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 SECOND SUBSTANTIVE PANEL MEETING

July 24, 2009

LIST OF EXHIBITS

EXHIBIT NUMBER	EXHIBIT NAME
133	U.S. ITA Schedule of Concessions
134	Technical Corrections to the Harmonized Tariff Schedule of the United States, 64 Fed. Reg. 32,915 (June 18, 1999)
135	Proclamation 8323 of November 25, 2008, 73 Fed. Reg. 72,677 (Nov. 28, 2008)
136	USITC, Proposed Modifications to the Harmonized Tariff Schedule of the United States (June 2001), pp. 1-8, B-97
137	HS2007 Explanatory Notes for HS heading 84.43
138	HS1996 and HS2007 GIR3 and Explanatory Notes
139	HDMI Search Results
140	Rafael Osso, Handbook of emerging communications technologies, p. 91
141	Definition of "ISDN" in McGraw-Hill Dictionary of Scientific and Technical Terms (6th ed. 2003), p. 518

TABLE OF REPORTS CITED

China – Auto Parts (U.S.) (Panel)	Panel Report, *China – Measures Affecting Imports of Automobile Parts*, WT/DS340/R, adopted 12 January 2009, as modified by the Appellate Body Report, WT/DS340/AB/R
China – Auto Parts (AB)	Appellate Body Report, *China – Measures Affecting Imports of Automobile Parts* WT/DS339/AB/R, WT/DS340/AB/R, WT/DS340/AB/R, adopted 12 January 2009
Dominican Republic – Cigarettes (AB)	Panel Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005
EEC – Apples (GATT Panel Report)	GATT Panel Report, *European Economic Community – Restrictions on Imports of Apples*, BISD 36S/135, adopted 22 June 1989
EC – Bananas III (Article 21.5) (US) (Panel)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States*, WT/DS27/RW/USA, adopted 22 December 2008, as modified by the Appellate Body Report, WT/DS27/AB/RW/USA
EC – Bananas III (Article 21.5) (US) (AB)	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by the United States*, WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008
EC – Bananas III (AB)	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997
EC – Biotech	Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, adopted 21 November 2006

EC – Chicken Cuts (Panel)	Panel Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/R, WT/DS286/R, adopted 27 September 2005, as modified by the Appellate Body Report, WT/DS269/AB/R, WT/DS286/AB/R
EC – Chicken Cuts (AB)	Appellate Body Report, *European Communities - Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005
EC – Computer Equipment (Panel)	Panel Report, *European Communities – Customs Classification of Certain Computer Equipment*, 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
EC – Computer Equipment (AB)	Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998
EC – Customs Matters (Panel)	Panel Report, *European Communities – Selected Customs Matters*, WT/DS315/R, adopted 11 December 2006, as modified by the Appellate Body Report, WT/DS315/AB/R
EC – Customs Matters (AB)	Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006
US – Certain EC Products (AB)	Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R, adopted 10 January 2001
US – Underwear (AB)	Appellate Body Report, *United States – Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/AB/R, adopted 25 February 1997

I. THE INFORMATION TECHNOLOGY AGREEMENT

Q100. (All parties) Where do the parties find the requirement for including the headnote in Members' Schedules? Is this requirement in the ITA itself or was it agreed upon subsequently? Please explain.

1. ITA participants incorporated the headnote into their Schedules as part of the process of implementing their ITA concessions with respect to Attachment B. The precise contents and format of the headnote, however, were not agreed upon until after the ITA was concluded. In this regard, paragraph 2(b) of the ITA provides, *inter alia*, that pursuant to the modalities set forth in the ITA Annex, each participant "shall bind and eliminate customs duties and other duties and charges of any kind...with respect to...all products specified in Attachment B to the Annex to this Declaration, whether or not they are included in Attachment A..."[1] Under the Annex, participants were required to submit a document containing "the details concerning how the appropriate treatment will be provided in its WTO schedule of concessions" as well as a list of "headings involved" for Attachment B products.[2] As the Annex suggests, the "details" of how the tariff treatment required by the ITA would be provided in participants' Schedules of Concessions were to be resolved after the ITA was concluded — the headnote was one of these details. Notably, every ITA participant included such a headnote in their modified schedule.

2. Participants' proposed modifications to their Schedules — including the EC's headnote — were reviewed and approved by other participants, and the modifications were then submitted and certified in accordance with the procedures outlined in the Decision of 26 March 1980 on Procedures for Modification and Rectification of Schedules of Concessions.[3] Thus, the headnote, along with the rest of the modifications to the EC Schedules, became WTO obligations of the EC pursuant to Article II:1(a) and II:1(b) of the GATT 1994.

Q101. (All parties) What does the term "trade regime" in the preamble of the ITA mean?

3. The term "trade regime" appears in paragraph 1 of the ITA, which states that "Each party's trade regime should evolve in a manner that enhances market access opportunities for information technology products." A "regime" is a "set of conditions under which a system ... is maintained."[4] Another dictionary defines "trade regime" as a set of "rules and practices prevailing in a country's international trade relationships."[5] Thus, "trade regime," as used in this

---

[1]ITA, para. 2(b) (Exhibit US-1).

[2]ITA, Annex (Exhibit US-1).

[3]*See* U.S. First Written Submission, paras. 21-32.

[4]Definition of "regime" *in* New Shorter Oxford English Dictionary (1993), p. 2527.

[5]Alan Deardorff, Terms of Trade: Glossary of International Economics (2006), p. 276.

provision of the ITA, is a term referring to a Member's trade-related laws, regulations, and other conditions for trade.

4. As the United States has explained in its submissions, paragraph 1 of the ITA, as well as the preamble to the ITA, are relevant context and support complainants' interpretation of the concessions at issue in this dispute.[6] Thus, for example, EC measures that impose duties on an STB merely because it uses a particular type of modem or on a flat panel display device merely because it includes a DVI plug, modify conditions for trade in the EC in a manner that does not accord with the positive evolution of ITA participants' trade regimes contemplated by paragraph 1 of the ITA. Likewise, in the ITA's preamble, participants expressed the desire to "achieve maximum freedom of world trade in information technology products" and to "encourage the continued technological development of the information technology industry on a world-wide basis." Singling out arbitrary technical characteristics to deny duty-free treatment to ITA products, as the EC does in its measures, is inconsistent with the ordinary meaning of the concessions in the EC's Schedule, when read in context — in particular in the context of paragraph 1 and the preamble to the ITA — and in light of the object and purpose of the GATT 1994.

> ***Q103. (All parties) What it the relationship between paragraph 2(b) of the ITA and paragraph 2 of its Annex? Within the logic of the ITA as a whole, is there any hierarchy between these two provisions? Should any significance be attached to the fact that, while the former provision does not make any reference to HS headings in connection with Attachment B products, the latter provision does in its chapeau and subparagraph 2(b)(ii)? Can a provision containing modalities to the implementation of an original obligation generate additional obligations beyond those already contained in the provision containing that original obligation?***

5. Paragraph 2 of the ITA states that "pursuant to the modalities set forth in the Annex," participants shall bind and eliminate duties on ITA products.[7] Thus, the relationship between the two provisions is as follows: the Annex, including paragraph 2(b) of the Annex, sets forth modalities for binding and eliminating duties on ITA products, as described in paragraph 2 of the ITA.

6. With respect to products included in Attachment B, paragraph 2 of the Annex states that participants are to "attach an annex to its Schedule including all products in Attachment B" and refers to HS headings in connection with the requirement, as part of this annex, to provide "a list

---

[6] *E.g.*, U.S. First Written Submission, paras. 107-108; U.S. Second Written Submission, paras. 59-62.

[7] ITA, para. 2.

of the detailed HS headings involved for products specified in Attachment B", and the requirement to "specify the detailed HS headings for" Attachment B products.[8] Thus, the requirement that each Member specify the HS headings that it considered applicable at the time was one of the agreed-upon elements in the process of implementing ITA concessions; the obligation contained in the ITA, however, is not limited to Attachment B products classified within those particular HS headings (nor do the modalities provide that the obligation in the ITA to provide duty-free treatment to Attachment B products is limited to those falling within specified HS headings).

7. Agreement text providing modalities could also include additional obligations, such as specific requirements for implementing a particular agreed-upon term. In addition, it should be noted that the complainants claim that the EC has acted inconsistently with obligations contained in its Schedules of Concessions.[9] Complainants have not alleged in this dispute that the EC has breached obligations set forth in paragraph 2 of the ITA or the modalities contained in paragraph 2(b) of the Annex to the ITA, nor could the complainants make such a claim in this proceeding since the ITA is not a covered agreement, and the DSU is limited to covered agreements. As the United States has explained in its submissions, the obligations in the EC Schedule of Concessions include the headnote, which requires the EC to accord duty-free treatment to Attachment B products "wherever...classified."[10]

> ***Q104. (All parties) Paragraph 2(a)(i) of the ITA states that Participants shall "bind and eliminate" duties with respect to all products "classified (or classifiable) with Harmonized System (1996) ('HS') headings". Could the use of the terms "classified (or classifiable)" be seen as an express indication that Participants intended HS classification rules to have an important role in the interpretation of the scope of the concessions made pursuant to the ITA?***

8. Paragraph 2(a) of the ITA states that it pertains to products listed in *Attachment A* to the ITA. The language referring to products "classified (or classifiable) with Harmonized System (1996) ("HS") headings" does not appear in paragraph 2(b), which deals with the elimination of duties on products specified in Attachment B. As complainants have explained, the text of the Attachment B concessions at issue is not derived from HS terminology, and the duty-free

---

[8]ITA, Annex, para. 2.

[9]*See e.g.*, U.S. Answers to First Panel Questions, paras. 1-4.

[10]*E.g.*, U.S. First Written Submission, paras. 84-168; U.S. Second Written Submission, paras. 23-119.

obligation extends to these products "wherever...classified."[11] Thus there is no basis to rely on the HS as relevant context to interpret those concessions.

9. With regard to the role of the HS in interpreting the concessions incorporated into participants' Schedules pursuant to Attachment A, as the United States has explained in its submissions, and has been noted in previous disputes, the HS Convention does not contain obligations with respect to tariff treatment,[12] nor can it serve as a basis to "add to or diminish the rights and obligations provided in the covered agreements."[13] This equally true of the concessions Members made following the ITA. A Member's tariff commitments are set forth in the terms of its Schedule, and therefore the Schedule — not the HS — dictates the nature and extent of those commitments. While the Appellate Body has stated in prior reports that the HS may be relevant context for interpreting HS-derived language used in the description of a tariff concession in a Member's Schedule,[14] the tariff obligation is contained in the Schedule, and the HS cannot be used to add to or diminish that obligation.

> ***Q105. (Complainants) If the Panel were to find that the tariff codes next to the product descriptions in the EC Schedule Attachment B section are "illustrative" only, please explain then how ITA Participants intended to monitor the "phasing out" of the Attachment B products mentioned in Article 2(a)(i) of the Annex? Does the lack of a date in the headnote to the EC's Schedule mean that the Attachment B products were supposed to be fully liberalized from day 1? Please explain.***

10. The ITA provides that participants are to complete the elimination of tariffs on both Attachment A and Attachment B products "through equal rate reductions of customs duties beginning in 1997 and concluding in 2000."[15] As the United States has explained, the tariff codes in the table following the headnote indicate where participants classified Attachment B

---

[11]*E.g.*, U.S. First Written Submission, para. 24; U.S. Second Written Submission, paras. 11-15; U.S. Answers to First Panel Questions, para. 26.

[12]Exhibit US-8, art. 9 ("The Contracting Parties do not assume by this Convention any obligation in relation to rates of Customs duty.").

[13]*See* U.S. First Written Submission, paras. 24-25; *China – Auto Parts (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).

[14]*E.g., EC–Computer Equipment (AB)*, para. 90; *EC–Chicken Cuts (AB)*, para. 199; *China – Auto Parts (AB)*, para. 149.

[15]ITA, para. 2.

products at the time the ITA was concluded. To the extent that these codes accurately captured Attachment B products, the phaseout of duties on Attachment B products would have been reflected in the phaseout for products classifiable in these codes.

11. If Attachment B products were classified by a Member in other codes for which it had not provided a phaseout, the Member would nonetheless be subject to the obligation to eliminate tariffs "through equal rate reductions of customs duties beginning in 1997 and concluding in 2000." Moreover, whatever the phaseout schedule, by 2000, Attachment B products must be duty-free.[16] For example, the U.S. concern with respect to the tariff treatment accorded by the EC to certain set top boxes which have a communication function arose toward the end of the implementation period, and was resolved when the EC eliminated duties on the tariff line in question.

12. As the United States has explained, the concession at issue in this dispute for Attachment B products is the headnote contained in the EC's Schedule.[17] Nothing in the headnote supports the conclusion that the tariff codes identified in the table in the EC's Schedule was intended to be "exhaustive," such that a Member would be entitled to impose duties on a product meeting the Attachment B description merely because it does not fall within a particular code a Member identified at the time as covering the product. As the United States has also explained, this position would render the entire headnote inutile — if participants intended to limit their obligations to individual codes they need only have bound and eliminated duties on products meeting the descriptions associated with those codes.[18] There would have been no need to include the headnote in the EC's Schedule. Indeed, at least one ITA participant (Japan) did not include a table listing specific tariff lines in its Schedule — if ITA participants' obligations with respect to Attachment B products were limited to the tariff codes listed in the table, this would suggest that this Member has no obligations with respect to Attachment B products.[19]

> ***Q106. (United States and Chinese Taipei) During the second substantive meeting, the United States and Chinese Taipei both noted that their national nomenclature had been amended on a number of occasions to take account of instances where the duty-free treatment was not being provided to certain Attachment B products. Please provide concrete examples and evidence to substantiate this statement. Were those modifications to the national schedules introduced in the Attachment B section of your***

[16]ITA, para. 2.

[17]*E.g.*, U.S. First Written Submission, paras. 87-88, 120.

[18]U.S. Answers to First Panel Questions, para. 20; U.S. Second Written Submission, paras. 11-15.

[19]*See* U.S. Answers to First Panel Questions, paras. 15-18 and n.13.

WTO Schedule? Please explain.

13. Since the ITA was concluded, the United States has modified its domestic nomenclature on a number of occasions to ensure duty-free treatment for Attachment B products. For example:

14. "Printed circuit assemblies for products falling within this agreement". Attachment B covers "printed circuit assemblies for products falling within" the ITA. In the table following the Attachment B headnote in its Schedule, the United States listed 39 codes it identified at the time as associated with subheadings including products meeting this description.[20]

15. Among the codes the United States identified in the table following the Attachment B headnote was subheading 8473.30.10 ("printed circuit assemblies for machines of heading 8471"). At the time the ITA was concluded, U.S. Customs classified printed circuit assemblies for PC/TVs in subheading 8473.30 as "parts and accessories of the machines of heading 8471." PC/TVs are products covered by the Attachment B description of "computers", and therefore are "products falling within" the ITA. Thus, printed circuit assemblies for these products are entitled to duty-free treatment "wherever...classified." In 1999, U.S. Customs concluded that these products should be classified in subheading 8528.12, as "[r]eception apparatus for television, whether or not incorporating radiobroadcast receivers or sound or video recording or reproducing apparatus". To ensure the proper duty treatment was maintained, the United States modified its national schedule, creating a duty-free line in subheading 8528.12 covering these products.[21] The United States did not modify its WTO Schedule.

16. The United States made another modification to ensure duty-free treatment for Attachment B printed circuit assemblies in 2008. In 2007, a company informed CBP and USTR that it planned to import a printed circuit assembly for a device that fell within subheading 9030.40, as "instruments and apparatus for measuring and checking, specially designed for telecommunications (for example, cross-talk meters, gain measuring instruments, distorsion factor meters, psophometers)." This product is covered by Attachment A-1 of the ITA,[22] and

---

[20]U.S. Schedule of Concessions, p. 4 (Exhibit US-133).

[21]Exhibit US-134, p. 32,917 ("Proclamation 7011 of June 30, 1997 provided duty-free treatment for the subject PC/TV printed circuit boards (cards). Pursuant to previous rulings, Customs has classified the subject PC/TV cards in subheading 8473.30.40 (now subheading 8473.30.10) as accessories of automatic data processing machines. It has since been concluded, however, that the PC/TV cards should instead be classified in subheading 8528.12.96. This action will continue the duty-free treatment currently provided these products."); *id.*, p. 32,917-918.

[22]ITA, Attachment A-1, p. 11 (Exhibit US-1).

therefore printed circuit assemblies for this product would fall within the Attachment B description of printed circuit assemblies. However, the only relevant code the United States set forth in the Attachment B table in its Schedule was 9030.90.64, which at the time referred to "printed circuit assemblies of instruments and apparatus of subheading 9030.82."[23] This code did not include printed circuit assemblies of subheading 9030.40. Nor did U.S. domestic nomenclature contain a duty-free provision for this product. Because products of subheading 9030.40 fall within the ITA, and because printed circuit assemblies for products falling within the ITA are entitled to duty-free treatment, wherever classified, the United States modified its domestic nomenclature in November 2008, to ensure duty-free treatment was accorded to printed circuit assemblies for goods of subheading 9030.40.[24] The United States did not modify its WTO Schedule.

17. "Paging alert devices, and parts thereof." "Paging alert devices and parts thereof" are covered by Attachment B of the ITA. In the table following the Attachment B headnote in its Schedule, the United States listed 12 codes it identified at the time as associated with subheadings including products meeting this description.[25] Among the codes the United States identified was subheading 8531.80.40 ("Electric sound or visual signalling apparatus...other apparatus...paging alert devices").[26] Following a decision of the WCO Harmonized System Committee regarding the classification of certain simple radio pagers, the United States modified its national nomenclature to create a new duty-free tariff line, 8531.80.00, covering paging alert devices.[27] The United States did not modify its WTO Schedule.

> ***Q107. (All parties) Could the parties please comment on the significance of the following language which appears at the end of paragraph 2(b) of the Annex of the ITA: "Each participant shall promptly modify its national tariff schedule to reflect the modifications it has proposed, as soon as they have entered into effect"? In particular, what is the meaning of the term "proposed"?***

18. "Proposed" refers to the modifications to Schedules of Concessions participants

---

[23]*See* U.S. Schedule of Concessions, p. 58.

[24]See Exhibit US-135, Annex C (adding PCAs "of subheading 9030.40" to description of goods covered by duty-free subheading 9030.90.64, and renumbering tariff line).

[25]U.S. Schedule of Concessions, p. 4.

[26]U.S. Schedule of Concessions, p. 42.

[27]Exhibit US-136, p. 7 and B-97.

circulated to Members in accordance with the chapeau to paragraph 2 of the ITA.[28] After review and approval, these modifications were then submitted and certified in accordance with the procedures outlined in the Decision of 26 March 1980 on Procedures for Modification and Rectification of Schedules of Concessions.[29]

Q108. (All parties) Could the parties identify any particular product narratives in Attachment B under which the participants to the ITA negotiations intended not to take into account technological development, in essence "freezing" the concessions in time?

19. No. The product descriptions cover products meeting the description, whether or not they existed at the time the concession was written.

Q110. (All parties) Could the European Communities update the Panel on the status of being "in the process of repealing or replacing" certain regulations at issue "as appropriate for reasons of legal certainty"? Will the amendment or repeal of these regulations occur prior to the conclusion of this dispute? Also, what are the status of the measures addressed by the Kip and Kamino rulings? The complainants may wish to comment also.

20. As the United States has explained in its previous submissions, the *Kip* and *Kamino* rulings are not themselves measures within the terms of reference of the Panel nor do they modify measures within the Panel's terms of reference. With respect to *Kamino*, the EC has offered no evidence that EC law has changed as a result of the *Kamino* decision, or that complainants' understanding of EC law is no longer accurate following *Kamino*.[30] Contrary to what the EC suggested in its Second Written Submission, the Kamino court did not comment on the CNEN that is before this Panel (which was published in 2006)[31], but rather was addressing the 2004 CNENs (the CNENs that were in effect when the particular importations at issue in the underlying proceeding were made). Likewise, none of the regulations identified by complainants as measures in this dispute were modified as a result of the issuance of the court's opinion — as the United States explained in its previous submissions, all remain in effect.[32] This is equally

[28] *See* U.S. First Written Submission, paras. 21-32.

[29] *See* U.S. First Written Submission, paras. 21-32.

[30] *E.g.*, U.S. Second Written Submission, paras. 73-76.

[31] *See* U.S. First Written Submission, paras. 65-66.

[32] *E.g.*, U.S. Answers to First Panel Questions, para. 45.

true with respect to *Kip*,[33] as indeed the EC conceded in its answers to the Panel's questions following the first meeting with the parties.[34] The fact that the EC asserts that it may modify the measures in question simply demonstrates that the court opinions themselves did not modify the measures, such that the measures as they exist today are no different from the measures as they existed when the Panel's terms of reference were established.

21. Finally, even if the EC were to repeal one or more of the measures within the Panel's terms of reference prior to the conclusion of the dispute, as the Appellate Body has noted on previous occasions, the Panel would not be precluded from making findings and recommendations with respect to those measures. Panels and the Appellate Body have in the past made findings and recommendations with respect to expired measures.[35] The measures in question are within the Panel's terms of reference and as noted, remain in effect. As the Appellate Body observed in *EC–Bananas*, "The DSU nowhere provides that the jurisdiction of a panel terminates or is limited by the expiry of the measure at issue. On the contrary, when the DSU provides for limitations on the authority of the panel in other instances, it does so in express terms."[36] The EC has advanced no credible reason why the Panel in this case should not exercise its authority to make findings with respect to the measures before it, even if the EC were at some late date in this proceeding to decide to repeal the measures in question.

22. As was the case in *EC–Bananas*, even if the EC were to adopt some new measure to modify or allegedly repeal the existing measures just prior to the issuance of the Panel report, such action will have occurred long after the final submissions of the parties have been made, making it difficult even for the parties to address its significance in a fulsome manner.[37] Such a measure would not be within the Panel's terms of reference, nor would it be evidence relevant to the Panel's evaluation of the measures in question as they existed at the time of panel

---

[33]*E.g.*, U.S. Answers to First Panel Questions, paras. 46-47; U.S. Second Written Submission, paras. 105-107.

[34]EC Answers to First Panel Questions, para. 105 (acknowledging that the MFM regulations remain "formally in force" and that the Customs Code Committee opinion regarding MFMs has "some interpretative value").

[35]*E.g., EC – Bananas 21.5 (Panel)*, para. 6.42 ("[E]vidence submitted at this late stage by the European Communities regarding the adoption of amendments to the EC bananas import regime is inadmissible."); *EC – Biotech*, paras. 8.16 and 8.36; *EC – Customs Matters (AB)*, para. 310; and *Dominican Republic – Cigarettes (AB)*, para. 129.

[36]*EC – Bananas 21.5 (AB)*, para. 270.

[37]*Cf. US – Certain EC Products (AB)*, paras. 60-82 (measure repealed prior to panel establishment).

establishment. While the Appellate Body has stated that "steps and acts of administration that pre-date or post-date the establishment of a panel may be relevant to determining whether or not a violation [of a covered agreement] exists at the time of establishment,"[38] the EC has identified no basis on which a later measure implementing *Kip* or *Kamino* would inform whether or not such a violation exists as of that time.

Q111. (All parties) In response to question n. 5 from the Panel, the parties indicated that the product narratives contained in Attachment B of the ITA are incorporated into the European Communities' WTO Schedule. The European Communities does not seem to dispute this. Could the parties then explain further:

(a) Is the "headnote" to Attachment B of the ITA itself (beginning with "[p]ositive list of specific products ...") also incorporated into the EC's Schedule? Or is it only the list of products which is incorporated?

23. As the United States noted in response to Panel Question 5, the narrative descriptions of products contained in Attachment B are referenced in the headnote to the EC's Schedule.[39] To know whether a product is a product "described in or for Attachment B," it is necessary to review Attachment B. To the extent that the headnote to Attachment B provides additional information on whether a given product is "described in or for Attachment B" (such as the particular rule with respect to parts), the headnote to Attachment B should also be taken into consideration in determining which products are referenced in the headnote to the EC's Schedule.

(b) How should the phrases "[p]ositive list of specific products" and "wherever they are classified in the HS" be interpreted and what are their relationship with the headnote in the EC's Schedule?

24. As noted above, the headnote to the EC's Schedule provides that "products described in or for Attachment B" of the ITA are entitled to duty-free treatment, wherever classified. The phrases "[p]ositive list of specific products" and "wherever they are classified in the HS" are not themselves products "described in or for Attachment B"; however, to the extent that they inform whether a product is "described in or for Attachment B", they are relevant to interpreting the phrase "products described in or for Attachment B" in the headnote to the EC's Schedule.

Q112. (European Communities) If the HS and its classification rules are not relevant to interpretation of products in Attachment B, how does one interpret concessions such as ones for "printed circuit assemblies" or "plotters", which include express references to certain HS headings? Since the term "automatic data processing

---

[38] *EC – Customs Matters (AB)*, para. 186 (internal quotes and footnote ommitted).

[39] U.S. Answers to First Panel Questions, paras. 11-14.

machines" is used in the "computers" description and in the description of HS1996 heading 8471, then would the HS definition be relevant for interpreting the Attachment B definition?

25. As the United States noted in its Responses to Panel Questions, while the HS might be relevant in a different case, the HS is not relevant context for interpreting the concessions for the products at issue in this dispute.[40] Thus, for example, whereas "input or output unit" is a term that derives from HS terminology, the phrase "flat panel display devices" is not; likewise, "set top boxes which have a communication function" is not a phrase that appears in the HS. Thus, the HS is not relevant to their interpretation. These provisions provide further confirmation of the fact that the HS is not as a general matter relevant context for interpreting Attachment B concessions. The Attachment B headnote provides for duty-free treatment to products "wherever...classified." Where the drafters relied on HS terminology or provided for the application of HS interpretative rules to Attachment B concessions, they did so expressly.[41] They did not do so for the concessions at issue in this dispute.

Q115. (Complainants) The European Communities noted in respect of question No. 55 that "The European Communities was unable to locate the above mentioned document [WT/MIN(96)/16/Corr.1] in its archives and consequently cannot but assume that the said document was never circulated to WTO Members or to ITA participants. What the United States introduced as a formal corrigendum to the Information Technology Agreement is possibly only an unused draft." Please comment.

26. As the United States noted in its Second Written Submission,[42] the document in question is formatted as an official WTO document, has an assigned document number, and is nowhere identified as a draft; and the fact that participants agreed to changes to Attachment B (changes that are consistent with this in the tables in their Schedules following the headnote) is also noted in G/L/159/Rev. 1.[43] More fundamentally, the EC does not dispute that the changes to the FPD concession are "part of the final agreement."[44]

---

[40]*E.g.*, U.S. Answers to First Panel Questions, para. 53.

[41]*E.g.*, U.S. Answers to First Panel Questions, para. 53.

[42]U.S. Second Written Submission, para. 66 n.129.

[43]*See* Exhibit US-37 ("In the plurilateral technical discussions held before 31 January 1997, it was agreed to amend the description of the products in attachment B and this amendment is already reflected in the schedules of participants.").

[44]EC First Written Submission, para. 186.

Q116. (Complainants) How do the complainants reconcile the view that the tariff codes next to the product descriptions in the EC Schedule Attachment B could be considered as "context" under the Vienna Convention with the view that the HS is not relevant to the Attachment B concessions?

27. The United States has stated that the HS is not relevant context for purposes of interpreting the concessions at issue.[45] The tariff codes next to the product descriptions in the EC Schedule refer to other provisions in its Schedule, containing descriptions of goods which indicate the types of products the EC at the time considered covered by its Attachment B concessions.[46] The codes themselves are not the concession — they simply refer to descriptions — nor has the United States relied on the HS to interpret the descriptions associated with those codes. The United States has used the codes, and associated product descriptions, simply as indicating some of the products the EC itself considered covered by its concessions.[47] The mere fact that HS codes are used in the table, and that they may indicate some products covered by the EC concessions, however, does not require the conclusion that the HS is relevant to interpreting the Attachment B concessions at issue. As noted, those concessions are not drafted using HS terminology, participants committed to provide duty free treatment to the products in question "wherever...classified", and different participants identified different codes (indicating no consensus with regard to classification).

Q117. (All parties) The EC WTO Schedule (and presumably the WTO Schedule of any ITA Participant) contains the language "by this agreement" (in the narrative description of "computers") and "[t]he agreement" (in the narrative description of "monitors") which are identical to those found in Attachment B of the ITA. However, as incorporated in each Participants' WTO Schedule these phrases are treaty language. In their context, what do these phrases mean? For example, do these terms refer to the ITA, in its entirely, as somehow incorporated in a Member's Schedule?

28. "[T]his agreement" and "[t]he agreement" are both references to the ITA.

Q118. (All parties) Footnote 3 to Attachment B of the ITA refers to the review of the "description" of "this product". Which product does this footnote refer to: "monitors" or "televisions"? If the reference is to "monitors", why does the footnote

---

[45] *E.g.*, U.S. Answers to First Panel Questions, paras. 48-49, 53; U.S. Second Written Submission, para. 14; U.S. Second Opening Statement, para. 12.

[46] U.S. Answers to First Panel Questions, paras. 19-20.

[47] *E.g.,* U.S. Second Written Submission, para. 39; U.S. Second Opening Statement, para. 12; U.S. First Opening Statement, para. 15; Exhibit US-26.

refer only to a review of the "description" and not also of the notified "tariff code(s)" listed next to the description?

29. The footnote refers to the "product description" for "Monitors" (that concession refers to "televisions", but there is no "product description" for "televisions" in the ITA). As the United States has explained, as is the case for "flat panel display devices" and "set top boxes which have a communication function", the product description in Attachment B is what determines the scope of the concession. The reference to paragraph 3 of the ITA suggests that the review concerns product coverage of the CRT monitors provision — this review need not involve analysis of the particular tariff codes listed in the tables in Members Schedules of Concessions, since, as complainants have explained, those codes are illustrative and do not limit the products covered by a given concession (and are in any case not a part of Attachment B to the ITA).

II. GENERAL QUESTIONS

Q119. (All parties) Are the complainants making any "as applied" claims in this dispute?

30. The United States is not making an "as applied" claims; rather, the United States is challenging each of the measures at issue "as such". These measures include the application and continued application of duties by the EC and its member States to the products at issue at rates in excess of those set forth in their Schedules.

Q120. (All parties) Do BTI's constitute the measure at issue in this dispute?

31. BTI have been provided as evidence of how the measures at issue operate; they are not themselves measures at issue in this dispute.

Q121. (All parties) Could a CN Explanatory Note be considered as setting forth rules or norms that are intended to have general and prospective application that provides administrative guidance and created expectations among the public and among private actors?

32. It should first be noted that the Appellate Body has recognized that legal instruments meeting the standard referenced in this question are not the only things that may constitute "measures." That said, CNENs do so qualify. CNENs set forth rules and norms that are intended to have general and prospective application — as the EC itself has described them, the rules they contain are applied generally and prospectively by EC customs authorities to all

importers to ensure uniformity of administration of the CN.[48] For this reason, they both provide administrative guidance and create expectations among the public and among private actors. Not only do they create expectations that they will be applied as written, the evidence that the United States has submitted demonstrates that they are in fact so applied by EC customs authorities, who rely on the criteria articulated therein to classify products in dutiable tariff lines in the EC's domestic nomenclature.[49] The EC has acknowledged that CNENs are "important tools for the interpretation of the CN" and that "customs authorities naturally have to" consult them.[50] Thus the EC appears to recognize that CNENs have legal effect and that member State customs authorities are expected to comply with them. Indeed, it elsewhere relied on a CNEN to assert that it has complied with DSB recommendations and rulings regarding uniformity of administration.[51]

Q122. (All parties) What is the practical implication when a CN Explanatory Note is known to customs authorities? Is it not true that when the CN Explanatory Note is known to customs authorities, they are going to follow it?

33. The evidence demonstrates that when a CNEN is known to customs authorities, they in fact follow it, and are expected to do so, as noted above. For example, the United States has submitted BTI demonstrating that customs authorities have relied on CNENs as a "classification justification" to classify products in a dutiable heading.[52]

III. MFMs

---

[48] *See EC – Customs Matters (Panel)*, para. 7.158 ("More particularly, in the tariff classification area, the Panel has been informed by the European Communities that the Customs Code Committee is frequently asked to provide opinions on measures proposed by the Commission which will secure a uniform application of the Common Customs Tariff, such as classification regulations and EC explanatory notes."); *id.*, para. 7.179.

[49] E.g., U.S. First Written Submission, paras. 90-91; Exhibit US-28. CNENs have a range of other legal effects — for example, once adopted, BTI that contradict a CNEN are no longer valied. See U.S. Second Written Submission, para. 35; U.S. Answers to First Panel Questions, para. 43; Exhibits US-18 and US-19.

[50] EC Answers to First Panel Questions, para. 103.

[51] U.S. Second Written Submission, para. 35 n.65; U.S. Answers to First Panel Questions, para. 44.

[52] U.S. Second Opening Statement, para. 7; U.S. Answers to First Panel Questions, paras. 43-44; U.S. First Written Submission, para. 48 n.59; Exhibit US-28.

Q123. (United States and Japan) As a preliminary issue in its oral statement during the second meeting, the European Communities objected to what it alleged to be a new MFM-related claim by Chinese Taipei on products described in CN 8443 32 91. The European Communities considers that this claim is outside the terms of reference of the Panel. Do the United States and Japan agree? Please explain, in particular in view of the text of footnote 15 of the Joint Panel request.

34. As Chinese Taipei noted during the second meeting with the Panel, MFMs are defined in footnote 15 of the Panel Request as "machines which perform two or more of the functions of printing, copying, or facsimile transmission, capable of connecting to an automatic data processing machine or to a network (including devices commercially known as MFPs (multifunctional printers), other 'input or output units' of 'automatic data processing machines', and facsimile machines)." Furthermore, the CN is a measure that was properly identified in the Panel Request.[53] Therefore, the claim that EC customs authorities impose duties on these products, contrary to the duty-free treatment provided for in the EC's Schedule, is not outside of the Panel's terms of reference. The United States understands Chinese Taipei to simply have noted another possible provision in the CN through which the EC is subjecting the products to duty — CN 8443 32 91, like CN 8443 31 91, carries a 6% duty. The United States therefore agrees with Chinese Taipei that, if the EC imposes a 6% duty on MFMs by classifying them in CN 8443 32 91, this action would be inconsistent with its obligations and therefore may properly be considered as part of the Panel's findings in this dispute. The United States looks forward to the EC's clarification of how this provision of CN operates and whether it includes any MFMs.

Q124. (Complainants) In response to question No. 38 by the Panel, the European Communities provided examples of products covered by CN 8443 31 91, CN 8443 32 91, CN 8443 39 10, CN 8443 39 31 and CN 8443 39 90. Do you agree with the examples and their classification. If not, why?

35. With respect to CN 8443 31 91, the EC confirms in its response that it classifies any multifunctional device that uses an electrostatic print engine in CN 8443 31 91, and subjects it to a 6% duty, unless it has a facsimile feature and is not capable of reproducing more than 12 pages per minute. The United States agrees that the EC would classify these products in the dutiable subheading, including the examples the EC identifies.[54] The United States, however, is not challenging how the EC classifies the products in question in its domestic nomenclature, but

[53]WT/DS375/8, p. 5 (referencing "Council Regulation (EEC) No. 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, including all annexes thereto, as amended" as a measure that results in the imposition of duties on MFMs).

[54]For additional examples of products the EC classifies in this subheading, *see* Exhibits US-104 and US-105.

rather the duty treatment it accords to those products and whether the duty treatment is consistent with that provided in the EC's Schedule of Concessions. For reasons explained in previous submissions, by imposing duties on these products, the EC acts inconsistently with its obligations under GATT 1994 Article II:1(a) and (b).[55]

36. With regard to CN 8443 32 91, insofar as the EC classifies a good performing two or more functions in this subheading (as some of its statements suggest it might), the United States submits that this would be incorrect even as a matter of classification — contrary to what the EC states, these devices are not "single-function" apparatus, and instead are properly classified in 8443 31. (Of course, as noted, the present dispute pertains to the duty treatment the EC accords to the products in question and whether that treatment is consistent with the concessions in its Schedule, not whether the EC properly classifies products in its domestic nomenclature.)

Q127. In paragraph 102 of its second written submission, the European Communities appears to raise an alternative argument that, if "digital copiers" are not "photocopying apparatus" under HS1996 9009.12, then ADP MFMs are at a minimum prima facie classifiable under both the duty-free concession under HS1996 8471.60 and the dutiable concession under HS1996 8472.90.

(a) (Complainants) Do the complainants agree with the European Communities? If not, why?

37. While an ADP MFM is a composite machine within the meaning of note 3 to Section XVI, and is therefore prima facie classifiable under HS subheadings 8471.60 and 8472.90, under note 3, composite machines must be classified as if consisting only of that component or as being that machine which performs the principal function.[56] As the United States has noted in its submissions, the principal function of MFMs that connect to an ADP machine is imparted by the print module[57] — whether printing a document scanned into the MFM's memory or printing a file from the ADP machine, the output is created through the operation of the print module.[58] Therefore these devices must be classified in HS subheading 8471.60.

38. As the United States has also noted, the question for purposes of this dispute is not where

---

[55]*E.g.*, U.S. First Written Submission, paras. 144-166; U.S. Second Written Submission, paras. 102-119.

[56]*See* HS1996 Section XVI note 3(b).

[57]U.S. Second Written Submission, para. 114.

[58]U.S. Second Written Submission, para. 113.

the product is "classified" (whether in the EC Schedule of Concessions or in its domestic nomenclature), but the tariff treatment to which it is entitled.[59] Consistent with the approach adopted by previous panels, the terms of the concession must be interpreted based on their ordinary meaning in context and in light of the GATT 1994's object and purpose.[60] As noted, the EC measure — which imposes duties on any MFM merely because it lacks a facsimile feature or is capable of reproducing more than 12 pages per minute, is supported neither by note 3 to Section XVI of the HS, nor by the text of the concessions at issue when read in context, and in light of the object and purpose of the GATT 1994.[61]

Q128. (All parties) Where would a "traditional" (analog) indirect process electrostatic print engine-based photocopier that was formerly classified under HS1996 9009.12 be classified today in the CN?

39. Based on the EC correlation tables and the text of the CN, the United States understands that the EC would classify a "traditional" analogue indirect process photocopier under CN code 8443.39.10.

Q129. (All parties) Assuming it is technologically feasible, where would an "electrostatic print engine" that could be used both as a part of a "stand alone" printer, an MFM or a stand alone "digital copier" be classified in the EC's Schedule of concessions? Where would this product be classified in the currently applied CN? If there were more than one possible tariff code, how would differentiation be made for classification purposes?

40. An electrostatic print engine that could be used both as part of a stand-alone printer, as part of an MFM, or as part of a stand alone "digital copier" would likely qualify as an "input or output unit" of subheading 8471.60 in the EC's Schedule of Concessions. With regard to the current EC CN, while the United States cannot state with certainty how the EC in fact classifies the devices, if the EC properly applied the HS GIRs, the United States believes that the EC

---

[59] *E.g.*, U.S. First Written Submission, para. 24.

[60] *E.g., EC – Chicken Cuts (Panel)*, paras. 7.87-88 (noting that "the content of the EC Schedule must be considered treaty language" and that principles of treaty interpretation reflected in the Vienna Convention on the Law of Treaties "comprise the legal framework within which this interpretative exercise must take place."); *EC-Chicken Cuts (AB)*, para. 175 et seq. (interpreting concessions using principles of treaty interpretation reflected in Vienna Convention).

[61] U.S. First Written Submission, paras. 153-165; U.S. Second Written Submission, paras. 109-119.

would classify them under CN subheading 8443.39.90, if the print engine, as imported, is not connectable to an ADP machine or network, and CN subheading 8443.32.10 if, upon importation, it is connectable to an ADP machine or network.[62]

Q130. (All parties) Did the WCO Secretariat volunteer its comments in document NCO300E1 (Exhibit TPKM-82) or did WCO/HS contracting parties request comments? Are comments commonly presented by the WCO? Do WCO/HS contracting parties normally conform with these comments? Is the WCO Secretariat staffed with tariff classification experts having technical and scientific backgrounds?

41. The WCO Secretariat regularly provides comments and outlines the issues before the Harmonized System Committee (HS Committee) of the WCO. Comments by the Secretariat are not binding on contracting parties to the HS. In the case of document NC0300E1, the Secretariat's comments were provided in response to a paper submitted by Brazil suggesting that HS heading 9009 be amended to include "multifunctional photo-copying apparatus." The WCO Secretariat is staffed with tariff classification experts who have technical and scientific backgrounds.

Q132. (All parties) The parties make reference to the HS2007 Explanatory Note to heading 84.43 without having submitted a copy therein. Could the parties provide the Panel with the full text of this Explanatory Notes?

42. *See* Exhibit US-137. It should be noted that the United States has not relied on the HS2007 Explanatory Notes in its arguments; *see* response to Panel Question 134, infra.

Q133. (All parties) When the parties refer to and discuss the HS GIRs, are they referring to the HS 1996 version of these rules? Have the GIRs changed since then? Are there any GIR Explanatory Notes under either the HS 1996 or HS 2007 that further discuss GIR 3? If so, please provide the Panel with any relevant part therein.

43. Unless noted otherwise, when referring to the GIRs, the United States is referring to the HS1996 version (regarding the relevance of material pertaining to HS2007, see response to Panel Question 134, infra). Neither the GIRs nor the Explanatory Notes have undergone any material revisions since HS1996 was issued. For copies of the Explanatory Notes accompanying GIR 3 (both for HS1996 and HS2007), *see* Exhibit US-138.

---

[62]The HS Explanatory Notes to subheadings 8443.31 and 8443.32 provide that if a device comprises all the components necessary for its connection to a network or an ADP machine to be effected simply by attaching a cable, it shall be considered "connectable to an ADP machine or to a network."

Q134. (All parties) In light of the Vienna Convention, what relevance, if any, should be ascribed to the HS 2007 Explanatory Notes to heading 84.43? Could it be treated, for example, as an element to be taken into account together with context under Article 31(3) of the Vienna Convention?

44. The HS2007 Explanatory Notes do not have weight under the customary rules of interpretation reflected in the Vienna Convention with respect to the issues in this dispute. For example, unlike HS1996, which the Appellate Body noted in *EC – Computer Equipment* was the basis for Uruguay Round tariff negotiations,[63] the concessions at issue were not negotiated in HS2007 nomenclature. There is also no basis to conclude that HS2007 constitutes a subsequent agreement between the parties regarding the interpretation of the GATT 1994. Nor does an HS2007 Explanatory Note constitute "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" — the "treaty" at issue in this case is not the HS, but rather the GATT 1994, and the HS2007 Explanatory Notes are not an "application" of that treaty. (In addition, given that Members' Schedules have not been certified in HS2007 nomenclature, at this time there is no agreement among WTO Members regarding the relationship between HS2007 and their Schedules of Concessions.) For similar reasons, the HS2007 Explanatory Notes are not a "rule of international law applicable in the relations between the parties." The United States agrees with the European Communities that HS2007 Explanatory Notes are not relevant to the interpretation of the HS96 provisions for "input or output units" (8471.60) or "photocopying apparatus" of heading 9009.[64]

Q135. (All parties) If the notion of "digital copiers" was already included within the descriptions in HS1996 subheading 9009.12 as well as in the HS1996 Explanatory Notes to heading 90.09, as the European Communities claims, why were "digital copiers" and "photocopiers" defined separately in the HS2007 Explanatory Notes to heading 84.43?

45. The separate definitions of "digital copiers" and "photocopiers" in the HS2007 Explanatory Notes is consistent with the fact that, as the United States has explained, "digital copiers" are not "photocopying apparatus" within the meaning of HS1996 subheading 9009.12.[65]

Q136. (Complainants) It has been argued that a CCD (Charged-Coupled Device) is not a "light-sensitive surface" within the meaning of the HS1996 Explanatory Notes to

---

[63] *EC – Computer Equipment (AB)*, para. 89.

[64] EC First Written Submission, para. 407.

[65] U.S. First Written Submission, paras. 157-160; U.S. Second Written Submission, paras. 111-114.

heading 90.09. The EC points out, however, that the HS2007 Explanatory Notes to heading 84.43 refers to this device exactly as a "photosensitive surface". Please, comment.

46. The United States understands the Panel to be referring to the assertion by the EC in its Second Written Submission that the United States argued that a CCD is not a "light sensitive surface."[66] As the United States noted in its oral statement during the second meeting of the Panel, the EC cited to paragraph 19 of the U.S. oral statement during the first meeting as support for this proposition.[67] That paragraph deals with STBs and make no mention of CCDs (or for that matter any aspect of the U.S. argument regarding MFMs). Furthermore, the United States has reviewed its submissions and has been unable to identify any portion of its submissions in which it argued that a CCD is not a "light sensitive surface". Rather, for example, as the United States has explained, with respect to heading 9009, MFMs are not "photocopiers" and do not incorporate an "optical system."[68] Thus, they do not fall within that heading.

Q137. (Complainants) In its oral statement during the second meeting of the Panel with the parties, the European Communities refers to the complainants' position with respect to non-ADP MFMs. According to the European Communities, while Japan considers that "all" non-ADP MFMs are included in the concession for HS1996 8517 21, the United States and Chinese Taipei seem to "concede" that "not all" non-ADP MFMs that can both copy and fax would fall within that subheading. Do the complainants agree with the European Communities' distinction among the parties? Please, explain.

47. The EC is correct that, in the U.S. view, while non-ADP MFMs whose essential character is that of a facsimile machine, are included in the concession for "facsimile machines" under subheading 8517 21, other non-ADP MFMs may not be "facsimile machines" and therefore would fall within the concession for goods of subheading 8472 90. As the United States has explained, however, the EC measures — which impose duties on *any* non-ADP MFM, merely because it is capable of reproducing more than 12 pages per minute — result in the imposition of

---

[66]EC Second Written Submission, para. 119. *Compare* EC Second Written Submission, para. 119 (citing "U.S. Oral Statement, para. 19") *with, e.g.,* U.S. Opening Statement at First Panel Meeting, para. 19 (discussing STBs).

[67]U.S. Second Opening Statement, para. 38.

[68]*E.g.*, U.S. First Written Submission, paras. 157-160; U.S. Second Written Submission, paras. 111-114.

duties on products that are "facsimile machines."[69] Thus, they are inconsistent with the EC's obligations. This is the case whether or not one considers all non-ADP MFMs to be "facsimile machines." Thus, the complainants are in agreement that the EC measures result in WTO-inconsistent duty treatment for certain "facsimile machines" of subheading 8517 21. Moreover, as the United States has noted, the only other appropriate subheading for non-ADP MFMs is subheading 8472 90 — a subheading for which the EC has a bound duty of 2.2%. Thus, all complainants are equally in agreement that the EC measures — which subject non-ADP MFMs to a duty of 6% — result in WTO-inconsistent duty treatment for all non-ADP MFMs.

IV. FLAT PANEL DISPLAY DEVICES

Q138. (All parties) How would each of the parties classify a 46-inch LCD flat panel display device that meets the following specifications: DVI connector, HDMI connector, s-video connector, included remote control with channel up/down and volume up/down buttons, and a television tuner? Would this product be subject to duties? If so, what is the duty rate? Is this device capable of being used with an ADP machine, or computer? If so, why is this product not eligible for duty-free treatment pursuant to the ITA Attachments as incorporated into WTO Members' Schedules?

48. The United States classifies a device that is capable of performing two or more complementary or alternative functions in accordance with GIR 1 and Note 3 to Section XVI, which cover composite machines. If an LCD flat panel display device is "solely or principally" for use with an ADP system, the United States would, in its current nomenclature, classify the device in subheading 8528.51 as a monitor of a kind solely or principally used in an automatic data processing system of heading 84.71. If not, the LCD device could be classified in any one of the following headings, depending upon the device's principal function: heading 8531 (visual signaling apparatus), subheading 8528.59 (as other monitors), subheading 8528.72 (as reception apparatus for television), or residual heading 9013 (as liquid crystal devices not constituting articles provided for more specifically in other headings). If it is classified in subheading 8528.51, it would be duty-free. If not, the duty treatment would depend on the heading in which it is ultimately classified — the other relevant subheadings in heading 8528 are dutiable, whereas those in headings 8531 and 9013 are not.

49. In order to determine "principal use", U.S. customs authorities apply a multi-factor analysis known as the "Carborundum" analysis.[70] Under this analysis, in addition to general

---

[69]*E.g.*, U.S. First Written Submission, paras. 165-167; U.S. Second Written Submission, para. 110.

[70]*See* Exhibit EC-19, p. 7. The "Carborundum" analysis derives from the judgment of the court in *United States v. Carborundum Co.*, 63 CCPA 98, 102, 536 F.2d 373, 377 (1976), cert

physical characteristics, customs authorities typically consider the following six factors: expectation of the ultimate purchaser; channels of trade; environment of sale (accompanying accessories, manner of advertisement and display); usage of the merchandise; economic practicality of so using the import; and recognition in trade of this use.[71] No single factor is dispositive. Thus, to determine whether the device in question is "solely or principally" for use with an ADP system, U.S. customs authorities would need additional information regarding the product beyond the physical characteristics set forth in the question. Even with respect to physical characteristics, U.S. customs authorities have in the past taken into consideration a number of factors in addition to those described above, including screen brightness and response time, in evaluating the proper classification of a flat panel display device.[72] Thus, a product with the specifications described above may or may not be subject to duties, depending on its other attributes, taken as a whole. The presence of a television tuner has been viewed by U.S. customs authorities as a "strong indication" that a device is not "solely or principally" for use with an ADP system; however neither this factor nor any of the other factors listed above is alone determinative of classification in the United States.

50. Both with regard to the tariff concession for "input or output units," and with regard to the tariff concession under the Attachment B headnote for "flat panel display devices" for products falling within the ITA, a product with the specifications described above may or may not fall within the concession. For example, for a product to be entitled to duty free treatment as a "flat panel display device", it must be "for" a product falling within the ITA. "For" is "a function word, to indicate purpose."[73] The mere ability to connect to or receive signals from a computer may not alone indicate that a device is "for" a computer. Indeed, the physical attributes specified above do not even indicate whether the device would function properly with a computer. The mere presence of a DVI connector, for example, does not mean that a device can operate properly with a computer — this may depend on a range of factors, including brightness, resolution, etc.

51. Under the EC measures, by contrast, any flat panel display device with DVI and any flat panel display device capable of receiving signals from a device other than a computer is automatically subject to duty. As the United States has explained, this position cannot be

---

denied, 429 U.S. 979 (1976).

[71]Exhibit EC-19, p. 7; *see also id.*, p. 18 ("[G]eneral physical characteristics are only one of several factors considered in determining the principal use of imported merchandise").

[72]Exhibit EC-19, p. 8-14.

[73]*See e.g.*, U.S. Second Written Submission, para. 81; EC Answers to First Panel Questions, para. 185 (referencing same definition of "for").

reconciled with the concessions in the EC Schedules, both that with respect the Attachment B headnote and that for "input or output units".[74]

> Q139. ***(All parties) Chinese Taipei has disputed the European Communities' characterization of its claim with respect to flat panel display devices as limited to the view that the mere presence of a DVI connector makes an LCD monitor an ADP monitor, or that the presence of a DVI connection determines whether an LCD monitor must benefit from duty-free treatment. Instead, Chinese Taipei contends that its claim should be understood as follows: that the presence of a DVI connector cannot automatically exclude a flat panel display device from duty-free treatment. Do the parties agree with this characterization of the claim? Please explain why or why not.***

52. The United States agrees with this characterization of this aspect of the claim. Under the EC measures, any device with DVI is automatically subject to duty.[75] As Chinese Taipei correctly notes, by excluding any flat panel display device from duty-free treatment, merely because it has DVI, the EC acts inconsistently with its obligations to provide duty free treatment to "input or output units" and "flat panel display devices for" ITA products.[76]

53. In addition, the complainants have argued that, under the EC measures, any device that is capable of receiving signals from a device other than a computer is automatically subject to duty.[77] As a result, the EC subjects to duty "flat panel display devices for products falling within" the ITA and "input or output units," contrary to the obligations in its Schedule and Articles II:1(a) and (b) of GATT 1994.[78]

54. The EC's characterization of complainants' argument again appears premised on its view that in order to successfully advance their claim, complainants must demonstrate that *all* devices with a given characteristic are entitled to duty free treatment — this argument, however, depends

---

[74]U.S. First Written Submission, paras. 120-143; U.S. Second Written Submission, paras. 66-101.

[75]U.S. First Written Submission, paras. 129-131; U.S. Second Written Submission, paras. 69-79, 88-92.

[76]U.S. First Written Submission, paras. 129-131; U.S. Second Written Submission, paras. 69-79, 88-92, 98-101.

[77]U.S. First Written Submission, paras. 132-134; U.S. Second Written Submission, paras. 69-79, 93, 98-101.

[78]U.S. First Written Submission, paras. 132-134; U.S. Second Written Submission, paras. 69-79, 93, 98-101.

on the EC's flawed understanding of the requirements for an "as such" claim, as explained in detail in previous U.S. submissions.[79]

Q140. (All parties) Is a dictionary definition found in a dictionary dated from 1995 relevant to the consideration of the ordinary meaning of the terms of a concession which entered into force in 1996? Is a dictionary definition found in a dictionary dated from 2003 relevant to the consideration of the ordinary meaning of the terms of a concession which entered into force in 1996?

55. As a general matter, the ordinary meaning of a concession is informed by sources indicating the meaning intended by the parties at the time the treaty was concluded.[80] In general, the United States has relied on dictionaries that are as contemporaneous as possible with the concession. In some cases, it has referred to dictionaries that slightly pre- or post-date the concessions at issue.[81] A dictionary definition from 1995 or 2003 may be relevant to the consideration of the ordinary meaning of the terms of a concession which entered into force in 1996, insofar as it is indicative of the meaning intended by the parties at the time the treaty was concluded. Whether such a definition is in fact indicative of that meaning depends on the particular facts of a given case.

56. With respect to the dictionary definitions relied on by complainants that predate 1996, such as the definition of the term "for" in the New Shorter Oxford English Dictionary published in 1993, or the term "facsimile" in the 1994 edition of the McGraw-Hill Scientific and Technical Dictionary, the EC has identified no basis on which to conclude that the meaning of the terms had changed significantly between the time the dictionary was published and the date of conclusion of the agreement such that those definitions would not reflect the ordinary meaning as understood by the parties at the time, nor does such a basis exist.

57. Likewise, dictionary definitions found in dictionaries that post-date the concession may be relevant insofar as they are indicative of the meaning intended by the parties at the time the

---

[79]*E.g.*, U.S. Second Written Submission, paras. 16-20; U.S. Second Opening Statement, para. 5; U.S. Answers to First Panel Questions, paras. 54-61.

[80]*E.g.*, *EC – Chicken Cuts (Panel)*, para. 7.99.

[81]The United States has also in some cases referred to dictionaries to explain terms that are not part of the concessions, such as particular technical terms. These definitions are not offered to interpret the ordinary meaning of the concession, but rather are provided to assist the Panel in understanding the technologies at issue in the dispute. In these cases, the United States has used contemporary dictionaries and other sources. *E.g.*, U.S. First Written Submission, para. 121 n.167 (discussing LCD technology).

treaty was concluded. (In contrast if the meaning of a term changed between the time the agreement was concluded and the dictionary was issued, and the dictionary reflected only that later-in-time meaning without including the prior meaning, then the later-in-time resource would not be useful in informing the "ordinary meaning.") To the extent that the United States has referred to dictionaries that post-date the adoption of the concessions at issue (such as the definition of "flat panel display devices" in the 2002 Microsoft Computer Dictionary), the EC has identified no inconsistency between the term as defined in that source and the term when understood from earlier sources, and indeed appears to agree with a definition that is fully consistent with the 2002 definition.[82]

58. Of course, the United States has not relied on dictionaries alone to interpret the concessions at issue, and has included other elements of the customary rules of interpretation reflected in the VCLT into its analysis, including context and object and purpose.[83] All of these elements together inform the meaning of the concessions at issue, and as the United States has shown, all support the complainants' interpretation of the concessions.

Q141. (United States and Chinese Taipei) Do the other complainants agree with Japan's definition of "for" in paragraph 70 of its second oral statement as something "designed to be used with computers"?

59. The United States agrees with Japan. As the United States has explained in previous submissions, "for" is a function word to indicate purpose. Consistent with this definition, the fact that a device is designed to be used with computers indicates that its purpose is to be used with computers.

Q142. (United States) The United States includes statistics in its second written submission based on an investigation into the number of consumer products equipped with a DVI connector, noting that "virtually no consumer electronics devices are today equipped with DVI" (US second written submission, paragraph 92). Could the United States also provide the Panel with statistics on the number of those same consumer devices which possess an HDMI connector although not a DVI connector? Please provide a source or the relevant data.

60. A search of one popular retail site (the same site used in Exhibit US-129 and referenced in paragraph 92 of the U.S. second written submission) indicates that approximately 32% of

---

[82]*See* U.S. Second Written Submission, para. 80.

[83]*E.g.*, U.S. First Written Submission, paras. 102-108, 137-138, 155-167; U.S. Second Written Submission, paras. 59-62, 94, 99-100, 111-118.

DVD players and 12% of camcorders have an HDMI connector but not a DVI connector.[84]

> ***Q143. (United States and European Communities) In their respective submissions, both the United States and the European Communities have sought to address the issue of whether the Apple Cinema Display (discussed in Exhibit US-78) is capable of operating independently of a computer. While the United States claims that this is the case, the European Communities has rebutted this argument with its statement that it is possible to "configure the displays in ... museum kiosks [and by] mounting them on hotel lobby walls". Please provide explicit evidence to demonstrate whether the Apple Cinema display can operate without a computer or not.***

61. Contrary to what the EC suggested during the second meeting of the Panel, the United States has already provided evidence demonstrating that the Apple Cinema Display cannot operate without a computer. In its First Written Submission, the United States referred to page 22 of Exhibit US-78, which states that a computer is *required* in order to use the Apple Cinema Display.[85] Therefore, the EC's contention in its second opening statement that the United States did not provide a reference in support of this point is incorrect. As page 22 of the Manual indicates, a CPU is a system requirement for operation of the Apple Cinema Display.

62. Furthermore, contrary to what the EC suggested, the fact that the devices may be configured in different ways does *not* mean that they can be used without a computer. In fact, in the very sentence that precedes the EC quotation, the Manual explains that the ability to, for example, mount the display on a wall "allow[s] more desktop computers to be set up in places where they may not have previously fit, such as crowded audio and video studios as well as home, office, and school environments."[86] Thus, the discussion of different configurations in the Manual in fact is simply additional description of the various ways in which the devices can be used *with computers*.

63. The EC position appears premised on its view that the mere presence of a DVI connector means that a device is capable of receiving signals from any other device equipped with DVI. This is simply incorrect. The Apple Cinema Display only operates at a single bandwidth of the DVI signal, a bandwidth that is not carried by other electronics products with DVI. Even if one connected an Apple Cinema Display to a consumer electronics product with DVI, it simply

---

[84]*See* Exhibit US-139. Search results returned 480 (out of 1500) results for "HDMI DVD players"and 180 (out of 1500) results for "HDMI camcorders".

[85]U.S. First Written Submission, para. 130 n.184; Exhibit US-78, p. 22 (listing a PC, Power Mac or Powerbook computer as "requirements" for operability).

[86]Exhibit US-78, p. 22.

would not display an image. Thus, the presence of a DVI connector does not support the conclusion that a device is not "for" a computer. By subjecting to duty any device with DVI the EC acts inconsistently with its obligation to provide duty free treatment to "input or output units" as well as "flat panel display devices for" products falling within the ITA.

Q145. (Complainants) Could the parties also comment on the European Communities statement in its second oral statement (paragraph 36) that the complainants cannot "have it both ways" by "includ[ing] within their claim only those parts of the measures they think might support their argument and ignoring those that do not."

64. The EC statement appears to rest on its view that item 1 of Regulation 2171/2005 supports its assertion that it does not impose duties on products merely because they are capable of receiving signals from a device other than a computer. As the United States explained in its Second Written Submission, item 1 is described as a device "having a mini D-sub 15 pin interface only." A mini D-sub 15 pin interface is a basic type of VGA plug.[87] As such, item 1 simply begs the question of the basis on which the EC would conclude that a device with nothing more than a standard VGA computer connector is in fact capable of receiving signals from a source other than a computer, when it does not appear to have any means of connecting to something other than a computer.[88] Nor has the EC offered a single BTI demonstrating that a device that in fact is capable of receiving signals from a source other than a computer could be classified in the duty-free heading, and, as the United States previously noted, the EC's assertion ignores the FPD CNEN entirely.[89] In its oral statement, the EC simply repeats its previous argument — it offers no response to any of the points made by the United States in this portion of its Second Written Submission.

V. SET TOP BOXES WHICH HAVE A COMMUNICATION FUNCTION

Q146. (All parties) The United States notes that, unlike a video cassette recorder, a set-top box is only capable of recording if it converts and decodes signals sent over a communication channel into a form that can be viewed on television. In this sense, according to the United States, if the communication device does not function, neither will the recording function. Could the parties comment on the relevance of this statement to the assessment of the characteristics of a set-top box?

65. In its submissions, the EC has asserted that set top boxes which have a communication

[87]U.S. Second Written Submission, para. 70.

[88]U.S. Second Written Submission, para. 71.

[89]U.S. Second Written Submission, para. 72.

function are not entitled to duty free treatment merely because they contain a hard disk, on the basis that such products supposedly do not have a "main purpose communication function."[90] The United States observed the relation between the hard disk and other elements of the set-top box to illustrate the factual inaccuracies underlying the EC's notion that these devices do not have a "main purpose communication function."[91]

66. However, as the United States also noted in its submission, this is ultimately irrelevant to the inquiry at hand.[92] There is no question that the devices subject to the EC measure are "set-top boxes" — the EC has acknowledged that this is so, in its measure,[93] in BTI applying the measure,[94] and in its submissions throughout this proceeding.[95] Nor does the EC dispute that the devices have a communication function.[96] The U.S. position is not, as the EC puts it, "minimal requirements"— it is simply that if a product meets the terms of a concession it is covered by that concession.[97] The EC theory, on the other hand, would require the Panel to read into the concession additional limitations that simply do not exist.

67. As the United States explained, whether or not a device has a "main purpose communication function" is not relevant to the determination of whether a device is a set top box or has a communication function, under the terms of Attachment B of the ITA and the EC's

---

[90]*E.g.*, EC Second Written Submission, para. 243.

[91]U.S. Second Written Submission, paras. 30-32; Exhibit US-122; Exhibit US-102; Exhibit US-123.

[92]U.S. Second Written Submission, paras. 30-32.

[93]Exhibit US-30, p. 8; *see also* U.S. Second Written Submission, para. 37.

[94]*E.g.*, Exhibit EC-43.

[95]*E.g.*, EC Answers to First Panel Questions, para. 194 (stating that "the term 'set top box' denotes a very broad category of products, the only common feature of which is that they have the form of a box and are placed close to a TV or a video monitor (for the use with that product for the purposes of ultimately reproducing television."); *id.*, para. 196 (describing the products on which it imposes duties as a "type of *set top box* product") (emphasis added).

[96]EC Answers to First Panel Questions, para. 196; *see also* U.S. Second Written Submission, para. 38.

[97]*E.g.*, U.S. Second Written Submission, paras. 36-42.

headnote.[98] Nor does the EC measure provide for such an analysis — instead, any STB equipped with a device capable of performing a recording or reproducing function must be classified in a dutiable category.[99] Therefore, the United States does not consider this analysis relevant to the Panel's assessment of whether or not the EC measures are consistent with its WTO obligations.

Q149. (All parties) Why are set top boxes incorporating a cable modem extended duty-free treatment under the CN Explanatory Note if these products do not operate over a telephone line?

68. The fact that the EC considers cable modems "modems", and extends duty-free treatment to devices equipped with such modems even though they do not operate over a telephone line simply illustrates the fact that the EC's current position regarding the proper interpretation of the term "modem" is at odds with that advanced in its own measure. As the United States has explained, the mere fact that a device does not communicate using telephone lines provides no basis to conclude that it is not a modem. All of the devices at issue — Ethernet, WLAN, and ISDN modems — are modems. They "modulate and demodulate signals," as the EC now concedes, and do so in order to connect data terminal equipment to a communication line.

Q150. (All parties) Why is a "cable modem" referred to as a "modem"? Does this mean a cable modem works similarly to a "traditional" modem that relies on a RJ-11 jack? Does a cable modem provide digital-to-analog transfer? Is data transferred by a cable modem via audible tones?

69. A cable modem is a modem because it modulates and demodulates signals in order to connect data terminal equipment to a communication line.[100] However, as the United States has explained, cable modems work differently than "traditional" dial-up modems which operate through standard telephone lines.[101] Cable modems transmit and receive information through a cable TV line[102] and do not normally have an RJ-11 jack (a connector which is used to connect a

---

[98]U.S. Second Written Submission, para. 34.

[99]*See* Exhibit US-30 (providing that any STB with a device "performing a recording or reproducing function" is subject to duty). *See also* U.S. Second Written Submission, para. 33.

[100]U.S. First Written Submission, paras. 100-101.

[101]*E.g.*, U.S. Second Written Submission, para. 53; U.S. Second Opening Statement, para. 22.

[102]U.S. Second Written Submission, para. 53; *see also* Exhibit US-72.

device to a telephone line).[103] Unlike a dial-up modem, which must convert digital signals through an analogue medium (a standard telephone line), a cable modem need not convert digital to analogue signals.[104] Data is not transmitted by a cable modem via audible tones.

70. All of these facts underscore the incongruity between the EC's position that Ethernet, ISDN, and WLAN devices are not modems, and its position (as stated in its measure) that cable modems are modems.[105] As the United States has demonstrated, Ethernet, ISDN and WLAN modems are "modems", just as cable modems are "modems".[106] Contrary to what the EC originally asserted in its measure, Ethernet, ISDN, and WLAN devices modulate and demodulate signals in order to connect data terminal equipment to a communication line, just as cable modems do. As the United States has explained in its submissions, when faced with evidence demonstrating that its measure rested on a flawed factual premise, the EC has reversed course, offering a definition of a modem that is equally at odds with that in its measure and unsupported by the evidence before the Panel.[107]

Q151. (All parties) Does a set top box incorporating an ISDN connection device connect via a phone line, whether a traditional copper phone line or other type of line? Does a set top box incorporating an ISDN connection device provide digital-to-analog conversion or handle data transfer via audible tones?

71. A set-top box incorporating an ISDN modem operates through a telephone network (*i.e.*, over phone lines). The network it uses is an enhanced version of the traditional phone network that allows for the digital transmission of data in order to access the Internet.[108] As the ISDN line

---

[103]*See* Exhibit US-65.

[104]Exhibit US-140.

[105]*Compare* EC Second Written Submission, paras. 223-224 *to* Exhibit US-30 (stating that modems "modulate and demodulate outgoing as well as incoming data signals...enabl[ing] bidirectional communication for the purposes of gaining access to the Internet" and claiming that Ethernet, ISDN, and WLAN modems are not modems because they "do not modulate and demodulate signals").

[106]*E.g.*, U.S. First Written Submission, paras. 100-104; U.S. Answers to First Panel Questions, paras. 101-103; Exhibits US-70, US-71, US-109, US-110, US-111, and US-112; U.S. Second Written Submission, paras. 50-58.

[107]*E.g.*, U.S. Second Opening Statement, para. 22; U.S. Second Written Submission, paras. 50-58.

[108]Exhibit US-141.

is a digital medium, an STB incorporating an ISDN modem does not convert data signals between digital and analog or transfer data via audible tones.

Q153. (All parties) Does an ISDN connection device connect directly to the Internet in a manner similar to a traditional digital-to-analog modem or cable modem? If not, please explain.

72. Like a dial-up, cable, Ethernet or other modem, an ISDN modem generally relies on the transmission of signals through the local network of an Internet Service Provider (ISP) to connect to the Internet. As the United States explained in its Second Written Submission, insofar as the EC argument is premised on its view that a modem does not connect to the Internet directly merely because it transmits a signal to another device, this position proves far too much: under this interpretation, short of constructing and interconnecting one's own network, no STB user would be able to access the Internet "directly" from his or her home.[109]

VI. ARTICLE X CLAIM

Q154. (United States, Chinese Taipei, European Communities): Is there a difference between "made effective" in Article X:1 and "enforced" in Article X:2, and if so, what is that difference both in general and specifically for this case? Please explain.

73. Article X:1 of the GATT 1994 refers to laws, regulations, and other measures "made effective by any Member."[110] Article X:2 refers to "enforcing" measures effecting an advance in a rate of duty. Whatever the difference in meaning between these terms, that difference is not presented in this dispute.

74. The measure in question in this dispute was both "made effective" and "enforced" following the vote of the EC Customs Code Committee. As the United States explained, the STB CNEN was "made effective" by the EC as a result of the vote of the EC Customs Code Committee — that is, pursuant to the vote, it was put into effect and relied upon by member State customs authorities to classify goods in a dutiable heading, over a year before it was published (and the Commission in fact repeatedly encouraged member State customs authorities to rely on it).[111] The STB CNEN was also a measure of general application effecting an advance in a rate

[109] See U.S. Second Written Submission, para. 54 and Exhibit US-127

[110]Pursuant to Explanatory Note (a) in paragraph 2 of the GATT 1994, "contracting party" in Article X:1 is deemed to read "Member."

[111]U.S. Second Written Submission, paras. 122-123. *See also US–Underwear (AB)*, p. 20 ("Article X:2, General Agreement, may be seen to embody a principle of fundamental

of duty that was "enforced" prior to publication — through their actions in classifying merchandise, member States based their customs decisions on the terms of the CNEN, again as evidenced by their reliance on the CNEN in issuing BTI following the vote of the Customs Code Committee.[112]

Q155. (United States, Chinese Taipei, European Communities): Could a draft measure that has not yet been formally adopted or did not yet enter into force be "made effective" or enforced" in the sense of Article X:1 and Article X:2 respectively? Please explain.

75. A measure that a Member labels a "draft" or which it characterizes as not yet "formally adopted" could nonetheless, as a matter of fact, be a measure that has been "made effective" or "enforced" within the meaning of Articles X:1 and X:2, respectively. The label that a Member assigns to a measure for its own domestic purposes does not necessarily control the status of that measure for WTO purposes,[113] and here the fact that the EC has characterized the CNEN as a "draft" does not change the fact that it had been made effective. While the EC claims that under its procedures the CNEN was not formally "final" until it was approved by the Commission, and therefore in the EC's view it was not "formally adopted" (or had not "officially" entered into force), the evidence demonstrates that EC customs authorities in fact made it effective and enforced the CNEN upon the vote of the Customs Code Committee, and did so with the

---

importance — that of promoting full disclosure of governmental acts affecting Members and private persons and enterprises, whether of domestic or foreign nationality. The relevant policy principle is widely known as the principle of transparency and has obviously due process dimensions. The essential implication is that Members and other persons affected, or likely to be affected, by governmental measures imposing restraints, requirements and other burdens, should have a reasonable opportunity to acquire authentic information about such measures and accordingly to protect and adjust their activities or alternatively to seek modification of such measures."); *EEC – Apples* (GATT Panel Report), para. 5.23 (Article X:1 does not permit back-dating of quotas and the EC breached Article X:1 when in failed to provide public notice of the quota allocation until two months after the quota period had begun).

[112]U.S. Second Written Submission, paras. 122-123.

[113]*E.g., China – Auto Parts (AB*), para. 178 ("We first observe that the way in which a member's domestic law characterizes its own measures, although useful, cannot be dispositive of the characterization of such measures under WTO law"); *id.*, n. 244 ("The Appellate Body has previously observed that 'municipal law classifications are not determinative of issues raised in WTO dispute settlement.'") (citing to *US – Softwood Lumber IV (Article 21.5-Canada) (AB)*, para. 82; *US – Softwood Lumber IV (AB)*, para. 56).

encouragement of the Chairman of the Customs Code Committee.[114] Indeed, the evidence demonstrates that EC member States issued BTI referencing the CNEN before it was "adopted" by the Commission. As the United States noted in its Second Written Submission, the EC's position — that a ministerial step in its domestic process allows it to delay publishing a measure, even when the Commission is encouraging member States to apply the measure and it is in fact being applied by member States — would suggest that a Member can avoid publishing a measure long after it has come into effect as a matter of fact, simply by introducing various ministerial steps into its domestic process. Nothing in the text of Article X:1 supports the proposition that a Member can avoid a finding that such a measure has been "made effective" or "enforced" simply by failing to take the final step in that Member's "formal" process.

> ***Q156. (United States, Chinese Taipei, European Communities): The parties disagree on the effect of the Comitology procedure in the adoption of the measure, i.e. whether the measure is adopted by the Customs Code Committee in Comitology or only by the Commission afterwards. However, could the parties elaborate on the relevance of the discussion on the adoption of the measure in light of the obligations under Article X:1 and X:2, since none of those obligations in these provisions seem to require that the measures have been adopted? Please explain.***

76. As noted above in response to Panel Question 155, as a matter of fact the measures were "effective" and "enforced" prior to what the EC labels as "formal adoption" of the measures in its system. Whether the measures were "formally adopted" by the EC (as the EC uses that term) does not change the fact that they were "effective" and "enforced".

77. The United States notes also that Article X:2 refers to measures "taken" by a Member, and does not refer to a measure "adopted" by a Member.

78. Accordingly, the EC's failure to publish the measures promptly is inconsistent with Article X:1, and the EC and member States enforcement of the measures prior to their publication is inconsistent with Article X:2.

> ***Q157. (United States, Chinese Taipei, European Communities): Is there a difference between the publishing requirement in Article X:1 and X:2? In particular, is there a difference, and if so what difference, between "published (...) in such a manner as to enable governments and traders to become acquainted with them" in Article X:1 and "officially published" in Article X:2? Please explain.***

79. While the United States does not exclude the possibility that there might be a difference, under a different set of facts, between "officially publish[ing]" a measure and publishing "in such

[114]U.S. Second Written Submission, paras. 122-123; *id.*, para. 122 n.266; Exhibit US-20.

a manner as to enable governments and traders to become acquainted with" the measure, in this case, as noted previously, the measures in question were not published for over a year after they were enforced and made effective — whether in the EC Official Journal or in another medium readily accessible to Members and traders.

Q158. (United States, Chinese Taipei, European Communities): Should the Panel consider a particular order of analysis when assessing the Article X claim, i.e. should Article X:1 or Article X:2 first merit consideration? Please explain.

80. Based on the text of the provisions and the facts of this case, the United States does not consider that the Panel need proceed in a particular order in evaluating the claims under Article X:1 and X:2.

Q159. (United States, Chinese Taipei, European Communities): What are the criteria for the Panel to establish whether the publication was "prompt" as required by Article X:1?

81. "Prompt" means "done ... without delay."[115] Similarly, in the GATT 1947 dispute *EEC – Apples*, the panel noted that "no lapse of time between publication and entry into force was specified by" Article X:1, and found that the EC had acted inconsistently with its obligations for failing to publish its measure until two months after it was in effect.[116] In this case, the EC did not publish the STB CNEN for over a year after it was in effect.[117] This does not constitute "prompt" publication.

Q160. (United States, Chinese Taipei, European Communities): Should the "advance in a rate of duty ..." in Article X:2 be read as an increase in duty, and should the measure of general application be the sole cause for such increase? Please explain.

82. An "advance" means "[a] rise in amount, value, or price."[118] Thus, an increase in duty is an "advance in a rate of duty". Also, Article X:2 does not contain any reference to a causation requirement or set any particular threshold. So long as the measure "effects" an advance in the

---

[115]New Shorter Oxford English Dictionary (1993), p. 2376; *see also Canada – Pharmaceuticals (Article 21.3(c))*, para. 46 ("The Concise Oxford Dictionary defines the word, 'prompt', as meaning 'acting with alacrity; ready', and 'made, done, etc. readily or at once.'").

[116]*EEC – Apples* (GATT Panel Report), paras. 5.21-23.

[117]U.S. First Written Submission, para. 115.

[118]New Shorter Oxford English Dictionary (1993), p. 31.

rate of duty, the measure would need to be officially published prior to its enforcement. Where a measure is part of the customs duty regime of a Member, it may be one of several statutes, decrees, regulations, or other types of measure pertaining to the relevant customs duty. All of these measures may be used by the Member's customs authority in determining the applicable rate of duty. However, the mere fact that the customs authority uses these measures cumulatively would not excuse the Member from the obligation under Article X:2 to publish officially a measure that effects an advance in a rate of duty and otherwise meets the requirements of Article X:2.

83. In this case, the evidence demonstrates that the CNEN effected an increase in EC duty rates. The purpose of a CNEN is, according to the EC, to ensure uniformity of administration.[119] The evidence demonstrates that before the CNEN was issued, at least some member State customs authorities did not impose duties on the STBs at issue;[120] after the CNEN, however, member State customs authorities imposed duties on the products, consistent with the requirements of the CNEN, and relied on the CNEN as a basis for their decisions to reclassify merchandise into a dutiable subheading.[121] Thus, the CNEN "effected an advance in the rate of duty" on imports of STBs.

> ***Q161. (United States, Chinese Taipei, European Communities): Does the determination of the alleged violation of Article X:1 and Article X:2 require a prior determination of the conformity of the CN Explanatory Notes (2008/C 112/3) with the CN? With regard to Article X:2 in particular, could the CN Explanatory Notes (2008/C 112/3) be considered the reason for effecting the advance in rate of duty only if that CN Explanatory Notes alters the scope of the relevant CN heading? Please comment.***

84. No; as the EC itself acknowledges, CNENs have legal effects independent from the CN

---

[119]U.S. Second Written Submission, para. 124; Statement of the European Communities at the December 11, 2006 meeting of the Dispute Settlement Body, WT/DSB/M/223 (15 January 2007), para. 8; U.S. Answers to First Panel Questions, para. 44 and n.42; *see also EC–Customs Matters (Panel)*, paras. 7.158, 7.179.

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

[121]U.S. Second Written Submission, para. 124; Exhibit US-28.

itself (if they did not, there would be no reason for the EC to adopt them). One of the purposes of a CNEN is, according to the EC, to ensure uniformity of administration of its customs laws.[122] This suggests that, absent the CNEN, at least some member States would *not* have imposed duties on the products at issue (thus creating the problem of nonuniformity of administration that CNENs as the EC itself describes them are intended to solve). By imposing uniformity throughout the EC, the CNEN thus at a minimum "effect[s] an advance in the rate of duty" for those portions of the EC customs territory that were imposing non-uniform lesser duties. The CNEN need not be *inconsistent* with the CN to have these effects (and there is no reason to conclude that the STB CNEN is in fact inconsistent with the CN). And while the United States welcomes efforts by the EC to ensure uniform administration of its customs measures throughout the EC, the United States considers that the EC should achieve that uniform administration by publishing the measures that lead to that uniformity, as GATT Article X:2 requires.

85. Nothing in Article X:1 or X:2 requires that a measure alter the legal scope or effect of another measure in order to be subject to the publication obligations contained in those provisions. For example, Article X:1 refers to all "laws, regulations, judicial decisions and administrative rulings of general application" pertaining to the specified matters, not just to those that make some change from pre-existing measures. Furthermore, the purpose of publishing these measures promptly "to enable governments and traders to become acquainted with them" supports the conclusion that the requirement should not be read to exempt from publication categories of measures that do not affect pre-existing measures, as the alternative would impair the ability of governments and traders to become familiar with such measures.

Q162. (United States, Chinese Taipei, European Communities): Please explain what are the criteria to determine an "established and uniform practice" under Article X:2?

86. Article X:2 refers to a measure that "effect[s] an advance in a rate of duty or other charge on imports under an established and uniform practice." In this context, "under an established and uniform practice" would appear to modify the term "other charge on imports". Accordingly, the question would be which charges on imports are under an established and uniform practice. Presumably this would exclude those charges that are imposed ad hoc on imports (for example a charge to deal with a particular situation arising with respect to a problem with a particular shipment at a particular port). The current dispute would thus not implicate the phrase "an established and uniform practice." In any event, the EC itself has stated repeatedly that CNENs are intended to ensure uniformity of administration of its tariff regime, thus supporting the

[122]U.S. Second Written Submission, para. 124; Statement of the European Communities at the December 11, 2006 meeting of the Dispute Settlement Body, WT/DSB/M/223 (15 January 2007), para. 8; U.S. Answers to First Panel Questions, para. 44 and n.42; *see also EC – Customs Matters (Panel)*, paras. 7.158, 7.179.

conclusion that the CNENs are an established and uniform practice.[123]

Q163. (United States, Chinese Taipei, European Communities): What is the meaning of the term "an established and uniform practice" in Article X:2? Does it relate to the measure of general application or to the required level of enforcement? In addition, can a draft measure constitute an "established and uniform practice"? Please explain.

87. This phrase relates to the other charge on imports, as evidenced by the fact that the phrase modifies that term.[124] Although this phrase is not implicated in this dispute, the particular manner in which a Member describes the status of its measure (such as "draft") does not necessarily answer the question of what effect the measure has in that Member's system and whether — as is the relevant question for purposes of Article X:2 — that measure is being enforced.

Q164. (United States, Chinese Taipei, European Communities): Do the parties consider that Article X:2 only concerns "as applied" claims? What is the nature of the complainants claim in this particular case? Please explain.

88. No; Article X:2 pertains to the enforcement of a measure effecting an advance in a rate of duty prior to publication. The United States has submitted BTI and other material to demonstrate that the measure was enforced prior to publication; the United States is challenging the enforcement of the measure (the STB CNEN) as such.

Q165. (United States, Chinese Taipei, European Communities): Do the parties believe that the criteria for determining an "established and uniform practice" under Article X:2 have been met? Please explain.

89. The phrase "an established and uniform practice" is not implicated in this dispute. In any event, a CNEN is an established and uniform practice — indeed, the EC has relied on CNEN in previous disputes to argue that it administers its customs regime uniformly (*i.e.*, that it eliminates

[123]U.S. Second Written Submission, para. 124; Statement of the European Communities at the December 11, 2006 meeting of the Dispute Settlement Body, WT/DSB/M/223 (15 January 2007), para. 8; U.S. Answers to First Panel Questions, para. 44 and n.42; *see also EC – Customs Matters (Panel)*, paras. 7.158, 7.179.

[124]*See* Article X:2 ("No measure of general application ... effecting an advance in a rate of duty or other charge on imports under an established and uniform practice...").

differences among the practices of individual member States).[125] The very purpose of a CNEN, as the EC has argued in the past, is to ensure uniformity of administration of its Community-wide customs regime.[126] Furthermore, the evidence in this case demonstrates that, in fact, the CNEN did establish such a practice — all BTI issued after the vote of the Customs Code Committee provide for classification of STBs in the dutiable heading, consistent with the requirements contained in the CNEN.[127] The EC has offered no evidence to suggest otherwise.

Q166. (United States, Chinese Taipei, European Communities): Would the BTIs # 5 to 9 in exhibit US-28, issued by France (three BTIs issued on the same day), Belgium and the Czech Republic reflect an "established and uniform practice"? Please explain.

90. The phrase "an established and uniform practice" is not implicated in this dispute. Even if "established and uniform practice" modified "duty" as well as "other charge on imports", the CNEN itself and the EC's statements regarding its role in ensuring uniformity of administration demonstrate that the measure would be "an established and uniform practice." These five BTI would also support the conclusion that the CNEN is "an established and uniform practice." Each of the BTI provide for classification of STBs in a dutiable heading, consistent with the CNEN (four of the five refer to the CNEN as a basis for the decision). Furthermore, whereas the United States has offered five BTI issued by three different member States, it is significant that the EC has offered *no* BTI issued by any member State reaching the opposite conclusion. There is in fact no evidence before the Panel suggesting that, after the vote of the Customs Code Committee, there was nonuniformity in EC classification of STBs. Based on the evidence, the only reasonable conclusion is that the CNEN would be a measure that was "an established and uniform practice," and that this measure was enforced before it was officially published.

Q167. (European Communities) Could the European Communities please clarify paragraph 326 of its first written submission, which states:
"[T]o the extent the Complainants would argue, despite the above explanations, that votes or discussions in the CCCE created some sort of 'established and uniform practice', the EC respectfully submits that the BTIs listed in # 1 to # 4 are a perfect confirmation of the fact that simply no practice, yet the 'established and uniform

---

[125]U.S. Second Written Submission, para. 124; U.S. Answers to First Panel Questions, para. 44.

[126]U.S. Second Written Submission, para. 124; Statement of the European Communities at the December 11, 2006 meeting of the Dispute Settlement Body, WT/DSB/M/223 (15 January 2007), para. 8; U.S. Answers to First Panel Questions, para. 44 and n.42; *see also EC – Customs Matters (Panel)*, paras. 7.158, 7.179.

[127]U.S. Second Written Submission, para. 124; Exhibit US-28.

practice' in the sense of Article X:2 GATT 1994, was created as a result of any such discussion or a vote".
Could the United States and Chinese Taipei also comment on this statement?

91. As the United States noted in its Second Written Submission, the four BTI issued before the CNEN amendments were voted upon provide no support for the conclusion that the measure was not effecting an advance in a rate of duty under an established and uniform practice.[128] The evidence demonstrates that prior to issuance of the BTI, at least some member States were subjecting STBs to duty.[129] All the BTI on the record that were issued after the vote provide for classification in the dutiable heading, consistent with the requirements contained in the CNEN.[130] As the United States has also noted, the EC's suggestion that the CNEN did not effect an advance in a rate of duty "under an established and uniform practice" is contrary to its repeated statements regarding the purpose of CNENs in the EC system.[131]

[128]U.S. Second Written Submission, para. 124.

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

[130]Exhibit US-28.

[131]U.S. Second Written Submission, para. 124; Statement of the European Communities at the December 11, 2006 meeting of the Dispute Settlement Body, WT/DSB/M/223 (15 January 2007), para. 8; U.S. Answers to First Panel Questions, para. 44 and n.42; *see also EC – Customs Matters (Panel)*, paras. 7.158, 7.179.