2005, Section 2, Part 3: Carrier Sense Multiple Access with Collision Detection (SCMA/CD) access method and physical layer specifications (Exhibit US-110), p. 426 (for Fast Ethernet (100BASE-T2), specifying that “Five-level Pulse Amplitude Modulation is employed for transmission over each wire pair (PAM 5 x 5). The modulation rate of 25 MBD matches the MII clock rate of 25 MHz); *id.*, Section 3, Part 3, pp. 149-150 (for Gigabit Ethernet, specifying that “Five level Pulse Amplitude Modulation (PAM5) is employed for transmission over each wire pair. The modulation rate of 125 MBd matches the GMII clock rate of 125 MHz and results in a symbol period of 8 ns.”). PCS and PMA transmit functions are responsible for generating the five-level pulse amplitude modulated signals for transmission at the transmitter side. PCS and PMA receive functions are responsible for demodulating the transmitted signals at the receiver side. *Id.*, Section 2, Part 3, Figure 32-4, p. 428.

103. WLAN. As with other types of modems, a wireless LAN (WLAN) device varies the characteristics of the electrical signal (in this case a radio frequency) in order for information to be transmitted and received. IEEE 802.11 is the standard that describes the physical and medium access control communication layers for wireless LANs. The two most popular versions of the standards are 802.11b and 802.11a. 802.11b supports DBPSK, DQPSK modulation schemes.⁹⁹ For example, when DBPSK is used, the data (information) to be transmitted are modulated at the transmitter side according to a binary constellation. At the receiver side, the received symbols/signals are demodulated according to the same constellation to retrieve the data (information). 802.11a supports BPSK, QPSK, 16-QAM and 64-QAM modulation schemes.¹⁰⁰ For example, when 64-QAM is used, the data (information) to be transmitted are modulated at the transmitter side according to a 64-point constellation. At the receiver side, the received symbols are demodulated according to the same 64-point constellation to retrieve the data (information).

76. (All parties) What is the meaning of the term "incorporating" in the definition of set top box?

104. "Incorporate" means "[c]ombine or unite into one body or uniform substance."¹⁰¹ In the context of the definition of set top box contained in the Attachment B headnote, "incorporate" signifies that the microprocessor-based device must be "combined in one body" with a modem — *i.e.*, the device must itself contain a modem. Ethernet, ISDN, and WLAN devices are modems, yet the EC measures exclude from duty-free treatment any set top box containing these modem technologies.¹⁰²

⁹⁹See IEEE Std 802.11b – 1999. Part 11: Wireless LAN Medium Access Control (MAC) and Physical Layer (PHY) specifications: Higher-Speed Physical Layer Extension in the 2.4 Ghz Band, p. 42 (Exhibit US-111) ("Four modulation formats and data rates are specified for the High Rate PHY. The basic access rate shall be based on 1 Mbit/s DBPSK modulation. The enhanced access rate shall be based on 2 Mbit/s DQPSK. The extended direct sequence specification defines two additional data rates. The High Rate access rates shall be based on the CCK modulation scheme for 5.5 Mbit/s and 11 Mbit/s. An optional PBCC mode is also provided for potentially enhanced performance.").

¹⁰⁰See IEEE Std 802.11a-1999 - Supplement to IEEE Standard for Information Technology, p. 24 (Exhibit US-112).

¹⁰¹Definition of "incorporate" in New Shorter Oxford English Dictionary (3rd ed., 1993), p. 1342 (Exhibit US-113).

¹⁰²See response to Question 72; *see also* U.S. First Submission, paras. 98-105.

77. (Complainants) Could the parties present evidence to demonstrate that ISDN-, Ethernet or WLAN- technologies modulate and demodulate data in a similar fashion by varying characteristics of the electrical signal as the information is transmitted?

105. See response to Question 72.

79. (Complainants) Leaving aside the argument concerning Attachment B of the ITA, should the Panel look exclusively at the language in the European Communities' concession in CN 8528 12 91 as provided for in G/MA/TAR/RS/74? Or should the Panel also look at the full description including the heading and the other eventual applicable sub-divisions up to the 8-digit tariff level? In case of the latter, what would be all those relevant descriptions?

106. As with other modifications to the EC Schedule, the modification contained in G/MA/TAR/RS/74 must be interpreted based on its ordinary meaning in context, and in light of object and purpose. The tariff heading and other associated text in the Schedule are relevant context for interpreting a concession. In this case, heading 8528 provides in relevant part for: "Reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus; . . ."

107. The heading text simply confirms the fundamental inconsistency between the EC's measure and its concession. For a set-top box to be classified in heading 8528, it must first be "reception apparatus for television." The EC does not contest that the devices at issue fall within this description.¹⁰³ The EC claims, however, that a set-top box with a DVD drive or a hard disk drive is excluded because it is performing video reproducing or video recording functions. Yet the heading text provides for reception apparatus for television "*whether or not incorporating ... video recording or reproducing apparatus*". In effect, the CNEN automatically excludes products from the subheading that contain additional features that are specifically listed in the legal text as being allowed within the heading. Thus, the heading text provides even further support for the conclusion that the EC's measure results in tariff treatment contrary to its obligations under its Schedule of Concessions.

80. (Complainants) Why do the complainants refer at times to the phrase "set top box with a communication function" to refer to the EC's product description pursuant to Attachment B of the ITA instead of the actual language appearing in the EC Schedule of concessions, "set top boxes which have a communication function"?

¹⁰³See STB CNEN, p. 8 (Exhibit US-30) ("*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 (subheading 8521 90 00)*") (emphasis added).

108. The phrase “set top box with a communication function” is at times used simply to paraphrase the language associated with the Attachment B headnote; in other cases it used to refer to the concession the EC made in 2000 for “set top boxes with a communication function.” Contrary to the EC’s suggestion, the United States has quoted the EC’s concessions accurately throughout its submission. In those cases in which the phrase is used to paraphrase the concession, it should be noted that the EC *itself* paraphrased the Attachment B headnote language in this fashion when it modified its Schedule in 2000.

109. Finally, as the United States noted in its opening statement during the first panel meeting, the substantive distinction between “with” and “which have” the EC now claims exists is without basis (as the EC itself recognized in 2000). Set top boxes “which have” a communication function are not limited to set top boxes which “only” have a communication function, as the EC suggests. Had the drafters intended to limit the concession in this fashion, they would have done so; the EC is asking the Panel to impute into the Schedule words that are not there.

81. (Complainants) Do the complainants agree with the European Communities' contention that primarily two categories of set top box existed in 1996 in the market: (i) "traditional" set top boxes that permitted viewing television programming (e.g. digital television on analogue television sets, often with a decoder function), and (ii) "Internet on TV" devices (see EC's first written submission, paragraphs 221-223).

110. No. Set-top boxes existed in 1996 that permitted both television programming and Internet access via TV. Such products existed in the marketplace and are clearly distinguishable from “Internet on TV” devices such as WebTV. For example, one set top box was described in 1996 as “respond[ing] to consumers’ desire for a single product that can deliver both video applications and Internet access via PC or TV,” noting that among the services that could be offered would be home shopping, interactive games and distance learning.¹⁰⁴ That product contained a decoder and television receiver as well as a cable modem.¹⁰⁵

111. The “Internet on TV” devices (*e.g.*, WebTV) described by the EC represented a small subset of devices then available that were specifically designed to work with Microsoft TV’s software platform.¹⁰⁶ These devices are not, and never have been, the only devices to fall within the terms of the concession for STBs with a communication function. Indeed, even when introducing the evidence it claims suggests that the concession was limited in this fashion, the

¹⁰⁴Scientific-Atlanta 1996 Annual Report, p. 16 (Exhibit US-114).

¹⁰⁵Explorer 2000 Installation and Operation Guide, pp. 1-2 and 1-4 (Exhibit US-115).

¹⁰⁶Gerard O’Driscoll, *The Essential Guide to Digital Set-Top Boxes and Interactive TV*, (2000), p. 91 (Exhibit US-116).

EC acknowledges that its own evidence is of limited utility in understanding the concession — perhaps because it realizes that its position accords neither with the plain text of the commitment nor the state of the market in 1996.¹⁰⁷

82. (Complainants) Do the complainants consider the tables presented by the European Communities in paragraphs 243 and 246 of its first written submission to be accurate? Are the European Communities' conclusions at paragraphs 244 and 247 reflective of the Participants' understanding of the scope of intended coverage of the ITA at the time of negotiations? Please elaborate.

112. While the tables in paragraphs 243 and 246 of the EC First Submission appear to accurately reflect those contained in document G/IT/2/Add.1 and G/IT/2/Add.1/Rev.1, respective, the EC's attempt to use this material to prove that its "understanding of the product was shared by an overwhelming majority of the ITA parties" appears to completely miss the point of Attachment B concessions and again reflects an attempt to read the headnote out of its Schedule entirely. First, contrary to what the EC suggests, participants "understanding of the product" is reflected in the text of the concession to which they agreed — any attempt to divine the parties' "understanding of the product" must begin with the text of the concession. For purposes of the Attachment B headnote, that concession extends to set top boxes which have a communication function "wherever...classified."

113. Second, as the ITA makes clear, participants recognized that they would not necessarily all classify the Attachment B products in the same subheadings in their national law, yet they wanted to ensure duty-free treatment *regardless* of classification. Thus, the fact that some governments happened to be classifying products differently at the time the ITA was concluded indicates nothing about the scope of the concession, and the fact that others classified the products in the same tariff lines used by EC customs authorities does not mean that these lines *limit* what governments understood to be the product covered by the concession. The product is defined in Attachment B; as explained in response to Question 7, the tables submitted by participants are illustrative of where the products were at the time classified, but cannot be read as the EC claims as "exhaust[ing]" the headnote. The headnote requires duty free treatment "wherever...classified" to products identified in Attachment B, and thus, regardless of where it classified the product in 1997 or classifies the product today, the EC must accord duty-free treatment to products meeting the Attachment B description — including the set top boxes at issue in this dispute.

¹⁰⁷EC First Submission, para. 234 ("the EC *has not presented the above documents necessarily to offer arguments* based specifically on one or other product description [regarding WebTV] which was used at a given time") (emphasis added).

85. (All parties) In the European Communities' oral statement (paragraph 31), the EC uses the example of set top boxes with hard disks of 1, 2 or 5 GB as products that were classified as set top boxes receiving duty-free treatment. As technology advances, and emails (potentially with large attachments) increase in size, how would the treatment of products based on the capacity of hard drives remain appropriate? What if, for example, e-mail attachments contain large High Definition videos that are stored in the hard drive of the set top box to be watched later?

114. As a threshold matter, it should be noted that the EC has not substantiated its assertion that its customs authorities accord duty free treatment to set top boxes with hard disks of 5 GB or less with a single decision of any of its customs authorities. That said, assuming that this is the approach now used by EC customs authorities, as the question suggests, just as the presence or absence of a hard disk provides no indication of whether a set top box meets the concession in the Attachment B headnote, the size of a hard disk cannot be used to distinguish between “set top boxes which have a communication function” and those that do not. Even today, free Web-based email accounts available from various service providers offer *at minimum* 10 GB of storage space.

115. More fundamentally, the fact that a set top box with a communication function may also be used to record video does not exclude it from the text of the concession. A set top box which has a communication function may serve other purposes and nonetheless fall within the concession — indeed, the EC acknowledged as much when it modified its Schedule to add a tariff subheading in which it classified STBs capable of receiving television signals to the list of tariff subheadings associated with the Attachment B description of STBs. As the United States noted in its Closing Statement, the EC's emphasis on “functionality” over the text of the concession does not accord with principles of treaty interpretation reflected in the Vienna Convention and would have serious consequences for the ITA as a whole.

87. (All parties) Is it acceptable to interpret a concession as follows: where a subheading does not enumerate or limit the number of functions that may be performed by an apparatus, then the titles do not limit the number of functions that may be performed?

116. For any concession (including those that are not associated with tariff subheadings), the text of the concession, when read using the principles of treaty interpretation reflected in the Vienna Convention, dictates the extent to which the functions a product performs are relevant to determining whether or not a product is covered by a concession.

117. The concession at issue for the Attachment B headnote covers “set top boxes which have a communication function.” Thus, the key questions for purposes of determining whether a product is covered by it are: (1) is the device a set top box?; and (2) does it have a communication function? With respect to the first question, the EC has conceded in its own

measures that devices with hard disks are “set top boxes.”¹⁰⁸ Likewise, with respect to the second question, the EC does not appear to dispute that the devices in question have a communication function, and as explained they have all the attributes enumerated after the colon in the text of the concession.¹⁰⁹ They meet the terms of the concession and thus are entitled to duty-free treatment “wherever...classified”.

88. (Complainants) Are the complainants arguing that the set top boxes in question should receive duty free treatment irrespective of other additional features that they may have?

118. The United States considers that any product meeting the terms of the concession is entitled to duty-free treatment. In this case, the particular “features” that a product may have are only relevant if they permit the conclusion that the product is not a “set top box which has a communication function.” None of the features identified in the EC measures permit the conclusion that the product no longer meets the terms of this concession. For example, a product with a hard disk may nonetheless be a “set top box” (as indeed the EC appears to concede in its measure) and may have “a communication function”. As such, it should be entitled to duty-free treatment.

119. Similarly, the *absence* of a feature is only relevant insofar as it permits the conclusion that a device does not meet the terms of the concession. For example, the EC’s view that the absence of a tuner now excludes certain devices from duty-free treatment (beyond being at odds with its current assertion that *only* devices *without* tuners were initially covered by its concession) does not accord with the terms of the concession itself (which neither require the presence of a tuner nor exclude devices without a tuner).

93. (Complainants) For set top boxes, the Panel request specifies Council Regulation 2658/87 and all annexes thereto, as amended. In a footnote it is stated that this includes amendments adopted pursuant to Commission Regulation 1214/2007 (CN 2008). Following circulation of the Panel request, there was an additional update in Commission Regulation 1031/2008 (CN 2009). Do all parties agree that the latter is the relevant measure in terms of this particular measure at issue?

120. As noted, the panel request specifies Council Regulation 2658/87 and all annexes thereto, as amended. Council Regulation 2658/87 is regularly amended and reissued without substantive

¹⁰⁸STB CNEN, p. 8 (Exhibit US-30) (“*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 (subheading 8521 90 00)”) (emphasis added).

¹⁰⁹U.S. First Submission, paras. 90-108.

modification to the provisions at issue as they existed at the time the Panel was established. Therefore, Council Regulation 2658/87, including such subsequent amendments, is the relevant measure at issue in this dispute. This includes the amendments effected through Commission Regulation 1031/2008 (CN 2009), which have not changed the essence of the measure at issue.

94. (Complainants) With regard to Commission Regulation 1031/2008 (CN 2009), what precise heading is relevant for the purposes of the complainants' claims regarding set top boxes? Is it CN 8528 71 13 and CN 8521 90 00?

121. CN 8528 71 13 is the duty-free code from which the products in question are excluded as a result of the STB CNEN, when read in conjunction with the CN. CN 8521 90 00 is the code in which products with hard disks are now classified as a result of these measures. This code carries a 13.9% duty. In addition, CN 8528 71 90 is the code in which products that do not have a tuner and communicate through Ethernet, WLAN, or ISDN modems are classified; products with these types of modems and a tuner would be classified in CN 8528 71 13. Both codes carry a 14% duty.