BEFORE THE WORLD TRADE ORGANIZATION

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

(WT/DS375, WT/DS376, WT/DS377)

FIRST WRITTEN SUBMISSION OF JAPAN

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EC - Chicken Cuts	Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005.
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EC – Computer Equipment	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, DSR 1998:V, 1851.
EC - Selected Customs Matters	Panel Report, *European Communities – Selected Customs Matters*, WT/DS315/R, adopted 11 December 2006, DSR 2006:IX, 3915.
Greece – Phonograph Records	Group of Experts Report, *Greece - Increase in Bound Duty*, L/580, 9 November 1956, unadopted.

TABLE OF ABBREVIATIONS

Abbreviation	Description
1987 CN/CCT Regulation	Annex I to Council Regulation (EEC) No. 2658/87 of 23 July 1987.
ADP	Automatic Data-processing machine *or* computer
BTI	Binding Tariff Information
CCD	Charge-coupled device
CCT	Common Customs Tariff
CN	Combined Nomenclature
CN2008	Combined Nomenclature 2008
CNEN	Explanatory Notes to the Combined Nomenclature
CPU	Central Processing Unit
CRT	Cathode ray tube
Commission	European Commission
Council	Council of the European Union
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
DTV	Digital television
DVI	Digital Visual Interface
EC	European Communities
ECJ	European Court of Justice
GATT	General Agreement on Tariffs and Trade
GRI	General Rule of Interpretation
HDMI	High-definition Multi-media Interface

Abbreviation	**Description**
HS	Harmonized Commodity Description and Coding System
HS07	2007 Harmonized System
HS96	1996 Harmonized System
HSEN	Harmonized System Explanatory Notes
ITA *or* Information Technology Agreement	The Ministerial Declaration on Trade in Information Technology Products
LAN	Local Area Network
LCD	Liquid Crystal Display
LSU	Laser Scanning Unit
MFM	Multifunctional digital machine
MFP	Multifunctional digital printer
OLAF	Office Européen de Lutte Anti-Fraude
STB	Set-top box
TCP/IP	Transmission Control Protocol/Internet Protocol
TPKM	Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu
VGA	Video Graphics Array connector
WAN	Wide Area Network
WCO	World Customs Organization

I. TRADE LIBERALIZATION AND THE INFORMATION TECHNOLOGY INDUSTRY

1. As information technology becomes a more important part of the world economy, trade liberalization of information technology products becomes a more important priority for the global trading system. The Ministerial Declaration on Trade in Information Technology Products (hereafter "Information Technology Agreement," or "ITA"), WT/MIN(96)/16 (13 December 1996), has been a critically important step in this trade liberalization. The ITA recently celebrated its 10th anniversary. Today, 71 WTO Members representing 97 percent of world trade in information technology products participate in the ITA.[1]

2. The economic growth stimulated by this trade liberalization has been both substantial and diversified. The legal obligations to grant duty-free treatment to information technology products have triggered a substantial increase in global trade. Information technology imports have grown from about $600 billion in 1996 to more than $1500 billion in 2006, more than doubling over this period.[2]

3. This dispute has sometimes been characterized as a disagreement over tariff classification, but that would be a misstatement. The official title of this dispute – "The Tariff Treatment of Certain Information Technology Products" – more accurately frames the dispute. This dispute is about the scope of tariff concessions set forth in the European Communities ("EC")'s tariff schedules formalized as part of the EC's WTO obligations – whether the EC can assess duties on products that Japan and the other complaining Members believe are subject to legally binding commitments of duty-free treatment. Japan believes the EC tariff concessions do not allow the imposition of duties on these technology products.

4. This distinction between deciding on the proper customs classification and interpreting tariff concessions is important. Customs classification itself is neutral – it does not affect market competition. A consistent system of customs classification improves the efficient administration of customs procedures and improves the quality of cross-border trade statistics. In particular, the specific harmonization of customs classification that has been taking place in the World Customs Organization ("WCO"), and has led to the creation of and continual improvement in the Harmonized Commodity Description and Coding

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[1] See generally Opening Statement by Pascal Lamy (28 March 2007) commemorating the 10th Anniversary of the ITA, available at http://www.wto.org/english/tratop_e/inftec_e/symp_march07_e/symp_march07_e.htm

[2] See generally K. Michael Finger, "An Overview of Tariff Liberalization and World Trade for ITA Products, 1996-2005" (28 March 2007), available at http://www.wto.org/english/tratop_e/inftec_e/symp_march07_e/symp_march07_e.htm

System ("Harmonized System" or "HS"), has been of tremendous benefit to the global trading system. It is critical, however, to keep in mind the limits of this effort. The Harmonized System has been crafted based on the explicit understanding that it does not affect tariff rates. Article 9 of the most recent restatement of the Harmonized System states that countries "do not assume by this convention any obligation in relation to rates of customs duty."[3] This starting point that harmonization does not affect duty rates allows the harmonization process to take place at a very technical level focusing on the mechanics of customs administration and consistent trade statistics, and within the domestic legal framework of each contracting party, rather than within the WTO framework. Accordingly, developments in the Harmonized System do not define and cannot change the scope of the tariff concessions of Members.

5. In all WTO disputes the language of the relevant legal obligation is critical. In this dispute, that specific language is found in the EC's schedule of tariff concessions. Japan will focus its arguments on the meaning of that language – both the ordinary meaning of the language of specific concessions, and the meaning of that language in the context of the other language in the EC's schedule of tariff concessions.

II. PROCEDURAL BACKGROUND

6. On 28 May 2008, Japan requested consultations with the EC pursuant to Articles 1 and 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Article XXII:1 of the General Agreement on Tariffs and Trade ("GATT 1994"), with respect to the tariff treatment the EC and its member States accord to certain information technology products.[4]

7. This request was circulated to WTO Members on 2 June 2008 (WT/DS376/1). The United States requested consultations with the EC and its member States on the same matter also on 28 May 2008 and that request was circulated on 2 June 2008 (WT/DS375/1). The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu ("TPKM") requested consultations with the EC and its member States on the same matter on 12 June 2008 and the request was circulated on 18 June 2008 (WT/DS377/1). Japan, the United States, and TPKM notified each other and the EC of their desire to be joined in their respective consultations, pursuant to Article 4.11 of the DSU. In addition, four other Members (Thailand, China, Singapore, and the Philippines) notified the parties of their interest in joining the consultations. With the exception of

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[3] International Convention on the Harmonized Commodity Description and Coding System, done at Brussels, 14 June 1983, 1503 UNTS 167 ("HS Convention").

[4] WT/DS376/1, G/L/852 (28 May 2008).

China's request to join the consultations requested by TPKM, the EC rejected each of those requests, asserting that none of the Members had a substantial trade interest in the consultations.

8. Japan and the EC and its member States held consultations on 26 June 2008 and 16-17 July 2008 in Geneva. The United States and the EC and its member States held consultations on 25-26 June 2008 and 14-15 July 2008 in Geneva. TPKM and the EC and its member States held consultations on 3 July 2008, 18 July 2008 and 25 July 2008 in Geneva. Those consultations were held with a view to reaching a mutually satisfactory solution. Unfortunately, the consultations failed to find such a solution in each of the three pending disputes arising out of the same EC measures.

9. On 18 August 2008, Japan, the United States, and TPKM jointly requested the establishment of a panel pursuant to Article 6 of the DSU (WT/DS376/8; WT/DS375/8; WT/DS377/6). The Dispute Settlement Body ("DSB") considered this request at its meeting on 29 August 2008, at which time the EC objected to the establishment of a panel.

10. On 23 September 2008, Japan, the United States, and TPKM renewed their joint request for the establishment of a panel.

11. The Panel was established at the DSB meeting of 23 September 2008, with the following standard terms of reference:

> To examine, in the light of the relevant provisions in the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the United States, Japan, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsui in document WT/DS375/8, WT/DS376/8, and WT/DS377/6, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[5]

12. The Panel was duly constituted on 22 January 2009.[6]

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[5] *Dispute Settlement Body: Minutes of the Meeting Held on 23 September 2008*, WT/DSB/M/256, para. 52; *Note by the Secretariat: Constitution of the Panel Established at the Request of the United States, Japan, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu*, WT/DS375/9, WT/DS376/9, WT/DS377/7, circulated 26 January 2009, para. 2.

[6] *Note by the Secretariat: Constitution of the Panel Established at the Request of the United States, Japan, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu*, WT/DS375/9, WT/DS376/9, WT/DS377/7, circulated 26 January 2009, para. 4.

III. OVERVIEW OF THE ARGUMENT

13. This dispute involves several types of information technology products, numerous EC measures, and a range of sometimes overlapping legal arguments. Japan therefore provides the following guide to how it has organized its discussion in its first written submission.

14. First, Japan uses an overall structure based on the products at issue. For that reason, Japan has organized its argument around each of the three products addressed in this submission:

- multifunctional digital machines, including two specific types:

  (i) multifunctional digital machines with connectivity to computers;

  (ii) multifunctional digital machines with a facsimile function, but without connectivity to computers;

- flat panel display devices "for" automatic data processing machines, particularly LCD monitors with DVI; and

- set top boxes with a communication function.

15. Within each of these three major sections, Japan presents its argument for each product. Japan first describes precisely the product at issue, including several illustrative examples for various products. Japan then sets forth the specific EC measures at issue in this dispute. Recognizing that the EC measures alone do not tell the entire story, Japan then provides for each product a brief history of the particular tariff concessions at issue and the history and context of the EC measures taken in the aftermath of these tariff concessions. Note that in the initial section on multifunctional digital machines with connectivity to computers, we have provided a brief overview of the legal framework for EC tariff classification and treatment, an overview that commonly applies regarding all the products at issue in Japan's argument, but an overview that we provide only once.

16. After providing this important factual background, Japan then presents its legal argument for each product. Japan begins with a brief summary of its argument. Japan then develops its legal argument in some detail, relying primarily on the ordinary meaning of the language of the EC tariff concession, read in context, and in light of the object and purpose of the concessions at issue.

IV. THE EC MEASURES CONCERNING MULTIFUNCTIONAL DIGITAL MACHINES – BOTH THOSE WITH AND THOSE WITHOUT CONNECTIVITY TO COMPUTERS -- ARE INCONSISTENT WITH EC OBLIGATIONS UNDER ARTICLES II:1(A) AND II:1(B) OF THE GATT 1994

A. The EC Measures Concerning Multifunctional Digital Machines With Connectivity to Computers

1. The Products at Issue

17. The EC and its member States impose duties on multifunctional digital machines ("MFMs"). MFMs are digital devices that generally incorporate both an input unit (a scanner unit to convert information into digital input for the device) and an output unit (a printer unit that allows the digital output from the device to be printed). Once a document has been converted into digital information, that information can be stored, manipulated on the computer, transmitted over phone lines, or sent over the Internet. The printer unit allows that digital information to be printed in a paper form. As explained later, MFMs with such connectivity are basically a technologically advanced version of printers.

18. In this dispute, Japan uses the term "MFMs" to refer to machines that perform, in addition to printing, one or more of the functions of scanning, copying, or facsimile transmission (which makes them "multifunctional"). These MFMs then fall into two different categories, which are subject to distinct tariff concessions.

19. First, many of these MFMs can connect directly in a digital form to an automatic data processing ("ADP") machine (typically, machines commonly known as computers) or to a computer network. Such MFMs include devices often known commercially as "multifunctional printers" or MFPs. Such MFMs are subject to tariff concessions that the EC made on those products under heading 84.71 and subheading 8471.60. These products are discussed in this Section of this First Written Submission.

20. Second, some MFMs do not have this digital connectivity[7] to a computer. Rather than connect to a computer, these MFMs operate primarily in connection with a telephone line. Such MFMs, often commercially known as facsimile machines, are subject to tariff concessions that the EC made on those

[7] Note that we use the phrase "digital connectivity" to refer to connectivity to a computer either directly or indirectly through a computer network. The key feature of such devices is the ability to create and work with digital information.

products under heading 85.17 and subheading 8517.21. These products are discussed below in paragraphs 182-185 of this First Written Submission.

21. To be more specific, Japan has identified specific illustrative models of MFMs that are being assessed duties by the EC even though these models are properly covered by EC commitments to treat such products as duty-free. Exhibit JPN-1 to this First Written Submission provides a list of specific products that Japan believes illustrate the types of MFMs that are properly covered by EC concessions on subheading 8471.60 as computer input/output units, and brochures that describe each of these products. These products all include more than one function, in addition to printing, which makes them "multifunctional." These products also all depend on digital technologies. This list is illustrative, not comprehensive.

2. The legal framework for EC tariff classification and treatment

22. This dispute concerns several different types of measures adopted by the EC and its member States that affect the tariff treatment of particular ITA products. As will be explained in detail below, the measures at issue include the Combined Nomenclature ("CN") of the EC, various Commission or Council Regulations, Explanatory Notes of the Combined Nomenclature ("CNEN"), as well as actions of the Customs Code Committee. Before describing the particular measures that have resulted in WTO-inconsistent tariff treatment, it is important to understand the legal and institutional framework as well as the mechanisms involved in the making and administering EC customs law relating to classification and tariff treatment. The following paragraphs in this section provide a brief overview of these issues.

(a) The Common Customs Tariff and the Combined Nomenclature

23. As a customs union, the EC and its member States apply a Common Customs Tariff ("CCT") on imports from third countries. Responsibility for administering the customs system is divided between the European Commission ("Commission") and the member States.[8] The Commission is responsible for adopting a complete version of the CN as well as the corresponding rates of duty provided for in the CCT. Customs authorities of the member States through which goods are imported into the EC territory then apply the CN and CCT to particular importations, and thereby are responsible for determining the proper classification of the goods and collecting the applicable tariff.

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[8] Articles 25 to 27 of the Treaty Establishing the European Communities.

24. Annex I to Council Regulation (EEC) No. 2658/87 of 23 July 1987, as amended ("1987 CN/CCT Regulation") sets forth the CN as well as CCT duty rates. The CN contains the common nomenclature -- the common descriptions of categories for different goods with numerical codes -- applicable to imports in the EC. The CCT uses this same framework but adds the corresponding rates of duty for each category provided under the CN. Pursuant to Article 12 of the 1987 CN/CCT Regulation, the EC Commission adopts each year by means of a regulation a complete updated version of the CN together with the corresponding rates of duty of the CCT, as an amendment to Annex I. The most recent update is contained in Commission Regulation (EC) No. 1031/2008, which was published in the EC Official Journal on 31 October 2008 and came into force on 1 January 2009.[9]

25. The EC and its member States are parties to the HS Convention of the WCO, which most recently completed a 2007 edition of the HS nomenclature.[10] The HS nomenclature comprises about 1200 headings that are grouped into 96 chapters. Each HS heading is identified by a 4-digit code, the first two digits of which indicate the Chapter to which the heading belongs and the remainder of which indicate the position of the heading in the Chapter. Most headings are further subdivided into subheadings which are identified by a six-digit code. WCO members may establish additional subdivisions at the national level, beyond the six-digit codes set forth in the HS.[11] In the CN, the EC has defined subheadings at the eight digit level (as well as nine or ten digit codes in some cases for purposes of the Integrated Tariff of the EC.

26. Numerical coding, common descriptions, and rates of duty for products (including the products at issue in this dispute) may change as a result of updates to the CN.[12] Some changes to the CN are EC-specific; others are the result of rules adopted by participants in the HS Convention. With respect to all the products subject to this dispute, the actions of the EC described below occurred over a period of several years. In describing the EC measures, Japan refers to the HS codes in existence at the time of the EC concession, since that language used in the text of the EC concessions defines the scope of the EC obligations. In a few instances where appropriate, we also discuss the changes that have been made more recently to these HS categories, so that the Panel can see how the older HS headings and subheadings have evolved into the headings and subheadings currently in use.

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9 Commission Regulation (EC) No. 1031/2008 of 19 September 2008, OJ L 291 (31 October 2008). See Exhibit JPN-20.

10 WCO, Harmonized Commodity Description and Coding System (4th ed. 2007).

11 International Convention on the Harmonized Commodity Description and Coding System, Article 3(3).

12 Article 12 of Council Regulation (EEC) No. 2658/87, OJ 1987 L 256/1.

(b) Other Council and Commission measures affecting classification

27. The Commission or the Council of the European Union ("Council") may modify or provide additional classification rules for particular products.[13] One such measure is a classification regulation. Classification regulations are adopted by the Commission, after seeking the opinion of the Customs Code Committee (a body comprised of representatives of each member State and chaired by a representative of the Commission) in accordance with the "management procedure" set forth in Article 10 of the 1987 CN/CCT Regulation. Classification regulations determine the tariff subheading to be applied to the specific goods described in the classification regulation, but may also be applied by analogy to products considered similar to those described in the regulation.[14] Based on these measures, a product may be reclassified in a different tariff line in the CN, which can result in the application of a different duty rate. For example, as explained below, Commission Regulation (EC) No 2171/2005 of 23 December 2005 contains classification rules which resulted in the imposition of duties on certain flat panel display devices.

(c) Explanatory Notes to the Combined Nomenclature (CNENs)

28. Pursuant to Article 9(1)(a) of the 1987 CN/CCT Regulation, the EC Commission may issue Explanatory Notes to provide additional clarifications to the CN.[15] CNENs are adopted by the Commission, after consulting with the Customs Code Committee in accordance with the procedures set forth in the 1987 CN/CCT Regulation. As the EC has stated in previous submissions to the WTO and as the ECJ has consistently held, CNENs "are an important aid in the interpretation of the CN."[16] In addition to providing guidance to member States on the application of the CN, CNENs have other important legal consequences. For example, once CNENs are adopted, Binding Tariff Information ("BTI") (a type of EC classification measure described below) that contradicts the guidance set forth in a CNEN is no longer valid.[17] Like a regulation, a CNEN can result in

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13 EC Nomenclature/CCT Regulation, art. 9(1).

14 Case C-130/02, Krings, judgment of March 4, 2004, para. 35.

15 CN Explanatory Notes are to be distinguished from HS Explanatory Notes, which are issued by the WCO.

16 Panel Report, *European Communities -- Selected Customs Matters*, WT/DS315/R (June 16, 2006), para. 2.39 ("*EC - Selected Customs Matters*") (citing Case C-396/02, *DFDS,* judgment of 16 September 2004 (not yet published), para. 28 (Exhibit EC-25); Case C-259/97, *Clees,* [1998] ECR I-8127, para. 12 (Exhibit EC-29)).

17 E.g., Administrative Guidelines on the European Binding Tariff Information (EBTI) System and Its Operation, Article 11 (stating that "[a] BTI ceases to be valid...[w]here the

reclassification of products to a different tariff line in the CN, and the application of a different duty rate.

(d) Opinions and statements of the Customs Code Committee

29. The Customs Code Committee, established pursuant to Articles 247a(1) and 248a(1) of the Community Customs Code, consists of representatives of the member States and chaired by a representative of the EC Commission. In accordance with Article 8 of the 1987 CN/CCT Regulation, the Customs Code Committee examines any matter referred to it by its Chairman concerning the CN. In particular, the Committee may adopt opinions on questions relating to the application and interpretation of the CN. With respect to these opinions, at the 433rd meeting of the Customs Code Committee, the Chairman explained that "as soon as the Committee has rendered an opinion on the classification of a specific type of product, no BTI should be issued contrary to that opinion and...this opinion should be respected by all member States."[18] Furthermore, he stated that "[i]t follows from the above that as soon as an opinion has been voted, member States can issue BTIs for the products concerned, even before the measure has been adopted by the Commission and published in the Official Journal."[19]

(e) Binding Tariff Information (BTI)

30. BTIs are decisions issued by customs authorities of individual EC member States on the correct classification of a particular product in the relevant nomenclature.[20] Under the BTI system, an economic operator (such as an importer) applies to a member State's customs authorities for issuance of BTI confirming the classification that will be assigned to particular goods on importation into the territory of that member State. Once issued, BTI is "binding on the customs authorities as against the holder of the information."[21] Implementing Provisions to the Community Customs Code provide that member State customs authorities are obliged to follow BTIs issued by other member

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BTI is no longer compatible with the interpretation of one of the customs nomenclatures, e.g. following amendments to the CN Explanatory notes...); see also Community Customs Code, article 12.5(a)(ii).

[18] Customs Code Committee, Tariff and Statistical Nomenclature Section (Heads of Tariff), 433rd meeting, Summary Report, point 5.

[19] Customs Code Committee, Tariff and Statistical Nomenclature Section (Heads of Tariff), 433rd meeting, Summary Report, point 5.

[20] Article 12 of Council Regulation (EEC) No. 2913/92 of 12 October 1992 (and Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of the Community Customs Code, Articles 5)

[21] Article 12(2) of Council Regulation (EEC) No 2913/1992, establishing the Community Customs Code.

States.[22] BTIs are normally valid for six years from the date of issue, but may cease to be valid if, for example, a contrary CNEN is issued. Article 12.5 of the Customs Code lists other cases in which a BTI will cease to be valid.

3. The Measures at Issue

(a) 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

31. As discussed earlier, Council Regulation (EEC) No. 2658/87 of 23 July 1987 provides the basic EC measure on tariffs – both the structure of tariff nomenclature and the duty rates. This regulation has been amended from time to time to reflect changes to the nomenclature or the duty rates.

32. For the purposes of this dispute, a key amendment that became effective on 1 January 2007 concerning multifunctional machines that improperly imposed duties on products that should be duty-free. Commission Regulation (EC) No. 1549/2006 of 17 October 2006 amended Annex I to Council Regulation (EEC) No. 2658/87.[23] Reflecting changes that had been negotiated as part of revising the Harmonized System, the EC essentially adapted the Council Regulation to the revised 2007 Harmonized System nomenclature (hereinafter "HS07").

33. Specifically, the amended Council Regulation created a new CCT code (8443 31), reflecting the new HS07 subheading, for "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." Within that heading, the regulation created three new provisions – two duty-free, and one with a six percent duty rate. The overall structure of these tariff provisions (as of 1 January 2007) is set forth below:

8443	Printing machinery used for printing by means of plates, cylinders and other printing components of heading 8442; other printers, copying machines and facsimile machines, whether or not combined; parts and accessories thereof:
	– Printing machinery used for printing by means of plates, cylinders and other printing components of heading 8442:

[22] Article 11 of Commission Regulation (EEC) No 2454/93.

[23] Commission Regulation (EC) No 1549/2006 of 17 October 2006 (31 October 2006). See Exhibit JPN-2.

	– **Other printers, copying machines and facsimile machines, whether or not combined:**	
8443 31	– – **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:**	
8443 31 10	– – – Machines performing the functions of copying and facsimile transmission, whether or not with a printing function, with a copying speed not exceeding 12 monochrome pages per minute	Free
	– – – Other:	
8443 31 91	– – – – Machines performing a copying function by scanning the original and printing the copies by means of an electrostatic print engine	6
8443 31 99	– – – – Other	Free

34. This new CCT indicates that MFMs with copying and computer printing functions, but without a facsimile transmission function, are always subject to a 6 percent duty when using an electrostatic print engine regardless of their copying speed. The CCT also indicates that even those MFMs with a facsimile function, but with copying speeds of more than 12 monochrome pages per minute and with an electrostatic print engine, are always subject to a 6 percent duty. Japan believes these EC regulations and other measures on their face are inconsistent with EC tariff concessions. These measures impose duties on MFMs that should be duty-free.

35. Commission Regulation (EC) No 1214/2007 of 20 September 2007, amending Annex I to Council Regulation No 2658/87, set forth Combined Nomenclature 2008 ("CN2008").[24] Commission Regulation (EC) No 1031/2008 of 19 September 2008, amending Annex I to Council Regulation No 2658/87, set forth Combined Nomenclature 2009 ("CN2009").[25] The CN 2008 and the CN 2009 continued the classification of MFMs under heading 84.43 as set forth in the CN 2007.

(b) Commission Regulation (EC) No 517/1999 of 9 March 1999

36. Although the amended Council Regulation discussed above is one of the core measure at issue in this dispute, other EC measures over the years led up to the decision improperly to impose a 6 percent duty on MFMs. These earlier measures are still applicable and also subject to this dispute.

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[24] Commission Regulation (EC) No. 1214/2007 of 20 September 2007 (31 October 2007. See Exhibit JPN-3.

[25] Commission Regulation (EC) No. 1031/2008 of 19 September 2008 (31 October 2008). See Exhibit JPN-20.

37. Commission Regulation (EC) No 517/1999 represents one of the first EC efforts to improperly impose duties.[26] This Commission Regulation provided for the following tariff treatment of two specific types of products which the regulation itself called "multifunctional apparatus."

38. Annex 1, No. 1 stated that CCT code 8517 21 00 shall apply to goods meeting the following description: "A multifunctional apparatus capable of performing the following functions: faxing, line telephony, telephone answering, scanning, printing, photocopying. The apparatus operates either in an autonomous form (as a fax transmitter, a fax receiver and a copier) or in conjunction with a computer (as a printer, scanner and fax machine). The machine also includes a document copying function (four pages per minute) available in autonomous mode."[27] This code provision set a duty rate of 0 percent, as reflected in the following excerpt from the CCT in effect at that time:

8517	Electrical apparatus for line telephony or line telegraphy, including line telephone sets with cordless handsets and telecommunication apparatus for carrier-current line systems or for digital line systems; videophones:	
	– Telephone sets; videophones:	
8517 11 00	– – Line telephone sets with cordless handsets	Free
8517 19	– – Other:	
8517 19 10	– – – Videophones	Free
8517 19 90	– – – Other	Free
	– Fax machines and teleprinters:	
8517 21 00	– – Fax machines	Free
8517 22 00	– – Teleprinters	Free

39. Annex 1, No. 2 stated that CCT code 9009 12 00 shall apply to goods meeting the following description: "A multifunctional apparatus (so-called 'digital copier') capable of performing the following functions: scanning, printing, faxing, photocopying (indirect process). The apparatus which has several paper feed trays is capable of reproducing up to 30 A4 pages per minute. The apparatus operates either in an autonomous form (as a copier, printer and a fax machine) or in conjunction with a computer or in a computer network (as a

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[26] See Exhibit JPN-4.

[27] In its recitation of "reason[s]," the regulation explained that, "Classification is determined by the provisions of General Rule 1 and 6 for the interpretation of the Combined Nomenclature, Note 3 of Section XVI, Note 5.E to Chapter 84, and the wording of CN codes 8517, 8517 21 and 8517 21 00. The principal function of the apparatus is considered to be that of faxing."

printer, scanner, fax machine and a copier)."[28] This CCT code provision set a duty rate of 6 percent, as reflected in the following excerpt from the CCT in effect at that time:

9009	Photocopying apparatus incorporating an optical system or of the contact type and thermo-copying apparatus:	
	– Electrostatic photocopying apparatus:	
9009 11 00	– – Operating by reproducing the original image directly onto the copy (direct process)	Free
9009 12 00	– – Operating by reproducing the original image via an intermediate onto the copy (indirect process)	6

40. Note that although Commission Regulation (EC) No. 517/1999 of 9 March 1999 did not address heading 84.71, the EC CCT at that time in fact provided duty-free treatment on items falling under heading 84.71, as the following excerpt demonstrates:

8471	Automatic data-processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included:	
8471 60	– Input or output units, whether or not containing storage units in the same housing:	
8471 60 10	– – For use in civil aircraft (1)	Free
	– – Other:	
8471 60 40	– – – Printers	Free
8471 60 50	– – – Keyboards	Free
8471 60 90	– – – Other	Free

(c) Commission Regulation (EC) No 400/2006 of 8 March 2006

41. Commission Regulation (EC) No 400/2006 also addresses these issues.[29] This regulation states in its annex, item 4, that CCT code 9009 12 00 applies to the products meeting the following description: "A multifunctional apparatus capable of performing the following functions: scanning, laser printing, laser copying (indirect process). The apparatus, which has several paper feed trays, is capable of reproducing up to 40 A4 pages per minute. The apparatus

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[28] In its recitation of "reason[s]," the regulation explained that, "Classification is determined by the provisions of General Rules 1, 3c and 6 for the interpretation of the Combined Nomenclature, Note 5.E to Chapter 84 and the wording of CN codes 9009, 9009 12 and 9009 12 00. The apparatus has several functions none of which are considered to give the product its essential character."

[29] Commission Regulation (EC) No 400/2006 of 8 March 2006, OJ L 70 (3 March 2006), p.11. See Exhibit JPN-5.

operates either autonomously (as a copier) or in conjunction with an automatic data-processing machine or in a network (as a printer, a scanner and a copier)."[30]

(d) Report of the Conclusions of the 360th meeting of the Customs Code Committee, Tariff and Statistical Nomenclature Section, TAXUD/555/2005-EN

42. This Report contains the results of the Customs Code Committee's fact-finding at a January 2005 meeting under Article 8 of Council Regulation (EEC) No. 2658/87, as amended by Article 252 of Council Regulation (EEC) No. 2913/92.[31] Under Part 3.11 the Report states as follows with respect to "multifunctional digital copiers":

> The Chair made it clear that the issue was not to classify multifunctional devices. This debate is closed, Regulation was issued in 1999 (Regulation 517/99) and discussions in the HS committee "closed". One needs to appreciate the product as a whole. Thus, the issue is to make a clarification and not a classification. Nevertheless an indicator for distinguishing between fax-machines and digital copiers could be the number of pages per minute. All MS agreed to have a clarification of the issue as reflected in the Committee statement in annex VII.

43. That annex VII, in turn, states as follows: "The Committee agreed that if a multifunctional device (fax, printer, scanner, copier) has the capability of photocopying in black and white 12 or more pages per minute (A4 format) this indicates that the product is classifiable in heading 9009 as a photocopying apparatus."

(e) Application of 6 percent duty

44. Japan does not consider that there is any factual dispute that the EC is currently assessing a 6 percent duty on many of the types of MFMs at issue in this case. To confirm this factual point, Japan provides in Exhibit JPN-7 sample BTI decisions showing that prior to 2007, the EC classified MFMs into CCT 9009.12.00 as photocopiers. Exhibit JPN-8 provides sample BTI decisions showing that starting in 2007 the EC used new CCT 8443.31.91 to continue assessing a 6 percent duty on those MFMs that had previously been assessed duties under CCT 9009.12.00. These BTIs – legally binding written decisions

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[30] Moreover, the regulations states that the legal basis for this classification rests on GRIs 1, 3(c), and 6 as well as Note 5(E) to Chapter 84. Finally, the regulation states that: "The apparatus has several functions none of which are considered to give the product its essential character."

[31] See Exhibit JPN-6.

concerning the tariff classification and duty rates to be accorded to products -- confirm that the EC regulations at issue are in fact being applied in ways to assess 6 percent duties on MFM. The EC application of these customs duties is unambiguous, and is being applied to a wide range of MFMs.

4. The History of the Concessions and Measures at Issue

45. The duty concessions at issue in this dispute arose as part of the ITA.[32] That group of 29 WTO Members signing the original ITA – including the EC as well as Japan, the United States, and the TPKM – declared that: "Each party's trade regime should evolve in a manner that enhances market access opportunities for information technology products."

46. This statement reflects two important principles underlying the common understanding among the ITA signatories. First, the parties all recognized that their national systems would need to adapt to the ITA over time. Second, and more importantly, the parties all recognized that their trade regimes should "enhance market access." The ITA to eliminate duties on many products sought to create and preserve market access for the covered technology products, not to create temporary duty reductions that would disappear over time.

47. After long negotiations, the parties declared to bind and eliminate their customs duties, within the meaning of Articles II:1(a) and II:1(b) of the GATT 1994, on various products at the four and six digit level in their own official tariff schedules. This agreement included in Attachment A the following items at issue in this dispute:

- 8471.60 – "Automatic data processing machines and units thereof" … "Input or output units, whether or not containing storage units in the same housing,"

- 8517.21 – "Electrical apparatus for line telephony … and telecommunications apparatus for carrier-current line systems or for digital line systems" … "Facsimile machines"

48. With regard to headings 84.71 and 85.17, the entire four digit heading was actually included as part of Attachment A, confirming the entire heading was to be subject to concessions.

49. These specific headings and subheadings and the language used to describe them come from the 1996 Harmonized System (hereinafter "HS96")

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[32] WT/MIN(96)/16 (13 December 1996)

nomenclature.[33] The natural reading of this language indicates the products covered by the ITA included everything within the specified six-digit subheading of the HS96 nomenclature, and not just part of the heading.

50. In plain language, the parties accepted concessions to treat as duty-free both (1) computer ("automatic data processing machines") peripherals ("input or output units") such as printers, scanners, and keyboards, and (2) facsimile machines.

(a) Evolution under EC law and practice

51. Article II:7 of the GATT 1994 makes each country's schedule of concessions "an integral part" of the GATT 1994.[34] On 2 July 1997 the EC modified its Schedule LXXX to the *Marrakesh Agreement Establishing the World Trade Organization* ("Marrakesh Agreement"), including concessions for "input or output units" of "automatic data processing machines," as contained in HS96 subheading 8471.60, including specifically both CCT subheading 8471.60.40 "printers" and CCT subheading 8471.60.90 "other." These concessions thus covered a broad range of "input or output units". The EC bound the duty rate for these products at zero. As a result of these concessions, the EC and its member States are obliged to grant duty free treatment to MFMs with digital connectivity.

52. Yet the EC has been imposing duties on these products. Shortly after making these concessions, the EC took actions to begin to erode these concessions. As it stands now, the EC has essentially eliminated the concession entirely, having carved out and subjected to duties most of the very products the concessions covered.

53. This shift occurred in large part because of a misinterpretation of a certain EC judicial decision. On 9 October 1997, the European Court of Justice ("ECJ") delivered its judgment in the *Rank Xerox* case.[35] The Commission argued the product at issue in that case should be classified under heading 90.09

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[33] Unless context indicates otherwise, references to headings and subheadings refer to the 1996 Harmonized System nomenclature (hereafter "HS96"), which was the tariff nomenclature in effect at the time the relevant tariff concessions were negotiated and notified to the WTO.

[34] Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, para 145 (hereinafter "*EC - Chicken Cuts*"); Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS/68AB/R, adopted 22 June 1998, para 84 (hereinafter "*EC – Computer Equipment*").

[35] Case C-67/95, *Rank Xerox Manufacturing (Nederland) BV v. Inspecteur der Invoerrechten en Accijnzen*, [1997] ECR I-5401 (9 October 1997).

as a photocopier. Xerox argued that this product should be classified under the residual heading 84.72 applicable to "other office machines." Since the MFM at issue in that case also operated as a facsimile machine, heading 85.17 was another possible classification. The ECJ considered many arguments in this case, but ultimately decided to apply General Rule of Interpretation ("GRI") 3 to decide the case. Making a classification decision under domestic law, the ECJ relied heavily on materials from the Harmonized System, particularly the GRIs. Having rejected GRI 3(a) since no heading was more specific than others, and having rejected GRI 3(b) since no feature determined the essential character of the MFM at issue, the ECJ decided to apply GRI 3(c) and simply adopt the heading that was last in numerical order – which was heading 90.09.

54. This judicial decision made a specific decision about a specific product that was not an MFM with digital connectivity, but triggered an EC misinterpretation that set into motion a series of broader changes in EC law and practice to treat most MFMs as photocopiers. This particular case involved the Xerox digital copier model 3010, which was an early generation digital copier that could not connect to any computer or computer network.[36] For this reason, the ECJ in that case was not considering the key legal issue in this dispute -- about the proper scope of heading 84.71. The dispute in that case focused instead on heading 84.72 and did not discuss the proper parameters of heading 84.71 at all. Moreover, since the Xerox model 3010 did not have digital connectivity, the ECJ in that case did not need even to address whether or how this feature could be the defining characteristic of the product. Notwithstanding the narrow basis for this particular judicial decision, the EC misinterpreted the narrow scope of this case, and its effort to treat MFMs as photocopiers began to accelerate.

55. This process took its first official form in 1999. On 9 March 1999, the EC published Commission Regulation (EC) No 517/1999, of which Annex 1, No.2 provides that certain MFMs would be classified as indirect process electrostatic photocopiers under CCT 9009.12.00 with a duty rate of 6 percent.[37] This regulation applied CCT 9009.12.00 to all such devices regardless of whether they could connect to a computer or not. Further, Annex 1, No.1 of the same regulation provides that the principal function of certain other MFMs is considered to be that of facsimiles under CCT 8517.21.00 with a duty rate of zero percent.

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[36] See generally the discussion at paragraphs 24-25 of "Classification of Multifunctional Digital Copiers," WCO NC0300E1 (26 October 2000), which describes these technical features of Xerox model 3010 and distinguished devices that can connect to a computer or computer network, and devices that cannot be connected. See Exhibit JPN-10.

[37] Commission Regulation (EC) No 517/1999 of 9 March 1999, O.J. L 61 (10 March 1999), pp. 23-24. See Exhibit JPN-4.

56. As these EC measures began to take shape, discussions also began in the WCO. These discussions during the 1999 to 2003 period are discussed in the next section.

57. The EC then began to formalize a new rule based on the number of pages copied per minute. For the first time, the EC used as a criteria, the ability of a device to copy a certain number of pages per minute, to distinguish the treatment of facsimile machines under heading 85.17 and photocopiers under heading 90.09. In January 2005 the EC Customs Code Committee issued a statement providing that "if a multifunctional device (fax, printer, scanner, copier) has the capability of photocopying in black and white 12 or more pages per minute (A4 format)," it would be classified in heading 90.09 as photocopying apparatus.[38] Photocopying apparatus classified in heading 90.09 and using the indirect electrostatic process was subject to a 6 percent duty. This statement made explicit for the first time that printing output speed – the pages per minute -- would be the key criterion, even though copying speed had no basis in the language of the various headings at issue. Nor did the EC in any way acknowledge that improving printing output speed was simply the natural improvement of these products, not some dramatic change in the nature of the product.

58. The EC reaffirmed this approach in March 2006 in a new regulation again classifying multifunction devices as photocopiers under heading 90.09.[39] The EC specifically addressed the ability to make copies, and largely dismissed the importance of digital connectivity in understanding these products.

59. Most recently, the EC continued this same approach, but in a new form. On 31 October 2006, the EC implemented a new tariff nomenclature under the Harmonized System by amending Annex I to Council Regulation (EEC) No 2658/87 of 23 July 1987 concerning the tariff and statistical nomenclature and the Common Customs Tariff. These amendments implemented the HS07 by creating three new subcategories: CCT 8443 31 10 ("[m]achines performing the functions of copying and facsimile transmission, whether or not with a printing function, with a copying speed not exceeding 12 monochrome pages per minute"), CCT 8443 31 91 ("[o]ther; [m]achines performing a copying function by scanning the original and printing the copies by means of an electrostatic engine") and CCT 8443 31 99 ("[o]ther"). By virtue of these new subcategories, MFMs with copying speeds of more than 12 monochrome pages per minute and with an

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[38] Customs Code Committee, Tariff and Statistical Nomenclature Section, *Report of conclusions of the 360th meeting of the Committee*, TAXUD/555/2005-EN, Annex VII (March 2005). See Exhibit JPN-6.

[39] Commission Regulation (EC) No 400/2006 of 8 March 2006, O.J. L 70 (9 March 2006), pp. 9-11. See Exhibit JPN-5.

electrostatic print engine are classified under CCT 8443 31 91. The duty rate for CCT 8443 31 91 is 6 percent.[40]

60. Beyond continuing this flawed use of the pages per minute, this latest EC regulation also confirmed the use of CCT 8443 31 91, and subjected to duties items that should be duty-free. MFMs that do not have a facsimile function necessarily fall outside of CCT 8443 31 10 because that category only covers items that can both copy and send facsimiles. Such MFMs would not be duty-free even if they had an output speed of 12 pages or less per minute, and would then fall into CCT 8443 31 91 and be subject to the 6 percent duty when they employ indirect process electrostatic print engines.

61. This evolution in EC regulations and practice just underscores the arbitrary nature of the "page per minute" criterion. Under the decision made by the Customs Code Committee in January 2005, if a device could output 12 pages per minute (or more), it would be deemed a photocopier under CCT 9009.12.00 and subject to a 6 percent duty. Yet in January 2007 that same device with an output of 12 pages per minute would be deemed a multifunction device under CCT 8443.31.10 and would be duty-free. Under the January 2007 formulation, the device had to have a page per minute output of greater than 12 pages per minute to fall under CCT 8443.31.99 and be subject to the 6 percent duty. Nothing factually or legally had changed between January 2005 and January 2007. In reality, there is nothing magical about 12 pages per minute – or any other specific page per minute rule – that determines the function and character of these devices.

(b) Discussions in the World Customs Organization

62. Japan notes that this evolution of EC practice took place against the backdrop of extensive discussions of these issues in the WCO. These discussions began in September 1998 when Brazil submitted a paper suggesting that the heading 90.09 be amended to include "multifunctional photo-copying apparatus."[41] When reporting this Brazilian proposal, the WCO Secretariat noted that many other headings needed to be considered, including headings 84.71, 84.72, and 85.17. The Secretariat called specific attention to the different treatment of printers in either heading 84.71 (if they could connect to a computer) or heading 84.72 (if they could not connect to a computer), thus stressing the importance of computer connectivity in considering the proper heading for these products.

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[40] 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.

[41] "Possible Amendment to Heading 90.09," WCO 42.498E (28 September 1998).

63. This issue received further discussion in 1998 and 1999. Even in this early stage of the discussion, the digital nature and computer connectivity of these devices was a key issue. The WCO Secretariat noted that the specific Xerox multifunction devices identified by Brazil incorporate:

> essentially a digital scanner and a digital memory, therefore, the Secretariat wonders whether these apparatus are really photo-copying apparatus within the meaning of heading 90.09….it is not clear that the apparatus at issue are classifiable in Chapter 90; classification in Chapter 84 might be appropriate.[42]

64. These discussions continued into 2000, and the WCO Secretariat undertook a careful technical study of these multifunction devices. Based on a review of illustrative multifunction devices, the WCO Secretariat prepared a detailed set of technical comments in October 2000. Based on this review, the WCO Secretariat concluded that "multifunctional digital copiers do not meet the terms of heading 90.09 and, as such, are not classifiable in that heading."[43] The WCO Secretariat went on to explore how traditional principles of classification would govern these products, and offered opinions about how certain specific products should be classified. This discussion, however, started from the premise that the Secretariat believed these digital devices did not properly fall under heading 90.09 as photocopiers.

65. These discussions continued from 2000 through 2003, and led to various votes. On May 2001 an initial vote took place, and by a vote of 22 to 14 the Harmonized System Committee decided that "photocopying" was "limited to the projection of an image onto a photosensitive surface and that, therefore, present heading 90.09 did not cover digital copying."[44] On November 2002 a further vote was taken, and by a vote of 24 to 22 the members voted to reverse the earlier decision.[45] Finally, on November 2003 the issue came up yet again, and by a vote of 33 to 33 the members could not reach any final decision on this issue.[46] At this point the HS Committee simply recognized that this issue would be picked up in the ongoing discussions to revise the Harmonized System.

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[42] "Possible Amendment to Heading 90.09," WCO NR0023E1 (24 February 1999). See Exhibit JPN-9

[43] "Classification of Multifunctional Digital Copiers," WCO NC0300E1 (26 October 2000), at para 27 (emphasis added). See Exhibit JPN-10.

[44] Decisions of the HS Committee, Annex H/4 to Doc. NC0430E2 (HSC/27/May 2001), para 9.

[45] Decisions of the HS Committee, Annex G/3 to Doc. NC0655E2(HSC/30/Nov. 2002), para 21.

[46] Decisions of the HS Committee, Annex F/4 to Doc. NC0796E2 (HSC/32/Nov 2003), para 27.

66. Taken as a whole, this discussion at the WCO makes two important points. First, from a technical perspective, the WCO Secretariat consistently took the view that the underlying digital technology at issue for MFMs did not belong under heading 90.09. Of course the WCO Secretariat does not decide these issues, but its technical discussions provide very useful background concerning how the technologies should be viewed. Second, from a legal perspective, such interpretative issues are not decided by notes, but based on the ordinary meaning of the language of the tariff concessions at issue, read in context, including the context provided by the underlying technologies.

67. The issue did receive extensive discussion in the process of revising the Harmonized System, which led to the new revision to heading 84.43 to include MFMs. This compromise on heading 84.43 resolved the classification issue – countries will now use the same heading to track trade flows of these goods – but did not resolve the underlying tariff concession issue. Some countries treat goods under subheading 8443.31 as entirely duty-free. The EC continues to subject many MFMs to a legally improper 6 percent tariff.

5. Summary of Argument

68. At its core, this dispute is about the meaning of specific language in EC tariff concessions. Japan believes the ordinary meaning of the language of EC concessions confirms that MFMs with digital connectivity must belong in heading 84.71 and therefore must be accorded duty-free status. The failure to do so is inconsistent with Articles II:1(a) and II:1(b) of GATT 1994 as less favorable than the treatment accorded to MFMs with digital connectivity under Schedule LXXX of EC tariff concessions.

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

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

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

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

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

74. Japan believes that ordinary meaning of the terms "output units" and "photocopying" read in context can resolve this dispute by itself, but interpretative materials from the Harmonized System also confirm this interpretation. Note 5 to Chapter 84 defines a broad scope for devices that are "units" as "printers" that output computer data. Particularly, Note 5(D) specifically addresses certain types of computer "units" and confirms that "printers" (a specifically enumerated type of "output unit" in the EC schedule of concessions) must be classified in heading 84.71 as long as those "printers" are connectable to a computer and can accept digital data.

75. Similarly the Harmonized System materials concerning heading 90.09 confirm what the ordinary meaning of "photocopying" would suggest – that photocopiers are technologically different than computer "output units." The Harmonized System Explanatory Notes for heading 90.09 confirm that "indirect

process" electrostatic photocopying involves projecting an optical image onto a photosensitive drum or plate as an intermediary, and then making photocopies onto plain paper from the photosensitive drum. This commentary confirms that "indirect process" had a very specific and narrow meaning when it was used in the EC Schedule, and in no way could be construed to apply to MFMs that are based on digital, not optical technologies.

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

6. The Ordinary Meaning of the Language of the EC Concessions Includes all MFMs with Digital Connectivity

77. When interpreting the scope of a tariff concession, the most important tool is the language of the tariff concession itself. When that language – its ordinary meaning read in context – is clear, the interpretative issue is over. No amount of other contextual or interpretative material can change the scope of the actual language of the concession.[47] In this dispute, Japan believes the language of the relevant tariff concession itself is dispositive and confirms that MFMs with "digital connectivity" should be duty-free under the applicable EC concessions.

78. The language at the four digit level in heading 84.71 and at the six digit level in subheading 8471.60 is dispositive. The ordinary meaning of this language focuses critically on whether a particular good can connect to a computer or not – whether it is a "unit" of a computer -- and whether that good can thus serve as an "input or output unit" for a computer. The MFMs with digital connectivity at issue in this dispute fall squarely within the scope of this concession. These devices can connect to a computer or computer network, and

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[47] See *EC - Chicken Cuts,* para. 234.

thus serve as an output unit for computers through the printer unit that is the integral feature of all such MFMs. At the eight digit level, these devices are covered by the EC concession in CCT 8471 60 40, "printers," because they fall within the ordinary meaning of that term as well. The fact that these devices may have other "input" and "output" functions simply confirms that these MFMs fall within the scope of heading 84.71 and subheading 8471.60.

(a) The ordinary meaning of the phrases "units thereof" in heading 84.71, "input or output units" in subheading 8471.60 and the term "printers" in CCT 8471.60.40 focuses on the digital connectivity of a device

(i) The technology sense of the terms "units thereof," "input or output unit," and "printers"

79. The key language of the EC concession at issue is the phrase "units thereof" in heading 84.71, the phrase "input or output units" used in subheading 8471.60 and the term "printers" in CCT 8471.60.40. These words define the scope of the EC concessions on heading 84.71, and confirm that this concession covers those MFMs at issue in this dispute with digital connectivity -- that can be connected to a computer or computer network, and that can process the digital information used by computers.

80. These key terms are the language from the HS96,[48] which was used in the ITA and the EC's Schedule LXXX. These concessions were negotiated as part of an agreement on information technology products. Under these circumstances, the technology sense in which these terms were used provides important interpretative guidance for this dispute.

81. For example, one leading technology dictionary from 1994 defines "output unit" in the context of computer science as "a unit which delivers information from the computer to an external device or from internal storage to external storage."[49] This meaning focuses on digital connectivity, and the ability to deliver "information from the computer."

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[48] As discussed further below, the Harmonized System is an internationally agreed nomenclature used in various contexts in the WTO. For purposes of this dispute, the key point is that the second edition of the Harmonized System, adopted in 1996, was the tariff nomenclature used by the parties to the ITA when negotiating the product coverage, and was the tariff nomenclature used when those commitments were codified as tariff concessions in the EC's Schedule LXXX.

[49] McGraw-Hill Dictionary of Scientific and Technical Terms (5th ed. 1994) at p. 1419. See Exhibit JPN-11. Note we generally use the fifth edition, published in 1994 to best reflect the sense of the language used in the mid 1990s while the ITA was being negotiated. We

82. The same technology dictionary defines "input" as "the information that is delivered to a data-processing device from the external world, the process of delivering this data, or the equipment that performs this process."[50] An "input unit" is thus a device that creates and delivers digital data to a computer.

83. Moreover, the words "output" and "input" are often used in a computer context together as a single phrase. For example, the ordinary meaning of the phrase "input/output" means "pertaining to all equipment and activity that transfers information into or out of a computer."[51] Note that this meaning includes all equipment, without limit, as long as the equipment can transfer digital data into or out of a computer. Similarly, an "input/output device" means "a unit that accepts new data, sends it into the computer for processing, receives the results, and translates them into a useable medium."[52] Input/output units are also known as "peripheral devices,"[53] a phrase that means "any device connected internally or externally to a computer and used to enter or display data, such as the keyboard, mouse, monitor, scanner, and printer."[54] Given this interconnected nature of the two terms, it is not surprising that subheading 8471.60 refers to "input or output units" together.

84. Finally, definitions from technology dictionaries confirm that a "printer" when used in the sense of "computer science" is "a computer output mechanism that prints characters one at a time or one line at a time."[55] So when used in CCT 8471 60 40, the term "printer" has its ordinary meaning in the sense of computer science as a computer "output unit" that produces a printed copy or copies of the digital data at issue. This digital data might come from the computer

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also note that the Harmonized System nomenclature was being amended during this same period, and the second edition of the Harmonized System was adopted in 1996. In a few instances, we use the sixth edition that added some additional definitions.

[50] McGraw-Hill Dictionary of Scientific and Technical Terms (5th ed. 1994) at p. 1021. See Exhibit JPN-11.

[51] McGraw-Hill Dictionary of Scientific and Technical Terms (5th ed. 1994) at p. 1021. See Exhibit JPN-11.

[52] McGraw-Hill Dictionary of Scientific and Technical Terms (5th ed. 1994) at p. 1021. See Exhibit JPN-11.

[53] See the definition of "input/output instruction," which explains that such an instruction "causes the transfer of data between peripheral devices and main memory, and enables the central processing unit [i.e., in the computer] to control the peripheral devices connected to it." McGraw-Hill Dictionary of Scientific and Technical Terms (5th ed. 1994) at p. 1021. See Exhibit JPN-11. This definition makes clear that "input/output devices" and "peripheral devices" are synonymous.

[54] McGraw-Hill Dictionary of Scientific and Technical Terms (6th ed. 2003) at pp. 1562. See Exhibit JPN-11.

[55] McGraw-Hill Dictionary of Scientific and Technical Terms (5th ed. 1994) at 1578. See Exhibit JPN-11.

itself, from a scanner that has created digital data from an original document, or a facsimile that has received digital data. In all instances, the "printer" will produce a paper version of that digital data using digital technologies.

(ii) The ordinary sense of the terms "units thereof," "input or output units," and "printers"

85. Tariff concessions about technology products can best be understood by considering the technology sense of the words of those concessions. We note, however, that the ordinary sense of the key terms of the EC concessions on MFMs with digital connectivity confirms the technology sense of these terms.

86. Heading 84.71 refers to "automatic data processing machines and units thereof." There is no dispute that the term "automatic data processing machines," refers to computers. The language of heading 84.71 also refers to "units thereof." The word "unit" has a broad range of meanings in the ordinary sense, but here refers most appropriately to "an individual thing, person, or group regarded as single and complete" or "a device with a specified function forming part of a complex mechanism."[56] In other words, the phrase "units thereof" refers broadly to devices designed and engineered to be connected to and used in an integrated fashion with computers. The language "units thereof" has no limitations and thus covers all "units thereof," not just some specific units. Moreover, the ordinary meaning of "thereof" is "of that, concerning that."[57] In other words, any "units" concerning or used in connection with a computer fall within this very broad ordinary meaning of "units thereof."

87. The phrase "input or output units" in subheading 8471.60 further confirms the wide range of "units" covered by heading 84.71. The word "output" has many meanings, but in this context means the electric signal delivered by the computer to which the "output" unit has been connected. The ordinary meaning of the term "output," in the most relevant context, describes "an electrical signal delivered by or available from an electronic device."[58] In subheading 8471.60 referring to computers, this use of "output" thus refers to the electrical signals – or the digital data -- being sent by the computer. The language thus speaks directly to the interconnectivity between the computer and any units used in connection with that computer that can process digital data as output from the computer. Devices connectable to the computer thus fall within the scope of the language in both heading 84.71 and subheading 8471.60.

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56 New Shorter Oxford English Dictionary, Vol. 2, at p. 3491. See Exhibit JPN-11.
57 New Shorter Oxford English Dictionary, Vol. 2, at p. 3275. See Exhibit JPN-11.
58 New Shorter Oxford English Dictionary, Vol. 2, at p. 2040. See Exhibit JPN-11.

88. Under the same logic as above, the word "input" covers the converse of "output." The plain meaning of the term "input," in the most relevant context, describes "an electrical signal entering an electronic device."[59] In subheading 8471.60, this use of "input" thus refers to the electrical signals – or the digital data -- being provided to the computer. Like the term "output," the term "input" thus speaks directly to the interconnectivity between the computer and any units used in connection with that computer that can process digital data as input to the computer.

89. The term "printer" has a variety of meanings. One meaning of a "printer" is a device that can "produce or reproduce (text, a picture, etc.) by mechanically transferring characters or designs to paper vellum, etc., esp[ecially] from inked types, blocks, or plates."[60] In a modern context, the term printer has a somewhat different meaning. When used in reference to computers, as in heading 84.71, the ordinary meaning of a "printer" refers to "an output device which produces a printed record of data, text, etc."[61] A printer therefore is a "computer output mechanism" that produces a paper version of some data stored on or otherwise being used in connection with a computer system.

90. Taken together, the more specialized understanding of these terms in a technology context and their ordinary sense both demonstrate that a "unit" of an "automatic data processing machine" (or computer) – particularly an "input or output unit," such as a "printer" -- is some device that can send digital data to a computer (input unit) or receive and then act upon digital data coming from a computer (output unit), such as printing the output on paper. This ability to use digital data and computer connectivity are the key concepts underlying these specific terms.

(b) The printing function of MFMs with digital connectivity confirms such devices are "output units" – as "printers" – and thus squarely within the scope of the EC concessions.

91. MFMs with digital connectivity operate in a way completely consistent with the plain meaning of the phrase "output unit" or the more specific term "printer." First, all such MFMs are designed and built around a printer unit that allows the outputting of information from the computer – that is very reason for having the digital connectivity. This printer unit functions just as any other single function computer printer. In particular, like all computer printers, the MFM's printer unit has a laser scanning unit ("LSU") that allows the device to

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59 New Shorter Oxford English Dictionary, Vol. 1, at p. 1375. See Exhibit JPN-11.
60 New Shorter Oxford English Dictionary, Vol. 2, at p. 2357. See Exhibit JPN-11.
61 New Shorter Oxford English Dictionary, Vol. 2, at p. 2357. See Exhibit JPN-11.

receive digital output from the computer and convert that digital output into laser light that can then be used to create the printed image on paper or some other medium. Any other features complement this basic printing function and simply increase the functionality of the device. There are no commercially available MFMs that do not include a printer unit. In this sense, the printer unit represents the core of the MFM and provides most of its basic functionality.

92. Second, the printer unit is by far the largest component of the overall MFM. Consider the following photograph of a typical MFM for use in an office setting:

93. If we break down this MFM into its constituent parts -- the scanner unit on the right and the printer unit on the left -- one can see that the printer unit constitutes the vast bulk of the machine:

94. The printer unit in this example on the left represents the vast majority of the total volume of the device. The scanner unit (and the fax unit if included) on the right, in contrast, are both relatively small parts of the total device. The printer unit will visually appear as the largest and most important component of the overall MFM. The scanner unit is a secondary feature of the device.

95. Third, the printer unit of an MFM can operate without any technical involvement of the scanner unit and/or fax unit. The printer unit connects to and prints the output from a computer or computer network. It is fully functional as a computer printer to process the digital data coming from a computer. Indeed, the printer unit itself looks much like any large computer printer used in an office setting, typically working in a computer network to service numerous computers at the same time. This similarity is hardly coincidental, since the printer unit of an MFM is basically a computer printer.

96. Finally, the printer unit represents the largest portion of the cost of a typical MFM. The printer unit and related parts necessary for the MFMs to operate as computer printers represent a majority of the total cost of manufacturing an MFM. Of the specific models listed in Exhibit JPN-1 to this First Written Submission, the printer unit represents about 60-80 percent of the total cost of manufacturing an MFM.

97. For all of these reasons, MFMs that connect digitally to a computer or computer network constitute "printers," and are thus "output units" of a computer covered by the concessions on heading 84.71.

(c) The other capabilities of MFMs with digital connectivity confirm that these devices are properly considered to be "input or output units" for computers

98. At their core, MFMs that connect to computers are computer "printers" – they are "output units" – that print computer or other digital output. All MFMs have a printer unit, and all those MFMs with digital connectivity at issue in this dispute allow computers to print the computer output. This combination of a printer unit and the ability to connect digitally to a computer or computer network through a multifunctional printer controller makes such an MFM a "printer" that is an "output unit."

99. Considering the fact that MFMs have broader features, the components that allow the MFM to offer those additional features -- in particular a scanner unit -- can also be characterized as input or output units for computers. In addition to their ability to print computer output, many MFMs can usually also serve as a digital scanner. The scanner unit allows the MFM to take physical documents, scan them, convert the original image into digital data, and then either transmit that digital data to the computer or in some other way process that digital data. This feature of the MFM would be considered an "input unit" of the computer operating with the MFM at issue.[62]

100. A typical MFM has both a printer unit and a scanner unit, which together define core capabilities of the device. In addition to these core capabilities, a scanner unit and a printer unit can work together to create an additional capacity as a digital copier. As we discuss in detail below in paragraphs 108-122, MFMs do not make "photocopies" of an original document. Photocopying depends on a fundamentally different technology. Rather, MFMs can scan an original document and convert a document into digital data. The digital data that has been created can be transferred to any device – either another part of MFMs (such as a printer unit) or some device separate from MFMs (such as an external computer, a computer network, or a memory device such as a flash drive) – that can receive, process, and store digital data. The digital data created

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[62] Some MFMs also have facsimile units. These MFMs use the scanner unit to scan an original document and convert a document into digital data to be transmitted through a facsimile unit over telephone lines. Similarly, the MFM can receive digital data over a telephone line, and then process that digital data through the MFM printer unit to be printed onto paper, or transferred to be stored on the computer itself. In doing so, the MFM features are still either "inputting" or "outputting" the digital data

from a scanned image can also be sent over phone lines. Digital data can also be manipulated in many ways, limited only by the software that has either been installed on a MFM itself or a software being used on a computer or a network.

101. For those MFMs with digital connectivity to computers, all of these features are fundamentally inputting and outputting digital data, and thus fall within the phrase "input or output units" of a computer. Since all the features fall within the plain meaning of this single phrase in subheading 8471.60, the MFMs themselves also should fall within the scope of the subheading and the EC commitment to treat all items under this subheading as duty-free.

102. This interpretation is reinforced by the phrase "units thereof" in heading 84.71. Even though the phrase "input or output unit" in subheading 8471.60 distinguishes "input units" from "output units," both are still "units" of a computer. The focus of the language is on the existence of digital connectivity – the ability to process digital data into and out of a computer. That is precisely why the phrase "input/output" means "pertaining to all equipment and activity that transfers information into or out of a computer."[63] The scope of the phrase "input or output" is broad, not narrow.

7. The Ordinary Meaning of "Output Units" and "Printers," Read In Context, Confirms That Heading 84.71 Covers Those MFMs With Digital Connectivity

(a) The context provided by the term "photocopying" in heading 90.09 confirms that MFMs with digital connectivity fall under heading 84.71

103. In Japan's understanding, the EC argument for treating MFMs as a dutiable product rests largely on the following logic. As a first step, the EC believes that MFMs should be considered to be digital copiers regardless of their other features. Secondly, the EC apparently believes that such digital copiers fall within the same HS96 heading 90.09 as electrostatic photocopying apparatus using the indirect process.

104. The EC apparently believes that MFMs – at least those without a facsimile function, or those that can print at a certain speed – are properly treated as electrostatic photocopying machines using the indirect process, and are thus dutiable products. This argument, however, is inconsistent with a plain meaning of the term "photocopying" used for heading 90.09 and its various subheadings, and the ordinary meaning of "output units" and "printers" read against this context.

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[63] McGraw Hill Dictionary of Scientific and Technical Terms (5th ed. 1994) at p. 1021. See Exhibit JPN-11.

This fundamental distinction between "photocopying" based on optical technology and "output units" and "printing" based on digital technology confirms that heading 84.71 includes those MFMs with digital connectivity regardless of the printing speed of the device.

(i) The ordinary meaning of "photocopying" refers to an optical image copying technology, which requires an original document for each copy

105. In sharp contrast to the type of "printing" done by computer "output units," the term "photocopying" in heading 90.09 makes explicit that items under this heading must be copying systems where light is used to make each copy from an original image. The ordinary sense of "photocopying" means producing "immediate, often full-size, paper copies of text or graphic matter by a process usually involving the electrical or chemical action of light."[64] In the same spirit, the word "optical" means: "of or pertaining to sight, especially in relation to the physical action of light."[65] In a technical sense, a "photocopying process" refers to "any of the means by which a copy is created on a sensitized surface (generally paper, film, or metal plate) by an action of radiant energy."[66] This use of reflected light to create an optical image of an original document is thus critical to a proper understanding of photocopying.[67]

106. The further use of "photocopying" in subheading 9009.12 reinforces this interpretation. All photocopying involves projecting an optical image onto a sensitized surface. This particular subheading explicitly covers so-called "indirect process" - "electrostatic photocopying apparatus: operating by reproducing the original image via an intermediate onto the copy." The key language in this subheading is the phrase "via an intermediate." An "intermediate" in this context refers to "that print which is used as a master for further reproduction."[68] Unlike direct process electrostatic photocopying, where the original image is projected directly onto light sensitive paper, indirect process electrostatic photocopying

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64 New Shorter Oxford English Dictionary, Vol. 2, at p. 2193. See Exhibit JPN-11.

65 New Shorter Oxford English Dictionary, Vol. 2, at p. 2011. See Exhibit JPN-11.

66 McGraw Hill Dictionary of Scientific and Technical Terms (5th ed. 1994) at p. 1494. See Exhibit JPN-11.

67 As described in paragraphs 155-164, this ordinary meaning is confirmed by the Explanatory Notes for heading 90.09, which explain that "photocopying apparatus" mean: "These apparatus incorporate an optical system (comprising mainly a light source, a condenser, lenses, mirrors, prisms or an array of optical fibers) which projects the optical image of an original document on to a light-sensitive surface, and components for the developing and printing of the image." Vol. 4 Harmonized Commodity Description and Coding System, Explanatory Notes (2d 1996), at p. 1592. See Exhibit JPN-23.

68 McGraw Hill Dictionary of Scientific and Technical Terms (5th ed. 1994) at p. 1034. See Exhibit JPN-11.

inserts a light sensitive "intermediate" – usually a light sensitive metal curved plate or drum – to serve as an "intermediate" in the process, which is then used to finish the photocopying. An "intermediate" in this context refers to that print used as a momentary master on which a latent image is created for further development. The developed image is then transferred to the plain paper surface. By inserting the light sensitive surface as an intermediate in the process, indirect process photocopying can use ordinary paper and avoid the use of special light sensitive paper or other light sensitive medium.

107. Nothing about traditional "photocopying" involves any use of digital data. Unlike MFMs that convert an image into digital data, and then print or otherwise transmit that digital data, a photocopier reflects light off of the original document and then uses that reflected light to transfer the original image of the document to a light sensitive surface. The reflected light is not digital data, and cannot be used or manipulated in the same way as digital data. The underlying technologies of an "output unit" (using digital data) and a "photocopier" (using reflected light) are thus fundamentally different.

(ii) The factual context of and differences between MFMs and photocopiers confirm MFMs fall under heading 84.71, and do not fall under heading 90.09

108. With this understanding of the technological distinction between photocopying and printing, one can see several important factual differences between "printers" (or more generally, "output units") and traditional photocopiers.[69] The words themselves have different meanings, and these factual differences provide important background against which the distinctions in ordinary meaning between "printers" including MFMs and "photocopiers" stand out.

109. One important difference is whether a device needs to have an original document for each copy to be made. Without an original physical document, a photocopier can do nothing. Photocopying requires a physical document from which a device can create an optical image to be reproduced each time. The optical system in a traditional photocopier uses light to create an illuminated image of the original document in real time, and then uses that optical image to create a copy. The optical block on a photocopier transmits that optical image directly to the print apparatus on the photocopier. That is why traditional photocopiers are often referred to as "light lens photocopiers" – they use reflected

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[69] See "Classification of Multifunctional Digital Copiers," NC0211E1 (WCO 14 February 2000), particularly Annex III, for a useful discussion of these technical differences. See Exhibit JPN-12.

light to create the image that is being copied. The document is illuminated each time a copy is to be made, which is why the photocopier needs the original. Standing next to a traditional photocopier, the light source flashes each time a copy is made. So for example, making ten copies requires ten flashes of light, since the original is illuminated ten times, once for each copy to be made.

110. Because a photocopier based on the indirect method transmits an optical image directly to the photosensitive curved plate (or drum) used to make photocopies, such a photocopier does not have two key items -- a scanner unit and a printer unit -- that an MFM would have. First, a photocopier needs no scanner unit with an image sensor (typically a charge-coupled device, or CCD") to convert the scanned image into digital data. Any scanner, or MFM incorporating a scanner unit, would have this distinctive technological feature. Second, the photocopier needs no printer unit with a laser scanning unit to convert the digital data into laser light to print out the data. Any "printer" or MFM with a printer unit, would have this distinctive feature.

111. MFMs, in contrast to photocopiers, do not require a physical document to print out multiple copies. Once the scanner unit on an MFM has sent a scanned image to the image sensor to convert that scanned image into digital data, the scanner unit then transfers that digital data as directed by the user. The scanner unit used in MFMs is not making a copy – the scanner unit is used only to convert a single scanned image into digital data. Once that single scan has been made, it is a digital data that is being printed or used in some other way. The original document is no longer necessary, and is no longer being "copied" in any ordinary sense of the word "photocopy." The MFMs, as "printers," print digital data that has been obtained by converting the original document.

112. Indeed, MFMs do not need an original document at all, since the digital data being printed can come from the computer, or from some other memory device. Many MFMs have ports to allow a user to insert a memory device, such as a USB flash drive, and print directly from that memory device. For the MFM, digital data from a memory device and digital data from a scanned image will both be printed out using the same basic process.

113. Another important difference is the <u>persistence of the image</u> being created. Photocopying requires a use of light to create an image for each copy. When the light goes away, the image goes away and there is no longer any optical image to be "copied." The light is necessary to discharge the photoreceptor used to make a copy of a document. The light used in a photocopier has no other purpose – it is used to make a copy, and if the light is not used to make a copy immediately, it is gone and a copy cannot be made later.

114. MFMs, in contrast, do not depend on light and optical images to make the copies. MFM scanners use light once, not to make either a direct or an indirect optical image of the document, but rather to convert the original document into digital data. There is no optical image of the original – but only

digital data is created. That digital data then may or may not be printed out on paper. That is why digital copiers are often described as "scan to print" technology. In today's increasingly paperless offices documents with highlighting, underlining and/or handwritten notes in the margins are digitized and then stored in as digital files rather than as the paper originals. If and when paper versions are later needed, those paper versions can be created from the digital data stored in the computer through printers, not from the original document through photocopiers. As discussed earlier at paragraphs 98-102, these additional functions of MFMs mean that MFMs are "output units" that also have some functions of an "input unit" (such as scanning), and thus still belong under subheading 8471.60 in the EC's schedule of tariff concessions as "input or output units."

115. Beyond the persistence of the image, another important difference is the ability to share the image with other devices. Photocopying involves creating an optical image that can be used at the moment to make photocopies. That image can be used in a particular machine, but the image cannot be transferred outside the machine or in any other way used by some other devices. The optical image has only one function – to make the photocopy at a moment in time.

116. MFMs, in contrast, can easily share or store digital data. The scanner does not create any optical image of a document -- neither a direct nor an indirect optical image of the document. Rather, the scanner converts a document into digital data. Once that data has been created, it can be transferred easily into storage units on the MFM, it can be transferred to other machines, or it can be used in any of the ways the digital data can be used. Some MFMs allow users to scan a document, and then transfer that digital data directly to an external memory device, such as a USB flash drive, avoiding the need to carry or store the bulking paper original.

117. The digital data also allows an MFM to perform one or more of these functions simultaneously (assuming an MFM software has been so programmed), something that a traditional photocopier cannot do. So, for example, an MFM could scan a document to convert that document to digital data, and then simultaneously send that digital data to a computer to be stored, to a facsimile module to be sent over a phone line as a facsimile, and to a print engine to be printed out in a paper form. A traditional photocopier could make only one copy of the original document during a single exposure, but could not store the image on a computer or transmit the image as a facsimile message.

118. A final important difference is the ability to manipulate the image. Photocopying depends on light reflected onto a photoreceptor. Since that light goes through a lens, a photocopier can make simple changes to the copy by magnifying or reducing the image using adjustments to the lens and the position of the lens. The basic idea is the same as moving a magnifying glass back and forth from the surface of a document to magnify or reduce the image being viewed.

119. MFMs with digital connectivity, working with a digital file rather than a reflected light image, can make any change to a digital file that the computer software can handle. Since MFMs are not working from an optical image, they are not limited in any way by that optical image. Again, as explained before, this function falls within the scope of "input units."

120. The common element in all four of these differences is the way in which traditional photocopiers and MFMs rely on either optical or digital technology. Traditional photocopiers use reflected light from an original document to make the copies; the light and the copies are integrally linked, and the light limits the uses of the photocopy. MFMs, in contrast, do not use reflected light from an original document to make copies. MFMs use light only to convert a document into digital data – essentially to function as a scanner unit.[70] That digital data can be stored, transferred, manipulated, and then printed out all without any regard to an original document or its reflected light.

121. It is also important to note that this ordinary meaning depends on the underlying technology being used, and not on the number of copies being made. The EC's belief that MFMs are "photocopiers" appears to rest on the notion that a device making multiple copies of an original -- particularly if it can make lots of copies quickly -- must be a photocopier. That seems to be the underlying logic of the "page per minute" rule adopted by the EC. Yet nothing in the ordinary meaning of the terms "output unit," "printers," or "photocopying" suggests any distinction based on the speed of output or the number of copies being made. The distinctions among these terms are based on underlying technologies – "output units" and computer "printers" depend on digital technologies, while "photocopiers" depend on optical technologies. The former can work with computers; the latter cannot.

122. The use of the word "photocopying" in heading 90.09 in the EC's schedule of tariff concessions, read in light of the factual context of differences between traditional photocopying and digital printing, thus has important legal significance and excludes the possibility of MFMs falling within heading 90.09. MFMs simply do not use light in the same way as a traditional photocopier – they do not convey an optical image onto a photosensitive surface, either directly or indirectly - and thus cannot be considered to fall within heading 90.09. This inapplicability of heading 90.09 provides context that reinforces Japan's argument that MFMs with digital connectivity must be included in heading 84.71.

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[70] Japan notes that optical scanners are "input units" of computers and thus also covered by the EC concessions on heading 84.71.

(iii) Other context for heading 90.09 confirms that "photocopying" does not include MFMs with digital connectivity

123. The language of heading 90.09 does not appear in isolation in the EC concessions. That language must be read in the context of the other language in the EC concessions. That broader context confirms that the term "photocopying" is distinguished based on fundamentally different technology, not based on the notion of making multiple copies of an original document.

124. The language in heading 90.09 must be read in the context of the language used in heading 84.71 and heading 84.72 in the EC's schedule of tariff concessions. Heading 90.09 covers "photocopying apparatus" that can make one or multiple copies of an original document based on reflected light. As discussed extensively in paragraphs 77-97, heading 84.71 covers "units" of computers, which include computer printers or "output units" that can print out one or multiple copies based on the outputting of digital data. Heading 84.72 covers "other office machines," including "duplicating machines" specified in subheading 8472.10, which also can make one or multiple copies of a document using technologies that are neither light based (like photocopying) nor digital (like computer output units). In other words, at least three distinct headings included in the EC concessions cover devices that can make multiple copies of a document. The crucial meaning of the language used in these distinct headings, therefore, must come from some other features of these devices. It is the underlying technologies that distinguish these headings from each other, and the products covered by the language of these headings from each other.[71]

125. Key technological differences distinguish these three headings from each other. Optical photocopying technology falls under heading 90.09 in the EC's schedule of tariff concessions. "Photocopying" involves projecting an optical image of the original document onto a photosensitive surface. Computers and digital technologies fall under heading 84.71. A "printer" that is an "output unit" of a computer takes digital data and converts that digital data into a print form. "Duplicating machines" would then fall under heading 84.72, more specifically subheading 8471.10. These devices include more traditional printing

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[71] We also note heading 84.43, which covers "printing machinery," but this heading is not part of the EC concessions negotiated as part of the ITA. Heading 84.72 was included in part, since the EC concessions did include "automatic teller machines," which is part of heading 84.72. The contextual argument being made would be reinforced if we were to include heading 84.43 as another example of a heading that includes devices that can make multiple copies, but that must be distinguished from other headings based on the underlying technology at issue.

devices, such as old stencil based printing devices, where the etched stencil is used to print multiple copies of whatever is put onto the stencil.

126. This distinction between optical technologies in Chapter 90 and other technologies in Chapter 84 can also be seen in the other headings of Chapter 90 in the EC's schedule of tariff concessions. Chapter 90 covers "optical, photographic, cinematographic…instruments and apparatus." The relevant headings under Chapter 90 all depend on optical and photographic technologies, as the following language from those headings illustrates:

- Heading 90.01: "Optical fibers…"
- Heading 90.02: "Lenses, prisms, mirrors and other optical elements…"
- Heading 90.03: "Frames and mountings for spectacles…"
- Heading 90.04: "Spectacles, goggles…"
- Heading 90.05: "Binoculars, monoculars…"
- Heading 90.06: "Photographic … cameras…"
- Heading 90.07: "Cinematographic cameras and projectors…"
- Heading 90.08: "Image projectors..; photographic … enlargers and reducers"
- Heading 90.10: "Apparatus and equipment for photographic …laboratories … not specified or included elsewhere in this Chapter …"

127. These other headings from Chapter 90 provide context for interpreting the scope of heading 90.09. Like the other relevant headings in Chapter 90, heading 90.09 covers optical products and/or products having optical mechanisms for transferring optical images. Heading 90.09 does not cover digital products. The language used in headings 90.09, and the language used in the other relevant headings of Chapter 90 all refer to optical technologies, an inherent technological distinction that precludes products built around digital technologies from the scope of heading 90.09. Technological developments cannot turn a digital product into an optical or photographic product, since the underlying technologies are so fundamentally different. Given this context, it is unreasonable to construct the scope of heading 90.09 in the EC's schedule of tariff concessions so broadly as to include a fundamentally different technology. On the contrary, the phrase used in heading 84.71 -- "input or output units" -- does cover digital technologies and is broad enough to include technologically advanced versions of this core digital technology.

128. Considered together, these distinctions reinforce the interpretation that MFMs with digital connectivity must fall under heading 84.71 in the EC's schedule of tariff concessions. MFMs are digital devices that allow a computer to output digital files. All of the components of an MFM with connectivity to computers– the printer unit, the scanner unit, and the facsimile module (if included) – all rely on digital data processing technologies. Such MFMs do not use optical images from a scanner projected onto a photosensitive surface. Such MFMs do not use hectograph or stencil technologies. Even though all these devices can produce a single or multiple copies of a document, their underlying

technologies are fundamentally different. Since MFMs depend on digital data processing technologies, those MFMs with computer connectivity must fall under heading 84.71.

(b) The context of heading 84.71 confirms that MFMs with digital connectivity fall under heading 84.71

129. Japan believes that the ordinary meaning of the term "units" read in the context of the term "photocopying" alone can resolve this dispute. Any "units" of a computer use digital technology that is fundamentally different from the optical technology used in "photocopying." This sharp distinction in meaning and technology is further reinforced by the broader context in which these key terms are used. Heading 84.71 and the language used in that heading and the various subheadings in the EC's schedule of tariff concessions confirm the distinction Japan draws here between "units" based on digital technology and "photocopying" based on optical technology.

130. The context of the phrases "units thereof" and "input or output units" confirms their meanings and confirms that MFMs with digital connectivity should be considered to be "input or output units." Japan notes that the EC concession broadly covers all of heading 84.71. Unlike some other concessions that apply only to parts of a particular heading, the concession on heading 84.71 covered the entire heading, and thus covers all devices that are computers or are used in conjunction with computers. The phrase "units thereof" in heading 84.71 of the EC concession confirms that the "units" at issue are those that relate to and are used in conjunction with computers. The subheading 8471.60 goes on to clarify that "units thereof" includes "input or output units." In other words, the concession broadly covers any devices that are used either to input information into a computer or to output information coming from a computer.

131. The structure of heading 84.71 confirms the broad scope of the EC concession. Heading 84.71 includes several subheadings that describe different types of computers, computer systems, and devices used in connection with computers. Both the negotiated concessions and the legal obligations broadly cover every item enumerated in heading 84.71 that has anything to do with computers, computer systems, or devices used with computers. This structure thus confirms the parties contemplated and the EC codified a very broad concession on computers and all "units" used in connection with computers.

132. The language of other subheadings under heading 84.71 in the EC's schedule of tariff concessions also provides useful context to understand the phrase "units thereof" in heading 84.71 and the more specific phrase "input or output units" in subheading 8471.60. After covering "automatic data processing machines" without any "units" included and regardless of weight in subheading 8471.10 and "portable" computers under 10 kg in subheading 8471.30, the remaining subheadings cover a series of items that combine computers with some

other devices. The languages of the other subheadings all support the interpretation that heading 84.71 includes those MFMs with digital connectivity.

133. Subheading 8471.41 covers those items: "[c]omprising in the same housing at least a central processing unit and an input and output unit, whether or not combined." This language recognizes that central processing units (or a "CPU," the brains of the computer) work together with input and output units to perform various tasks.

134. Subheading 8471.49 then covers those items: "[o]ther, presented in the form of systems." This language recognizes the inclusion of devices that combine a computer with input and output devices. The various items need not be in the same housing, as long as the computer and input/output devices are sufficiently linked – basically that the units are used principally with the computer, can connect to the computer, and can transmit data throughout the system.

135. Subheading 8471.50 covers those items: "other than those of subheadings 8471.41 or 8471.49, whether or not containing in the same housing one or two of the following types of unit: storage units, input units, output units." Here the devices need not be in the same housing unit, but there can only be one or two of the devices.

136. All three of these subheadings cover different types of products that combine a computer with some other computer related devices. The next series of subheadings cover "units" of computers, devices that do not themselves include computers.

137. Subheading 8471.60 – the key subheading at issue in this case – covers: "input or output units, whether or not containing storage units in the same housing." Like the prior subheadings, this subheading recognizes the possibility of combining input or output units and storage units. But unlike the prior subheadings, there is no language limiting the number of units, requiring at least some combination of units, or limiting the inclusion or exclusion in the same housing unit. In other words, read in the context of the prior subheadings and specific restrictions, the language of subheading 8471.60 is broader and more inclusive.

138. Subheading 8471.70 then specifically covers "[s]torage units" on stand alone basis. Storage units (such as hard disc drives) are mentioned as units that might be included in combination with devices in some earlier subheadings, but here are listed as a stand alone item.

139. Subheading 8471.80 then covers "[o]ther units" of computers. Even if a "unit" does not qualify as an "input unit," or an "output unit," or a "storage unit," it would still qualify as "other units" of a computer if the device rested on digital technology and was to be used in connection with computers.

140. Heading 84.71 thus covers all conceivable "units" of computers. Subheading 8471.60 captures all input and output devices, either with or without a storage unit. Subheading 8471.70 captures storage units as stand alone devices. Subheading 8471.80 then captures any other type of "unit" that might be used in connection with a computer that would not otherwise be an "input unit," "output unit," or "storage unit."

141. These subheadings (8471.60, 8471.70 and 8471.80) from the text of the EC concessions covering computer "units" provide important context for several reasons. First, they show that "input" and "output" units were treated together and separately from "storage" units or "other" units. Second, they show that the inclusion or exclusion of a storage unit in combination with other units does not change the applicability of subheading 8471.60; storage units have to be stand alone to fall under subheading 8471.70. Third, collectively these three subheadings include every possible type of computer "unit."

142. Finally subheading 8471.90 captures "other" devices that would otherwise be included in heading 84.71 but that do not fall within any of the earlier subheadings. Even on this broad residual category, the EC concessions codified a zero duty rate. "Other" devices are still duty-free as long as they are digital devices that would otherwise belong in heading 84.71.

143. Taken together, these subheadings provide strong contextual support for including MFMs with digital connectivity within the scope of heading 84.71 in the EC's schedule of tariff concessions, and within the scope of the EC concession on this item. All types of computers and all types of computer units – separately or in various combinations – fall within heading 84.71. All of these items were included in the concessions negotiated and codified in the EC concessions. Nothing in the language or structure of heading 84.71 justifies pushing MFMs -- which are devices based on digital technology and used in connection with computers, both for inputting data through a scanner unit and for outputting data through the printer unit -- outside the scope of heading 84.71.

8. Other Interpretative Materials Confirm That MFMs With Digital Connectivity to Computers Are "Output Units," And Thus Fall under Heading 84.71.

144. The Panel has other interpretative tools to confirm the ordinary meaning of the treaty text in heading 84.71. The Panel has the broader context from the EC's schedule of tariff concessions, which Article II:7 of the GATT 1994 makes "an integral part" of the GATT 1994. The Panel also has other relevant materials from the Harmonized System. The Appellate Body has specifically affirmed the use of the Harmonized System as helpful for interpreting tariff concessions. In *EC - Chicken Cuts*, the Appellate Body determined that since there was an agreement among the Members to use the Harmonized System as a tool for interpreting their tariff concessions, such agreement would qualify as

context under Article 31(2)(a) of the *Vienna Convention on the Law of Treaties* ("Vienna Convention") for interpreting the tariff concession at issue in that case.[72]

145. Japan notes that these arguments based on the interpretative materials from the Harmonized System are only relevant to the extent they help the Panel properly interpret the language of the tariff concession at issue. For different products, the nature of any "consensus" about how to categorize such products will necessarily be different. For that reason, Japan believes that the Harmonized System must be considered carefully in this particular dispute, with an awareness of the unique nature of technology products. The Panel need not approach this issue in the manner a national authority would use when trying to classify the goods. Rather, the Panel can and should consider the contextual arguments and other interpretative materials so as to interpret the treaty language at issue, with particular sensitivity to the interrelationship of the ordinary meaning of the language of tariff concessions read in light of the underlying technologies of the different products at issue.

(a) The Harmonized System confirms that MFMs fall under heading 84.71.

146. Japan believes the language of heading 84.71 in the EC's schedule of tariff concessions, when read in light of its ordinary meaning and in its context, confirms that those MFMs with digital connectivity fall under that heading. The broad use of the term "units" in heading 84.71 and the broad phrase "input or output units" in subheading 8471.60 both demonstrate that MFMs with such digital connectivity – as devices that serve as input/output units for computers -- fall under this heading.

147. This interpretation based on ordinary meaning finds strong confirmation in the interpretative materials from the Harmonized System. The Notes to Chapter 84 in the Harmonized System, particularly those Notes that clarify the meaning of word "units" in heading 84.71 and the phrase "input or output units" in subheading 84.71.60, offer interpretative guidance for these phrases in the EC's schedule of tariff concessions. When considering interpretative materials to help ascertain the meaning, the most relevant materials will be those materials that speak most directly to the language at issue.[73] Notes 5(B), 5(C), and 5(D) to Chapter 84 speak directly to the meaning of these terms, and thus provide particularly important guidance.

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[72] See Appellate Body Report, *EC - Chicken Cuts*, para 199. We note that in the Panel and Appellate Body proceedings in *EC - Chicken Cuts*, the parties expressed a wide variety of views as to how to treat the Harmonized System under the Vienna Convention.

[73] See Appellate Body Report, *EC - Chicken Cuts*, at para 224, n. 431.

148. In the Harmonized System, Note 5 to Chapter 84[74] addresses heading 84.71 and describes what goods are properly considered to be "units" of computers included in heading 84.71. Note 5 to Chapter 84 confirms that the defining characteristic of these MFMs is their ability to connect to and be used as an input/output device for a computer, and that any such goods with digital connectivity to a computer belong in heading 84.71.

149. Note 5 to Chapter 84 addresses various aspects of heading 84.71 and the scope of that heading. Note 5(B) clarifies the scope of a computer "system" and provides that:

> Automatic data processing machines may be in the form of systems consisting of a variable number of separate units. Subject to paragraph (E) below, a unit is to be regarded as being a part of a complete system if it meets all of the following conditions:
>
> (a) It is of a kind solely or principally used in an automatic data processing system;
>
> (b) It is connectable to the central processing unit either directly or through one or more other units; and
>
> (c) It is able to accept or deliver data in a form (codes or signals) which can be used by the system. [75]

In particular, this Chapter Note focuses specifically on the ability of the unit to connect to the computer, and the extent to which the units can exchange data with the computer, and thus become part of a computer "system." Note 5(B) to Chapter 84 adds the additional requirement of being "solely or principally used" in a computer system to qualify as part of the "system."[76]

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[74] Unless otherwise indicated, discussion of Chapter Notes refers to those chapter notes in effect as part of the HS96, which was in effect at the time of the original EC concessions in 1997. Changes to the Chapter Notes since 1996 do not affect the scope of the concessions.

[75] Subheading Note 1 to the Harmonized System further clarifies that the term "systems" means computers: "whose units satisfy the conditions laid down in Note 5(B) to chapter 84 and which comprise at least a central processing unit, one input unit (for example, a keyboard or a scanner), and one output unit (for example, a visual display unit or a printer.)"

[76] Note 5(E)to Chapter 84 also focuses on connectivity to the computer, noting that "[m]achines performing a specific function other than data processing and incorporating or working in conjunction with an automatic data processing machine are to be classified in the headings appropriate to their respective functions, or failing that, in residual headings." With regard to an MFM, though a printing function and a scanning function work "in conjunction

150. Note 5 to Chapter 84 has two further provisions that specifically address the scope of "units" for computers under heading 84.71 as opposed to the scope of a computer system. Note 5(C) provides that: "Separately presented units of an automatic data processing machine are to be classified in heading 84.71." This Chapter Note explicitly confirms that "units" of a computer – whether being imported with or without computers that can use the "unit" in question – still belong in heading 84.71. In the context of this dispute, Note 5(C) confirms that MFMs entering without computers are still to be considered a "unit" belonging under heading 84.71.

151. Note 5(D) to Chapter 84 then addresses certain types of "units" of computers, including specifically "printers." Note 5(D) provides that:

> Printers, keyboards, X-Y coordinate input devices and disk storage units which satisfy the conditions of paragraphs B(b) and B(c) above, are in all cases to be classified as units of heading No 84.71.

In other words, for any computer "printers" – devices that can receive and print the output of a computer – heading 84.71 must apply, as long as the printers can "connect" to the computer (the rule of paragraph B(b)) and the printers can "accept or deliver" the computer data (the rule of paragraph B(c)). This Chapter Note provides strong support for the interpretation that any device that can print the output of a computer "are in all cases" to be classified in heading 84.71." It is also important to note that such printers need not meet the rule of paragraph B(a) that they are of a kind "solely or principally used" in a computer.

152. Note 5(D) to Chapter 84 thus provides important interpretative guidance. The limitation of Note 5(B)(a) does not apply to computer "printers". This means that such devices belong in heading 84.71 even if they have other uses that might arguably be considered "principal." Obviously, if the device at issue in fact has its sole or principal use in a computer system, it still belongs in heading 84.71. Even if the good has some other principal use, however, that other use does not push the device into some other heading, as long as the device meets the conditions of Note 5(B)(b) and Note 5(B)(c). In the context of this dispute, Note 5(D) to Chapter 84 thus provides specific confirmation that an MFM can still be an "output unit" as a printer even if the MFM has some other principal use, as long as the MFM is connectable to a computer and can use digital data. The MFMs at issue here in fact have a principal use as an "output unit" as a printer.

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with" an ADP, a digital copying function does not. The digital copying function works independently from an ADP. So, a digital copying function could not be "a specific function" under Note 5(E), which is required to work "in conjunction with" an ADP.

Even if they did not, they would still belong in heading 84.71 as digital devices that can connect to a computer.

153. The other key point about Note 5(D) to Chapter 84 is that the device need only be "connectable" to computer, and need not be actually connected. It is the ability to connect to and work with a computer that brings the device within the scope of heading 84.71, even if the device also has some stand-alone features.

154. Read as a whole, Note 5 to Chapter 84 provides strong interpretative guidance that confirms that MFMs with computer connectivity fall within the meaning of the phrases "units thereof" in heading 84.71 and "input or output units" in subheading 8471.60.

(b) The Harmonized System Explanatory Notes also confirm that MFMs do not fall under heading 90.09

155. Japan believes that the ordinary meaning of the phrase "photocopying apparatus incorporating an optical system" in the EC schedule of concessions excludes any possibility that MFMs could fall within heading 90.09. To the extent there is any ambiguity about the meaning of the language of heading 90.09, the various interpretative tools provided by the Harmonized System confirm that heading 90.09 does not include MFMs.

156. The Harmonized System Explanatory Note ("HSEN") to heading 90.09 elaborates on the meaning of "photocopying apparatus incorporating an optical system" and confirms that this term does not cover MFMs. HSEN to heading 90.09 provides that:

> These apparatus incorporate an optical system (comprising mainly a light source, a condenser, lenses, mirrors, prisms or an array of optical fibres) which projects the optical image of an original document on to a light-sensitive surface, and components for developing and printing of the image.[77] (emphasis added)

Several aspects of this HSEN confirm and reinforce the plain meaning of the term "photocopying" as involving light reflected from an original document that is then used to make the photocopy.[78]

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[77] Vol. 4 Harmonized Commodity Description and Coding System, Explanatory Notes (2d 1996), at p. 1592. See Exhibit JPN-23.

[78] *See* "Classification of Multifunctional Digital Copiers," NC0300E1 (WCO 26 October 2000) at pp. 3-4, for a useful discussion of this EN and its relationship to the technology in existence at the time the EN was drafted. See Exhibit JPN-10.

157. Photocopiers use a light source and the optical system of photocopiers projects the entire image of the original document directly onto the photosensitive paper or some other photosensitive surface. In other words, the photocopier is using the actual image taken from the original document. That image is then projected onto the light-sensitive surface. This understanding of how a photocopier works is part of the ordinary meaning of "photocopy," but it is also specifically reflected in this HSEN that confirms this ordinary meaning – the optical image of an original document must be directly projected onto a photosensitive surface.

158. As discussed in paragraphs 108-122, unlike photocopiers, an MFM relies on a totally different digital technology. An MFM uses a scanner to break down the entire image into digital data, which can then be stored and manipulated. The optical image of the document is never directly projected onto a light sensitive surface; rather, the image of the document is simply converted into digital data. Because an MFM does not project the optical image directly onto a photosensitive surface, it is distinct from a traditional photocopier. Indeed, because a scanner is fundamentally a digital device, scanners are included in heading 84.71 as "input units" for a computer, and do not constitute part of Chapter 90 as an optical or photographic product.

159. Photocopiers also use their optical systems to make a copy by projecting an image to be reproduced. The optical system generates and reflects a light, which is directly reflected from the original object onto the photosensitive surface, and as such is integrally involved in making the photocopy.

160. MFMs, in contrast, use a scanner unit that itself has no involvement in the printing function at all. The scanner unit uses an optical system to convert the original document into digital data – the individual points of light, reflected from the original object, are converted into electrical signals that become the digital data. The scanning is then finished. The digital data can be printed out at some point, but the scanner unit plays no role in printing out the document.

161. Moreover, the original image is never projected. The original image no longer exists after the image is converted into digital data. The image has been converted to digital data that can reconstruct the image, but the image itself is not being used or projected in anyway.

162. The HSEN for heading 90.09 also clarifies what the language "indirect process" means in the context of photocopying. The HSEN provides that for the indirect process:

> [t]he optical image is projected onto a drum (or plate) coated with selenium or other semiconducting substance charged with static electricity. After the latent image has been developed by means of a powdered dye, it is transferred onto ordinary paper by

> applying an electrostatic field and fixed to the paper by heat treatment. (emphasis added)[79]

The feature here is the use of the photosensitive drum or plate as the intermediary, thus avoiding the need to use photosensitive paper directly in the process. The latent image on the drum or plate is then applied to ordinary paper – the drum or plate creates the copy. It is this reflected optical image of the original document that has been directly projected onto the drum or plate – as discussed in both of these HSENs -- that defines the photocopying.

163. Note this direct projecting of the original optical image must happen immediately as part of the photocopying process. The use of direct versus indirect simply refers to whether the projected image goes directly onto the paper or indirectly onto the paper via the photosensitive intermediary. The express language of the HSENs refers to projecting the optical image itself, not converting the image into digital data that can be stored, manipulated, or in other ways processed before being used.

164. Although HSENs are not binding and do not have the same legal status as the actual text of the tariff concession at issue, in this instance the HSENs to heading 90.09 provides useful interpretative guidance to understand the meaning of the key term "photocopying," and the specific technology covered by "photocopying." These HSENs confirm that this term does not encompass MFMs that depend entirely on digital technologies, not optical images.[80]

(c) Developments in WCO also confirm this interpretation that MFMs are "input or output units" for computers

165. The fundamental task of this Panel is to determine the meaning of the language used in heading 84.71 at the time of the EC concessions at issue in this dispute. That language must govern the issue. If the language itself is not dispositive, then the Panel can turn to the context provided by other language in the EC concessions. The Panel can also turn to the interpretative materials

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[79] Vol. 4 Harmonized Commodity Description and Coding System, Explanatory Notes (2d ed. 1996), at p. 1592. See Exhibit JPN-23. We note that the exactly same language was used to describe the indirect process photocopying when this good was shifted to heading 84.43. See Vol. 4 Harmonized Commodity Description and Coding System, Explanatory Notes (4th ed. 2007), at p. XVI-8443-4.

[80] Further, the same argument as mentioned in paragraph [114] using the neighboring headings as context applies here; the fact that the neighboring headings 90.01 to 90.10 cover optical, photographic and cinematographic products indicates that it is impermissibly expansive to include digital copying process into the aforesaid "indirect process" used in heading 90.09.

provided by the Harmonized System in existence in 1996, since that system existed at the time the language of the EC concession was drafted.

166. Since 1996, however, there have been changes to the Harmonized System that provides further interpretative guidance to determine the meaning of "units thereof" from heading 84.71 and "photocopying" from heading 90.09, as those words were used in 1996. Note carefully the interpretative task here. Changes to the Harmonized System cannot change the scope of the concessions originally agreed upon. Tariff concessions can only be changed by the WTO itself. Nevertheless, the changes to the Harmonized System in fact provide support for Japan's argument about the scope of the EC concession on heading 84.71.

167. The language of subheading 8443.31 under the HS07 reinforces Japan's argument that MFMs that can connect to a computer should be part of Chapter 84, and in 1996 were in fact part of heading 84.71. This subheading provides:

> 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.

This language specifically addresses the point that "other printers, copying machines and facsimile machines" in heading 84.43 include those devices that can perform multiple functions. This language also makes explicit the need to be "capable of connecting to an automatic data processing machine or to a network." In other words, this language confirms one of Japan's main arguments above – that the defining feature of these MFMs is in fact their ability to be connected to a computer or to a network.[81]

168. The new HSENs for heading 84.43 provide further interpretative guidance. Although the HSENs are not binding under the HS system, they still provide potentially helpful guidance to understand the meaning of specific language in the headings. In this dispute, the guidance being sought is what the original language used in headings 84.71 and 90.09 meant in HS96 when the language was used to define the scope of EC tariff concessions.

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[81] In this regard, the HSEN for subheading 8443.31 provides that this connectability "denotes that the apparatus comprises all the components necessary for its connection to a network or an automatic data processing machine to be effected simply by attaching a cable." Vol. 4 Harmonized Commodity Description and Coding System, Explanatory Notes (4th ed 2007), at p. XVI-8443-7.

169. The HSENs for heading 84.43 provide two particularly helpful points of interpretative guidance. First, the HSENs draw a clear and explicit distinction between "digital copiers" and "photocopiers," discussing each of them in separate categories under the broader category "copying machines."[82] The term "photocopiers" comes from the old language of heading 90.09 and is further defined to include electrostatic photocopying, which includes both the direct process and the indirect process. In other words, "photocopiers" and "digital copiers" are not interchangeable terms; they have very distinct meanings. Photocopiers are required to shed light on an original document for each copy. Digital copiers do not require an original document for each copy, since the original document has been used to create digital data first, and that digital data is then printed out "to produce the required number of copies." The fact that this distinction is now being so sharply drawn strongly suggests that the distinction was there from the beginning.

170. Second, the HSENs focus on the ability to connect to a computer as the defining characteristic of these devices. The phrase "capable of connecting to" a computer is a key concept of heading 84.43. The HSEN for subheadings 8443.31 and 8443.32 explains that this phrase means "that the apparatus comprises all the components necessary for its connection to a network or an automatic data processing machine to be effected simply by attaching a cable."[83] The HSENs then use this feature of connectivity to distinguish "printers" from "digital copiers." A "printer" can accept data from a computer, which necessarily requires computer connectivity. A "digital copier" is a stand-alone machine – basically composed of a printer and a scanner, which together can then make digital copiers.

171. The key point for purposes of this dispute is whether the scope of the concession on heading 84.71 in HS96 covered those MFMs that can connect to computers. The respective origins of the parts of new heading 84.43 under the HS07 confirm that such multi-function devices with computer connectivity came from old heading 84.71 and not from the old heading 90.09.

9. The Object and Purpose of the EC Concessions Are Best Served by Interpreting the Concessions So As To Secure Continued Duty-Free Treatment for Computer "Units".

172. Article 31(1) of the Vienna Convention requires treaty text to be interpreted based on the ordinary meaning, in context, but also "in light of its

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82 Vol. 4 Harmonized Commodity Description and Coding System, Explanatory Notes (4th ed. 2007), at p. XVI-8443-4.

83 Vol. 4 Harmonized Commodity Description and Coding System, Explanatory Notes (4th ed. 2007), at p. XVI-8443-7.

object and purpose." Recognizing this principle, the Appellate Body has repeatedly recognized the "object and purpose of the WTO Agreement and the GATT 1994" as an "interpretative principle." Moreover, the Appellate Body has specifically recognized that the object and purpose of these agreements can be used in interpreting tariff concessions negotiated by the Members.[84] A recognized object and purpose of the WTO Agreement and the GATT 1994 has been the security and predictability of "the reciprocal and mutually advantageous arrangements *directed to the substantial reduction of tariffs and other barriers to trade*."[85]

173. This overarching object and purpose of the WTO Agreement and the GATT 1994 has been reinforced in the specific context of the ITA. The tariff concessions negotiated in the ITA took place within the framework of the WTO Agreement and the GATT 1994. The statements in the Ministerial Declaration on Trade in Information Technology Products not surprisingly echo the overarching object and purpose of the WTO Agreement and GATT 1994. The ministers desired "to achieve maximum freedom of world trade in information technology products."[86] These 29 original signatory members had as their object and purpose, as Director-General Lamy subsequently put it, nothing less than the "rapid opening [of global markets] aiming at duty-free treatment for a group of products relating to information technology."[87] This object and purpose to achieve a "substantial reduction of tariffs" – and to ensure the security and predictability of these reductions – thus lies at the core of the WTO Agreement, the GATT 1994, and the ITA. All the three share this common object and purpose.

174. The reciprocal tariff concessions had the additional object and purpose of expanding trade. The WTO Agreement and the GATT 1994 both specifically recognized "expanding the production and trade in goods" as another core object and purpose that would be furthered by the reciprocal and mutually

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[84] *See* Appellate Body Report, *EC – Computer Equipment,* para.82; Appellate Body Report, *EC - Classification*, para 243. See also Panel Report, *China – Auto Parts,* para. 7.460.

[85] Para 3 of the Preamble, Marrakesh Agreement; Para 3 of the Preamble, The General Agreement on Tariffs and Trade (emphasis added). *See also* Panel Report, *China – Auto Parts*, para. 7.460 (emphasis in original), citing Appellate Body Report, *EC - Chicken Cuts*, para. 243.

[86] Ministerial Declaration, WT/MIN (96)/16, adopted 13 December 1996, at Preamble, Page 1, Clause 4.

[87] Statement of WTO Director-General Pascal Lamy at the Opening of the 3d WTO Information Technology Symposium, 28 March 2007. This speech can be found at http://www.wto.org/english/news_e/sppl_e/sppl58_e.htm.

beneficial reduction of tariffs.[88] Echoing this same object and purpose, the ITA explained that the concessions were made, "considering the key role of trade in information technology products in the development of information industries and in the dynamic expansion of the world economy."[89] In light of this object and purpose, as negotiations under the ITA progressed, new countries were added to the negotiating parties and the scope of product coverage was broadened.

175. Consistent with reducing tariffs and thus expanding trade, the ITA elaborated on these core objects and purposes. The ITA specifically recognized the need "to encourage the continued technological development of the information technology industry on a global basis."[90] To ensure the security and predictability of the reciprocal tariff concessions and expanded trade, the ITA also specifically declared that "[e]ach party's trade regime should evolve in a manner that enhances market access opportunities for information technology products."[91] In other words, the ITA sought to encourage "technological development" and "evolution," not create disincentives to such development or evolution.

176. In recognizing this need for technological development for information technology products, however, the ITA was simply echoing and reinforcing in a specific factual context the core object and purpose of reciprocal concessions to reduce tariffs and expand trade. It would be inconsistent with these object and purposes of the WTO Agreement and the GATT 1994 to reduce tariffs on a certain product, only to re-impose those tariffs because of some technological developments in that product.

177. The object and purpose of establishing and <u>continuing</u> duty-free treatment for information technology products should thus guide the interpretation of the tariff concessions under heading 84.71 on computer "units." The word "units" in heading 84.71 and the phrase "input or output units" in subheading 8471.60 are broad and inclusive precisely because these terms seek to describe devices that change over time and cannot be defined narrowly based on the current generation of the device. The essential elements of such devices – their ability to connect to a computer or computer network, and their ability to work with digital data – apply to all such devices, regardless of how their other functionality may change or improve over time. The reciprocal and mutually

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[88] Para 1 of the Preamble, Marrakesh Agreement; Para 2 of the Preamble, The General Agreement on Tariffs and Trade

[89] Ministerial Declaration, WT/MIN (96)/16, adopted 13 December 1996, at Preamble, Page 1, Clause 2.

[90] Ministerial Declaration, WT/MIN (96)/16, adopted 13 December 1996, at Preamble, Page 1, Clause 5.

[91] Ministerial Declaration, WT/MIN (96)/16, adopted 13 December 1996, at Preamble, Page 2, Para 1.

beneficial tariff concessions on computer "units" thus sought to reduce tariffs and expand trade on all computer "units."

178. Similarly, the word "printer" applies to all such devices, not just the particular type of computer printers that existed in 1996. The ordinary meaning of "printer" in the context of computers is simply "a computer output mechanism." Nothing in that ordinary meaning imposes any other limitations, and certainly nothing in definition in any way implies improving output speed over time as somehow disqualifying devices from being a printer.

179. In contrast to the terms computer "unit," "output unit," and "printer," the term "photocopying" refers to a specific non-digital technology that does not relate at all to the digital technology that defines the ordinary meaning of computer "output units" such as MFMs. It would be inconsistent with the objectives and purposes of the reciprocal concessions on digital devices such as computer "output units" to treat them dutiable because of some characteristic unrelated to ordinary meaning of "output units," such as pages per minute or any other characteristic unrelated to the core meaning of an "output unit" or a computer "printer." Such treatment would undermine the security and predictability of the original concession.

180. It would be fundamentally at odds with the objects and purposes of the WTO Agreement, the GATT 1994, and the ITA to disqualify computer "units" products from continued duty-free treatment. The EC approach of inserting some additional qualification – such as pages per minute -- that has no basis in the ordinary meaning of the text of the concession would undermine the security and predictability of the tariff concession.

10. Conclusions

181. MFMs with digital connectivity fall squarely within the scope of the term "output units" as used in subheading 8471.60 and should be duty free under the concessions made by the EC under the ITA on these very products. Instead, the EC has crafted strange measures that have no basis in the language, context, or object and purpose of the relevant treaty concessions. The EC imposes duties on MFMs that should be duty-free, simply because such devices do not have a facsimile function or can print more pages per minute than the EC deems to be acceptable. The EC measures that impose duties on MFMs are inconsistent with EC tariff concessions and are therefore inconsistent with Articles II:1 (a) and II:1(b) of GATT 1994.

B. The EC Measures Concerning Multifunctional Digital Machines with a Facsimile Function but Without Connectivity to Computers

1. The Products at Issue

182. As discussed earlier, this dispute involves two categories of MFMs – those that are input/output units of computers under heading 84.71 and those that are facsimile machines under heading 85.17.

183. The key difference that distinguishes MFMs into either heading 84.71 or heading 85.17 is digital connectivity – the ability of the MFM in question to connect to a computer or a computer network. All MFMs with this digital connectivity fall under heading 84.71 and more specifically subheading 8471.60 as "input or output units" for computers.

184. Those MFMs without this digital connectivity cannot be "units" of a computer. Such MFMs in this dispute are covered by heading 85.17 and more specifically by subheading 8517.21 if they have a facsimile transmission function. These MFMs have scanners, which allow an image of the document to be converted into digital data, but only so that the data can then be transmitted over phone lines as a facsimile.

185. To be more specific, Japan has identified specific illustrative models of MFMs that are being assessed duties by the EC even though these models are properly covered by EC commitments to treat such products as duty-free as facsimile machines. Exhibit JPN-13 provides a list of specific products that Japan believes illustrate the types of MFMs that are properly covered by EC concessions on subheading 8517.21 as facsimile machines, and brochures that describe each of these products. These products all include more than one function, which makes them "multifunctional." These products also all depend on digital technologies. This list is illustrative, not comprehensive.

2. The Measures at Issue

186. Note that the EC measures discussed above in paragraphs 31-44 apply to all MFMs, whether or not they have the ability to connect to a computer or computer network. The EC measures focus on other product characteristics – the pages per minute of output – rather than the more legally relevant features of the products such as the ability or inability of the device to connect to a computer. This discussion of the EC measures provided above, therefore, applies equally to the MFMs at issue in this section – those that do not have the ability to connect to computers.

187. Beyond these specific EC regulations and measures, Japan notes that the customs authorities of EC member States have in fact been imposing a 6 percent duty on imports of MFMs that do not connect to computers, but that

operate as facsimile machines. Japan provides in Exhibit JPN-7 sample BTI decisions showing that prior to 2007, more specifically prior to the clarification at the 360th meeting of the Customs Code Committee that the distinction among multifunctional apparatus between facsimile machines and photocopiers would be decided based on the 12 pages per minute copying speed, the EC classified these MFMs into CCT 8517.21.00 as facsimile machines. Exhibit JPN-14 provides sample BTI decisions showing that starting in 2007, more specifically after the introduction of 12 ppm threshold at the 360th meeting, the EC began to use new CCT 8443.31.91 to assess a 6 percent duty on those MFMs that had previously been treated as duty free under CCT 8517.21.00.

188. These EC measures violate EC commitments to treat those products under heading 85.17 as duty-free. As noted above, on 2 July 1997 the EC modified Schedule LXXX – European Communities to the Marrakesh Agreement, and provided specific concessions for "[f]acsimile machines," as contained in CCT 8517. 21.00. The EC bound the duty rate for these products at zero. As a result of these concessions, the EC and its member States are obliged to grant duty free treatment to MFMs that fall within the scope of this concession. Article II:7 of the GATT 1994 makes each country's schedule of concessions "an integral part" of the GATT 1994.[92]

189. The legal arguments to support this interpretation of the scope of heading 85.17 cover much of the same ground as previously discussed for those MFMs with digital connectivity covered by the concession on heading 84.71. We summarize that discussion, adapting it to the specific circumstances of heading 85.17 below.

3. History of the Concessions and Measures at Issue

190. Note that the history of the EC concessions and measures discussed above in paragraphs 45-61 apply to all MFMs, whether or not they have the ability to connect to a computer or computer network. This discussion of the EC measures provided above, therefore, applies equally to the MFMs at issue in this section – those that do not have the ability to connect to computers and are therefore properly treated as facsimile machines.

191. The key point is that the EC concessions as a result of the negotiation of the ITA specifically included:

> 8517.21 – "Electrical apparatus for line telephony … and telecommunications apparatus for carrier-current line

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92 Appellate Body Report, *EC - Chicken Cuts*, para 145 ; Appellate Body Report, *EC – Computer Equipment,* para 84 .

systems or for digital line systems" … "Facsimile machines"

For heading 85.17, the entire four digit heading was included as part of Attachment A, confirming the entire heading was subject to the concessions.

4. Summary of Argument

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

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

194. Conversely, the ordinary meaning of "photocopying" in heading 90.09 equally confirms that MFMs -- with or without digital connectivity -- cannot fall under this heading. "Photocopying" represents a fundamentally different technology. Unlike MFMs, which are based on digital technology and which use digital technology to send and receive messages over the telephone lines, photocopiers operates based on optical technology. The fact that MFMs cannot fall under the ordinary meaning of heading 90.09 reinforces the conclusion that MFMs with facsimile capability, but without digital connectivity, in fact belong under heading 85.17. These arguments about the ordinary meaning of key terms are confirmed by the very different underlying technologies of MFMs and photocopiers.

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

196. Finally, the object and purpose of the EC concessions would be best served by confirming the duty-free treatment of these MFMs as "facsimile machines." The WTO Agreement seeks to reduce tariffs and barriers to trade, an

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

5. The Ordinary Meaning of the Language in Heading 85.17 and Subheading 8517.21 Read with its Technical Features Confirms that MFMs with a Facsimile Function but Without Digital Connectivity Are Within the Scope of the EC Concessions.

197. Although many types of MFMs connect to an automatic data processing machine, and are thus subject to EC concessions on heading 84.71, some MFMs do not have this digital connectivity. Rather than connect to a computer, many of these MFMs operate only in connection with a telephone line and are thus properly considered to be facsimile machines subject to EC concessions on heading 85.17.

198. Heading 85.17 refers in relevant part to "electrical apparatus for line telephony or line telegraphy." The plain meaning of this language covers a broad range of devices used to communicate over telephone lines.

199. The subheadings under heading 85.17 confirm this broad scope and specifically include "facsimile machines." The subheadings under heading 85.17 include a range of devices that make use of telephone or telegraphic lines. Subheading 8517.21 includes "[f]acsimile machines" as a specific example of a device that uses telephone lines and that is subject to concessions on heading 85.17.

200. In the technical sense, "facsimile" is defined as a "system of communications in which a transmitter scans a photograph, map, or other fixed graphic material and converts the information into signal waves for transmission by wire or radio to a facsimile receiver at a remote point."[93] Similarly, a

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[93] McGraw-Hill Dictionary of Scientific and Technical Terms (5h ed. 1994) at p. 728 See Exhibit JPN-11.

"facsimile transmitter" is "[t]he apparatus used to translate the subject copy into facsimile signals suitable for delivery over a communication system."[94]

201. The ordinary sense of "facsimile machines" confirms that these devices are used in connection with telephone lines. The plain meaning of facsimile in this context is "a system for producing a copy by radio etc transmission of signals from scanning an original."[95] A "facsimile" could involve transmission over either a telephone line or a telegraph line, but that distinction would not affect the meaning of a "facsimile machine" falling under heading 85.17.

202. For MFMs without digital connectivity to a computer, their key purpose to transmit and receive documents over telephone lines confirms that they are "facsimile machines" and properly within the scope of the EC concessions. These MFMs can scan an original document and convert it into digital data, which can then be transmitted over the telephone lines. These devices can also receive digital data over phone lines and then print out a copy of the incoming document that has been converted back from digital data into a printed document. Because these MFMs without digital connectivity have more limited functionality, they tend to be smaller and not to have the various devices that complement the printer unit on those MFMs that have digital connectivity, and that thus serve as computer "output units" as computer "printers."

203. These devices consist of two features, a scanning module (a transmitter section) and a printing module (a receiver section). A scanning module serves primarily to allow the device to convert an original document into digital data that can then be processed as a facsimile. Any facsimile machine needs some method to convert the original document into digital data that can then be sent over the telephone line.

204. Similarly these devices also have a print module. The print module serves primarily to allow the device to print out a facsimile that it has received. Any facsimile machine must have some method to print out onto paper the digital data that it has received over the phone line. The scanner and print modules therefore are both integrally related to the facsimile function– which is to send and receive facsimiles.

205. The ordinary meaning of the language in heading 85.17 and subheading 8517.21 read with its technological features confirms that MFMs with

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94 McGraw-Hill Dictionary of Scientific and Technical Terms (5h ed. 1994) at p. 729. See Exhibit JPN-11.

95 New Shorter Oxford English Dictionary, Vol. 1, at p. 903. See Exhibit JPN-11.

a facsimile function but without digital connectivity are within the scope of the EC's schedule of tariff concessions.

6. Context and Other Interpretative Materials Confirms that MFMs with a Facsimile Function but Without Digital Connectivity Are Covered by the EC Concessions.

206. As noted above for MFMs under heading 84.71, Japan would like to reemphasize at the outset the importance of the language of the relevant four-digit headings. Considering the ordinary meaning of the headings, as discussed above, the MFMs with a facsimile function, but without digital connectivity, fall squarely within heading 85.17 of the EC concessions. The language of heading 90.09 and the HSEN for heading 85.17, as context and other interpretative material, confirm this understanding.

207. As discussed in paragraphs 103-128, none of these MFMs can possibly fall within heading 90.09. MFMs are all based on digital technologies and do not "photocopy." Making a digital copy does not require an image of an original document to be projected onto a light sensitive surface, and therefore cannot be considered a "photocopy" as that term is used in heading 90.09. Such digital copying cannot fall under heading 90.09 since these devices do not "photocopy" as that term was used in heading 90.09. Context or other interpretative materials, whatever they provide, simply cannot change the scope of concessions that are clear on their face based on the language of those concessions.

208. Most types of MFMs have the ability to connect to a computer and thus fall under the scope of EC concession on heading 84.71. For some applications, however, a customer may want a simpler device that can send and receive facsimiles, and perhaps some other functions, but does not have any ability to connect to a computer. For these devices, such as the specific products listed in JPN-13, the factual context of heading 85.17 confirms that they belong in this particular heading.

209. Any uncertainty about the meaning of "facsimile machine" can be clarified by considering the HSEN for heading 85.17, which provides that:

> Facsimile machines for the telecommunication of text or graphics over telephone lines. These machines, which are connected to a telephone line, consist essentially of a transmitter section incorporating a device for the dot-by-dot scanning of the original document and a receiver section incorporating a recording device (sometimes heat-

> sensitive). This equipment is suitable both for the transmission and automatic reception of copies.[96]

This HSEN focuses on the connection to a telephone line, and the ability both to send and to receive original documents by converting them into digital data (the so-called "dot-by-dot" scanning) and sending them over telephone lines.

210. For those MFMs listed in JPN-13, their defining characteristic is the ability to send and receive facsimiles, and thus to operate as a facsimile machine. These devices do not connect to a computer, but do connect to a telephone line. This connection to a telephone line allows these devices to send and receive facsimiles.

7. The Object and Purpose of the EC Concessions Are Best Served by Interpreting the Concession So As To Secure Continued Duty-Free Treatment for "Facsimile Machines"

211. Considering the object and purpose of the WTO Agreement and the GATT 1994, the security and predictability of "the reciprocal and mutually advantageous arrangements directed to *the substantial reduction of tariffs and other barriers to trade*,"[97] MFMs without digital connectivity but with facsimile capability deserve continued duty-free treatment. To allow the EC to redefine its concessions to treat these products as dutiable would be inconsistent with the object and purpose of the WTO Agreement.

212. The object and purpose of establishing and continuing duty-free treatment for information technology products should thus guide the interpretation of the tariff concessions under heading 85.17 on "facsimile machines." This phrase is broad and inclusive precisely because these terms seek to describe devices that change over time and cannot be defined narrowly based on the current generation of the device. The essential elements of such devices – their ability to send and receive messages over telephone lines – apply to all such devices, regardless of how their other functionality may improve over time. The reciprocal and mutually beneficial tariff concessions on "facsimile machines" thus sought to reduce tariffs and expand trade on all such devices.

213. In contrast to the phrase "facsimile machines," the term "photocopying" refers to a specific non-digital technology that does not relate at all to the digital technology that defines the ordinary meaning of "facsimile machines." It would be inconsistent with the objects and purposes of the

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[96] Vol. 4 Harmonized Commodity Description and Coding System, Explanatory Notes (2nd ed 1996), at p. 1475. See Exhibit JPN-23.

[97] Para 3 of the Preamble, Marrakesh Agreement; Para 3 of the Preamble, The General Agreement on Tariffs and Trade (emphasis added).

reciprocal concessions on digital devices such as "facsimile machines" to treat them dutiable because of some characteristic unrelated to ordinary meaning of "facsimile machines," such as pages per minute or any other characteristic unrelated to the core meaning of a "facsimile machine". Such treatment would undermine the security and predictability of the original concession.

214. It would fundamentally at odds with the objects and purposes of the WTO Agreement, the GATT 1994, and the ITA to disqualify "facsimile machines" from continued duty-free treatment. The EC approach of inserting some additional qualification – such as pages per minute -- that has no basis in the ordinary meaning of the text of the concession would undermine the security and predictability of the tariff concession.

8. Conclusions

215. MFMs with facsimile capability, but without digital connectivity, fall squarely within the scope of the term "facsimile machines" as used in subheading 8517.21 and should be duty free under the concessions made by the EC. Instead, the EC applies to MFMs with a facsimile function, but without digital connectivity, a rule based on pages per minute that has no basis in the language or context of the relevant treaty concessions. The EC uses this strange rule to impose duties on MFMs that should be duty-free, simply because such devices can print more pages per minute than the EC deems to be acceptable. The EC measures that have created this rule and impose duties on MFMs are inconsistent with EC tariff concessions and are therefore inconsistent with Articles II:1(a) and II:1(b) of GATT 1994.

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

A. The Products at Issue

216. In addition to the MFMs discussed earlier, this dispute also covers "flat panel display devices," including the liquid crystal display ("LCD") type commonly referred to, in numerous EC and other documents, as "LCD monitors." This submission focuses on LCD monitors with a "digital visual interface" or DVI, which permits them to display the information from an ADP machine (typically, products commonly known as a computer) – whether or not they can display information from other units. It should be noted, however, that the scope of this dispute comprises flat panel display devices "for" ADP machines. LCD monitors with DVI are the most common type of such devices. With respect to other types of flat panel display devices than LCD monitors with DVI, Japan supports the arguments of U.S. and TPKM that the EC measures limiting the scope of heading 84.71 to those devices that can display information only from an

ADP machine are inconsistent with the EC's obligations under Articles II:1 (a) and II:1 (b) of GATT 1994.

217. The EC and its member States have classified LCD monitors with DVI under heading 85.28 as television or video display devices rather than under heading 84.71 as computer "output units." This approach subjects LCD monitors with DVI to the imposition of duties at a rate of 14 percent. Some LCD monitors with DVI are being assessed duties at that rate. Other LCD monitors with DVI are subject to the imposition of duties when the "temporary suspension" of duties on these products is lifted.

218. Exhibit JPN-15 to this first submission provides a list of specific products that Japan believes illustrates the types of LCD monitors that are subject to classification by the EC Commission under heading 85.28. This Exhibit also provides brochures that describe each of these products. This list is illustrative, not comprehensive.

B. The Measures at Issue

219. As with the MFMs discussed earlier, the EC has enacted regulations or other measures so as to deny duty-free treatment to products that otherwise should be duty-free under applicable EC tariff concessions.

220. In Schedule LXXX of its tariff concessions, the EC specifically included the products at issue here. The EC concessions included: "Flat panel display devices (including LCD, Electro Luminescence, Plasma and other technologies) for products falling within this agreement, and parts thereof." At the time, and until 2004, the EC included in this duty-free subheading LCD monitors with a DVI. As noted earlier, the DVI is the interface that permits the LCD monitors to be connected to ADP machines. Since 2004 the EC has adopted a series of measures, the effect of which is to classify LCD monitors with DVI under heading 85.28 as dutiable rather than under heading 84.71 as duty-free. When classifying under heading 85.28, the EC measures deny duty-free treatment unless the LCD monitors with DVI were used "solely" in conjunction with a computer.

221. These regulations and other measures ignore the legal requirement under the EC tariff concessions to treat these products as duty-free, and assert under EC domestic law the right to impose duties on these products. (The basic framework of the EC domestic law has already been reviewed at paragraphs 22-30 above.) Although the EC has temporarily suspended duties on some LCD monitors that it currently classifies under heading 85.28, the measures at issue, "as such," violate Article II:1(a) and II:1(b) of GATT 1994.

1. 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

222. Council Regulation (EEC) No 2658/87 provides the basic EC measure on tariffs. Commission Regulation (EC) No 1549/2006 of 17 October 2006 amended this Council Regulation and modified the EC CCT to reflect HS07. As a result, all monitors including those previously classified as "output units" of an ADP machine under heading 84.71 would be classified under heading 85.28. Previous subheading 8528.21 for video monitors was replaced by two new subheadings under which all LCD monitors would be classified: new subheadings 8528.51, applicable to "other monitors: of a kind solely or principally used in an automatic data processing system of heading 84.71", and subheading 8528.59, applicable to "other." The overall structure of these tariff provisions is set forth below:[98]

8528	**Monitors and projectors, not incorporating television reception apparatus; reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus:**	
	– **Other monitors:**	
8528 51 00	– – **Of a kind solely or principally used in an automatic data-processing system of heading 8471**	Free
8528 59	– – **Other:**	
8528 59 10	– – – Black and white or other monochrome	14
8528 59 90	– – – Colour	14

223. Commission Regulation (EC) No 1214/2007 of 20 September 2007, amending Annex I to Council Regulation No 2658/87, set forth Combined Nomenclature 2008.[99] Commission Regulation (EC) No 1031/2008 of 19 September 2008, amending Annex I to Council Regulation No 2658/87, set forth Combined Nomenclature 2009.[100] The CN 2008 and CN 2009 continued the classification of LCD monitors under Heading 85.28 as set forth in the CN 2007.

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[98] Commission Regulation (EC) No 1549/2006 of 17 October 2006 (31 October 2006), pp. 578-579. See Exhibit JPN-2.

[99] Commission Regulation (EC) No. 1214/2007 of 20 September 2007 (31 October 2007). See Exhibit JPN-3.

[100] Commission Regulation (EC) No. 1031/2008 of 19 September 2008 (31 October 2008). See Exhibit JPN-20.

2. Commission Regulation (EC) No 634/2005 of 26 April 2005.

224. This regulation specifically governed LCD monitors with a diagonal measurement of 38.1 cm (15") and overall dimensions of 30.5 (W) × 22.9(H) × 8.9(D) cm, with the following interfaces: VGA in, DVI in, BNC in and out, S-video (Y/C) in and out, and audio in and out. The product "can display signals received from various sources, such as an automatic data-processing machine, a closed circuit television system, a DVD player or a camcorder." The regulation classified this product under CCT code 8528.21.90. The stated reason for this classification was that "the monitor is not of a kind solely or principally used in an automatic data-processing system (see Note 5 to Chapter 84) in view of its capabilities to display signals from various sources." This regulation remains in effect through CN 2007.[101]

3. Commission Regulation (EC) No 2171/2005 of 23 December 2005.

225. This regulation covered the following three products (among others) –

- LCD monitors with a diagonal screen measurement of 50.8 cm (20"), with overall dimensions of 47.1 (W) × 40.4 (H) × 17.4 (D) cm, among other characteristics. The product "is equipped with a DVI interface enabling the product to display signals received from an automatic data-processing machine via a graphic card capable of processing video signals…."
- LCD monitors with a diagonal measurement of the screen of 54 cm (21") and overall dimensions of 46.7 (W) × 39.1 (H) × 20 (D) cm., with DVI-D, DVI-I, and other features. The product "can display signals received from various sources such as a closed circuit television system, a DVD player, a camcorder or an automatic data-processing machine.
- LCD monitors with a diagonal measurement of the screen of 76 cm(30") and overall dimensions of 71 (W) × 45 (H) × 11 (D) cm (aspect ratio 15:9)., with DVI-D, and other features. The product "can display signals received from various sources such as a closed circuit television system, a DVD player, a camcorder or an automatic data-processing machine."

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[101] Commission Regulation (EC) No 634/2005 of 26 April 2005, O.J. L 106 (27 April 2005), pp. 8-9. See Exhibit JPN-16.

The regulation classified these three types of products under CCT code 8528.21.90. The stated reason for this classification was that "[c]lassification under subheading 8471.60 is excluded as the monitor is not of a kind solely or principally used in an automatic data-processing system (see Note 5 B to Chapter 84), but is capable of displaying signals from various sources."[102]

4. Explanatory Notes to the Combined Nomenclature of the EC, 2008/C 133/01 of 30 May 2008. [103]

226. The Explanatory Note, in relation to classification under CN 8528.51.00, made clear that this CN code was to be limited to LCD monitors that "are capable of accepting a signal **only** from the central processing unit of an automatic data-processing machine of heading 84.71 (emphasis added)."[104] It stated that only such machines are "of a kind solely or principally used in an automatic data-processing system." It added that CN 8528.51.00 was not available for LCD monitors that can "be connected to a video source such as a DVD recorder or reproducer, a camera or a video camera recorder, a satellite receiver or a video game machine."

227. The Explanatory Note, in relation to classification of products under CN 8528.59.10 and CN 8528.59.90, made clear that these CN codes covered all LCD monitors fitted with interfaces that "allow for the reception of a signal from a video source such as a DVD recorder or reproducer, a camera or a video camera recorder, a satellite receiver or a video game machine," or with "interfaces for automatic data-processing machines of heading 84.71."

5. Council Regulation (EC) No 493/2005 of 16 March 2005.

228. The preamble to this regulation (paragraph (3)) stated that LCD monitors, "with a diagonal measurement of the screen of 48.5 cm or less and a screen aspect ratio of 4:3 or 5:4….also capable of reproducing video images from a source other than an automatic data-processing machine…are therefore not covered by the Agreement on trade in information technology products" and therefore are not subject to duty-free treatment.[105] The regulation stated in the recitals that according to the Commission, such LCD monitors were "classifiable" under CCT code 8528.21.90, subject to a duty of 14 percent. Therefore, in anticipation of such a reclassification, this regulation suspended duties on the

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[102] Commission Regulation (EC) No 2171/2005 of 23 December 2005, O.J. L 346 (29 December 2005), pp. 8-9. See Exhibit JPN-17.

[103] Explanatory Note 2008/C 133/01 replaced Explanatory Note 2006/C332/05 of 30 December 2006, to which it was substantially identical.

[104] See Exhibit JPN-18.

[105] Council Regulation (EC) No 493/2005 of 16 March 2005, O.J. L 82/1 (31 March 2005), p. 1. See Exhibit JPN-19.

specific products covered by the regulation "for a limited period", until December 31, 2006.[106]

229. The preamble to the regulation noted that such LCD monitors "are **mainly used** as output units of automatic data-processing machines (emphasis added)." It added, however, that since "such monitors are frequently also **capable** of reproducing video images from a source other than an automatic data-processing machine (emphasis added)," they were not "solely or principally for use with such machines" and therefore could not be classified under heading 84.71.

230. The duty suspension provided for in Council Regulation (EC) No 493/2005 and subsequent suspensions applies only to LCD monitors with a diagonal screen measurement of 48.5 cm or less and with an aspect ratio of 4:3 or 5:4. Other LCD monitors with DVI interface are subject to duty rates of 14 percent under heading 85.28. In addition, such suspension is temporary and conditional and may be terminated unilaterally as soon as the EC considers that the conditions for its continuation are no longer fulfilled. The clearest indication that the EC as a whole no longer intended to accord duty free treatment to flat panel display devices – and LCD computer monitors in particular – came when the EC issued Council Regulation (EC) No 493/2005.

C. History of the Concessions and Measures at Issue.

231. The duty concessions at issue with regard to LCD monitors also arose out of the ITA. Unlike the MFM concessions discussed earlier, that appeared only once in the ITA, the duty concessions on LCD monitors actually appeared twice.

232. Attachment A to the ITA specifically listed the tariff categories to be covered by the concessions. Included in this list were subheading 8471.60:

> 8471.60 – "Automatic data processing machines and units thereof" … "Input or output units, whether or not containing storage units in the same housing"

233. Attachment B to the ITA listed specific products to be covered by the agreement wherever they are classified. Included among the products listed in Attachment B were: "Flat panel display devices (including LCD, Electro Luminescence, Plasma and other technologies) for products falling within this agreement, and parts thereof."

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[106] This duty suspension was further extended by Council Regulation (EC) No 301/2007, until December 31, 2008. A regulation to extend this suspension is currently pending.

234. The EC modification of its own national tariff schedule also reflected this duplicative approach. The EC certified its concessions as a Certification of Modifications to Schedule LXXX on 2 July, 1997. Included in the list of concessions were –

> 8471.60 Input or output units, whether or not containing storage units in the same housing
>
> 90 Other

The published rate contained in the EC concessions for both of these subheadings was zero.

235. The EC also added a head note to its Schedule, providing for duty-free treatment for "[f]lat panel display devices (including LCD, Electro Luminescence, Plasma and other technologies) for products falling within this agreement, and parts thereof" wherever classified.

236. Following the adoption of the concessions, LCD monitors with DVI were classified under heading 84.71 by customs authorities in EC member States. This practice made complete sense, since LCD monitors were specifically covered by the ITA, and the DVI interface allowed such monitors to receive and display information from an ADP machine. This practice was uniform among EC member States until 2004.

237. On 23 November 2003, the EC Customs Code Committee of the Commission voted to classify *plasma* monitors with DVI under heading 85.28. Plasma monitors use a different technology from that of LCD monitors to display the information visually on the screen. Even though the plasma monitors had a DVI interface to allow the monitor to receive and display information from an ADP machine, the Committee nevertheless decided that because these monitors could <u>also</u> receive and display signals from a source other than an ADP machine, these monitors had to be classified under heading 85.28 as television or video monitors.

238. Following the vote in the 23 November 2003 meeting of the Customs Code Committee, the Commission issued Commission Regulation (EC) No 754/2004 on 21 April 2004. This regulation specifically classified *plasma* monitors with DVI under 85.28.

239. At its meeting of 30 June – 2 July 2004, the EC Customs Code Committee requested that the member States also classify LCD monitors with DVI under heading 85.28. The Minutes of the Customs Code Committee state:

> unless an importer can demonstrate that a monitor is *only* to be used with an ADP machine (heading 8471) or to be used as an indicator panel (heading 8531), it has to be classified under heading 8528." (emphasis added.)[107]
>
> Plasma regulation can be used to revoke BTIs classifying plasma monitors in 84.71; by analogy this can be done for LCD monitors; classification is a matter of facts and law.[108]

240. Following these developments, one member State, the United Kingdom, changed its classification of LCD monitors with DVI to heading 85.28, in a decision published in October 2004. Referring explicitly to Commission Regulation (EC) No 754/2004, the UK notice announced that the decision "represents a UK change of classification practice insofar as certain LCD/TFT Monitors with a DVI connector were previously classified in heading 84.71."[109]

241. The Netherlands had started early in 2004 to reclassify LCD monitors with DVI under heading 85.28 following the vote of the Customs Code Committee in November 2003. The Netherlands applied the reasoning voted for plasma monitors with DVI by analogy to LCD monitors with DVI. However, since member States had continued classifying LCD monitors with DVI under heading 84.71 or at least the classification had not been uniformly changed to heading 85.28 by all member States, effective 22 November 2004, the Netherlands customs authority returned to classifying certain LCD monitors with DVI under heading 84.71 provided that they were smaller than 20" measured diagonally and met certain other listed criteria.[110] The Netherlands decree announcing this policy stated that "not all member states" of the EC were applying the classification policies on the plasma monitors announced in Commission Regulation (EC) No 754/2004 to LCD monitors with DVI and at the minutes of the Customs Code Committee through the Statement adopted in 30 June – 2 July 2004 meeting. The Netherlands was therefore concerned about the flow of imports moving from its customs offices to member States that maintained the application of heading 84.71 such as Belgium or Germany.

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[107] Minutes of Customs Code Committee 346th Meeting, TAXUD/2477/2004-EN, 15 July 2004, item 3.16; also cited in *EC – Selected Customs Matters,* WT/DS315/R, 16 June 2006, para.7.299 and n. 570.

[108] *Id.*

[109] HM Customs & Excise, Tariff Notice 13/04, cited in *EC – Selected Customs Matters,* para. 7.300 and n. 573.

[110] The decree was issued on 8 July of 2005 but was effective as of 22 November 2004. Douanerecthen. Indeling van bepaalde LCD monitoren in de gecombineerde nomenclatuur, No. CPP2005/1372M, cited in *EC – Selected Customs Matters*, para. 7.290 and n. 553.

242. Germany continued to classify LCD monitors with DVI under heading 84.71. The minutes of the EC Customs Code Committee of November 2004 state:

> All MS present, except one, confirmed that they classify plasma monitors and LCD monitors with a DVI connector in heading 85.28, unless the importer can demonstrate that the monitor is to be used *only* with an ADP machine (heading 84.71), or to be used in an indicator panel (heading 85.31) (emphasis added)."[111]

In February 2005, Germany still published a National Explanatory Note to the Combined Nomenclature classifying LCD FPDs of all sizes with DVI under heading 8471.[112]

243. On 16 March 2005, the EC issued Council Regulation (EC) No 493/2005, which sought to force the classification of LCD monitors with DVI under heading 85.28 for those members States that continued to classify them under heading 84.71. The EC expected member States to change the tariff classification of LCD monitors with DVI to heading 85.28 more easily if imports under that heading were subject to a duty suspension. The regulation stated flatly that LCD monitors of 48.5 cm or less (measured diagonally) and a screen aspect ratio of 4:3 or 5:4 "are not covered" by the ITA despite the fact that they are "mainly used as output units of automatic data-processing machines." Thus, the regulation claimed, these monitors were not subject to the zero duty concessions of the ITA because they were "capable of producing video images from a source other than" an ADP machine. The regulation anticipated that these monitors were appropriately classified under "CN code 8528 21 90" which would carry a rate of 14 percent. Therefore the regulation suspended duties on the specific products covered by the regulation until December 31, 2006. That duty suspension was prolonged by Council Regulation (EC) No 301/2007 until 31 December 2008.[113]

244. The preamble to Council Regulation (EC) No 493/2005 stated that such LCD monitors "are *mainly used* as output units of automatic data-processing machines." (emphasis added) The preamble further stated, however, that since "such monitors are frequently also *capable* of reproducing video images from a source other than an automatic data-processing machine (emphasis added)," they were not "solely or principally for use with such machines" and therefore could not be classified under heading 84.71.

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[111] Minutes of the Customs Code Committee 354th Meeting, TAXUD/3073/2004-EN, 6 December 2004.

[112] VSF-Nachrichten of 25 February 2005 in: Vorschriftensammlung der Bundesfinanzverwaltung N 22 2005.

[113] Council Regulation (EC) No 301/2007 of 19 March 2007.

245. On 26 April 2005, the EC issued Commission Regulation (EC) No 634/2005, classifying certain LCD monitors with a diagonal screen measurement of 38.1cm (15") with DVI and other connectors under CN 8528.21.90. See Exhibit JPN-16. The LCD monitors in question could "display signals from various sources, such as an automatic data-processing machine, a closed circuit television system, a DVD player or camcorder." The stated ground for this measure was that such an LCD monitor was "not of a kind solely or principally used in an automatic data-processing system…in view of its *capabilities* to display signals from various sources (emphasis added)". In other words, if an LCD monitor with DVI was capable of displaying signals from a source other than an ADP machine, it had to be classified under heading 85.28.

246. On 23 December 2005 the EC issued Commission Regulation (EC) No 2171/2005 concerning the classification of certain goods for the Combined Nomenclature of 2006. See Exhibit JPN-17. The Annex to this regulation provided that certain LCD monitors with DVI and a diagonal screen measurement of 50.8 cm (20") , 54 cm (21") or 76 cm (30") as well as other characteristics, would be classifiable under CCT 8528.21.90. The Annex to the regulation stated that "classification under subheading 8471 60 is excluded as the monitor is not of a kind solely or principally used in an automatic data-processing system (see Note 5 to Chapter 84), but is capable of displaying signals from various sources."

247. Late in 2006, the EC issued Explanatory Note 2006/C332/05. This explanatory note provided that LCD monitors that "*can be fitted with interfaces such as DVI-D, DVI-I* and High-Definition Multi-media Interface (HDMI)" were explicitly excluded from subheading 8471.60.80. The only LCD monitors that could be classified under subheading 8471.60 (and thus eligible for duty-free treatment) were those that "are capable of accepting a signal *only* from the central processing unit of an automatic data-processing machine (emphasis added)", and which *cannot* be fitted with DVI and other interfaces.

248. On 17 October 2006 the EC issued Commission Regulation (EC) No 1549/2006, adopting the CN 2007 and incorporating HS07. It eliminated subheading 8528.21 and created a new subheading 8528.51, "other monitors: of a kind solely or principally used in an automatic data-processing system of heading 84.71."[114]

249. This practice had continued. On 20 September 2007, the EC issued CN2008. On 19 September 2008, the EC issued CN2009. CN2008 and CN2009 are identical with CN2007 in connection with the tariff classification of LCD monitors.

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[114] Commission Regulation (EC) No 1549/2006 of 17 October 2006 (31 October 2006), p. 579. See Exhibit JPN-2.

250. On 30 May 2008, the EC adopted a consolidated version of the explanatory notes, 2008/C 133/01. See Exhibit JPN-18. This consolidated version of the explanatory notes contained the above Explanatory Note 2006/C332/05, amending the CN codes in conformity with the implementation of the HS2007 as discussed above. It confirmed that the only LCD monitors that could be classified under subheading 8528.51 (and thus eligible for duty-free treatment) were those that "are capable of accepting a signal *only* from the central processing unit of an automatic data-processing machine (emphasis added)," and which *cannot* be fitted with DVI and other interfaces.

D. Summary of Argument

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

252. The EC incorporated a head note referencing the list of specific products in Attachment B to the ITA, as part of its Schedule LXXX. One of these products is "flat panel display devices (including LCD…) for products falling within this agreement…" An LCD monitor with DVI is a display device "for" an ADP machine, and ADP machines are indisputably products falling within the ITA. Therefore, LCD monitors with DVI are explicitly covered by the concessions of Schedule LXXX and entitled to duty-free treatment.

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

254. The ordinary meaning of this phrase -- LCD monitors "for" computers -- is reinforced by the context in which this phrase was used. Attachment B to the ITA also discusses projection-type flat panel displays. The sole requirement to projection-type flat panel displays to be duty free is that such devices "can" display digital information from a computer, and that in no way precludes multiple uses for these devices. The context provided by this other display device confirms that it is only necessary for LCD monitors "for" computers to be capable of receiving a digital signal from a computer to be eligible for duty-free treatment. Had any other limitations been contemplated,

Attachment B would not have used the broad term "for" and the language on LCD monitors would have included some limitation. It does not.

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

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

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

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

259. In addition, Note 5(B) to Chapter 84 says that for purposes of heading 84.71, a unit is to be regarded as part of an ADP system if it is "solely or principally" used in connection with an ADP system.[115] The ordinary meaning of the term "principally" is that the monitors may have uses other than output devices of ADP machines. The very language of the statements made by the EC in its regulations -- in particular Council Regulation (EC) No 493/2005 of 16

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

March 2005 -- concedes that LCD monitors with DVI are "mainly" used in connection with ADP machines.[116] Hence, the basis of the EC's classification of LCD monitors as outside heading 84.71 is self-contradictory and wrong.

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

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

E. The Ordinary Meaning of the Phrase "Flat Panel Display Devices (Including LCD…) For Products Falling Within this Agreement," In Its Context and in Light of Its Object and Purpose, Includes LCD Monitors with DVI Within the Scope of the EC Concessions.

1. The ordinary meaning of this specific language in the EC concessions demonstrates that LCD monitors with DVI were intended to be covered by the concessions.

262. The EC's Schedule LXXX was modified on 2 July 1997 in which the content of Attachments A and B to the ITA were incorporated. As discussed earlier at paragraphs 231-235, Attachment A to the ITA is a list of HS headings and subheading under which products would receive duty-free treatment pursuant to the concessions negotiated in the ITA. Attachment B is a list of specific products that are covered by the concessions and would also receive duty-free treatment wherever they are classified in the HS.

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[116] Council Regulation (EC) No 493/2005 of 16 March 2005, O.J. L 82/1 (31 March 2005), p. 1. See Exhibit JPN-19.

263. Since both Attachments A and B were incorporated by the EC into its concessions, if a product qualifies for duty-free treatment under either of the Attachments, it is entitled to duty-free treatment. Although the two Attachments are intended to be overlapping, if a product is explicitly covered by one of the attachments but it is unclear whether it is covered by the other, the product is still covered by the EC concessions.

264. In the case of LCD monitors that are connectable to computers, the product is explicitly covered by Attachment B, regardless of whether it is covered by Attachment A. Attachment B specifically includes "flat panel display devices (including LCD…) for products falling within this agreement, and parts thereof." By specifically making Attachment B to the ITA part of its concessions in Schedule LXXX, the EC has effectively made the descriptions of the products in Attachment B equivalent to the language contained in the headings set forth in Attachment A. The descriptions in Attachment B, in other words, are part of the concessions which must be examined *pari passu* with the language set forth in the headings.

265. There is no dispute that ADP machines -- commonly known as computers -- are "products falling within this agreement". Indeed, computers might even be considered the heart of the ITA that provided the basis for the concessions in Schedule LXXX.

266. There is equally no dispute that LCD monitors are "flat panel display devices" for display of data from an ADP machine. Personal and desk-top computers were in common use in 1996, when the ITA was signed. At that time – and continuing today – the display screen of a monitor was the only means of visually displaying the data stored on a computer in a manner that can be understood by a human being. Although ADP machines could (and can) send their output to other devices and display the data on paper (through a printer), the display of the data on a screen is undoubtedly the most important output of an ADP machine, and perhaps the most common. Certainly the most commonly recognized type of ADP machine, a personal computer, would be virtually worthless without a display screen of some sort. And the product listed in Attachment B explicitly includes "LCD" display devices.

267. The only question, then, is whether an LCD monitor with DVI is a device "*for"* an ADP machine. If an LCD monitor, which has the capability of receiving output from an ADP machine by virtue of its DVI connector, is a device "for" an ADP machine, then it is explicitly covered by Attachment B.

268. The ordinary meaning of the word "for" is extremely broad. The New Shorter Oxford English Dictionary provides over 20 definitions for the word.

The definition most clearly relevant to the word "for" in the context of the term in question is "to be received by, to belong to; to be used with, or in connection with."[117] In its ordinary meaning, the word "for" imposes no exclusivity of its own. The mere fact that a device is "for" one type of machine does not, by virtue of the word alone, impose any kind of exclusivity of use. There is nothing in the term "for" that prevents a device from being used "for" more than one type of product. Thus a device can equally be "for products covered by the agreement" and "for" products not covered by the agreement. The fact that the device is "for" the latter does not preclude the possibility that it is "for" the former.

269. Moreover, it is noteworthy that the "for" in the phrase in question appears without any modifier or restriction. The lack of a modifier confirms the word is being used without limitation. There is no limiting language in this product description – nothing that would require the flat panel display device to receive output "solely" from an ADP machine.

270. The ordinary meaning of this key phrase in the EC concession thus demonstrates that LCD monitors with DVI fall within the scope of this EC concession, should be accorded duty-free treatment.

2. The history of computer display technology at the time the ITA was negotiated provides factual context that confirms the inclusion of LCD Monitors with DVI as being within the products covered by the Agreement.

271. The history of computer display technology at the time countries negotiated the ITA and the EC granted concessions on "flat panel display devices (including LCD…) for products falling within this agreement" provides further guidance of the meaning of that phrase. Originally, the primary display devices for computers were cathode ray tubes ("CRTs"), which were analogue devices (receiving analogue signals).[118] The signal generated by computers, being a digital signal, had to be converted from digital to analogue before delivery to the CRT. This conversion was done through a digital-analogue interface located in the computer.

272. This signal was then transmitted to the CRT through a standard Video Graphics Array or "VGA" connector. These connectors and the associated

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[117] New Shorter Oxford English Dictionary, Vol. 1, at pp. 996-997. See Exhibit JPN-11.

[118] An analogue signal is a "nominally continuous electrical signal that varies in amplitude or frequency in response to changes in sound, light, heat, position, or pressure." McGraw Hill Dictionary of Scientific and Technical Terms (5th ed 1994), at p. 87. See Exhibit JPN-11.

technical standards could handle analogue video signals, and thus transmitted the analogue signal coming from the computer to the analogue CRT.

273. During the early 1990's, however, flat panel displays, including LCD devices, were very much a growing part of the market. Liquid crystals were first observed in 1888, and LCD technology began to be commercialized in the 1970s on pocket calculators and digital watches.[119] The first serious attempts at developing the active matrix technology used in LCDs for computer displays occurred in the early 1970s, and began to be commercialized in the 1980s. Indeed, in 1990 several companies in the United States filed high profile antidumping cases against imported flat panel displays for computers, including both passive matrix and active matrix technologies,[120] which was a significant event for the entire technology industry. These devices were thus well known during the mid-1990s when the ITA was being negotiated.

274. Unlike the CRTs, flat panel monitors are digital devices. Since the computer was generating a digital signal, and since flat panel display devices could receive and process a digital signal, the old conversion into an analogue signal for the CRT no longer made sense. It became apparent that a new interface was necessary to replace the old VGA connector and digital-analogue interface, and to permit the reception of the digital signal directly and more efficiently from the computer.

275. The market settled on Digital Visual Interface or "DVI" standard. This standard was developed by the Digital Display Working Group, an industry consortium formed in 1998 and led by Intel, Compaq, Fujitsu, Hewlett Packard, IBM, NEC and Silicon Image. Its objective was to address the industry's requirements for a digital connectivity specification for high-performance PCs and digital displays. [121] It is worth noting that the leaders of this consortium were all very active players in the computer industry. When publishing this new standard in April 1999, the group explained that the DVI specification:

> …provides a high-speed digital connection for visual data types that is display technology independent. The interface is primarily focused at providing a connection between a computer and its

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[119] For general background on this history, see H. Kawamoto, "The History of Liquid-Crystal Displays," Proceedings of the IEEE, Vol. 90, No. 4 (April 2002), available at http://www.ieee.org/web/aboutus/history_center/lcd.html.

[120] See *Certain High-Information Content Flat Panel Displays and Display Glass Therefore from Japan: Determination of the Commission Investigation NO. 731-TA-469 Final Under the Tariff Act of 1930 Together with the Information Obtained in the Investigation* (Washington, DC: US International Trade Commission, August 1991).

[121] See generally http://www.ddwg.org/.

> display device. The DVI specification meets the needs of all segments of the PC industry (workstation, desktop, laptop, etc) and will enable these different segments to unite around one monitor interface standard.[122]

With this broad based support for leading computer companies, this new standard became the *de facto* standard for an interface permitting the display of digital information received from the computer.

276. DVI connectors operate based on different technology. The DVI connector relies on a digital protocol in which the pixels on the display screen are individually illuminated based on binary data coming from the computer. This technology allows a one-to-one correspondence between each pixel in the output buffer of the source device (such as a computer) to one pixel in the display device (the LCD monitor). Thus, unlike an analog signal being sent to a CRT, where the appearance of each pixel on the display device may be affected by the adjacent pixels as well as by the electrical noise associated with the analogue signal itself, this digital signal allows a direct one-to-one and undistorted connection to each display pixel. VGA connectors had been designed for CRT-based devices. As the analog signal transmitted each horizontal line of the image, it varied its output voltage to adjust the desired brightness, and thus varied the intensity of the scanning beam as it moves across the screen. This technology difference explains why CRT monitors had a more pronounces "flutter" in the image on the screen, and the scanning beam had to circle back and refresh the image being displayed.

277. At the time the negotiations for the ITA were taking place, it was well known that flat-panel displays -- including LCD devices -- were becoming a significant factor in the market for display devices for computers and computer systems. Indeed, this presence is precisely why the competing U.S. industry filed an antidumping petition in 1990 and triggered an outcry from the major computer companies who saw their important supply channels being disrupted. The commercial presence of LCD devices is, moreover, precisely why the concessions themselves mentioned flat panel devices "including LCDs."

278. LCD devices with the DVI connector are quintessentially digital devices. The creation of a digital-to-digital transfer was inevitable. When most computer monitors were CRTs, computers were built to convert their digital data into analogue signals that could be processed by the CRT. As LCD monitors came onto the market, they had to work with these existing computers, so they were configured to convert the analogue signal back to a digital signal to be processed by the LCD. Even though this may have been the "snapshot" of the

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[122] See Digital Visual Interface, Revision 1.0 (2 April 1999), at 5, found at http://www.ddwg.org/lib/dvi_10.pdf.

market in 1996, the elimination of this "digital-to-analogue-to-digital" was inevitable. The DVI standard emerged precisely for this reason, allowing a "digital-to-digital" connection that avoided the inevitable degradation of the data and resulting image from the conversion of a digital signal to an analogue signal and back.

279. The standard means for adapting these LCD devices to a computer – so that they could be used "for" the computer -- was (and still is) the DVI standard. Thus, the language "display devices (including LCD…) for products falling under this agreement" refers to display devices that receive data from the computer – that is, LCD monitors with DVI. The presence of the DVI interface makes the "digital" connection between the computer and the display device even closer, by eliminating the need for the intermediate step of converting the digital signal to an analogue signal and then back to the digital signal.[123]

280. In sum, the description of products covered by the concessions of Schedule LXXX, as set forth in Attachment B, is broad and without additional restrictions. This broad scope reflects the same inclusive approach adopted for many of the HS headings and subheadings listed in Attachment A. The concession is intended to be as inclusive as possible. An LCD monitor with DVI is undeniably a display device "for" an ADP machine, because the DVI allows it to be used in connection with -- to receive output from -- an ADP machine. There is no language in Attachment B that imposes any requirement that it be used "exclusively for" an ADP machine. Indeed, the history of computer display technology at the time the ITA was negotiated supports a conclusion that LCD monitors with DVI are precisely the type of "display devices" intended to be covered by the concessions of Schedule LXXX.

3. The treatment of network equipment in Attachment B confirms, as context, the interpretation of the concessions to include LCD monitors with DVI

281. Further contextual support for a broad and inclusive interpretation of flat panel displays within Attachment B can be seen in the contrasting treatment afforded "network equipment" in Attachment B. The provision on network equipment covers –

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[123] Although the DVI does enable the monitors to connect to alternative devices such as DVDs (in addition to being connectable to ADP machines), this alternative "connectivity" is in fact quite limited. Only alternative sources specifically designed for that purpose can be connected to an LCD monitor through a DVI. Virtually all DVDs made by major consumer electronics producers such as Panasonic, SONY and Philips cannot connect to an LCD monitor through a DVI.

> Local Area Network (LAN) and Wide Area Network (WAN) apparatus, including those products *dedicated for use solely or principally* to permit the interconnection of automatic data processing machines and units thereof…(emphasis added)

282. The inclusion of limiting language "dedicated for use solely or principally" in the provision on network equipment stands in stark contrast to the complete absence of such language on flat panel displays. The network equipment provision, which immediately follows the provision on flat panel displays, shows that where the parties intended to require that the equipment be "dedicated for use solely or principally" with ADP machines, they knew how to do so. The fact that they did not include such language in the flat panel display provision – opting instead for the much broader and non-exclusive term "for products falling within this agreement" – is a powerful indication that the parties did *not* intend a similar limitation on flat panel displays.

283. Put another way, if the term "for products falling within this agreement" as used in the flat panel displays provision were interpreted in a limited manner, then there would be no need to require explicit limiting language in other provisions. The language requiring that network equipment be "dedicated for use solely or principally" with ADP machines would be inutile – mere surplusage. There is a strong presumption against interpreting terms in such a manner as to render them inutile. Thus, the provision on network displays, which includes explicit language of dedication of use, can only mean that no such limitation was required when a general term such as "for" is used in the provision on flat panel displays.

4. The treatment of projection-type flat panel devices in Attachment B and by the EC supports, as context, the interpretation of the language of Attachment B to cover display devices with other uses

284. The conclusion that LCD monitors that connect to an ADP machine through a DVI are "for" products under the agreement is also reinforced by the treatment of projection-type flat panel devices in Attachment B to the ITA incorporated in the Schedule LXXX. Attachment B contains language specifically covering:

> projection type flat panel display units used with automatic data processing machines which *can* display digital information generated by the central processing unit. (emphasis added)

285. The provision explicitly covers projection flat panel display units if they "can" display information from a computer. A unit may display information from other sources as well; however, if it "can" display information from a computer, it is covered by the concessions. Dual or multiple usages for the unit is contemplated by this language.

286. In fact, we note that the EC itself has consistently applied duty-free treatment to dual or multiple use projection-type flat panel displays and granted duty-free treatment to projection-type flat panel displays under CN code 8528.30.05 until 2007, and under CN code 8528.69.10 from 1 January 2007.[124]

287. There is no logical reason why projection-type flat-panel displays should receive duty-free treatment under Attachment B, even if they display information from sources other than ADP machines, while duty-free treatment of non-projection LCD monitors would be limited to those exclusively used for computers. Both devices are display devices "for" computers if they have the ability to display information from an ADP machine. The only difference between them is that one is a projection-type display device and the other is not. Thus, both projection-type and non-projection-type flat panel display devices are entitled to duty free treatment if they can display information from an ADP machine, regardless of whether they can receive information from alternate sources.

5. The object and purpose of the EC concessions are best served by interpreting the concessions broadly so as to secure continued duty-free treatment for LCD monitors with DVI

288. As discussed earlier concerning MFMs, Article 31(1) of the Vienna Convention requires treaty text to be interpreted based on its ordinary meaning, in context, but also "in light of its object and purpose." Recognizing this principle, the Appellate Body has repeatedly recognized the "object and purpose of the WTO Agreement and the GATT 1994" as an "interpretative principle." Moreover, the Appellate Body has specifically recognized that the object and purpose of tariff concessions can be used in interpreting tariff concessions negotiated by the Members.[125] A recognized object and purpose of the WTO Agreement and the GATT 1994 has been "the security and predictability of the reciprocal and mutually advantageous arrangements *directed to the substantial reduction of tariffs and other barriers to trade*."[126]

289. The overarching object and purpose of the WTO Agreement and the GATT 1994 has been reinforced in the specific context of the ITA. This object

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[124] Under the current EC regulations, duty-free treatment is provided under CCT 8528.60.10 for "projectors…operating by means of a flat panel display (for example, a liquid crystal device) capable of displaying digital information generated by an automatic data-processing machine."

[125] *See, e.g.*, Appellate Body Report, *EC – Computer Equipment*, para.82; Appellate Body Report, *EC - Chicken Cuts*, para. 243. See also Panel Report, *China – Auto Parts*, para. 7.460.

[126] Panel Report, *China – Auto Parts*, para. 7.460 (emphasis in original), citing *EC - Chicken Cuts*, para. 243.

and purpose -- to achieve a "substantial reduction of tariffs" and to ensure the security and predictability of these reductions – lies at the core of the WTO Agreement, the GATT 1994, and the ITA. All three share this object and purpose. The reciprocal tariff concessions had the additional object and purpose of expanding trade. Echoing the WTO objects and purposes, the Ministerial Declaration for the ITA explained that "the key role of trade in information technology products in the development of information industries and in the dynamic expansion of the world economy."[127] In light of this purpose, as negotiations under the ITA progressed, new countries were added to the negotiating parties and the scope of product coverage was broadened.

290. Consistent with reducing tariffs and expanding trade, the ITA elaborated on these core objects and purposes. The ITA sought to encourage "technological development" and "evolution," not create disincentives to such development or evolution. In recognizing this need for development and evolution for information technology products, the ITA was simply echoing and reinforcing in a specific factual context the core object and purpose of reciprocal concession to reduce tariffs and expand trade. It would be inconsistent with these object and purposes of the WTO Agreement and the GATT 1994 to reduce tariffs on a particular product, only to permit the reimposition of those tariffs simply because of some evolution in that product.

291. The object and purpose of establishing and continuing duty-free treatment for a broad array of information technology products should guide the interpretation of the descriptions in Attachment B of the ITA relating to visual display devices for computers and computer systems. As noted at paragraphs 271-280, at the time the ITA was negotiated CRTs were the predominant means of visually displaying information from computers, but various types of flat panel displays, including LCD monitors, were a rapidly emerging technology for such display devices. The outcome of the ITA negotiations was broad enough to include this emerging technology, since Attachment B of the ITA specifically mentioned flat-panel devices, including LCDs, for computer display.

292. As also discussed previously, the DVI connector emerged as the preferred means of permitting computers to interface with flat-panel (including LCD) display devices. It is precisely the DVI that permits the LCD monitor to be a display device "for" the ADP machine.

293. With the development of the DVI connector, and with the development of other connectors, it became possible for LCD display devices sometimes to display information from other sources in addition to displaying information from an ADP machine. This additional functionality, which is in fact

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127 WT/MIN/96(8).

relatively limited, however, is wholly in keeping with the nature of the technology understood and foreseen by the signatories to the ITA.

294. Given that the ITA sought to apply the WTO's and the GATT's object and purpose of providing duty-free treatment for a broad array of information technology products, it would be fundamentally at odds with this object and purpose to restrict the concessions on "flat panel displays" in Attachment B to those devices that can "only" display information from an ADP machine. On the contrary, the object and purpose of the WTO and GATT, as effected through the negotiation of the ITA, can only be furthered if the ITA covers LCD monitors with DVI, regardless of their ability to receive signals from other sources. By seeking to restrict duty-free treatment to those devices that can only display information from an ADP machine, the EC approach undermines the security and predictability of the tariff concession.

F. The Ordinary Meaning of the Phrases "Units Thereof" in Heading 84.71 and "Output Units" in Subheading 8471.60, in their Context and in light of Their Object and Purpose, Includes LCD Monitors with DVI within the Scope of the EC Concessions.

1. The ordinary meaning of "units thereof" and "output units" supports the conclusion that LCD monitors with DVI are covered by the concessions.

295. As previously noted, the EC's Schedule LXXX contains the contents of two Attachments to the ITA, Attachment A and Attachment B. We have already discussed how LCD monitors are among the specific products covered by Attachment B. The alternative basis for coverage in Schedule LXXX is Attachment A to the ITA, a list of the HS headings and subheadings for which duty-free treatment applies.

296. Heading 84.71 covers “automatic data processing machines and units thereof.” Subheading 8471.60 refers to “input or output units, whether or not containing storage units in the same housing.” LCD monitors that are connectable to ADP machines, including LCD monitors with DVI, are “output units” of ADP machines under the ordinary meaning of the phrases "units thereof" and “output units."

297. The key language of the EC concession at issue are the phrases “units thereof” in heading 84.71 and “output units” used in subheading 8471.60. This language defines the scope of the EC concessions on heading 84.71 and confirms that these concessions cover those LCD monitors that can be connected to computer, including LCD monitors with DVI.

298. As with our discussion of MFMs, the language of the EC concessions on technology products can best be interpreted in light of its meaning

in the technology sense of those words. In the words of one technical dictionary, "output" is defined as "data produced by a data-processing operation, or the information that is the objective or goal in data processing."[128]

299. In technology contexts, the phrase "output unit" or the synonymous phrase "output device" thus refers to devices that display or in some other way use computer output. For example, one technology dictionary defines "output unit" as "a unit which delivers information from the computer to an external device or from internal storage to external storage".[129] Display monitors that can display the data from a computer are "output devices."

300. The specialized meaning arising from a technology context can also be confirmed by the ordinary sense of these key terms. Heading 84.71 refers to "automatic data processing machines and units thereof." There is no dispute over the term "automatic data processing machines," which refers to computers. The language of heading 84.71 also refers to "units thereof" -- in other words, devices designed and engineered to be connected to and used in an integrated fashion with computers. The language "units thereof" has no limitations and thus covers all "units thereof," not just units that are exclusively dedicated to ADP machines. Moreover, the ordinary meaning of "thereof" is "of that, concerning that."[130] In other words, any "units" concerning or used in connection with computers fall within the ordinary meaning of "units thereof."

301. The phrase "output units" in subheading 8471.60 is an example of the type of wide range of "units" covered by heading 84.71. The word "output" has many meanings, but in this context it means the electric signal delivered by the computer to which the "output" unit has been connected. The ordinary meaning of the term "output," in the most relevant context, describes "an electrical signal delivered by or available from an electronic device."[131] In subheading 8471.60, this use of "output" thus refers to the electrical signals – or the data -- being sent by the computer. The language thus speaks directly to the interconnectivity between the computer and any units used in connection with that computer. Any devices connectable to a computer thus fall within the scope of the language in both heading 84.71 and subheading 8471.60.

302. Taken together, both the specialized understanding of this phrase in a technology context and the more ordinary sense of the language demonstrate that

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[128] McGraw-Hill Dictionary of Scientific and Technical Terms (5th ed. 1994) at p. 1418. See Exhibit JPN-11.
[129] McGraw Hill Dictionary of Scientific and Technical Terms (5th ed. 1994) at p. 1419. See Exhibit JPN-11.
[130] New Shorter Oxford English Dictionary, Vol. 2, at p. 3275. See Exhibit JPN-11.
[131] New Shorter Oxford English Dictionary, Vol. 2, at p. 2040. See Exhibit JPN-11.

a "unit" of an "automated data processing machine" (or computer) – particularly an "output unit" -- is some device that *can* receive and then act upon electrical signals coming from a computer. There is nothing in the ordinary meaning of this phrase that requires the device to be exclusively dedicated to receiving the output of a computer.

303. In sum, an LCD monitor qualifies as an "output unit" and a unit of an ADP machine. By virtue of the DVI, the LCD monitor can receive signals from the computer and display them on the display screen. It therefore is properly duty-free under heading 84.71 and subheading 8471.60.

2. The context of heading 84.71 and subheading 8471.60 confirms that LCD monitors with DVI are covered by the EC concessions

304. The structure of heading 84.71 in the EC's schedule of tariff concessions, the language used in the various subheadings, and the explanations of the scope of this specific heading provide important interpretative materials that confirm that the reference in heading 84.71 to "units" of computers in fact includes all of those LCD monitors that can connect to a computer, regardless of whether they can connect to other devices.

305. Beyond its language, the structure of heading 84.71 confirms the broad scope of the EC concessions. Heading 84.71 includes several subheadings that describe different types of computers, computer systems, and devices used in connection with computers. Every one of these subheadings was included in the ITA, and, therefore, all were included in the EC schedule of concessions.[132] In other words, both the negotiated concessions and the legal obligations broadly cover every item enumerated in heading 84.71 that has anything to do with computers, computer systems, or devices used with computers. This structure thus confirms the parties contemplated and the EC codified a very broad concession on computer and all "units" used in connection with computers.

306. The language of other subheadings under heading 84.71 also provides useful context to understanding the phrase "units thereof" in heading 84.71 and the phrase "input or output units" in subheading 8471.60. They all support the interpretation that heading 84.71 and subheading 8471.60 include LCD monitors with DVI. After covering computers in subheading 8471.10 and portable computers under 10 kg in subheading 8471.30, the subheadings cover a series of items that combine computers with some other devices.

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[132] ITA, at 6-7. EC Concessions, at 7-9.

307. Subheading 8471.41 covers those items: "[c]omprising in the same housing at least a central processing unit and an input and output unit, whether or not combined." This language recognizes that central processing units (or a "CPU," the brains of the computer) work together with input and output units to perform various tasks.

308. Subheading 8471.49 then covers those items: "[o]ther, presented in the form of systems." This language recognizes the inclusion of devices that combine a computer with input and output devices. The various items need not be in the same housing, as long as the computer and input/output devices are sufficient linked – basically that the units are used principally with the computer, can connect to the computer, and can transmit data in the system.

309. Subheading 8471.50 covers those items: "other that those of subheadings No 8471.41 and 8471.49, whether or not containing in the same housing one or two of the following types of unit: storage units, input units, output units." Here the devices need not be in the same housing unit, but there can only be one or two of the devices.

310. All three of these subheadings cover different types of products that combine a computer with some other computer related devices. The next series of subheadings cover units of computers, but do not themselves cover computers.

311. Subheading 8471.60 – the key subheading at issue in this case – covers: "input or output units, whether or not containing storage units in the same housing." Like the prior subheadings, this subheading recognizes the possibility of combining input or output units and storage units. But unlike the prior subheadings, there is no language limiting the number of units, requiring at least some combination of units, or limiting the inclusion or exclusion in the same housing unit. In other words, read in the light of the prior subheadings, the language of subheading 8471.60 is broader and more inclusive.

312. Subheading 8471.70 then specifically covers "storage units" on stand alone basis. Storage units (such as hard disc drives) are mentioned as units that might be included in combination devices in some earlier subheadings, but here are listed as a separate item.

313. Subheading 8471.80 then covers "other units" of computers. Heading 84.71 covers all "units" of computers. Subheading 8471.60 captures all input and output devices, either with or without a storage unit. Subheading 8471.70 captures storage units as separate item. Subheading 8471.80 then captures any other type of "unit" that might be used in connection with a computer that would not otherwise be an "input unit," "output unit," or "storage unit."

314. When read in context, these subheadings (8471.60, 8471.70 and 8471.80) from the text of the EC concessions covering computer "units" are

important for several reasons. First, they show that "input" and "output" units were treated together and separately from "storage" units or "other" units. Second, they show that the inclusion or exclusion of a storage unit in combination with other units does not change the applicability of subheading 8471.60; storage units have to be separate to fall under subheading 8471.70. Third, collectively these three subheadings include every possible type of computer "unit."

315. Finally subheading 8471.90 captures "other" devices that would otherwise be included in heading 84.71 but that do not fall within any of the earlier subheadings. Even on this residual category, the EC concessions codified a zero duty rate.

316. Taken together, other subheadings under heading 84.71 provide support for including LCD monitors with DVI within the scope of heading 84.71 and subheading 8471.60, and as falling with the scope of the EC concessions on this item. All types of computers and all types of computer units – separately or in various combinations – fall within heading 84.71. All of these items were included in the concessions negotiated and codified in the EC concessions. Nothing in the language or structure of heading 84.71 would justify classifying LCD monitors with DVI outside the scope of heading 84.71 merely because of the existence of DVI connector – indeed, it is by virtue of the DVI connector that these devices can be used in connection with computers. And nothing in the language or structure of heading 84.71 limits coverage to LCD monitors that can receive input only from an ADP machine.

3. Other interpretative materials -- Chapter Note 5 in effect at the time of the concessions -- confirm that LCD monitors with DVI were covered by the concessions

317. As previously noted, the concessions made by the EC in its Schedule LXXX specifically incorporated the contents of both Attachment A and Attachment B to the ITA. Attachment B contains descriptions of specific products covered by the concessions, and as such, must be interpreted according to the ordinary meaning of the words used to describe the products. Attachment A, on the other hand, lists specific headings and subheadings of HS96 to describe the concessions. Since Attachment A relies upon the headings of HS96, the rules that have been developed to interpret those headings may provide useful interpretative materials to understand the meaning of the language in Attachment A.

318. The Appellate Body has stated that the HS is relevant context for purposes of interpreting Members' tariff concessions, and has recently reaffirmed that point.[133]

319. The arguments based on the Harmonized System are only relevant to the extent they help the Panel properly interpret the language of the tariff concession at issue. The Panel need not approach this issue as would a national authority trying to classify the goods. Rather the Panel can and should consider the arguments holistically, in whatever approach helps the Panel best interpret the treaty language at issue.

320. The Appellate Body has also stated that chapter notes provide relevant supplemental materials for interpreting the meaning of the terms in tariff concessions.[134] In this case, the relevant provisions of the Notes to Chapter 84 of the Harmonized System show that LCD monitors with DVI are output units of ADP machines and are therefore within the definition of the terms under heading 84.71, even if they can receive signals from additional sources.

321. Chapter 84 contains a series of Notes providing further guidance for the appropriate classification of goods entering under the Chapter. Note 5 to Chapter 84 specifically deals with the meaning of several of the key terms set forth in heading 84.71. See Exhibit JPN-23.

322. Note 5 to Chapter 84 has been the subject of some changes since the negotiation of the ITA and the implementation of the EC's concessions to schedule LXXX intended to effectuate the ITA. Given these changes, it is important to examine the text of the Notes to Chapter 84 as they existed at the time that the ITA was negotiated and the EC's concessions were made. As contemporaneous documents, these notes confirm the meaning of language used at the time the concessions were made, and therefore are entitled to appropriate weight. Therefore, we examine the structure and text of Note 5 to Chapter 84 as reflected in HS96 as evidence of the meaning of the terms in heading 8471 as it existed in HS96. All discussion in this section relates to the 1996 text.[135]

323. Note 5 to Chapter 84 consists of 5 subsections, (A) through (E). Note 5(A) defines the term "automatic data processing machines" in heading 84.71. Note 5(B) relates to ADP machines "in the form of systems." Note 5(C)

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[133] See Appellate Body Report, *EC - Chicken Cuts*, para 199; see also Appellate Body Report, *China – Auto Parts*, paras 146-149.

[134] Appellate Body Report, *EC - Chicken Cuts*,, para. 219.

[135] World Customs Organization, *Harmonized Commodity Description and Coding System, Explanatory Notes*, Sections XII-XVI (Chapters 64-84), 2d Edition (1996), at 1232 (Chapter 84, Note 5). See Exhibit JPN-23.

relates to "separately presented units of an automatic data processing machine." Note 5(D) covers printers, and other specified "devices" and "units," and Note 5(E) covers "machines performing a specific function other than data processing and incorporating or working in conjunction with" an ADP machine.

(a) Note 5(C) to Chapter 84 requires LCD monitors with DVI to be classified in heading 84.71

324. Of these subsections, the one with the most relevance to LCD monitors with DVI is Note 5(C), [136] which discusses "separately presented units of an automatic data processing machine." The Note simply states that such units "are to be classified in heading No. 84.71."

325. This is the broadest possible reading of coverage under heading 84.71. Any unit "of" an ADP machine is to be classified under heading 84.71. The word "of" is one of the most broadly defined words in the English language. The New Shorter Oxford English Dictionary alone lists over 30 separate meanings. The definition that is most relevant to the word's use in this instance is "related to (a thing) in a way defined, specified, or implied by the preceding words".[137] This is an extremely inclusive meaning. A unit that is "related to" an ADP machine is a unit "of" an ADP machine.

326. It is important to note that the word "of" does not require or even imply exclusivity in any way. An object can be "of" something and still be "of" something else. Whether an object can be "of" one or more things depends on nature of the object itself, not on the word "of."

327. The use of the simple word "of" in the case of "units of" an ADP machine therefore requires only a relationship, not an exclusive relationship. Hence, an LCD monitor that is connectable to an ADP machine through a DVI is unit "of" an ADP machine, because it can display the output of the ADP machine. The fact that it may also display the output of other machines does not make it

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[136] From 1997, when the EC's tariff concessions were first made, to 2005, when the EC issued its first regulations covering LCD monitors, the first sentence of Explanatory Note 5(B) read "[a]utomatic data-processing machines may be in the form of systems consisting of a variable number of separate units." Under the HS now in effect, this sentence became its own separate Note 5(B), and the remainder of Note 5(B), which contains the language discussed here, became Note 5(C). Since this sentence was in Note 5(B) when negotiated and is referred to as such in many of the EC regulations at issue, we refer to it throughout this submission as note 5(B) for clarity. As previously discussed, the Chapter Notes as written in HS96 provide the clearest and most accurate reflection of the context of the concessions made by the EC at that time, the time when the ITA was agreed upon. Similarly, when we refer to "Note 5 (C)", it is Note 5 (C) in HS96.

[137] New Shorter Oxford English Dictionary, Vol. 2, pp. 1980-81. See Exhibit JPN-11.

any less a unit of an ADP machine. There is nothing in Note 5(C) to Chapter 84 that says that unit must be exclusively or even primarily used in an ADP machine to be a "unit of" that machine.

328. On its face, then, the ordinary meaning of the wording of Note 5(C) to Chapter 84 is broad enough to encompass LCD monitors with DVI. LCD monitors with DVI are connectable to ADP machines by virtue of their DVI connector. Therefore, they are "units of" ADP machines and Note 5(C) to Chapter 84 requires them to be classified under heading 84.71.

(b) Note 5(B) to Chapter 84 requires the classification of LCD monitors with DVI in chapter 84

329. Although Note 5(C) to Chapter 84 appears to apply to the case of LCD monitors with DVI, this section of Note 5 to Chapter 84 has not been relied on by the EC in the measures in dispute. Instead, the Chapter Note that the EC used to make its first interpretation of the classification of LCD units with DVI connectors under Heading 84.71 was Note 5(B) to Chapter 84.

330. Note 5(B) on its face does not appear to apply directly to "separately presented units of" ADP machine. Rather, Note 5(B) to Chapter 84 by its terms applies to "separate units" of ADP "systems." The LCD monitors with DVI are not necessarily part of "systems," and so the applicability of this section to this case does not appear clear. Nevertheless, because this note has been relied upon repeatedly by the EC for its measures, we discuss it at length here.

331. Note 5(B) to Chapter 84 states, in pertinent part:

> Subject to paragraph (E) below, a unit is to be regarded as being a part of a complete system if it meets all of the following conditions:
>
> (1) it is of a kind *solely or principally* used in an automatic data-processing system;
>
> (2) it is connectable to the central processing unit either directly or through one or more other units; and
>
> (3) it is able to accept or deliver data in a form (code or signals) which can be used by the system. (emphasis added.)

There is no dispute that LCD monitors with DVI are connectable to a central processing unit or that they are able to accept data in a form which can be used by the system. That is the very nature of the DVI connector – it permits the monitor to receive signals from an ADP machine. The only question raised by Note 5(B) to Chapter 84 is whether these monitors are "solely or principally used" in an ADP system.

332. The first sentence of the provision uses the disjunctive – goods meet the definition if they are *either* "solely" *or* "principally" used in an ADP system. The use of the disjunctive means that the two words are alternatives. Hence, if a product satisfies either of the two words, it satisfies the provision. A product does not need to be "solely" used in an ADP system, so long as it is "principally" used in an ADP system. That is the ordinary meaning of the word "or."

333. The alternative words "solely" and "principally" do not mean the same thing. According to the New Shorter Oxford English Dictionary, the word "solely" means: "as a single person or thing; *without any other* as an associate, partner, etc.; alone."[138] (emphasis added) In other words, the phrase "solely…used in an automatic data-processing system" means that the unit is *only* used in an ADP system; *there may be no other uses.*

334. The alternative word, "principally," means something quite different. According to the New Shorter Oxford English Dictionary, "principally" means "for the most part; *in most cases*."[139] (emphasis added) That is, the phrase "principally…used in an automatic data-processing system" means that the unit is used in most cases in an ADP system. There may be other uses. "Principally," by definition, admits of uses other than the "principal" one. The use of the word "principally" necessarily means that the unit may be used in connection with machines other than ADP systems.

335. Thus, the ordinary meaning of the term "solely or principally" in Note 5(B) to Chapter 84 is that the output unit, in this case, the LCD monitor with DVI connector, may have uses other than with an ADP, so long as none of those additional uses is the "principal" one.

(c) The EC's interpretation of the phrase "solely or principally" is discordant with the ordinary meaning of the words, effectively reading the word "principally" out of Chapter Note 5(B)

336. Since 2005, the EC's regulations classifying LCD monitors in the Combined Nomenclature, have classified LCD monitors as outside heading 84.71 if those monitors are *capable of any use* other than in an ADP system, for example:

- Council Regulation (EC) No. 493/2005 of 16 March 2005 declared LCD monitors were not covered by the ITA because they were "*capable* of reproducing video images from *a source*

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138 New Shorter Oxford English Dictionary, Vol. 2, at 2939. See Exhibit JPN-11.

139 New Shorter Oxford English Dictionary, Vol. 2, at 2356. See Exhibit JPN-11.

other than an automatic data-processing machine…." (emphasis added).[140]

- Commission Regulation (EC) No. 634/2005 of 26 April 2005 classified certain LCD monitors in heading 85.28 because "the product *can* display signals received from various sources…." (emphasis added).[141]

- Commission Regulation (EC) No. 2171/2005 of 23 December 2005 classified certain LCD monitors in heading 85.28 because "the product *can* display signals received from various sources…." (emphasis added.).[142]

337. The EC's interpretations of Chapter Note 5(B) to Chapter 84 contained in these regulations might be in accordance with the ordinary meaning of the word "solely" in the Note. That is, if the only words in Note 5(B) to Chapter 84 were "of a kind solely…used in an automatic data-processing system," the EC's Regulations might be consistent with the ordinary meaning of that word. However, the EC interpretations are not consistent with the ordinary meaning of the word "principally," which by definition admits of uses other than use in an ADP system. By requiring the LCD panel to be used only in connection with an ADP system, the EC's measures render the term "principally" *inutile*. In effect the EC's regulations read the word "principally" right out of Chapter Note 5(B), as if the word were not even there.[143]

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[140] Council Regulation (EC) No 493/2005 of 16 March 2005, O.J. L 82/1 (31 March 2005), p. 1. See Exhibit JPN-19.

[141] Commission Regulation (EC) No 634/2005 of 26 April 2005, O.J. L 106 (27 April 2005), p. 9. See Exhibit JPN-16.

[142] Commission Regulation (EC) No 2171/2005 of 23 December 2005, O.J. L 346 (29 December 2005), pp. 8-9. See Exhibit JPN-17.

[143] There is no question that at least some of LCDs at issue have as their main or "principal" use the receipt of output from an ADP. Indeed, one of the EC's measures in dispute *admits* that at least some of the LCD monitors in question are used principally in ADP systems. Paragraph (3) of the preamble to Council Regulation (EC) No 493/2005 of 16 March 2005 states: "Trade data indicate that currently monitors using liquid crystal display technology, with a diagonal measurement of the screen of 48,5 cm or less and a screen aspect ratio of 4:3 or 5"4, are *mainly used as output units of automatic data-processing machines*." (emphasis added.). Council Regulation (EC) No 493/2005 of 16 March 2005, O.J. L 82/1 (31 March 2005), p. 1. See Exhibit JPN-19. The word "mainly" is a synonym of the word "principally." Thus, the EC agrees that LCD monitors with DVI are used "principally" with ADP machines, yet it classifies the products under heading 85.28 rather than under heading 84.71. By their own terms, then, the EC's regulations are clearly inconsistent with the ordinary meaning of the term "*principally*" in Note 5(B).

338. Although a word-by-word analysis of the terms "solely" and "principally" leads inescapably to the conclusion that the EC's measures are inconsistent with Note 5(B) to Chapter 84, it is not necessary to rely on the words' plain meaning alone. A WTO panel has specifically considered the EC's measures on the classification of LCD monitors with DVI, and has found them to be inconsistent with the language of Note 5(B) to Chapter 84. In *EC – Selected Customs Matters*, the Panel stated that the EC's exclusive use requirement "contrasts with the formulation used in Regulation No. 634/2005 which implicitly states that subheading 8471 60 only applies to monitors of a kind *solely or principally* used (not *only* used) in an automatic data-processing system."[144] Thus, a plain reading of the language of the EC regulations shows them to be inconsistent with the language of Note 5(B) to Chapter 84.

339. In summary, to the extent that the Notes to Chapter 84 provide supplemental materials for the interpreting the terms "units thereof" in heading 84.71 and "output units" in subheading 8471.60, Note 5(B) to Chapter 84 provides for the inclusion of output units in this heading and subheading if the units are "principally" used with ADP machines. The word "principally" admits of other uses. An output unit that receives output from a computer but has the ability to receive output from other sources is within the meaning of heading 84.71 as further elucidated by Note 5(B) to Chapter 84.

4. The object and purpose of the EC concessions are best served by interpreting the concessions broadly so as to secure continued duty-free treatment for computer "units" as they have evolved over time

340. As discussed at length in the section on the Attachment B, the object and purpose of the WTO Agreement and the GATT 1994 have been repeatedly recognized as including the "substantial reduction of tariffs" and the expansion of trade. These object and purposes were reinforced by the ITA, which provided for broad concessions on covered products and specifically declared that each party's "trade regime should evolve in such a manner that enhances opportunities for information technology products."

341. The object and purpose of establishing and continuing duty-free treatment for information technology products should also guide the interpretation of the tariff concessions under heading 84.71 on computer "units." The word "units" in heading 84.71 and the phrase "input or output units" in subheading 8471.60 are broad and inclusive precisely because these terms seek to describe devices that change over time and cannot be defined narrowly. The essential elements of such devices – their ability to connect to a computer or computer

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144 Panel Report, *EC - Selected Customs Matters*, para. 7.299 (emphasis in original).

network, and their ability to work with digital data – apply to all such devices, regardless of how their functionality may improve over time. The reciprocal and mutually beneficial tariff concession on computer "units" thus sought to reduce tariffs and expand trade on all computer units.

342. It would be inconsistent with the object and purposes of the WTO Agreement, the GATT 1994, and the ITA to disqualify computer output units such as LCD monitors with DVI simply because they have the ability to receive data from devices other than an ADP machine. The fact that these devices have the capability of displaying information from an ADP machine – that is what the DVI is for – makes them "output units" of the ADP machine; they are no less an output machine simply because they have additional functionality. To fulfill the object and purpose of the agreements, therefore, the concessions in heading 84.71 must be interpreted broadly enough to encompass LCD monitors with DVI, whether or not they can receive signals from a source other than an ADP machine.

G. Conclusions

343. The EC accepted duty-free treatment for LCD monitors with DVI twice – once in Attachment A and then again in Attachment B, which the EC reflected in its concessions. The language of the EC concession, read in context and in light of its object and purpose, demonstrates that LCD monitors with DVI are used for and in connection with computers, and are thus entitled to duty-free treatment. Any other uses of these devices do not change this duty-free status. The EC has grafted onto its tariff concessions a limitation – that the devices be used only in connection with computers – that has no basis in the language of the actual EC concessions. The EC measures that have created this rule and impose duties on LCDs with DVI are inconsistent with EC tariff concessions and are therefore inconsistent with Articles II:1(a) and II:1(b) of GATT 1994.

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

A. The Products at Issue

344. A set top box is an electronic apparatus that connects to a communication channel, such as a phone, ISDN (integrated services digital network) or cable television line, and produces output on a conventional television screen.[145] STBs "can vary greatly in their complexity."[146] They enable

[145] E.g Informitv Dictionary, http://informitv.com/glossary/settopbox/ (describing a set top box as a "[r]eceiver device that processes an incoming signal from a satellite dish, aerial,

a television set to receive and decode digital television ("DTV") broadcasts and are often referred to as "cable boxes" or "receivers."[147] STBs with a communication function additionally enable a user to connect to the Internet and send and receive information (engage in "interactive" information exchange).[148]

345. Unlike video devices such as a digital video disk ("DVD") player or videocassette recorder ("VCR"), an STB with a communication function engages in interactive information exchange in a real-time manner over the Internet using a modem.[149] STBs with a communication function sometimes include a hard disk to record television programs, to download software from the DTV provider, and to perform other ancillary applications made possible by the DTV provider.

B. The Measures at Issue

1. 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

346. The 1997 version of the CCT[150] contains the following descriptions with respect to headings 8521 and 8528, as shown in the following tables:

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cable, network or telephone line"). See Exhibit JPN-11; see also Interactive TV Dictionary, http://www.itvdictionary.com/set-top_box.html ("A set-top box (STB) is a device that connects to an external signal source and decodes that signal into content that can be presented on a display unit such as a TV."). See Exhibit JPN-11.

146 Newton's Telecom Dictionary, p. 833.

147 Newton's Telecom Dictionary, p. 833.

148 ITA, Attachment B. See also Annabel Z. Dodd, The Essential Guide to Telecommunications, 3rd ed., p. 308 ("Digital set top boxes are available to take advantage of the two-way capability of digital cable TV and satellite TV."). See Exhibit JPN-11.

149 ITA, Attachment B.

150 Annex I to Council Regulation (EEC) No. 2658/87 as amended by Commission Regulation (EC) No. 1734/96 of 9 September 1996, OJ L 23801 (19.09.1996), p 710. See Exhibit JPN-21.

8528	**Reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus; video monitors and video projectors :**		
	– Reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus :		
8528 12	**– – Colour :**		
	– – – Television projection equipment :		
8528 12 14	– – – – With scanning parameters not exceeding 625 lines	22	14
	– – – – With scanning parameters exceeding 625 lines :		
8528 12 16	– – – – – With a vertical resolution of less than 700 lines	22	14
8528 12 18	– – – – – With a vertical resolution of 700 lines or more	22	14
	– – – Apparatus incorporating a video recorder or reproducer :		
8528 12 22	– – – – With a screen width/height ratio less than 1,5	22	14
8528 12 28	– – – – Other	22	14
	– – – Other :		
	– – – – With integral tube :		
	– – – – – With a screen width/height ratio less than 1,5, with a diagonal measurement of the screen :		
8528 12 52	– – – – – – Not exceeding 42 cm	22	14
8528 12 54	– – – – – – Exceeding 42 cm but not exceeding 52 cm	22	14
8528 12 56	– – – – – – Exceeding 52 cm but not exceeding 72 cm	22	14
8528 12 58	– – – – – – Exceeding 72 cm	22	14

	– – – – – Other :		
	– – – – – – With scanning parameters not exceeding 625 lines, with a diagonal measurement of the screen :		
8528 12 62	– – – – – – – Not exceeding 75 cm	22	14
8528 12 66	– – – – – – – Exceeding 75 cm	22	14
	– – – – – – With scanning parameters exceeding 625 lines :		
8528 12 72	– – – – – – – With a vertical resolution of less than 700 lines	22	14
8528 12 76	– – – – – – – With a vertical resolution of 700 lines or more	22	14
	– – – – Other :		
	– – – – – With screen :		
8528 12 81	– – – – – – With a screen width/height ratio less than 1,5	22	14
8528 12 89	– – – – – – Other	22	14
	– – – – – Without screen :		
	– – – – – – Video tuners :		
* 8528 12 92	– – – – – – – Digital (including mixed digital and analogue)	22	14
* 8528 12 94	– – – – – – – Other	22	14
8528 12 98	– – – – – – – Other	22	14

8521	**Video recording or reproducing apparatus, whether or not incorporating a video tuner :**		
8521 10	– **Magnetic tape-type :**		
8521 10 10	– – For use in civil aircraft (1)	13	Free
	– – Other :		
8521 10 30	– – – Of a width not exceeding 1,3 cm and allowing recording or reproduction at a tape speed not exceeding 50 mm per second . . .	14	14
8521 10 80	– – – Other	13	8

347. On 31 October 2008, the EC published Commission Regulation (EC) No. 1031/2008[151] establishing the CN for 2009 together with the applicable conventional rate of duty. The structure concerning the relevant subheadings for STBs is the same as the one contained in the 2007 CN adopted by Commission Regulation No. 1549/2006 of 17 October 2006[152] and implementing into the EC legal order the HS 2007. As a result of the introduction of the HS 2007, the

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[151] Commission Regulation (EC) No. 1031/2008 of 19 September 2008, OJ L 291 (31 October 2008), p. 569 and p. 574. See Exhibit JPN-20.

[152] Commission Regulation (EC) No. 1549/2006 of 17 October 2006, OJ L 301, 31.10.2006. See Exhibit JPN-2.

structure of heading 8528 had to be amended. The 2009 CN adopted by Commission Regulation No. 1031/2008 contains the following description with regard to headings 8521 and 8528 as far as they relate to STBs:

8521	**Video recording or reproducing apparatus, whether or not incorporating a video tuner:**	
8521 10	– **Magnetic tape-type:**	
8521 10 20	– – Using tape of a width not exceeding 1,3 cm and allowing recording or reproduction at a tape speed not exceeding 50 mm per second	14
8521 10 95	– – Other	8
8521 90 00	– **Other**	13,9

	– **Reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus:**	
8528 71	– – **Not designed to incorporate a video display or screen:**	
	– – – Video tuners:	
8528 71 11	– – – – Electronic assemblies for incorporation into automatic data-processing machines	Free
8528 71 13	– – – – Apparatus with a microprocessor-based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange, capable of receiving television signals ('set-top boxes with communication function')	Free
8528 71 19	– – – – Other	14
8528 71 90	– – – Other	14

2. Explanatory Notes to the CN 2008/C 112/03[153]

348. On 7 May 2008,[154] the EC published an amendment to the consolidated CNENs with respect to STBs in its Official Journal as follows:

[153] Explanatory Notes to the Combined Nomenclature of the European Communities, 2008/C 112/03, OJ C 112, 7.05.2008, pp. 8-9. See Exhibit JPN-22.

[154] Explanatory Notes to the Combined Nomenclature of the European Communities, 2008/C 112/03, OJ C 112, 7.05.2008, pp. 8-9. See Exhibit JPN-22.

'8521 90 00 Other

This subheading includes apparatus without a screen capable of receiving television signals, so-called "set-top boxes", which incorporate a device performing a recording or reproducing function (for example, a hard disk or DVD drive).'

On page 339, the following text is inserted:

'8528 71 13 Apparatus with a microprocessor-based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange, capable of receiving television signals ("set-top boxes with communication function")

This subheading covers apparatus without a screen, so-called "set-top boxes with communication function", consisting of the following main components:

— a microprocessor,

— a video tuner.

The presence of an RF connector is an indicator that a video tuner may be present.

— a modem.

Modems modulate and demodulate outgoing as well as incoming data signals. This enables bidirectional communication for the purposes of gaining access to the Internet. Examples of such modems are: V.34-, V.90-, V.92-, DSL- or cable modems. An indication of the presence of such a modem is an RJ 11 connector.

Devices performing a similar function to that of a modem but which do not modulate and demodulate signals are not considered to be modems. Examples of such apparatus are ISDN-, WLAN- or Ethernet devices. An indication of the presence of such a device is an RJ 45 connector.

The modem must be built into the set-top box. Set-top boxes which do not have a built-in modem but use an external modem are excluded from this subheading (e.g. a set consisting of a set-top box and an external modem).

The Transmission Control Protocol/Internet Protocol (TCP/IP) must be present as firmware in the set-top box.

Set-top boxes of this subheading must enable the user of the apparatus to access the Internet. The apparatus must also be able to run Internet applications in an "interactive information exchange" mode such as an e-mail client or a messaging application using UDP or TCP/IP sockets.

Set-top boxes which incorporate a device performing a recording or reproducing function (for example, a hard disk or DVD drive) are excluded from this subheading (subheading 8521 90 00).

8528 71 19 Other

See the last paragraph of the Explanatory Notes to subheading 8528 71 13.

8528 71 90 Other

This subheading includes products without a screen which are reception apparatus for television but which do not incorporate a video tuner (for example, so-called "IP-streaming boxes").

See also the last paragraph of the Explanatory Notes to subheading 8528 71 13.'

349. These CNENs now classify STBs either under CCT subheading 8528.71.13 (0%), CCT subheading 8528.71.19 (14%), CCT subheading 8528.71.90 (14%) or under CCT subheading 8521.90.00 (13.9%).

C. The History of the Concession and Measures at Issue

350. Like the concessions discussed earlier concerning MFMs and LCD monitors, the duty concessions at issue with regard to STBs also arose from the ITA. The list of products specified in Attachment B, which is referenced in a headnote to the EC Schedule, contains a concession promising duty-free treatment for:

> [S]et-top box which have a communication function: a microprocessor-based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange.

351. As with its other concessions made pursuant to Attachment B, the EC also included a headnote to accompany these concessions that reads as follows:

> With respect to any product described in or for Attachment B to the Annex to the Ministerial Declaration on Trade in Information Technology Products (WT/MIN(96)/16), to the extent not specifically provided for in this Schedule, the customs duties on such product, as well as any other duties and charges of any kind … shall be bound and eliminated, as set forth in paragraph 2(a) of the Annex to the Declaration, wherever the product is classified.

352. Attachment A of the ITA also provides for duty-free treatment for various HS tariff lines that include STBs with a communication function. The EC bound at zero three tariff lines covered under Attachment A of the ITA that includes STBs with a communication function: 8517.50 (HS96), 8517.80 (HS96), and 8525.20 (HS96). The EC then created 8528.12.91 in 2000, to cover "[a]pparatus with a microprocessor-based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange, capable of receiving television signals," and modified its Schedules accordingly to provide for duty-free treatment.[155]

353. Initially, the EC respected this concession and accorded STBs with a communication function the duty-free treatment they deserve. Over the past few years, however, the EC has begun to subject a substantial number of these STB to

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[155] Rectifications and Modifications of Schedules, Schedule CXL – European Communities, G/MA/TAR/RS/74 (December 15, 2000).

improper duties. Through the measures at issue, namely the Explanatory Notes to the Combined Nomenclature as published on 7 May 2008[156] and Council Regulation (EEC) No. 2658/87 as amended, the EC is now imposing a customs duty on certain STBs with a communication function.

354. More precisely, the EC currently provides the following duty treatment for STBs imported into the EC:

- STBs classifiable under CCT 8528.71.13 as "Apparatus with a microprocessor-based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange, capable of receiving television signals ('set-top boxes with communication function')" continue to enjoy duty-free treatment.

- STBs classifiable under CCT 8521.90.00 as "Video recording or reproducing apparatus, whether or not incorporating a video tuner – other" are subject to a customs duty of 13.9 percent.

- STBs classifiable under CCT 8528.71.19 as "Reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus - Not designed to incorporate a video display or screen – Video tuners – Other" are subject to a customs duty of 14 percent.

- STBs classifiable under CCT 8528.71.90 as "Reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus - Not designed to incorporate a video display or screen – Other" are subject to a customs duty of 14 percent.

355. The issue of the tariff-treatment of STBs was raised in the Customs Code Committee and was first discussed during its meeting in January 2005.[157] The discussion concerned the classification of a satellite receiver with built-in modem which enables links to a server providing reception of "pay-to-view" televisions programs but which cannot be used to access the internet.

356. The issue was discussed during several meetings of the Customs Code Committee in 2005 and 2006. In 2006, the Commission proposed a draft

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[156] Explanatory Notes to the Combined Nomenclature of the European Communities, 2008/C 112/03, OJ C 112, 7.05.2008, pp. 8-9. See Exhibit JPN-22.

[157] Customs Code Committee – Tariff and Statistical Nomenclature Section (Mechanical/Miscellaneous Sector), *Report of conclusions of the 360th meeting of the Committee held from 26 to 28 January 2005*, point 3.4.

Explanatory Note for the classification of different types of STBs. The EC proposed that STBs fall under either CCT 8528.12.20 as "reception apparatus for colour television, incorporating a video recorder or reproducer," under CCT 8528.12.90 to 8528.12.95 as "video tuners;" under CCT 8528.12.91 as "set-top boxes with communication function," or under CCT 8528.12.98 as "other."[158] The main purpose of this draft CNEN was to clarify and limit the types of STBs covered by CCT 8528.12.91 – and to be duty-free -- by defining the criteria to determine the scope of application of this item.

357. In its meeting of October 2006 the Customs Code Committee adopted an opinion unanimously supported the wording of the CNEN concerning CCT codes 8528.12.90 to 8528.12.95 and CCT code 8528.12.98. The Opinion was merely favourable with regard to CCT code 8528.12.91. The vote on the draft CNEN concerning STBs incorporating a hard disk drive was postponed due to procedural reasons until a later stage.[159] Although the above CNEN were adopted, they were not published in the Official Journal of the European Union until 7 May 2008 even though they were already being applied by member States.[160]

358. The draft CNEN concerning STBs with a hard disk drive were on the agenda of the Customs Code Committee meeting of April 2007 as an item for a vote. The Customs Code Committee delivered no opinion and no vote was taken.[161] Nevertheless, the CNEN were considered adopted under the management procedure. As a result, the draft CNEN was added to the minutes of

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158 Customs Code Committee – Tariff and Statistical Nomenclature Section (Mechanical/Miscellaneous Sector), *Conclusions of the 407th Meeting of the Committee*, Draft CNEN on "Satellite receivers with built-in modem" in Annex VI.

159 Customs Code Committee – Tariff and Statistical Nomenclature Section (Mechanical/Miscellaneous Sector), *Conclusions of the 407th Meeting of the Committee*, Draft CNEN on "Satellite receivers," point 3.7.

160 It should be noted that the content of the CNEN adopted by the Customs Code Committee in October 2006 was amended before its publication on 7 May 2008 without this amendment having the necessary support of the Customs Code Committee. The wording "*Set-top boxes of this subheading must enable the user of the apparatus to access the Internet by accessing any IP address*" was replaced by the wording "*Set-top boxes of this subheading must enable the user of the apparatus to access the Internet.*" The amendment was proposed by the Commission during the Customs Code Committee meeting held in February 2008. Although the Customs Code Committee did not support the Commission amendment by qualified majority, the amendment was still introduced in the CNEN as finally published in the Official Journal of the European Union.

161 Customs Code Committee – Tariff and Statistical Nomenclature Section (Mechanical/Miscellaneous Sector), *Conclusions of the 420th Meeting of the Committee*, Draft CNEN on "Set-top boxes incorporating a hard disk", point 3.3.

the Customs Code Committee meeting as an Annex.[162] The Customs Code Committee only discloses classification measures in the minutes when the file is considered closed by the Customs Code Committee. Therefore, the CNEN concerning STBs with a hard disk was deemed adopted following the April 2007 meeting. This CNEN was not published in the Official Journal of the EU until 7 May 2008. However, it was already being applied by several member States before its publication in the Official Journal.

359. As a result of these new CNENs, the zero tariff now only applies to STBs classified under CN code 8528.71.13. STBs which incorporate a device performing a recording or reproducing function (e.g., hard disk or DVD drive) are classified as video recorders under CN 8521.90.00 and are subject to a 13.9 duty rate.

360. In addition, STBs that include devices that allow access to Internet -- such as ISDN-, WLAN- or Ethernet devices -- are also excluded from CCT code 8528.71.13 and thus from duty free tariff treatment as such devices are not considered by the CNEN to be "modems". These STBs are now classified under CCT code 8528.71.19 which is subject to a 14% customs duty.

361. Some member States raised again the issue of whether the Explanatory Note could be applied before it was published. This matter was discussed in the Customs Code Committee's meeting of October 2007:

> "**Set top boxes:** Some MS raised the issue of publication of the CN Explanatory Notes explaining the difficulties they encounter in practice. Chair informed that the publication of the CN Explanatory Notes was planned to be accompanied by the introduction of the autonomous duty suspension on these products. However, DG TAXUD was aware of the opposition by a number of MS to an autonomous duty suspension. Chair reminded MS not to issue any contradictory BTIs and to follow the text that had been agreed upon and had been made public in the Annex to the report of the respective meeting.
>
> One MS raised the question of the absence/presence of software (linked to camcorder issue, ECJ court rulings C-208/06 and C-209/06 - Medion/Canon). Chair concluded that the question of

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[162] Customs Code Committee – Tariff and Statistical Nomenclature Section (Mechanical/Miscellaneous Sector), *Conclusions of the 420th Meeting of the Committee*, Draft CNEN on "Set-top boxes incorporating a hard disk", Annex IV.

> the absence/presence of software in this case needs further examination." [163]

362. The Commission stressed that member States should follow the text as agreed and voted upon and should refrain from issuing contradictory BTIs, even if the CNEN had not yet been published. The Commission also reiterated that the publication of the CNEN was planned to be accompanied by the introduction of the autonomous duty suspension on these products.

363. In December 2007, there was again a discussion about the classification of STBs covered by the CNEN which did not include the necessary software at the time of importation. [164] One member State had asked how to classify such STB. Although all physical elements (hardware) were part of the STB at the time of importation, the absence of software meant that the STB could not be connected to the Internet as imported. Member States were requested to reflect on this matter. The member State that requested the clarification was asked to provide further information.

364. During the February 2008 meeting of the Customs Code Committee,[165] STBs without HDD were placed on the agenda once again. The Customs Code Committee did not reach the qualified majority required to issue a favourable opinion on the proposed amendment. However, since there was no qualified majority against the amendment, the Commission considered the proposed amendment adopted. This amendment was included in the text of the CNEN which was finally published in the Official Journal of the European Union on 7 May 2008.

365. On 7 May 2008, the CNENs to CN code 8521.90.00 (STBs with HDD); CN code 8528.71.13 (STBs with communication function), CN code 8528.71.19 and CN code 8528.71.90 ("other") were finally published in the Official Journal.[166] The CNENs are one of the measures challenged in the present dispute.

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[163] Customs Code Committee – Tariff and Statistical Nomenclature Section (Mechanical/Miscellaneous Sector), *Report of conclusions of the 432nd meeting of the Committee held on 19 October 2007*, Item 6.

[164] Customs Code Committee – Tariff and Statistical Nomenclature Section (Mechanical/Miscellaneous Sector), *Report of conclusions of the 439th meeting of the Committee held from 19 to 21 December 2007*, Item 4.8.

[165] Customs Code Committee – Tariff and Statistical Nomenclature Section (Mechanical/Miscellaneous Sector), *Report of conclusions of the 442nd meeting of the Committee held from 20 to 22 February 2008*, Item 3.2.

[166] Explanatory Note to the Combined Nomenclature of the EC, 2008/C 112/03, OJ 2008 C 112, 07.05.2008, p.8. See Exhibit JPN-22.

366. Under the CNENs now in effect, quoted in full in paragraph 350, the EC excludes certain STBs with a communication function from duty-free treatment.[167]

D. Summary of Argument

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

368. The ordinary meaning of the phrase "set top boxes which have a communication function" confirms this interpretation. The meaning of this language is broad, covering those STBs whose purpose or intended role is the transmission or exchange of information, without any limitation on the type of information exchanged. This language certainly includes STBs with modems for gaining access to the Internet, which the EC concedes in the CNEN as "set top boxes." The language also includes other methods of receiving signals, and nothing in the language supports the EC's reading that an STB with a communication function may not be equipped with a hard disk or other "recording or reproducing" apparatus. The EC measure is contradictory and illogically ignores the ordinary meaning of the language of the EC concession.

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

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

371. Finally, the object and purpose of the EC Concessions are best served by continued duty-free treatment of STBs with a communications function. In addition to furthering the reduction of tariffs and expansion of trade, the ITA

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[167] Explanatory Notes to the Combined Nomenclature of the EC, 2008/C 112/03, OJ 2008 C 112, 07.05.2008, p.8. See Exhibit JPN-22.

aimed to encourage technological development. It would be inconsistent with this objective to reduce tariffs on a product, only to permit the reimposition of those tariffs simply because of an evolution in that product.

E. The Ordinary Meaning of the Language of the EC Concessions Includes all STBs with Communication Function

372. As with the earlier discussion about the concessions on MFMs and flat panel display devices, the language of the tariff concession itself is the most important factor for the Panel to consider. The language of the EC concessions on STBs – "set top boxes which have a communication function" -- is dispositive in this case.

373. The EC Schedules provide a definition of "set top boxes which have a communication function." This definition is reflected in ITA Attachment B. Under the terms of the Schedules, when a device has the following three characteristics, it is a set top box with a communication function (and thus is to be accorded duty-free treatment): (1) it is a microprocessor-based device; (2) incorporating a modem for gaining access to the Internet; and (3) having a function of interactive information exchange.

374. The headnote confirms that STBs which have a communication function – a product contained in Attachment B – must be granted duty free treatment, wherever such STBs are classified under the tariff nomenclature. Therefore, it is not relevant for this dispute whether a STB with a communication function is classified under a specific subheading in the EC's Schedule or whether a specific subheading includes such a STB. Rather, this dispute is about the coverage of the phrase "set top boxes which have a communication function" as set forth in the ITA and in the EC's Schedule. If a product falls within the scope of this key phrase, that product must be granted duty-free treatment regardless of its classification in the EC Schedule or in the EC's Common Customs Tariff.

375. All STBs with a communications function, as defined by the EC Schedule, are covered by the EC concession, not just the subset of STBs that the EC continues to accord duty-free treatment.

1. The technology sense of the phrase "set top boxes which have a communication function"

376. The product covered by the concession at issue here is defined in the following terms: "Set top boxes which have a communication function."

377. The term "set top box" is a high-tech neologism; hence its definition is not contained in ordinary dictionaries. Each of the individual words can be defined, but the individual definitions do not meaningfully combine with each other to understand the ordinary meaning of this phrase.

378. Although the term "set top boxes which have a communication function" is the language from the HS96 which was used in the ITA and the EC's Schedule LXXX, as stated in the context of the MFMs above, the concessions themselves were what reflected the negotiation on tariff reduction of information technology products.

379. The devices in question are "set top boxes which have a communication function" as that term is defined in Attachment B to the ITA. According to Newton's Telecom Dictionary, they are microprocessor based devices (i.e., devices based on an electronic circuit (or chip) performing functions with assistance of internal memory).[168] They incorporate modems for gaining access to the Internet, and have a function of interactive information exchange – users can connect to the Internet through a device that modulates and demodulates signals and sends and receives information. Indeed, the EC concedes in the CNEN that the devices are "set top boxes".[169]

2. The ordinary sense of the phrase "set top boxes which have a communication function"

380. As noted, the phrase "set top boxes" does not lend itself to a definition in the ordinary sense of these three words. Nevertheless, the ordinary sense of the remainder of this phrase confirms the broad scope of the language of this EC concession.

381. The only textual limitation on the phrase "set top box" is the phrase "which have a communication function." The ordinary meaning of "communication" is "[t]he action of communicating heat, feeling, motion, etc.; esp. the transmission or exchange of information, news, etc."[170] The ordinary meaning of "function" is "[t]he activity proper or natural to a person or thing; the purpose or intended role of a person or thing; an office, duty, employment, or calling. Also, a particular activity or operation (among several) …"[171] According to these ordinary meanings, STBs with a "communication function" are therefore those set-top boxes whose purpose or intended role is the transmission or exchange of information. The phrase is broad and does not in anyway constraint

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168 Newton's Telecom Dictionary, p. 599 (defining microprocessor as "[a]n electronic circuit, usually on a single chip, which performs arithmetic, logic and control operations, with the assistance of internal memory"). See Exhibit JPN-11.

169 See Amended STB CNEN, p. 8 (referring to the devices excluded as "set top boxes"). Indeed, in a previous draft of the Explanatory Note, the Commission stated that "set-top boxes which incorporate a device performing a recording function are excluded from this subheading, even where they have a communication function." March 2006 draft EN (TAXUD/667/2006-EN) (emphasis added).

170 New Shorter Oxford Dictionary, Vol. 1, p. 455. See Exhibit JPN-11.

171 New Shorter Oxford Dictionary, Vol. 1, p. 1042. See Exhibit JPN-11.

the type of information that can be exchanged. The word "function" also conveys the notion of a single function among several functions, in no way excluding other functions.

382. This broad scope is confirmed by the word that precedes this phrase, the indefinite article "a." This word is defined as follows in the *Shorter Oxford English Dictionary*: "a (indefinite article): One, some, any".[172] The use of the indefinite article "a" indicates that parties to the ITA intended to cover STBs which may perform not only a communication function *but also* STBs which may perform other functions *in addition to* a communication function.[173] Hence the EC's concession at stake in this dispute should include not only STBs capable of *solely* performing a communication function but also STBs which perform additional functions, such as recording or reproducing, in addition to the communication function.

383. Considered as a whole, the phrase "which have a communication function" thus simply identifies a characteristic which the covered STBs must have, but it in no way limits the other functions or features the STB at issue may have. The ordinary meaning in no way hints or in any way suggestions any other limitations.

3. The EC imposes duties on set top boxes with a communication function simply because they incorporate a hard disk or DVD drive, contrary to the ordinary meaning/technological sense of the phrase "set top boxes which have a communication function"

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

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172 New Shorter Oxford Dictionary, Vol. 1, p. 1. See Exhibit JPN-11.

173 Neither the text of the concession in the Schedule of the EC nor Attachment B of the ITA require explicitly – through the use of terms such as "solely" or the like – that the communication function be the sole function that the STB must have in order for it to benefit of the duty free treatment.

385. This interpretation of the EC's tariff concession is consistent with, for example, the view of the Group of Experts in the GATT dispute *Greece - Increase in Bound Duty*. In that dispute, Germany argued that Greece had raised its tariff on long-playing gramophone records, despite the fact that "gramophone records" were bound in the Greek schedule.[174] Greece contended that the introduction of later-developed, long-playing gramophone records constituted a new item not subject to the earlier binding. The reviewing Group agreed with Germany that the disputed records were covered by the description of "gramophone records" in the bound item and found that Greece had violated its Article II obligations.[175] It noted that "when this item was negotiated the parties concerned did not place any qualification upon the words 'gramophone record'."

386. As was the case with respect to gramophone records, ITA participants did not qualify the words "set top boxes which have a communication function" other than by specifying the three attributes described above. Indeed, the concession does not require that the STBs may *only* have a communication function in order to be covered by the EC concession. Rather, the ordinary meaning of term makes clear that the concession covers STBs which have a communication function even if they could have additional functions.

387. The amendments to the CNEN for 8528.71.13 also operate to exclude devices which have particular types of modems from duty free treatment. The EN states that "set top boxes with a communication function" must have a modem, and that "modems modulate and demodulate outgoing as well as incoming data signals.[176] Among the examples provided of devices that the EC considers to be modems are "V.34-, C.90-, DSL-, or cable modems." It states that "an indication of the presence of such a devise is an RJ11 connector." However, the EC then proceeds to state that:

> Devices performing a similar function to that of a modem but which do not modulate and demodulate signals are not considered to be modems. Examples of such apparatus are ISDN-, WLAN-, or Ethernet devices. An indication of the presence of such a devise is an RJ 45 connector.[177]

388. STBs with a communication function that do not have "modems" as the EC defines the term receive a 14 percent duty. Thus, under the EC measure, a set top box with a communication function is disqualified from duty-free

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174 GATT Group of Experts Report, *Greek Increase in Bound Duty*, L/580, 9 November 1956, unadopted ("*Greece – Phonograph Records*")

175 GATT Group of Experts Report, *Greece – Phonograph Records.*

176 Amended STB CNEN, p.8.

177 Amended STB CNEN, p. 8.

treatment merely because it gains access to the internet with a device that operates through an Ethernet or network connection, a wireless based connection (i.e., WLAN or "wireless LAN"), or a digital communications network (ISDN), using an RJ-45 connector, rather than an RJ-11 connector.[178]

389. Both from a technical standpoint and based on the ordinary meaning of the terms in its Schedule, the EC measure is contradictory and lacks basis in logic. First, there is no basis to conclude, based on the ordinary meaning of the terms, that devices which communicate using ISDN-, WLAN- or Ethernet technology are not "set top boxes which have a communication function" – devices which, among other things, "incorporat[e] a modem for gaining access to the Internet."[179]

390. A "modem" is equipment that connects data terminal equipment to a communication line.[180] Devices that operate through an Ethernet or network connection, a wireless based connection (i.e., WLAN or "wireless LAN"), or a digital communications network (ISDN) are modems — they connect the set top box to a communication line and convert signals produced by one type of device to a form compatible with another.[181]

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[178] Amended STB CNEN, p.8. A registered jack-11 (RJ-11) connector is a plug that holds six telephone wires and is the connection most commonly used to plug a telephone into the wall. An RJ-45 connector holds eight telephone wires, and is most commonly used for data transmission over standard telephone wire. See Newton's Telecom Dictionary, pp. 794-95. See Exhibit JPN-11. See also PCMag.com, Technical Encyclopedia, http://www.pcmag.com/encyclopedia_term/0%2C2542%2Ct%3DRJ-45&i%3D50561%2C00.asp ("Cable modems connect to the computer via an Ethernet port, which is an always-on connection...RJ-45 plugs and sockets are used in Ethernet and Token Ring Type 3 devices."). See Exhibit JPN-11.

[179] ITA, Attachment B.

[180] The IEEE Standard Dictionary of Electrical and Electronics Terms (1996), p. 660 (defining modem as "[a] contraction of Modulator-DEModulator, an equipment that connects data terminal equipment to a communication line."). See Exhibit JPN-11.

[181] Newton's Telecom Dictionary, p. 922. See Exhibit JPN-11. ("A Terminal Adaptor, also known as an ISDN Modem, is an interface device that essentially is a protocol converter that serves to interface non-ISDN devices (e.g., PCs, fax machines and telephone sets) to an ISDN BRI (Basic Rate Interface) circuit..."); Newton's Telecom Dictionary (2004, 20th ed.), p. 532 ("The term 'modem' also is applied (and correctly so, in the purely technical sense) to ISDN TAs (Terminal Adapters), ADSL TUs (Terminating Units), line drivers and short-haul modems"); Dictionary of Business Terms (3rd ed.) (defining ISDN as "[a] telecommunications technology offered by telephone companies that allows for the rapid transfer of voice and data. Communication is digital, in contrast to the analog telephone system, and requires use of a network terminator and an ISDN adapter, *sometimes referred to as a digital modem*.") (emphasis added). A wireless broadband modem operates in a manner similar to a cable modem, but receives and transmits signals without wires over various

391. In the amended CNEN, the EC claims that these devices "perform[] a similar function to that of a modem" but "... do not modulate and demodulate signals," and therefore are not entitled to duty free treatment. Even as a technical matter this assertion is incorrect. Each of the devices in question modulates and demodulates signals –- that is, they vary some characteristic of the electrical signal as the information to be transmitted on the communication medium varies, which is precisely what enables the device to communicate with another source.[182]

F. The Context of this Language Confirms that the EC Concessions Include All STBs with A Communication Function

392. It bears mention that the EC cites the following three subheadings next to STBs in the second list: "85175090, 85178090, 85252099". The titles of the relevant headings and subheadings, taken from the first list in the EC's Schedule of Concessions, are as follows:

HS96	**Description**
8517	Electrical apparatus for line telephony or line telegraphy, including line telephone sets with cordless handsets and telecommunication apparatus for carrier-current line systems or for digital line systems; videophones:
8517 50	Other apparatus, for carrier-current line systems or for digital line systems
8517 50 90	Other
8517 80	Other apparatus
8517 80 90	Other

8525	Transmission apparatus for radio-telephony, radio-telegraphy, radio-broadcasting or television, whether or not incorporating reception apparatus or sound recording or reproducing apparatus; still image

frequency bands. Wireless Broadband Modems, International Engineering Consortium, www.iec.org.

[182] IEEE 100: The Authoritative Dictionary of IEEE Standard Terms (2000), p. 703, 287. See Exhibit JPN-11. (defining "modulate" as "to convert voice or data signal for transmission over a communications network"; and "demodulate" as "to receive signals transmitted over a communications computer; and to convert them into electrical pulses that can serve as inputs to a computer system"). Even purely digital devices must convert signals to communicate. ISDN modems, for example, typically operate through pulse code modulation. E.g., McGraw Hill Encyclopedia of Science and Technology, 5th ed. ("The deployment of high-speed networks such as the Integrated Service Digital Network (ISDN) in many parts of the world has also relied heavily on PCM [pulse code modulation] technology.").

HS96	**Description**
	video cameras and other video camera recorders:
8525 20	Transmission apparatus incorporating reception apparatus
8525 20 99	Other

393. The first three subheadings identified by the EC as involving STBs are entitled "Other." Therefore, they do not support a proposition that STBs performing functions in addition to the communication function – such as HDD STBs – or STBs performing the communication function through certain devices other than "V.34-, V.90-, V.92-, DSL- or cable modems" fall outside the scope of the EC concession at dispute.

394. In accordance with Article 31(2) of the Vienna Convention, panels have examined the structure of the Chapters to assess whether that structure may provide textual context for the interpretation of relevant terms in the concession at stake.[183] The relevant parts of the structure of Chapter 85 of the EC Schedule,[184] together with the terms of product descriptions of products covered by Attachment B other than "Set top boxes which have a communication function," may provide such context.

395. An examination of other apparatus covered in Attachment B shows that, where the drafters intended to limit the function of the apparatus, they included clear statements to this effect.[185] For instance, when describing the concession for computers, the EC Schedule provides that "Machines performing a *specific function other than data processing*, or incorporating or working in conjunction with an automatic data processing machine, and not otherwise specified under Attachment A or B, are not covered by this agreement." (emphasis added).

396. Similarly, the EC Schedule's concession for Network equipment covers "Local Area Network (LAN) and Wide Area Network (WAN) apparatus, including those products dedicated for use *solely or principally* to permit the interconnection of automatic data processing machines and units thereof for a network…". (emphasis added) Hence, when the drafters of the concession

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[183] See, *e.g.* Panel Report, *EC - Chicken Cuts*, para. 7.167 *et seq*.

[184] It will include an analysis of the headings/subheadings under which the EC argues that the products at issue must be classified. (Appellate Body Report, *EC - Chicken Cuts*, para. 214)

[185] In the same vein, the Appellate Body found in *EC - Chicken Cuts* that: "It seems to us that, where the Harmonized System considers that these terms control the definition of the scope of a heading, it will use them *expressly*." (Appellate Body Report, *EC - Chicken Cuts,* para. 226) (emphasis added).

wanted to restrict the function or use of the apparatus in the concession, they knew how to do so.

397. No comparable words of limitation appear in the concession relating to STBs with a communication function. The terms of the concession do not state that STBs performing functions *in addition to* a communication function are not covered. Nor does the concession require that STBs must *solely or principally* perform a communication function. The absence of terms of limitation in the concession on STBs is significant.

398. We now turn to the relevant parts of the structure of Chapter 85 of the EC Schedule. Heading 85.17 covers "Electrical apparatus for line telephony or line telegraphy, including line telephone sets with cordless handsets and telecommunication apparatus for carrier-current line systems or for digital line systems; videophones:".

399. In turn, subheading 8517.50 covers "Other apparatus, for carrier-current line systems or for digital line systems" and subheading 8517.80 covers "Other apparatus".

400. Neither the terms contained in heading 85.17 nor those in the titles of the two subheadings make any reference to the functions that apparatuses classified under this heading and subheadings may perform. Nor do the terms in those titles expressly or implicitly limit the functions of products classified under them to one or more functions. Moreover, the terms of heading 85.17 and CN codes 8517.50 and 8517.80 make no reference to any specific type of modems that would restrict the scope of the concession.

401. Heading 85.25 covers "Transmission apparatus for radio-telephony, radio-telegraphy, radio-broadcasting or television, whether or not incorporating reception apparatus or sound recording or reproducing apparatus; television cameras; still image video cameras and other video camera recorders :" and subheading 8525.20 refers to "transmission apparatus incorporating reception apparatus".

402. The title of the heading makes it clear that apparatus covered by this heading fall under it regardless of whether they incorporate reception apparatus or sound recording or reproducing apparatus. Indeed, the title of subheading 8525.20 -- under which the EC stated that certain STBs with a communication function should be classified -- covers expressly transmission apparatuses "incorporating reception apparatus".

403. Heading 85.25 is divided into four main subheadings: 8525.10 ("Transmission apparatus"), 8525.20 ("Transmission apparatus incorporating reception apparatus"), 8525.30 ("Television cameras") and 8525.40 ("Still image video cameras and other video camera recorders"). Inasmuch as the terms "recording" and "reproducing" are placed before the first semi-colon in the title of

Heading 8525, they must refer to functions that transmission apparatus for radio-telephony, radio-telegraphy, radio-broadcasting or television – one of which is STBs classified under subheading 8525.20 – may perform. Therefore, apparatus falling under subheading 8525.20 may perform more than one function and still be classifiable under one of the two subheadings.

404. Neither the terms in the title of heading 85.25 nor of subheading 8525.20 require that the transmission apparatus incorporating reception apparatus consists of a modem for the apparatus to be classifiable under that heading and subheading.

405. Finally, Heading 85.28 covers "Reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus; video monitors and video projectors" Thus, for purposes of heading 85.28, the fact that a device may or may not incorporate video recording or reproducing apparatus is expressly described as irrelevant to classification in the heading. Yet the EC relies on the presence of such apparatus to exclude STBs from duty free treatment.

406. Furthermore, heading 85.27 differentiates between "Other radio-broadcast receivers, including apparatus capable of receiving also radio-telephony or radio-telegraphy : − − Combined with sound recording or reproducing apparatus", classifiable under subheading 8527.31, and "Other radio-broadcast receivers, including apparatus capable of receiving also radio-telephony or radio-telegraphy : − − Not combined with sound recording or reproducing apparatus but combined with a clock", classifiable under 8527.32.[186][187] The separate treatment provided for in headings for products able to perform different functions would seem to indicate that where no such differentiated treatment exists, for instance in headings 85.17 and 85.25, apparatus able to perform more than one function should not be treated differently..

407. The examination of terms of product descriptions of other concessions contained in the EC Schedule and tariff headings/subheadings contained in the EC Schedule shows that where the drafters intended to limit the function of some apparatuses covered in Attachment B of the ITA, as contained in

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[186] Similarly, CN Heading 8528, subheading CN 8528.12 "− Reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus: − − Colour" differentiates between "− − − Television projection equipment" and "− − − Apparatus incorporating a video recorder or reproducer".

[187] It should be noted that Heading 8527 overlaps, in terms of coverage, with Heading 8525. The main difference between them is that while Heading 8525 covers transmission apparatus, Heading 8527 covers reception apparatus, with the exception of reception apparatus for television which falls under Heading 8528.

the EC's Schedule, they did so clearly and explicitly. By contrast, no such statement was included in the text of the concession at stake.

408. The relevant parts of the structure of Chapter 85, and the terms of heading 85.25 and subheadings also do not support the exclusion from the EC's concession of apparatus that perform functions in addition to the communication function. At the same time, where other headings in Chapter 85 do wish to provide differential treatment for products performing different functions, they say so explicitly. Where no such differentiated treatment exists, for instance in headings 8517 and 8525, apparatus able to perform more than one function should not be treated differently.

G. The Object and Purpose of the EC Concessions Are Best Served by Interpreting the Concessions Broadly So As To Secure Continued Duty-free Treatment for STBs With A Communications Function

409. As discussed earlier concerning other products, Article 31(1) of the Vienna Convention requires treaty text to be interpreted based on its ordinary meaning, in context, but also "in light of its object and purpose." Recognizing this principle, the Appellate Body has repeatedly recognized the "object and purpose of the WTO Agreement and the GATT 1994" as an "interpretative principle." Moreover, the Appellate Body has specifically recognized that the object and purpose of tariff concessions can be used in interpreting tariff concessions negotiated by the Members.[188] A recognized object and purpose of the WTO Agreement and the GATT 1994 has been "the security and predictability of the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade."[189]

410. The overarching object and purpose of the WTO Agreement and the GATT 1994 has been reinforced in the specific context of the ITA. This object and purpose -- to achieve a "substantial reduction of tariffs" and to ensure the security and predictability of these reductions – lies at the core of the WTO Agreement, the GATT 1994, and the ITA. All three share this object and purpose. The reciprocal tariff concessions had the additional object and purpose of expanding trade. Echoing the WTO objects and purposes, the Ministerial Declaration for the ITA explained that "the key role of trade in information technology products in the development of information industries and in the

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[188] See, *e.g.,* Appellate Body Report, *EC - Computer Equipment*, para.82; Appellate Body Report, *EC - Chicken Cuts*, para. 243. See also Panel Report, *China - Auto Parts*, para. 7.460.

[189] Panel Report, *China – Auto Parts*, para. 7.460 (emphasis in original), citing Appellate Body Report, *EC - Chicken Cuts*, para. 243.

dynamic expansion of the world economy."[190] In light of this purpose, as negotiations under the ITA progressed, new countries were added to the negotiating parties and the scope of product coverage was broadened.

411. Consistent with reducing tariffs and expanding trade, the ITA elaborated on these core objects and purposes. The ITA sought to encourage "technological development" and "evolution," not create disincentives to such development or evolution. In recognizing this need for development and evolution for information technology products, the ITA was simply echoing and reinforcing in a specific factual context the core object and purpose of reciprocal concession to reduce tariffs and expand trade. It would be inconsistent with these objects and purposes of the WTO Agreement and the GATT 1994 to reduce tariffs on a particular product, only to permit the reimposition of those tariffs simply because of some evolution in that product.

412. The object and purpose of establishing and continuing duty-free treatment for a broad array of information technology products should guide the interpretation of the descriptions in Attachment B of the ITA relating to STBs. The object and purpose of the WTO Agreement and the GATT 1994 require that concessions made pursuant to the ITA should be interpreted broadly enough to encompass such technological change unless the concession expressly prohibits it.

413. The EC's regulations and HSENs seek to restrict its concessions on STBs to a very limited type of modem, with very limited functionality and uses. There is no justification for these restrictions in the language of the concession itself. It would be fundamentally at odds with the WTO's and the GATT's object and purpose of providing duty-free treatment for a broad array of information technology products to restrict the concession on STBs in this manner. By seeking to restrict duty-free treatment to a very limited type of STBs, the EC's approach undermines the security and predictability of the tariff concession.

H. Conclusions

414. All set-top boxes with a communications function should be duty free under the concessions made by the EC. The EC's decision to impose duties on set-top boxes with a hard disk or other "recording or reproducing apparatus" cannot be grounded under the ordinary meaning of the phrase or in light of the other product descriptions contained in the EC Schedule. The EC measures have imposed duties that are inconsistent with EC tariff concessions and are therefore inconsistent with Articles II:1(a) and II:1(b) of GATT1994.

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190 WT/MIN/96(8).