

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

**CLOSING STATEMENT OF THE UNITED STATES OF AMERICA
AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL**

MAY 14, 2009

Mr. Chairman, members of the Panel —

1. In this closing statement I would like to highlight briefly a few aspects of our discussion over the past several days that in our view are of particular importance to resolving this dispute.
2. To evaluate this case one must first evaluate the text — the text of the measures that complainants have claimed give rise to a breach and the text of the concessions complainants argue have been breached. One must reason from the text.
3. First, with respect to the measures. Throughout its argument, the EC ignores the text of its own measures. It claims that classification is done on a case by case basis, and that no single attribute is dispositive, but that is not what the measures say. At times it appears to be defending two ECJ opinions that were issued a few months ago — but these opinions, while helpful illustrations of the numerous flaws in the EC measures, are not the measures themselves. The measures at issue are those identified in the panel request. They are in effect. The ECJ opinions did not result in their withdrawal or modification. The EC may be in the process of modifying them or considering modifying them, but it has not done so. Moreover, the measures mean what they say. They require customs authorities to impose duties on products with particular arbitrary technical attributes. For example, the STB CNEN states and I quote — “Set-top boxes which incorporate a device performing a recording or reproducing function (for example, a hard disk or

DVD drive) are excluded from this subheading” (the duty-free subheading); it then identifies the dutiable subheading as the subheading in which the product is classified. We have provided ample evidence, including a number of BTI, to demonstrate that the CNEN has resulted in the application of duties to any STB with these attributes. The EC has offered no evidence to the contrary.

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

5. As for the meaning of the set top boxes concessions, the theory the EC offers is supported neither by the text of Attachment B nor by the EC’s modification in 2000. We do encourage the Panel to review that document. The EC’s claim that it does not have a concession on STBs “with” a communication function, that there is a substantive difference between “with” and

“which have”, and that STBs with tuners were excluded from the Attachment B description of STBs is wrong and flatly contradicted by the 2000 modification.

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

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

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

9. For example, the FPD concession states that an FPD must be “for” a product falling within the agreement. “For” is a function word indicating purpose. The “purpose” in question is use with another ITA product, e.g., a computer. The text of the concession does not, for example, exclude an FPD “for” watching video or an FPD “for” television. Indeed, as some of

the Chairman's comments today suggest, today many people use their computers to watch video or even television. The question, again, is whether it is for another ITA product. The EC measures provide that any FPD with DVI and any FPD capable of receiving signals from something other than a computer is dutiable. As we have argued, this rule necessarily results in the application of duties to FPDs that are "for" computers. Just because something has a DVI plug, just because it could be connected to a device other than a computer, does not mean it isn't "for" a computer.

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

11. To the EC, characteristics specified by the agreement text are not relevant. It is all about function. The EC approach, however, does not respect the text of the agreement. The text of the EC concessions was not written so as to enumerate even all of the functions that the products existing at the time of the ITA's conclusion had. For example, an STB may have the function of receiving television signals, as we discussed earlier. The text doesn't say anything about

receiving television signals. Does this mean that these STBs were not covered? No. Indeed, the EC in 2000 modified its Schedule to add a new line containing these STBs and specifically attached this line to the Attachment B description.

12. The fact is that the ITA covers products. It does not cover “functions” in the abstract, as the EC at times suggests. Therefore, for example, when the EC says that the ITA excluded televisions it cannot mean that the ITA excluded all devices on which you can watch TV.

Watching TV on your computer may rot your mind and keep you from getting your work done, but the ITA does not penalize you for using your computer to do so, nor does it allow participants to impose duties on computers that allow you to do so. Indeed, the ITA expressly includes computers with TV tuners in them. There is no such thing as an ITA-covered function and a non-ITA-covered function.

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

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

15. It may be for these reasons that so many Members have taken a keen interest in this

dispute, and why so many, including developing country Members, expressed their concerns so eloquently yesterday in defense of complainants' position regarding the EC approach. The ITA concessions were and remain a critical tool in encouraging development, technological innovation, and expansion of trade.

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