BEFORE THE WORLD TRADE ORGANIZATION

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

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

SECOND WRITTEN SUBMISSION OF JAPAN

16 JUNE 2009

TABLE OF CONTENTS

Page

TABLE OF CASES CITED

Short Title	Full Case Title and Citation
China – Auto Parts	Panel Report, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/R, adopted 12 January 2009.
EC – Chicken Cuts	Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269, 286/AB/R, adopted 27 September 2005.
EC – Computer Equipment	Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62, 67, 68/AB/R, adopted 22 June 1998, DSR 1998:V, 1851.

TABLE OF ABBREVIATIONS

Abbreviation	Description
ADP	Automatic Data-Processing machine *or* computer
CCD	Charge-Coupled Device
CCT	Common Customs Tariff
CN	Combined Nomenclature
CNEN	Explanatory Notes to the Combined Nomenclature
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
DVI	Digital Visual Interface
EC	European Communities
ECJ	European Court of Justice
FPD	Flat Panel Display
GATT	General Agreement on Tariffs and Trade
GIR	General Rules for the Interpretation of the Harmonized System
HS	Harmonized Commodity Description and Coding System
HS07	2007 Harmonized System
HS96	1996 Harmonized System
HSEN	Harmonized System Explanatory Notes

Abbreviation	**Description**
ITA *or* Information Technology Agreement	The Ministerial Declaration on Trade in Information Technology Products
LAN	Local Area Network
LCD	Liquid Crystal Display
MFM	Multifunctional digital machine
STB	Set top box
TPKM	Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu
Vienna Convention	Vienna Convention of the Laws of Treaties
WAN	Wide Area Network
WCO	World Customs Organization

I. INTRODUCTION

1. The Ministerial Declaration on Trade in Information Technology Products (hereinafter "ITA") has provided tremendous benefits to the world economy by eliminating tariffs on a wide range of products. These benefits have been important for all countries, but particularly developing countries who see trade in technology products as fueling their own economic development. Indeed, that is why so many countries have joined this dispute as third parties; they recognize the importance of these issues, both for their countries and the trading system.

2. Although the ITA provides the backdrop, this dispute is fundamentally about tariff concessions under the *WTO Agreement*, concessions that benefit all countries. This dispute is not about the ITA itself, and is certainly not about who has been leading the ITA effort. Judging from its introduction,[1] one might think the EC believes its leadership in the ITA somehow inoculates it from challenge now. In fact, who led the ITA does not really matter. What matters in this dispute is simply the scope of the relevant tariff concessions, and whether the EC is subjecting products within the scope of those concession to duties improperly.

3. The language of the concessions – the legal text agreed to by all WTO members – matters. The ITA process itself does not matter, since it represents a negotiating process of a few WTO members, not final legal text agreed to by all WTO members. Subsequent negotiations – either those actually begun, or those that might take place in the future – do not matter either. The subjective expectations of various Members also do not matter, since the legal text must stand on its own regardless of the expectations of the drafters.

4. The common theme underlying many of the EC arguments in this dispute is simply that "this could not be what we meant." Yet that focus on the expectations of the parties – particularly as the EC frames its arguments – at best downplays and at worst ignores the meaning of the text of the relevant concessions. Whatever the parties' intentions, whatever the evolution of the products, the relevant legal question remains simply whether the language of the concession – its ordinary meaning, read in context, and considered in light of the object and purpose – covers the product at issue.

---

[1] First Written Submission by the European Communities, 2 April 2009, at para. 6 (hereinafter, "EC FWS").

II. FOR ALL OF THE PRODUCTS AT ISSUE, THE PANEL SHOULD BEAR IN MIND KEY INTERPRETATIVE PRINCIPLES.

5. At the outset, Japan would like to review the key interpretative principles that apply to all of the specific products at issue in this dispute. The language of the concessions at issue is absolutely critical, and thus serves as the foundation of Japan's arguments, even if the EC tries to shift focus away from the language itself. The Harmonized System ("HS") materials and ITA have interpretative relevance, but they can only help to clarify the meaning of the language of the concessions, and cannot change that meaning. The EC tries to give certain rules from the HS and certain provisions from the ITA an interpretative significance they simply do not deserve. The EC also tries to rely upon its own expectations from the ITA negotiations and its own views about technological development to narrow the scope of the concessions at issue. Such ideas, and their reflection in specific negotiating history or the past or present classification practice of certain countries, simply have little if any interpretative weight.

A. The Central Importance of the Language of the Concession, Interpreted in Accordance with the *Vienna Convention*.

6. The parties to this dispute have debated repeatedly whether this case is about tariff concessions or tariff classification. On a simplistic level, this may seem to be a distinction without a difference. Japan firmly believes, however, that recognizing this dispute as a question of the proper scope of tariff concessions – and framing the analysis in that way – is very important. The key distinction is recognizing the central role of the language of the concession itself. The EC tries to shift the focus to classification. In other words, the EC wants to skip the question of what the language of the concession actually means – discussing some language superficially and other language not at all – and instead focus on the rules to choose between competing headings.

7. Despite efforts by the EC to reframe the issue, the question for the Panel's consideration remains whether the products at issue fall within the scope of the relevant EC Schedule of Concessions. Because this dispute does not involve questions of tariff classification, but instead interpretation of particular treaty text – the language of the tariff concessions – the Panel must focus first and primarily on the language of the concessions. Under the Vienna Convention on the Laws of Treaties (hereinafter "*Vienna Convention*") the task is clear. The Panel must examine the language of the concession – must consider the ordinary meaning of that language read in context and in light of the object and purpose of the treaty at issue – and decide on the meaning of that language.

8. This focus on the language of the concession interpreted in accordance with the *Vienna Convention* fundamentally shapes the analysis. First, the focus must be on the language, and the product at issue must be tested against that language. The EC often focuses on whether products are new products, or multifunctional products, or different products. But that commentary misses the key point. Whatever the product was previously or has become now, the question remains simply does the product fall within the scope of the language in the tariff concession at issue, interpreted in light of the *Vienna Convention*.

9. Second, the focus must be on the language used in the concession itself. The language can be understood based on its ordinary meaning derived from dictionaries, and from the factual context, including background that existed when those words were being used to draft treaty text. Language that covers products that existed at the time that language was used, and in no way limits those products to specific technologies, should be interpreted accordingly. Similarly, language that more narrowly describes certain specific technologies that existed at that time should also be interpreted accordingly. The extent to which the language is limited or not depends on the language, not some overarching principles of broad or narrow interpretation.

10. Third, the focus must be on the meaning of the language. Language in an agreement on technology products must be understood as such, which means the ordinary meaning of that language should reflect both its ordinary sense from standard usage and ordinary dictionaries, but also its technology sense from usage in a technology context and from technology dictionaries.[2] In theory a Panel might need to consider a "special meaning" of some term under Article 31.4 of the *Vienna Convention*, but Japan does not believe any of the terms in dispute here require any special meaning.

11. Fourth, context matters a great deal, but all context is not equal. Oftentimes language can only be understood in context. But the interpretative relevance of the context must be viewed holistically, and with a view to the interpretation question at issue. An HS rule that speaks directly to the meaning of language used in a heading – such as a specific chapter note – would have more interpretative weight. Moreover, a non-binding explanatory note to the HS rule – HSEN – should be given less weight than a binding HS rule, and accordingly the former cannot override the latter. A HS rule that is simply a rule disconnected from any specific language – such as the General Rules for the Interpretation of the Harmonized System ("GIRs") – would have much less interpretative relevance, at least under the *Vienna Convention*. Such a rule must still be considered, but it

[2] Japan's Answers to Panel Questions to the Parties from the First Substantive Meeting, at paras. 36-37 (hereinafter, "Japan Answers").

simply has less interpretive weight because it does not speak the meaning of the language.

12. Finally, the object and purpose of the *WTO Agreement* and the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") reinforces Japan's interpretation based on the ordinary meaning of the language of the concession. The *WTO Agreement* and the GATT 1994 stand generally for the security and predictability of "the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade."[3] The ITA largely embraced these same objects and purposes – that is why the ITA negotiations lowered tariffs. By grounding its interpretation in the language of the concession itself, this Panel can best ensure the security and predictability of the concession.

B. The HS Has Interpretative Relevance, But Only to the Extent It Helps Clarify the Meaning of the Text of the Concessions Made Pursuant to Attachment A.

13. The HS has interpretative relevance in this dispute. The Appellate Body has made clear that the agreement by the WTO members to use the HS as the basis for negotiating tariff concessions qualified the HS as context within the meaning of Article 31.2(a) of the *Vienna Convention*. Japan recognized this point in its FWS.[4] This basic point is not in dispute.

14. The interpretative relevance, however, will vary depending on the particular item from the HS being considered, and on what purpose it is being considered for. First, HS materials that address directly the meaning of the language of a concession – HS section and chapter notes addressing the language of the concessions as well as HSENs addressing the language – are highly relevant. In a sense, such HS materials are another tool – like dictionaries, factual context, and other circumstances – for understanding the ordinary meaning of the language being used. That being said, such HS materials, no matter how directly they address the meaning, cannot override the text of the language in the concession itself.

15. Second, HS materials that do not speak directly to the meaning of the language in a specific heading, or even a range of headings, but only provide

---

[3] Para. 3 of the Preamble, Marrakesh Agreement; Para. 3 of the Preamble, The General Agreement on Tariffs and Trade. *See also* Panel Report, *China – Measures Affecting Imports of Auto Parts*, WT/DS339/R, 12 January 2009, at para. 7.460 (hereinafter, "*China – Auto Parts*"). Appellate Body Report, *European Communities – Custom Classification of Frozen Boneless Chicken Classification*, WT/DS269/AB/R, adopted 27 September 2005, at para. 243 (hereinafter, "*EC – Chicken Cuts*").

[4] Japan First Written Submission, 5 March 2009, at para. 144 (hereinafter, "Japan FWS").

guidance for how to pick between two competing headings, have much less relevance. In such a case, the HS rules – such as the GIRs – may not even apply at all, if the product at issue in fact clearly falls into a single heading. Even if the product could arguably fall under two headings, that choice should be determined by examining the ordinary meaning of the language of the two headings read in context, and considering any HS section notes and chapter notes. In the course of applying the HS rules, the objective characteristics of the product at issue should also be fully considered to help clarify the meaning of the language of the concessions. Even if tariff concessions on two headings or subheadings are potentially relevant, HS materials should not be applied mechanically as in the tariff classification practice, because the issue in this dispute is not the proper tariff classifications under national law. In disputes concerning tariff concessions, a Panel must examine cautiously and critically the roles of the HS materials in deciding the scope of the tariff concession, and should give little interpretative weight to those materials that have been adopted for practical convenience, and thus, would be arbitrary from the viewpoint of properly interpreting tariff concessions.

16. Third, the relevance of the HS materials extends only to concessions that relied upon the HS framework. Regarding the interpretation of the tariff concessions made outside the HS framework – such as the language of the concessions made pursuant to Attachment B in this dispute – the HS does not provide any relevant context. Whereas the ITA explicitly contemplates the value of the HS with reference to Attachment A, it makes clear that the HS is irrelevant for purposes of interpreting the products specified in and for Attachment B.[5]

C. The ITA Has Interpretative Relevance, But Only to the Extent It Helps Clarify the Meaning of the Text of the Concessions at Issue.

17. The EC has tried to use parts of the ITA – in particular, the mechanism for future negotiations – to argue that the tariff concessions negotiated through the ITA must be narrow, and the parties must have intended to add new products later. These EC arguments fundamentally misunderstand the interpretative significance of the ITA.

18. The ITA is not treaty text for purpose of interpreting the EC concessions.[6] It does not provide the language of the tariff concessions to be

---

5 ITA, para. 2. *See* Japan Answers, at paras. 61-63.

6 Although Japan does not regard the ITA as a treaty (*see* Japan Answers, at paras. 1-2), we note that the EC argued the ITA is a treaty (EC Answers, at paras. 1-3.) But regardless of whether the ITA is a treaty or not, it is not the treaty at issue in this dispute. The Complainants focus on specific tariff concessions that are part of the GATT 1994

interpreted. Rather the treaty text is the language used in the EC schedule of concessions; that language may mirror ITA language to a substantial extent, but in the event of conflict the language of the EC concessions must govern.[7] The ITA could be relevant as context under the *Vienna Convention*,[8] but such context is only relevant to the extent it helps interpret the language of the concessions at issue. Since so much of the substantive content of the ITA was subsequently included (albeit in a different form) in the EC concessions themselves, the remaining portion of the ITA has less interpretative weight. The remaining portion does not speak directly to the meaning of the language in EC tariff concessions.

19. In particular, the EC has dramatically overstated the interpretative significance of paragraph 3 of the Annex to the ITA regarding future negotiations. The EC argues that the Panel must consider the products at issue with reference to paragraph 3 of the ITA Annex, which expresses the expectation for future negotiations. Through its reliance on that paragraph 3, the EC seems to believe that the possibility for future negotiations somehow narrows the scope of the original concessions.[9]

20. Japan strongly disagrees with the EC's argument, and believes that paragraph 3 is largely irrelevant to the present dispute. The fact that the parties to the ITA recognized in general terms that they might have future negotiations simply states the obvious. With or without paragraph 3, the parties could always decide to have more negotiations. The focus remains on what the agreed upon language of the concession itself says. Resolution of this dispute concerns only those concessions currently in place, and does not depend on future agreements that may or may not arise in the future. Accordingly, the Panel should focus on the actual language of the concessions. Indeed, although the EC accuses the Complainants of focusing on only parts of the ITA out of context,[10] it is in fact the EC that tries to give paragraph 3 interpretative weight that it simply does not deserve.

D. The Expectations of the Parties Are Irrelevant to Interpreting the Proper Scope of the Tariff Concessions at Issue.

---

schedule of tariff concessions. It is the language of those concessions that must govern this dispute.

7 Japan Answers, at paras. 10-11; 17.

8 Japan Answers, at para 3.

9 EC FWS at para. 16.

10 Replies of the European Communities to the Questions of the Panel of 15 May 2009 after the first substantive meeting, at para. 10 (hereinafter, "EC Answers").

21. Notwithstanding the efforts to repackage the arguments, the EC's expectations at the time of the concessions serve no interpretive purpose. The EC emphasizes that at the time of the concessions it could not have expected the products at issue to exist, let alone be included in the concessions. In doing so, the EC refers to the products as "new" and as products that could not have been "foreseen" at the time of the negotiations of the ITA.[11] Yet the EC argument is deeply flawed for three reasons.

22. First, regardless of how they are presented, the EC expectations at the time of the concessions are simply irrelevant. The Appellate Body has made clear that subjective expectations are irrelevant to interpreting the meaning of a tariff concession,[12] and that what matters is the language of the concession and the objective characteristics of the product at issue.[13]

23. Second, the EC has a very selective memory that ignores or downplays products that were well known and commercially available at the time. In many situations, the key technology was developed and in commercial use at the time of the concessions. The EC repeatedly turns improved versions of existing products into "new" and "unforeseen" products, when in fact the products, properly understood, were neither new nor unforeseen.

24. Finally, the EC argument focuses too much on the product and not the language of the tariff concessions. That language may or may not cover certain products, and may or may not be language that covers a wide range of technological versions of the same basic product. The language is the key and the EC tends to ignore that language.

E. The Language of a Concession Will Often Cover a Product Regardless of the Technological Developments that May Occur Regarding that Product.

25. The EC devoted considerable attention to explain the technological development of the products at issue. Although providing interesting background information for the Panel, this history has little relevance to the actual dispute. Resolution of this dispute must begin with an understanding of the ordinary meaning of the language and the context in which that language has been used in the concessions in the EC's Schedule.[14] The Appellate Body in *EC – Chicken*

---

11 EC FWS, at para. 76.

12 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, at para 80 (hereinafter, "*EC – Computer Equipment*").

13 Appellate Body Report, *EC – Chicken Cuts* at para. 246.

14 Japan Answers, at paras. 4-7; 8-9.

Cuts provided clear guidance, stating that "in characterizing a product for purposes of tariff classification, it is necessary to look exclusively at the 'objective characteristics' of the product in question when presented for classification at the border."[15] The objective characteristics of the products, not their evolution over time, thus remain the key considerations.

26. The EC argues that certain products may cross into two headings, or may even "cease to exist" and may be replaced by a new product.[16] But in making this argument, the EC makes two legal errors.

27. First, the EC assumes that the language of the concessions no longer applies when the product evolves, or no longer applies sufficient to preclude other headings. The language of concessions would often have been drafted specifically to avoid reference to specific technologies or specific objective characteristics that might change over time. In those situations, the language of the original concession continues to apply.

28. Second, whether a product "ceases to exist" depends as much on the language of the concession as the development of the product. The EC reluctantly admits this key point, but then later simply ignores the logical implication of this key point. The EC notes that "the definition allows technological development and innovation as long as the end result is a product that fulfills the conditions set out in the" definition or heading at issue.[17] That is precisely our point. Whether a product – no matter how much it has changed – still falls within the scope of the concession depends critically on the language of the concession.

F. Negotiating History and the Classification Practice of Certain Members Have Little Interpretative Relevance in this Dispute.

29. Japan believes that the Panel should give little if any weight to extraneous information provided by the EC not relevant to interpretation of the concessions at issue. First, the EC attempts to direct the Panel's attention away from the actual language of the text of the EC's Schedule, and instead towards the negotiating history of the ITA. According to the EC,[18] this negotiating history provides conclusive information on the products that fall within the concessions.

30. Japan urges the Panel to dismiss this argument. Only the language actually included in the final text – such as the language of the EC concession at

15 Appellate Body Report, *EC – Chicken Cuts*, at para. 246.
16 EC Answers, at para. 15.
17 EC Answers, at para. 16.
18 EC FWS, at paras. 181-188; 225-236; 400-403.

issue here – matters, not materials regarding the complex and uncertain path to create the final text. The interpretative significance of a final agreement derives from the understanding that all members agreed to the provisions. In contrast, negotiating history merely represents the process by which members coordinate and compromise with one another to reach that agreement ultimately accepted by all.

31. Furthermore, the history referenced by the EC does not constitute "the preparatory work" within the meaning of Article 32 of the *Vienna Convention*. Japan does not consider the ITA itself to be a treaty within the meaning of Article 31 of the *Vienna Convention*.[19] It is legally erroneous to say that the negotiating history of the ITA constitutes the preparatory work of the EC's Schedule of concession because the ITA is neither part of the EC's Schedule nor part of the GATT 1994. In addition, the Panel need not resort to this information as a "supplementary means of interpretation" because the interpretative issues can be resolved pursuant to Article 31 of the *Vienna Convention*, rendering Article 32 legally inapplicable.

32. Even less relevant is the classification practice of certain WTO members. As with negotiating history, these materials do not reflect in any way on the agreement made by the WTO Members. Such classification practices do not rise to the level of "subsequent practice" under Article 31.3 (b) of the *Vienna Convention* because too few countries are involved and that practice is not consistent.

III. THE EC MEASURES CONCERNING MULTIFUNCTIONAL DIGITAL MACHINES ARE INCONSISTENT WITH EC OBLIGATIONS UNDER ARTICLES II:1(A) AND II:1(B) OF THE GATT 1994.

A. The Products and Measures at Issue

33. At the outset, we note that the EC has not raised any objections to our arguments about the definition of the products at issue with respect to MFMs.[20] The EC disagrees with the Complainants about the proper way to characterize MFMs, but the product at issue is clear.

34. We also note there is no major dispute among the parties on the measures and tariff concessions at issue. The EC has argued that only the current

---

19 Japan Answers, at para. 31-32.

20 EC FWS, at paras. 328-338.

version of the CCT is at issue in this dispute.[21] But as Japan and the other complaining parties have explained in their answers to panel questions,[22] the measures preceding the current version of the CCT still have legal effect and influence the EC interpretation of its tariff concessions. Unless and until these measures are formally withdrawn, Japan considers them still to be in effect for purposes of this WTO dispute. Indeed, we note the EC has stated it is beginning the process to repeal certain of these measures.[23]

35. The repeal of these older measures, however, will not alone cure the WTO inconsistency of imposing duties on MFMs that should be duty-free under EC concessions. The only cure will be to eliminate the duty under CN 8443.31.91 and to stop imposing duties on MFMs.

B. The EC Largely Ignores the Ordinary Meaning of the Language of the Concessions at Issue in this Dispute, the Language of Heading 84.71

36. The EC tries to avoid discussing the language of the concessions at issue, and never really explains why MFMs that connect to ADPs do not fall under heading 84.71. The EC argues that Japan has provided only a "cursory examination" of the ordinary meaning of this language,[24] but we note the EC has provided no examination at all of the ordinary meaning of the key concession at issue here – the concession on heading 84.71. Instead the EC jumps to several contextual arguments – principally Note 5(B) to Chapter 84 – without discussing the language of the concession at all.[25] This omission highlights a fundamental weakness in the overall EC argument – that the EC really has no argument about the ordinary meaning of the language in heading 84.71.

37. The ordinary meaning of the language in heading 84.71 covers MFMs with digital connectivity, what the EC calls ADP MFMs. As Japan has explained at length,[26] MFMs with digital connectivity fall squarely within the ordinary meaning of a "unit" of a computer, as an "input or output unit." Whether one considers the ordinary sense of these words or the technological sense of these

---

21 EC FWS, at para. 342.

22 Japan Answers, at paras. 71-72. See also TPKM Answers to the Panel's Questions to the Parties in Connection with the First Substantive Meeting, at pp. 15-16 (hereinafter, "TPKM Answers"); Answers of the United States of America to the Panel's Questions to the Parties in Connection with the First Substantive Panel Meeting, at para. 46 (hereinafter, "U.S. Answers").

23 EC Answers, at para. 108.

24 EC FWS, at para. 410.

25 EC FWS, at para. 411.

26 Japan FWS, at paras. 79-90.

words, they both point to the same ordinary meaning. This language captures devices such as MFMs that operate in an integrated manner with computers, using digital technology to "input" information as well as to "output" information. The EC never really challenges this argument because it cannot.

38. The printing and other functions of MFMs confirm that they are "output units" of an ADP. Japan develops this argument at some length in its First Written Submission.[27] These objective characteristics of the MFMs allow one to conclude that MFMs are properly considered to be "output units" under subheading 8471.60 and more specifically "printers" under subheading 8471.60.40. The EC largely ignores these objective characteristics, stressing the multiple functions of MFMs but never relating these functions to objective characteristics. The objective physical characteristics demonstrate that MFMs are first and foremost "printers" that may have other functions. But these other functions do not change the basic physical characteristics that make such devices "printers."

39. The historical development of MFMs further confirms that they are "output units" of ADPs, and were well known at the time of the concessions of heading 84.71. Japan has presented extensive evidence of this fact.[28] The EC concedes this point as well.[29] Yet the EC refuses to acknowledge the extent to which this concession undermines its argument on the meaning of the language in heading 84.71. Knowing fully well about MFMs and their interconnectivity with computers, the EC's concessions under heading 84.71 applied to all "units" of computers, including all devices that fell under the subheading 8471.60 on "input or output units." Given this history, it simply makes no sense to read this language as not applying to MFMs with digital connectivity. The ordinary meaning of this language covers MFMs with digital connectivity and nothing in the ordinary meaning of these terms would suggest in any way that MFMs with digital connectivity would not be covered.

C. The Context Provided by Heading 90.09 Confirms that Digital Copying Is Not A Form of Photocopying, and Therefore Contrary to the EC Arguments MFMs Cannot Fall Within the Scope of Heading 90.09.

40. The claim in this dispute is that the concession on heading 84.71 covers MFMs. The EC tries to rebut this claim by shifting the focus to heading 90.09, and tries to turn this dispute into a classification question, which it is not. As we discuss below, nothing in the language or context of heading 90.09 or

---

27 Japan FWS, at paras. 91-102.

28 Japan Answers, at paras. 78-79. *See also* Exhibit JPN-28.

29 EC FWS, at para. 331; EC Answers, at para. 109.

subheading 9009.12 supports the conclusion that MFMs can possibly fall within their scopes. As we explain below:

- The EC has misinterpreted the term "photocopying" in heading 90.09. The use of light in a digital copier does not make that device into a "photocopying apparatus." The EC largely ignores the critical role of the digital file in an MFM, and that digital file is dramatically different than the reflected light used in an analogue photocopier.

- The EC has also misinterpreted the phrase "indirect process" in subheading 9009.12. The language used in this phrase refers to a very specific technology, as evidenced by the use of precise language that describes analogue photocopying technology and does not apply to the very different digital copying process.

- The HSEN for heading 90.09 confirms the ordinary meaning of "photocopying" and "indirect process" as excluding MFMs with digital connectivity. This HSEN describes analogue photocopying technology. Moreover, this HSEN was not changed in 1996 – even though digital copying technology was then well developed – because heading 90.09 applies only to the analogue photocopying technology covered by this heading.

41. The term "photocopying" in heading 90.09 and the phrase "indirect process" in subheading 9009.12 have very specific meanings that the EC tries to ignore in this dispute. This context thus confirms that MFMs fall within the scope of heading 84.71 and cannot possibly be within the scope of heading 90.09.

1. The EC has misinterpreted the language of the concessions on heading 90.09.

42. The EC fundamentally misinterprets the term "photocopying" used in the EC tariff concessions on heading 90.09 as including digital copying. The various EC definitions[30] describe analogue photocopying, and do not apply to digital copying.

43. Contrary to the EC argument,[31] the use of light alone does not make a digital copier into a "photocopying apparatus" as that phrase is used in heading 90.09. In a digital copier, the light flashed on and reflected from the original document is used to create a digital file, not to create a duplicate image of the original. More specifically, a digital copier does not project an optical image of

30 EC FWS, at para. 369.
31 EC FWS, at para. 371.

the original document onto the light sensitive surface. A digital copier creates, transmits, and prints digital files. That distinction is quite fundamental.

44. This digital file is much more than just an "additional intermediate step," as argued by the EC.[32] Rather the ability to create a digital file represents a fundamental technological difference that dramatically changes the objective characteristics and operation of the device. An analogue photocopier can do only one thing with the light reflected off an original document – it can make a single photocopy of that reflected image. An MFM using digital technology, in contrast, does not face this same technological limitation. Because the MFM is creating a digital file, it can scan an original image and store that image in a computer, and never print out the image itself at all – nothing is being "photocopied." An MFM using digital technology can also print out a computer file that never even existed as an original document – again, nothing is being "photocopied." Both of these features of MFMs are key objective characteristics of MFMs that fundamentally distinguish them from analogue photocopiers. The fact that these two features – that are utterly different from the functioning of a photocopier – can be used together so the device can have the additional incidental feature of digital copying does not make an MFM into a photocopier.

45. The EC has been sloppy in the use of the terms "copying," a broad term that covers both digital copying and photocopying, and the more precise term "photocopying" that refers to a specific technology. The fact that marketing literature may not always draw a precise distinction between these two words[33] does not eliminate the fundamental distinction between these very different words. Tariff concessions use language more precisely than marketing departments of companies.

46. The few EC contextual arguments for heading 90.09 do not save an otherwise flawed interpretation of the meaning of this language.[34] The EC confuses the distinction between having an optical system, and using the optical system to make the copy. In MFMs, the optical system is used to scan a document and convert that document into digital data. At that point, the digital data can be used in many ways, and need not be printed out at all. In photocopiers, in contrast, the optical system creates an image of the original which has no purpose other than to produce a photocopy. Otherwise, the light image disappears.

47. Placing stand-alone digital copiers in heading 84.72 does not support the EC argument.[35] The EC argument that digital copiers have more in

32 EC FWS, at paras. 372, 374.
33 EC FWS, at para. 375.
34 EC FWS, at paras. 376-377.
35 EC FWS, at paras. 378-380.

common with analogue photocopiers tries to side-step the important technological differences. The list of other office machines in heading 84.72 is illustrative, not exhaustive. Given the function of the residual subheading 8472.90, there is no reason to think another example would need to be added to the non-exhaustive list of examples already provided in the parenthetical.

2. The EC has also misinterpreted the ordinary meaning of the language of the concessions on subheading 9009.12.

48. Beyond misreading the language of heading 90.09, the EC also misreads the language of subheading 9009.12. Subheading 9009.12 defines the "indirect process" as meaning "operating by reproducing the original image via an intermediate onto the copy." The EC interpretation[36] does not pay sufficient attention to the precise meaning of the structure or language of this heading.

49. Heading 90.09 has three categories at the five digit level, only one of which could possibly cover the MFMs at issue – five-digit subheading 9009.1, which covers "electrostatic photocopying apparatus." This level can be seen in the EC schedule as having only a single dash "-" rather than two dashes "--." Since the MFMs at issue use "electrostatic" printing technology,[37] this five-digit subheading is the closest. The other headings do not apply (and even if they did, these other heading are also duty-free).

50. Yet the more detailed language of subheading 9009.11 and of subheading 9009.12, which define specific technologies, both exclude MFMs. MFMs do not reproduce the optical image of an original document directly onto the paper, as required by subheading 9009.11. Nor do they reproduce the optical image onto the paper in the specific manner described in subheading 9009.12. MFMs do not meet either of these definitions, which confirms that heading 90.09 does not cover MFMs with a digital copying function.

51. In this regard, Japan emphasizes that subheading 9009.12 describes a rather specific technology. The EC apparently struggles to reconcile its view that the ITA applies only to the snapshot of technology that existed in 1996 with its effort to read subheading 9009.12 broadly enough to include both traditional analogue photocopiers as well as the new digital copiers. In fact, the language has meaning, and language that describes a specific technology such as subheading 9009.12 describes a narrower scope than more open-ended language like

---

36 EC FWS, at para. 374.

37 MFMs may have non-electrostatic print engines – such an inkjet printers – but such devices are not subject to this dispute since they are duty-free. See EC FWS at para 334, fn. 242.

subheading 8471.60 that does not have any technological limitations. The EC seems to embrace this view,[38] but is then reluctant to apply this logic to subheading 9009.12.[39]

52. Consider the specific language of subheading 9009.12. The terms "image" and "copy" are both in the singular form, indicating that photocopying apparatus covered by this subheading should reproduce a single copy from a single original image. The use of the article "the" before both words reinforces this meaning. An analogue photocopy takes "the original image" – the optical image reflected from the original – and then uses that image to produce "the copy." The language used here thus precisely captures the "one image" to make "one copy" correspondence that characterizes analogue photocopying technology.[40]

53. Further, the phrase refers to a single "intermediate" – an intermediate – not an unlimited series of devices operating in conjunction to create or transfer digital data. Again, this language precisely reflects the use of a single intermediate in analogue photocopiers – the light sensitive drum or plate – and does not apply to all the series of steps used in digital copiers or digital MFMs.

54. The EC has tried to interpret the phrase "indirect process" broadly to disregard the rather precise description of the indirect process given in subheading 9009.12: "operating by reproducing the original image via an intermediate on the copy". Contrary to the EC arguments,[41] multiple indirect steps do not still qualify as an "indirect process;" the phrase "indirect process" refers to a specific type of technology well known in 1996, and only covers that technology, not the broader concept of any form of indirect process. Also contrary to the EC argument,[42] multiple devices do not qualify as "an intermediate;" an intermediate is singular, not plural. Moreover, an "intermediate" is a specific term referring to

38 EC Answers, at para. 17.

39 EC Answers, at para. 113, where the EC declines to provide a specific answer to a question about subheading 9009.12 and instead refers to an earlier generic answer.

40 In this regard, we also note the language of the current EC schedule, CN 8443.31.91, which covers MFMs as: "Machines performing a copying function by scanning the original and printing the copies by means of an electrostatic print engine." This recognition that digital copying is taking "the original" (singular) and using that single original to print "the copies" (plural). This "single original-multiple copies" technology is inconsistent with the "single original-single copy" technology described in HS96 subheading 9009.12.

41 EC FWS, at para. 372.

42 EC FWS, at para. 374.

the master print in a printing/reproducing process;[43] digital data does not constitute an "intermediate" as that term is used in subheading 9009.12.

3. The HSEN to heading 90.09 confirms that MFMs fall under the scope of heading 84.71 and do not fall under the scope of heading 90.09.

55. Based on the ordinary meaning of treaty language read in context – the heart of treaty interpretation under the WTO, the EC arguments fail. The other EC arguments based on other interpretative materials do not save this failed argument.

56. The HSEN to heading 90.09 is relevant, but the EC draws the incorrect conclusions from this HSEN.[44] Even if the language was drafted before digital copiers existed, that same language continued from its original drafting of this HSEN through to HS07 – strongly suggesting that the drafters did not see any confusion between digital copiers under heading 84.71 and analogue photocopiers under heading 90.09.

57. The EC efforts to parse the language of this HSEN actually confirm the interpretation Japan just presented above. The EC argues that the HSEN to heading 90.09 does not have the phrase "for each copy."[45] Yet as we have just discussed the language "the original image" and "the copy" in subheading 9009.12 – both the use of singular nouns, and the use of the definite article "the" – conveys this very same idea of a one-to-one correspondence between the image and the copy in analogue photocopying. The fact that the phrase "for each copy" was not added to the HSEN until 2007 does not in any way change the meaning of the language in subheading 9009.12 as it existed in 1996. To the contrary, this later clarification in the HSEN of how to distinguish "photocopiers" from "digital copying" reinforces Japan's interpretation.

58. Moreover, the EC's efforts to say that digital copying falls within the scope of "photocopying" as defined by the HSEN ignore the crucial distinctions. First, a CCD array does not constitute "a light sensitive surface." A light sensitive surface refers to a photosensitive drum or plate, which is a single surface. A CCD array does not consist of any single surface that can receive the optical image of an original document. Rather, a CCD array consists of numerous

---

43 Japan FWS, at para. 106.
44 EC FWS, at paras. 381-384.
45 EC Answers, at paras. 125-127.

diodes that convert photons of light into electrical impulses that become the digital signal.[46]

59. Second, the EC glosses over the importance of the remainder of the HSEN. The EC asserts that the enumeration of certain types of photocopiers does not preclude others.[47] But this argument misses a critical point. Digital copying cannot fall under the language of heading 90.09 and subheading 9009.12, because it is not "indirect process electrostatic photocopying" that involves projecting an optical image onto a drum or plate, and then making a photocopy onto plain paper from the photosensitive drum or plate, as the HSEN 96 to heading 90.09 specifies. This HSEN is relevant because it does not conflict with and rather confirms the ordinary meaning of the language of heading 90.09 and subheading 9009.12, as explained in Sections 1 and 2 above.

60. None of this argument should be surprising to the EC. In 1995, the EC itself made exactly the same arguments to distinguish between plain paper photocopiers subject to an antidumping order on photocopiers and digital copiers that were not.[48] The EC explained that:

> a digital copier does not 'project' an image onto a light-sensitive surface, but rather recomposes the original image, after it has been transformed by the image processor into digital signals, into a new image, with or without changes to the original image. It is this new image which is transmitted by a laser onto a light-sensitive surface. When digital copiers are connected to computers, they are not even dependent on an original document for their input.[49]

61. This notice serves two important points. First, the EC completely understood the meaning of the term "indirect process" in 1996 during the ITA negotiations, since the EC had just the year before focused on this specific issue. Second, the EC itself notes that digital copiers do not project an original image onto a light sensitive surface (an intermediate) but rather simply prints out an image recomposed from digital signals. That is precisely Japan's point here.

62. Japan recognizes that an EC determination in an antidumping case is not, strictly speaking, interpretative material itself. But in this instance, the EC commentary on the distinction between analogue photocopying and digital copying so closely tracks the arguments based on the ordinary meaning and

---

46 *See* Dr. Dennis A. Abramsohn, A comparison of photocopying to digital printing from hardcopy (Exhibit US-90).

47 EC FWS, at para. 384.

48 Oral Statement of Japan, 12 May 2009, at para. 20; s*ee* Exhibit JPN-24.

49 Exhibit JPN-24, at para 13.

context for heading 90.09, and occurred at a time so contemporaneous to the ITA negotiations, Japan believes this EC commentary bears particular note. The EC arguments in this WTO dispute about the scope of heading 90.09 fly directly in the face of the arguments the EC adopted in 1995.

D. The Other Interpretative Materials Presented By The EC Are Either Irrelevant Or Support Japan's Interpretation

63. Having largely ignored the language of heading 84.71 and having misinterpreted the language of heading 90.09, the EC offers a number of other arguments for interpreting this language. These arguments, however, miss the mark:

- The classification practice of a handful of member countries has little interpretative relevance under the *Vienna Convention*, and certainly the EC's own practice – which is what is being challenged in this dispute as WTO inconsistent – has no relevance.

- The WCO political votes on classification also have no interpretative relevance under the *Vienna Convention*, but the detailed factual and legal discussion provided by the WCO Secretariat as background for those debates and votes provides a neutral perspective that a panel may find useful and persuasive, much as a panel may find the reasoning of any earlier panel persuasive.

- The negotiating history of the ITA also has very little, if any, interpretative weight here. The conditions for invoking Article 32 of the *Vienna Convention* have not been met here. Even if it were considered, the negotiation history provides little support for the EC interpretations in this dispute.

- The EC arguments about the HS07 nomenclature actually support Japan's position. The HS07 nomenclature cannot change the scope of heading defined under the HS06 nomenclature. Yet the way in which the HSEN 07 distinguishes ”photocopying” and ”digital copying” is completely consistent with Japan's interpretation of these two phrases and utterly at odds with the EC's interpretation. The EC's emphasis on the new phrase ”for each copy” misses the mark, because this new language in the HSEN simply reflects a concept already inherent in the language used in subheading 9009.12 of the HS06 nomenclature.

1. The classification practice of member countries

64. The EC appears to place significant weight on the classification practice of a few member countries.[50] The EC seems to be relying on Article 31.3 (b) of the *Vienna Convention* concerning "subsequent practice" in the application of a treaty. Yet as the Appellate Body has made clear, subsequent practice only has interpretative weight when it is the consistent practice of many countries.[51] The EC arguments fail this test.

65. The practice of the EC has little if any weight. Japan and the other Complainants are challenging as WTO inconsistent the EC measures treating digital MFMs as dutiable. We find it rather remarkable the EC would stress its own WTO-inconsistent classification practice as relevant for deciding on the WTO consistency of the EC duty treatment.

66. The fact that some U.S. decisions prior to 1996 treated MFMs under heading 90.09 is also not particularly relevant to the issue at hand. Rather, the EC itself documents that the United States reversed this approach in early 1996 and thus had a position that MFMs belong under heading 8471 during the negotiation of the ITA. This hardly supports the EC position on the meaning of the key language in heading 84.71 and heading 90.09.

2. The WCO practice

67. The EC also tries to use the inconclusive political debate in the WCO as interpretative material.[52] At the outset, Japan notes that the lack of any consensus by the WCO Members on the meaning of the words in heading 84.71 and heading 90.09 does not change the interpretative task here – to give those words some meaning. We fail to see how the EC argument supports its interpretation of the language in dispute.

68. We agree that the WCO Secretariat does not have the authority to interpret the HS nomenclature. That is not our point. But this legal status does not mean the views of the WCO Secretariat have no relevance at all, as the EC argues.[53] The WCO Secretariat provides technical discussion and commentary that stands on its own merits. These comments reflect a neutral perspective, and thus provide a useful interpretative perspective to consider. Just as panels often look to the earlier decisions of panels on the same issue – not as precedent per se,

---

50 EC FWS, at paras. 385-399

51 Appellate Body Report, *EC – Chicken Cuts*, at para. 276.

52 EC FWS, paras. 397-399.

53 EC Answers, para. 111.

but to see if the earlier reasoning is persuasive or not – this Panel can review and consider the comments presented by the WCO Secretariat.[54]

3. The negotiating history of the ITA

69. The negotiating history of the ITA is not relevant here either. Treaty interpretation should be done pursuant to Article 31 of the *Vienna Convention*, and the preconditions for turning to Article 32 have not been met here.[55]

70. As little interpretative weight as the ITA negotiating history may have, the ITA II history has even less relevance.[56] Comments by various WTO members after the signing of the ITA are even more remote and irrelevant to the interpretation of the EC concession made pursuant to the ITA. Moreover, to use future negotiations – not finished agreements, but mere negotiations – after the fact to interpret prior tariff concessions would establish a very dangerous precedent that would chill future negotiations. It makes little sense to adopt interpretative principles that would make the participants worry about how the next non-paper they circulate might be used against them in some future WTO dispute.

4. The HS07 Nomenclature and HSEN 2007

71. We note the EC objections to using in any way the HS07 nomenclature. Japan itself had specifically noted that subsequent events – the changes in the EC Schedule to reflect the changes as part of the HS07 amendments – cannot change the scope of the concession.[57] Yet we find rather curious the adamant EC view that the HS07 cannot even be considered, particularly given the materials the EC is willing to consider as relevant for interpreting the concessions.

72. Japan's point is only that subsequent developments can help supplement one's understanding – not change, but supplement – the meaning of

---

54 We note the EC argument that some countries considered the WCO Secretariat comments to be "deeply flawed." EC FWS, at para. 399, fn. 275. We strongly disagree. If the Panel wishes, we would happily provide a more complete history of the debate in the WCO, which will show rather conclusively that the proponents of digital MFMs falling under heading 84.71 had the much stronger technical arguments, and that the proponents of digital MFMs falling under heading 90.09 had few if any technical arguments at all. Rather than burden the Panel with that detailed argumentation, we simply note that the EC has not articulated, cited, or documented any of these so-called "deeply flawed" comments by the WCO Secretariat.

55 Japan Answers, at paras. 31-32; U.S. Answers, at para. 30-31; TPKM Answers, at p. 8.

56 EC FWS, at para. 404-406.

57 Japan FWS, at para. 166.

the language used in the original concessions. The EC appears not to dispute this general point. After all, the EC has no problem discussing at length its own post 1996 interpretations of the meaning of heading 84.71 and heading 90.09.[58] Similarly, we note the EC itself quotes various marketing materials as relevant to the issue of whether digital copiers and photocopiers are the same or different and considers these arguments as part of ordinary meaning.[59] We submit that the HS07 is at least as relevant as subsequent EC practice and any general commercial literature, and reflects a broader range of perspectives.

73. Even conceding the EC point that HS07 represents a "hard fought compromise,"[60] there was a sufficient consensus on the meaning of the words "digital copying" and "photocopying" for the HSEN 2007 to draw a specific distinction between the two concepts. We believe that distinction in fact existed in the HSEN 1996 – for the reasons discussed above in Section III.C.2 – and was simply continued over into the HSEN 2007, only this time in more explicit terms.

74. The EC argues that HSEN 2007 was drawn more narrowly, and for that reason the HSEN 2007 added the phrase "for each copy" to heading 84.43.[61] The EC argument, however, fails for several reasons. First, as discussed above, the language of HS96 subheading 9009.12 already captures this notion. So regardless of what the non-binding HSEN said, the language of the concession itself reflect this same idea, albeit with different words. Second, the HSEN cannot change the scope of the headings and subheadings themselves. The EC has the order of interpretative significance backwards, stressing the language of the HSEN at the expense of the language of the concession. This is simply incorrect.

75. Finally, the EC interpretative logic is just too strained. The words "for each copy" in fact simply clarifies a point about the ordinary meaning of the word "photocopying." The technological distinction between analogue photocopying and digital copying reflects this point; analogue photocopying requires the optical image to be projected for each copy. Adding this phrase to the HSEN in no way changes the basic meaning of "photocopying." It simply confirms what the ordinary meaning of "photocopying" already establishes. Given this ordinary meaning, it is rather tortured to argue that adding the phrase "for each copy" to HSEN 2007 heading 84.43 somehow proves that HSEN 1996 was broader and had to be narrowed, and that therefore the language of the 1996 concession also had to be broader.

---

58 EC FWS, at paras. 387-389.

59 EC FWS, at para. 375.

60 EC FWS, at para. 408. *See also* EC Answers, at para. 123.

61 EC Answers, at paras. 125-127. *See* section II (B) (2) of the Explanatory Note to HS 2007 Chapter 84.

76. There is a much more direct and persuasive interpretative path. MFMs with digital connectivity fall, by the language itself, under Chapter 84, and more specifically under heading 84.71 as "units" of computers. Such MFMs connect to computers and take full advantage of all the options that come with digital files rather than a fleeting optical image of reflected light. It makes far more interpretative sense to simply recognize that such MFMs fall under heading 84.71, rather than embrace the rather tortured logic of a 2007 change in non-binding HSENs somehow confirming a broader reading of a 1996 non-binding HSEN, which then somehow changes the meaning of the concessions on heading 90.09.

E. Even if Heading 90.09 Were to Cover Digital Copying, MFMs with Computer Connectivity Would Still Fall Within Heading 84.71

77. The EC argues that if heading 90.09 covers digital copying, then heading 90.09 must include all MFMs unless the digital copying function is secondary.[62] This argument is wrong primarily because (as demonstrated above) the ordinary meaning of the language "photocopying" in heading 90.09 covers only traditional analogue photocopying and does not cover digital copying at all.

78. Even if the Panel were to assume hypothetically that heading 90.09 can include the digital copying function of MFMs, that does not end the analysis. MFMs are much more than digital copiers. The MFMs at issue in this dispute connect either to computers, computer networks, or telephone networks, and are not stand alone devices. Indeed, the digital copying function is nothing more than an incidental feature of other physical characteristics of these MFMs. Properly understood, these MFMs fall under heading 84.71 (or perhaps heading 85.17) even if the digital copying function alone might fall under heading 90.09.

79. The EC effort to elevate the primacy of the digital copying function and to downplay the more fundamental features of MFMs with digital connectivity represents fundamentally flawed treaty interpretation for several reasons:

- The EC purports to interpret heading 84.71 and the limits on heading 84.71 without ever grappling with the meaning of the language itself. Japan and the other Complaining Parties have provided the ordinary meaning of "units thereof" in heading 84.71 and "input or output units" in subheading 8471.60. The EC has ignored the ordinary meaning of these key terms, preferring to skip the language to the various contextual arguments.

62 EC FWS, at paras. 410-434.

- Note 5(D) of Chapter 84 strongly supports treating MFMs with digital connectivity as "output units" and "printers" under subheading 8471.60. An MFM is fundamentally a "printer," and the meaning of "printer" is not limited to single function printers. When thinking about the nature of a multifunctional device, it is entirely proper to think of that device as being the machine that performs the principal function of the device. This perspective fundamentally contradicts the EC interpretation that a "printer" can only be a single function printer.

- Note 5(B) to Chapter 84 does not change and in fact supports this interpretation. Even if Note 5(B)(a) applies (and we believe that under Note 5(D) it does not apply), MFMs with digital connectivity are in fact "of a kind solely or principally used" with computers. The intrinsic qualities of MFMs are basically those of a printer, and the existence of an incidental copying function does not change this reality. Moreover, empirical evidence confirms that the printing function (and particularly the printing and scanning function together) vastly exceeds the digital copying function of such devices.

- GIR 3(b) in fact supports this interpretation, and renders GIR 3(c) unnecessary and irrelevant. The "essential character" of the MFM is that of a printer, and the two key components of MFMs – printer module and scanner module – both fall under the "input or output units" of heading 84.71. It make no logical sense to argue that an incidental feature of combining printing and scanning – the additional ability to make digital copies – somehow trumps the "essential character" of printing and somehow gives the MFM a new essential character.

- Nothing in the ECJ decision in *Kip* changes this analysis. A decision under the EC's domestic law within its jurisdiction, *Kip* is of very limited relevance anyway. That limited relevance is to confirm that current EC practice is deeply flawed, and impermissibly ignores heading 84.71, and to confirm that most MFMs in fact probably fall within the rule of Note 5(B) as "of a kind solely or principally used" with computers, as specified in Note 5(B)(a).

80. Considering the language of heading 84.71, its ordinary meaning read in the context provided by the HS, the EC has failed to show that heading 84.71 does not cover MFMs with digital connectivity. To the contrary, the language of heading 84.71 confirms the opposite – that MFMs with digital connectivity do fall under heading 84.71. We believe the Panel can reach this

conclusion based solely on the ordinary meaning of heading 84.71 read in context. But to the extent the Panel explores the HS materials, doing so will just confirm this ordinary meaning of heading 84.71.

1. The EC has failed to consider the ordinary meaning of heading 84.71.

81. We find it curious that the EC argues about the scope of heading 84.71 without ever discussing the language of that heading or the subheadings.[63] The EC thus appears to concede our arguments about the ordinary meaning of the phrase ”units thereof” in heading 84.71 and the phrase ”input or output units” in subheading 8471.60. The ordinary meaning of this language covers MFMs with digital connectivity, and is in no way limited to specific technologies. This language focuses on the digital connectivity, and the ability to operate as input and output devices for computers. The EC has not disputed – and indeed, cannot dispute -- this fundamental point about the meaning of this key language.

82. This omission in the EC argument is quite significant. The EC has not offered a competing interpretation of the language in heading 84.71 and instead simply shifts the attention elsewhere. The EC tries to use context – the context provided by other headings such as heading 90.09, and the context provided by Chapter Notes – to override the ordinary meaning of the crucial language in heading 84.71 itself. Context can be used to understand better the meaning of text, but context cannot override the ordinary meaning of the text. Yet that is precisely what the EC attempts with its arguments that do not even discuss the ordinary meaning of heading 84.71 and instead focus exclusively on context.

2. Contrary to the EC argument, HS materials in fact support finding MFMs with digital connectivity to be within the scope of heading 84.71.

83. As noted above, Japan believes that the ordinary meaning of ”output units” in heading 84.71, read in the context of the ordinary meaning of ”photocopying” in heading 90.09 can resolve this dispute. But if the Panel assumes hypothetically that the digital copying function of MFMs might fall under heading 90.09, the contextual materials from the HS in fact confirm that such MFMs remain within the scope of heading 84.71.

(a) Note 5(D) to Chapter 84

84. The MFMs at issue can perform more than one function. That is precisely why they are called ”multifunctional.” Most such devices provide a

63 EC FWS, at para. 410.

printing function, a scanning function, and usually a facsimile function. Because the printing function and scanning function can work together, such devices also generally provide a digital copying function. The interpretative challenge is how to fit these multiple functions within the meaning of the language used in the EC concessions.

85. The HS can provide interpretative guidance. The Appellate Body has so recognized.[64] Moreover, all WTO members have agreed – through GIR 1 – that the language of the headings, plus the section and chapter notes, all have interpretative relevance. But the EC is wrong to assert that chapter notes have the same interpretative value as the headings themselves.[65] The heading is the treaty text to be interpreted. The section and chapter notes are simply context that helps interpret that treaty text. Even if the heading and the section and chapter notes have similar interpretative value under GIR 1 for tariff classification purposes, that conclusion does not mean that section and chapter notes have the same weight as the language of the heading.

86. Moreover, the Appellate Body has used HS materials holistically, drawing upon them and giving them weight based on their connection to the interpretative question at hand.[66] In this regard, Japan believes that Note 5(D) to Chapter 84 provides relevant interpretative guidance.

87. Note 5(D) to Chapter 84 directs that MFMs with digital connectivity – as "printers" – must fall within heading 84.71, as long as they meet certain conditions. Namely, if the MFMs as "printers" are (1) "connectible" to a computer, and (2) "able to accept or deliver data" to the computer or system, then the MFMs meet the requirements of Note 5(D) and must fall within heading 84.71.

88. A key issue is when a device should be considered a "printer." A device should be considered a "printer" when the device can function as a "printer" and the facts and circumstances demonstrate the device is more a "printer" than any other item. Japan has demonstrated at length that the MFMs at issue: (1) are designed and built around a printer unit that allows the outputting of information from the computer; (2) have a printer unit that is the largest and most important component; (3) have a printer unit that can operate independently of any other devices on the MFM; and (4) have a printer unit that represents the largest portion of the cost.[67] Under these facts and circumstances – completely unaddressed by the EC argument – the MFM is essentially a "printer."

---

64 Appellate Body Report, *EC – Chicken Cuts*, at para. 199.
65 EC FWS, at para. 412.
66 Appellate Body Report, *EC – Chicken Cuts*, at paras. 219-229.
67 Japan FWS at paras 91-97.

89. The EC claims this argument is to assume the conclusion,[68] but the EC has misunderstood the argument. The EC is engaged in a classification inquiry, following the analytic steps of classification and applying HS rules in a mechanical fashion. WTO treaty interpretation under the *Vienna Convention* is a different exercise that considers text, context, and object and purpose more holistically to understand the meaning of the language at issue – in this case, the meaning of the word ”printer.”

90. We note that contrary to the EC argument,[69] nothing in the HSEN 96 to heading 84.69 supports the EC argument that ”printer” means ”single function printer.” Rather, this HSEN makes clear that ”keyboardless machines (printers)” that might otherwise be considered as automatic typewriters under heading 84.69 in fact become ”printers” falling under heading 84.71 if they meet the conditions set out in Note 5(D) of Chapter 84. The term ”printer” does not directly address the distinction between single function printers and multiple function printers. Inherent in the word ”printer” is the notion that a device that is essentially a ”printer” does not automatically become something else because of some other functions. The meaning of the word ”printer” does not have any such bright line as advocated by the EC.

91. This interpretation of the word ”printer” finds strong contextual support in Note 3 to Section XVI. This Section Note provides interpretative guidance for headings in Chapter 84 and Chapter 85, and thus represents relevant context for understanding heading 84.71 and the Note 5 to Chapter 84. Note 3 confirms the common sense notion that when deciding what a multifunction device should be considered to be for purpose of the tariff nomenclature, the focus should be on the ”principal function” of the device at issue. More specifically, Note 3 provides:

> Unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines adapted for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or *as being that machine which performs the principal function.* (emphasis added)

92. Thus Note 3 helps confirm the notion that a device will in fact be a ”printer” as long as the device functions principally as a printer. The addition of other features or other functions does not change the fundamental nature of the device as a printer.

---

68 EC FWS, at para. 421.

69 EC FWS, at para. 421, fn. 291. We note that nothing in Exhibit EC-77 addresses this distinction between single function printers and multifunction printers.

93. Moreover, Note 3 decisively rejects the EC view that a device is either a "single function" printer or it cannot be a "printer" at all. Such an approach is not consistent with the common sense understanding of the meaning, i.e., ordinary meaning, of "printer," which inherently focuses on the ability of a device to be – to function as – a printer. Nor is such an approach consistent with the explicit guidance of Note 3 to focus on the "principal function" of a composite machine that may have many functions.

94. Japan notes that regardless of frequency of actual use,[70] printing and scanning are the objective characteristics of an MFM, and digital copying is an incidental function that occurs because of these core objective characteristics. Printing and scanning are the tangible features of MFMs that provide the core functions that can operate on their own. A preexisting digital file can be printed. An original document can be converted into a digital file and then stored. The digital copying function simply reflects the fact that the printing and scanning functions can be combined. Both the printing and scanning functions – and the equipment that makes these two functions possible -- fall squarely within heading 84.71 as "units" of a computer.[71] This device does not cease being a "unit" of a computer simply because these two functions operating together – with no additional equipment – can also provide a digital copying function that can mimic analogue photocopying.

95. Put another way, the EC argument assumes erroneously that the possible use of the device as a digital copier can somehow trump its objective characteristics. An MFM has a printer unit to output digital files as paper documents. It also has a scanner unit to create digital files from paper originals. So the printer unit can be used either to output digital files that already exist, or to output those digital files that are being created by the scanner. In both instances, the objective characteristics confirm the device as a "printer." The device has the potential also to be used as a digital copier, but may or may not ever be used as such. The device could be used only as a printer, outputting digital files as necessary. Or the device could be used only as a scanner, to create digital files to replace bulky paper. The objective characteristics of the device are principally as

---

70 Although the actual use of the device is not strictly speaking relevant for determining the scope of a tariff concession – the objective characteristics of the device control – we note that US Exhibit-88 provides the results of a recent survey on the use of multifunction devices that confirms that the printer function is the principal function of MFMs. For a wide variety of situations, the printing function is predominate. This evidence – which has been neither rebutted nor even addressed by the EC – confirms that MFMs in fact function principally as printers, and as such should be deemed to be "printers" for purposes of heading 84.71. This evidence of use confirms the more basic points about the intrinsic qualities of MFMs that make them "printers."

71 See Japan FWS, at paras. 91-102 and Japan SWS para. 99.

an "output unit" as a "printer." The Appellate Body has focused on the objective characteristics of the device, not its actual use and the objective characteristics of this device – the printer unit and the scanner unit – are both either directly or indirectly part of the device as a "printer." The other functions do not change these objective characteristics.

96. The EC tries to downplay the significance of Note 3 to Section XVI,[72] but in doing so misunderstands the distinction between mechanical application of rules for tariff classification and holistic application of context for WTO interpretation. For purpose of interpreting treaty text under the *Vienna Convention*, it would make little sense to ignore Note 3 – which applies to Chapter 84 and Chapter 85 – as context for understanding heading 84.71. Moreover, even if Note 3 does not strictly speaking apply, the common sense logic that underpins Note 3 would apply in any event to find the ordinary meaning of a treaty term. Note 5(D) to Chapter 84 – whether considered alone, or considered in the context of Note 3 to Section XVI – strongly supports treating MFMs with digital connectivity as falling within the scope of heading 84.71.

(b) Note 5(B) to Chapter 84

97. The EC places great weight on Note 5(B) to Chapter 84, and tries to use Note 5(B) to justify its current practice as case by case examination of MFMs to decide whether they are dutiable or not.[73] These arguments, however, both misconstrue Note 5(B) and ignore the evidence before the panel.

98. At the outset, we note that Note 5(B)(a) need not technically apply to the MFMs at issue. The duty-free status of the MFMs in dispute is to be decided by Note 5(D) to Chapter 84, as discussed above. Since these MFMs are "printers," under Note 5(D) the rule of Note 5(B)(a) does not apply.[74]

99. But since treaty interpretation is holistic and not mechanically sequential, let us consider Note 5(B) in its entirety, including the "solely or principally" rule of Note 5(B)(a). Even considering this "solely or principally" rule, we believe that MFMs with digital connectivity should still fall under the same heading 84.71 as a unit of the computer. It is clear that MFMs with digital connectivity comprising a printer module and a scanner module satisfy all three conditions of Note 5(B). The MFMs at issue can connect to a computer (the rule

72 EC Answers, at paras. 78-80.
73 EC FWS, at paras. 412-422.
74 Japan FWS, para. 151. Oral Statement of Japan, at para 29.

of sub-paragraph (b)) and MFMs can accept or deliver the computer data (the rule of sub-paragraph (c)). The EC has conceded as much.[75]

100. The only issue is whether the MFMs also satisfy the rule of sub-paragraph (a). They do satisfy this rule as well. First, the printer module is the most important part of the device.[76] This centrality of the printer module to the overall device – which serves to allow the device to print computer output – strongly supports the view that MFMs are "principally" used for a computer, even if they may have other uses as well.

101. Second, since Note 5(B) focuses on the intrinsic qualities of the device, not how it actually is going to be used, the printer module is the "principal" use of the device. Note 5(B)(a) requires only that the device be of "a kind" principally used with a computer. In other words, the device need not actually be used principally with a computer. Similarly, Note 5(B)(b) requires only that the device be "connectable," not that it actually be connected, and Note 5(B)(c) requires only that the device be "able" to accept or deliver signals. The rule of Note 5(B)(a) thus follows the Appellate Body logic in *EC-Chicken Cuts*, that it is necessary to look to the product based on its objective characteristics at the time it crosses the border.[77] So even if a particular MFM might actually be used more often in some non-computer use, the device would still belong under heading 84.71 since it is "a kind" principally used with a computer based on its objective characteristics.

102. Third, even though the digital copying function of an MFM does not involve a computer, that digital copying function could never turn the device into "a kind" of unit that is not used principally with a computer. The EC logic mistakenly assumes the digital copying process of such an MFM is a unitary function. It is not. The digital copying function exists only because of underlying – and more intrinsic – printing and scanning functions. The equipment and technology serves to allow printing and scanning. The printing function goes beyond the mere digital copying process because the printing process may print digital data from an ADP machine. Likewise, the scanning function also goes beyond the mere digital copying process because the scanning process may accompany transmitting scanned data to an ADP machine. Thus digital copying is secondary to the more fundamental printing or scanning functions. Most of the printing and scanning functions in MFMs are performed with an ADP or ADP system, which confirms that MFMs are intrinsically devices "of a kind" principally used with computers.

---

75 EC FWS, at para. 415.

76 Japan FWS, at paras. 91-95.

77 Appellate Body Report, *EC-Chicken Cuts*, at para. 246. The EC concedes this point. EC FWS, at para. 419 (citing the Appellate Body decision in *EC-Chicken Cuts*).

103. Fourth, the empirical evidence before the Panel in fact shows that MFMs are used principally with computers. The results of the survey on the use of multifunctional office devices before the Panel confirms they are actually used principally in conjunction with computers – either as a printer (output unit) or a scanner (input unit).[78] Even if evidence of the actual use is not strictly speaking necessary for the interpretation, the evidence strongly supports the arguments about the centrality of the printer module, and the intrinsic qualities of the device. Even if some users do not use the device principally with a computer, the device remains of "a kind" to be used principally with computers.

104. Finally, we note the interpretative interplay between Note 3 of Section XVI and Note 5(B)(a) of Chapter 84. Both of these notes point to the notion of "principal" function or use. These two notes should be read holistically, since they address very similar concepts. Given these two reinforcing concepts as context for reading the language of heading 84.71, it makes even less sense to engage in mechanical application of classification rules about what rule is considered before some other rule. Both of the these notes point to the same underlying principle of considering the intrinsic nature of the device, and allowing the "principal" purpose of the device to determine its nature, and ultimately its dutiable status.

(c) The limited relevance of GIR 3

105. The EC also relies heavily on GIR 3, arguing that because the headings, chapter notes, and section notes do not resolve the issue, the mechanical rule of GIR 3(c) must come into play.[79] These arguments fail on many levels.

106. First, the EC is applying a mechanical, sequential approach[80] that is utterly at odds with proper holistic consideration of context as required to interpret treaty text in accordance with the *Vienna Convention* and Appellate Body guidance.[81]

107. Second, the EC too quickly dismisses GIR 3(b), which in fact supports the interpretation developed above based on Note 5 to Chapter 84 and Note 3 to Section XVI. GIR 3(b) requires focus on the component that provides the "essential character" of the device. As discussed in Japan FWS,[82] the MFMs at issue: (1) are designed and built around a printer unit that allows the outputting

78 Exhibit US-88.
79 EC FWS, at paras. 435-441.
80 EC FWS, at para. 436.
81 Appellate Body Report, *EC-Computer Equipment*, at para 88-89; Appellate Body Report, *EC-Chicken Cuts*, at paras 194-199.
82 Japan FWS, at paras. 91-96.

of information from the computer; (2) have a printer unit that is the largest and most important component; (3) have a printer unit that can operate independently of any other devices on the MFM; and (4) have a printer unit that represents the largest portion of the cost. Under these facts and circumstances – although it is completely unaddressed by the EC argument – the MFM is essentially a "printer."

108. Moreover, although the printer unit gives the MFMs their "essential character," the scanner unit reinforces this conclusion. As discussed earlier, MFMs with digital connectivity have two key components – a printer module and a scanner module – which separately and together provide most of the functionality of the MFM. The printer module places the device under heading 84.71 but the scanner module also would place the device under heading 84.71. The fact that both of the key components point to the same heading – both are "units" of computers under heading 84.71 – strongly reinforces an interpretation that places MFMs under this heading.

109. The EC tries to argue that "print engine" is not the same as a "printer."[83] But this statement is not true. The printer module of an MFM can and does operate as a "printer" – it can connect to and print the output from a computer. Whether some components of the printer module may or may not be used in other devices does not change the fact that the printer module of the MFM is in fact a fully functional "printer" and it is that printer module that gives the device its essential character.

110. Thus, even considering GIR 3, one need never reach the mechanical rule of GIR 3(c) to simply pick the heading last in numerical order. The interpretative guidance provided by Note 5 of Chapter 84, Note 3 of Section XVI, and GIR 3(b) all point – both individually and collectively – to a view that MFMs with digital connectivity fall under heading 84.71. It is simply not possible – within the framework of holistic interpretation of context – to ignore all of this guidance pointing to heading 84.71 and instead invoke GIR 3(c) to place these MFMs under heading 90.09. Indeed, this interpretative exercise underscores the fundamentally flawed nature of the EC measures and practice by relying heavily on GIR 3(c).

(d) The ECJ decision in *Kip* does not change this analysis.

111. As noted above, Japan believes that the ordinary meaning of "output units" in heading 84.71, and indeed the *Kip* decision in fact reinforces this interpretation of heading 84.71. Even if the Panel assumes hypothetically that digital copying can fall under heading 90.09 (an error the ECJ also made), the *Kip*

83 EC FWS, at para. 439.

decision in fact agrees that most MFMs are likely to be of a kind used principally with computers, and thus are likely to be covered by heading 84.71.

112. The EC tries to use the ECJ decision in the *Kip* case to justify its argument that Complainants have an affirmative burden to show the digital copying function is secondary, and that otherwise MFMs belong in heading 90.09.[84] But *Kip* simply does not provide the decisive and definitive guidance the EC would like to attribute to this decision.

113. At the outset, Japan must note two important limitations on *Kip*. First, the ECJ's judgment in that case is merely the national practice of a single member to the WTO, and thus should be treated as such. Second, Japan believes that the ECJ decision erroneously presumes that digital copiers can be photocopying apparatus under heading 90.09. Japan strongly disagrees with this premise and believes that the primary question for the Panel is to determine the validity of this premise.

114. That being said, Japan notes that nothing in the *Kip* decision changes the interpretation set forth above based on Note 5 to Chapter 84. First, the *Kip* decision rejected current EC practice which was to ignore heading 84.71. In this sense, the ECJ agrees with the Complainants that the rigid refusal even to consider heading 84.71 is just wrong, even under EC law. The fact that the EC may now be considering how to fix this problem does not eliminate the WTO inconsistencies of its current approach.

115. Second, the *Kip* decision rested heavily on Note 5(B)(a) and the notion of the device being "of a kind solely or principally used" with computers. As we discuss above, Note 5(B)(a) actually supports the conclusion that MFMs fall under heading 84.71. Indeed, that is why the ECJ found – and Japan agrees with the *Kip* decision when it states – that:

> [i]n the present case, it is apparent from the description of the characteristics of those machines that most of the functions which they perform, that is to say, printing and electronic scanning, can be used only in connection with an automatic data-processing machine. Accordingly, those machines are likely to be of a kind used principally in an automatic data-processing system.

116. Considering the similarities of the products concerned in the *Kip* case and those in this case, the above interpretation could be applicable to this case. In other words, *Kip* recognized that MFMs with digital connectivity "are likely to

---

84 EC FWS, at paras. 417-418.

be of a kind used principally in an automatic data-processing system." Such devices automatically fall under heading 84.71, even under the ECJ decision.

117. Finally, we also note that the ECJ in the *Kip* case found that MFMs are composed of two components, a printer module and a scanner module. This approach contrasts with the EC effort in its FWS to breakdown the MFM into more discrete components: a print engine, a scanning device, a modem and a print controller.[85] The ECJ approach makes more sense for the following reasons.

118. It makes no practical sense to separate the print engine from the print controller. The print engine itself does not have any ability to function independently. Rather a print engine can work only with a print controller as a printer module. No device would have a print engine without a print controller, since the print engine alone simply could not operate and would thus serve no purpose. The printer module is the functional unit.

119. Moreover, GIR 3(b) requires that composite goods shall be classified according to the component that gives them their essential character. The "essential character" of a machine can be derived only from a component that can perform independently – like a printer module. It cannot be derived from the "print engine" alone, which cannot operate and thus cannot give a machine its "essential character."

120. For these reasons, the *Kip* decision does not really influence the Panel's interpretative task here. At most, *Kip* actually reinforces the interpretative argument that Japan has presented – that MFMs with digital connectivity are properly within the scope of heading 84.71. None of the statements in *Kip* override the facts and analysis that the Complaining Parties have presented to show that MFMs with digital connectivity have as a "principal function," as a "principle use," and as an "essential character" printing the output of computers.

F. MFMs with Facsimile Function but without Digital Connectivity Are Also Entitled to Duty-Free Treatment Under Applicable EC Concessions.

121. As Japan has argued from the outset, this dispute involves the two categories of MFMs – those that are input/output units of computers covered by the EC concession on subheading 8471.60 and those that are facsimile machines covered by the EC concession on subheading 8517.21. The key difference between these MFMs is the connectivity to a computer. As a practical matter, a multifunctional device is either a printer (if it connects to a computer) or a facsimile machine (if it has a fax function but does connect to a computer).

---

85 EC FWS, at paras. 334-336.

Therefore, MFMs without digital connectivity are covered by the EC duty-free concession on HS 8517.21.

122. As with MFMs with digital connectivity, the EC never really addresses the language of the key concession at issue, the concession on heading 85.17. Rather than address the language and its ordinary meaning, the EC simply jumps ahead to assume that both heading 85.17 and heading 90.09 are equally applicable, and therefore GIR 3(c) must apply.[86]

123. Yet the premise of this argument – that heading 90.09 applies at all – is flawed. The earlier arguments in Section III.C that MFMs based on digital technology cannot fall under heading 90.09 apply equally to both MFMs with digital connectivity and those with a facsimile function. All MFMs – whether connectable to a computer or not – use digital technology to scan documents and use digital technology whether printing computer output or printing out an incoming facsimile. None of these MFMs use the "one original-one copy" technology that characterizes analogue photocopying.

124. The EC argument stresses the existence of the copier function on MFMs with a facsimile function,[87] but in doing so misunderstands the various functions of these devices. Even assuming hypothetically that heading 90.09 could cover digital copying, that would not mean that heading 90.09 covered such MFMs. MFMs with a facsimile function are much more than digital copiers. As discussed earlier for MFMs with digital connectivity,[88] digital copying is simply an incidental function that results from the need for such MFMs with a facsimile function to have both a scanner unit to input an original document to send as a facsimile and a printer unit to output an incoming facsimile. Both the scanner and printing functions are essential for the device to be able to function as a facsimile machine. It is these scanning and printing functions that define the device as essentially a facsimile machine. The existence of some additional function of digital copying does not change the essence of the device as a facsimile machine.

125. Put another way, the EC argument assumes erroneously that the possible use of the device can trump its objective characteristics. An MFM with a facsimile function has a scanner unit to input documents to fax, and a printer unit to output documents that are being received. The device has the potential also to be used as a digital copier, but may or may not ever be used as such. The device could be used only as a facsimile machine. The Appellate Body has focused on the objective characteristics of the device,[89] and not its actual use and the objective

86 EC FWS, at paras. 449 and 451.
87 EC FWS, at para. 446.
88 *See* Section III.C.1.
89 Appellate Body Report, *EC-Chicken Cuts*, at para 246.

characteristics of this device – the scanner unit and the printer unit – are essential for the device to be a facsimile machine. The other functions do not change these objective characteristics.

126. The EC tries to elevate the copying function of the device,[90] but in doing so the EC argument misses the point. The printing or copying speed of the device is irrelevant to its proper duty treatment. Neither the language of heading 85.17 nor the language of heading 90.09 focuses on the speed of output. The products have improved and the output speed has increased is simply irrelevant to the concessions at issue.

IV. THE EC MEASURES CONCERNING FLAT PANEL DISPLAY DEVICES ”FOR” ITA PRODUCTS ARE INCONSISTENT WITH EC'S OBLIGATIONS UNDER ARTICLES II:1(A) AND II:1(B) OF THE GATT 1994.

A. The Products and Measures at Issue.

127. The EC has argued that the Complaining Parties have not sufficiently made a *prima facie* case. Yet in doing so, the EC is trying to limit this dispute improperly to a case-by-case assessment of specific models and import transactions, when the dispute is really about EC measures that treat many flat panel display (”FPD”) devices as dutiable products that should be duty-free under the applicable EC concessions.

128. In a sense, the EC is trying to resurrect an argument it made and lost in *EC – Computer Equipment*. In that case, the EC argued that DSU Article 6.2 required such case by case determinations, an argument the Appellate Body rejected.[91] The EC now uses a comment from that case it perhaps thinks is necessary ”to identify the products subject to the measures” as a basis to revive its old argument.[92] The need to define the product at issue does not require panels to turn every dispute over tariff concessions into a burdensome review of hundreds or thousands of specific models or transactions. Those concerns that motivated the Appellate Body decision to reject the EC argument in *EC – Computer Equipment* apply with equal force here[93].

129. None of the specific EC arguments have merit. Japan has properly defined both the products at issue and the measures at issue. The EC erroneously

---

90 EC FWS, at para. 448.
91 Appellate Body Report, *EC – Computer Equipment*, at para. 67.
92 EC Answers, at para. 86.
93 Appellate Body Report, *EC – Computer Equipment*, at para. 71.

assumes that not collecting the duties somehow avoids the WTO inconsistency when it does not. Japan has also identified the specific aspects of the EC measures that necessarily lead to a WTO inconsistency. The various EC arguments are simply efforts to distract the Panel from the core issues in this dispute – the EC insistence that certain FPD devices should be dutiable (even if the duties have been suspended), rather than recognizing that these FPD devices are entitled to duty-free status.

1. Identification of the products at issue.

130. The Appellate Body stated quite clearly that "Article 6.2 does *not* explicitly require that the products to which the "specific measures at issue" apply be identified."[94] Rather, what is important is that the products must be identified only if and to the extent necessary to identify sufficiently the claim at issue. In this case, the claim is not defined by the universe of individual, specific products that may or may not fall within the language of the concession in dispute. Rather, it is sufficient to define the type of products that fall within the language of the concession. To show what types of products fall within the language of the concession, it is sufficient to show that the scope of the concessions at issue covers some products subject to duties based on the EC measures at issue. Once it is shown that some products fall within the language of the concession, and that the EC measures necessarily impose duties on the products, Japan has established a *prima facie* case that the measures "as such" violate the concession. As discussed later, Japan successfully meets the requirements. Therefore it is not necessary to specifically define the products at issue in this case, much less necessary to provide an exhaustive list of all conceivable individual products that may or may not violate the concession.

131. That being said, and contrary to the EC argument,[95] Japan has in fact specifically defined the product at issue: "flat panel display devices" capable of operating with a computer or some other non-computer ITA products. This product scope covers those FPD devices that are:[96]

- "output units" of ADP machines under concessions made pursuant to Attachment A that include heading 84.71; and

- "for" ADP machines and other ITA products under the EC concessions made pursuant to Attachment B; concessions made pursuant to Attachment B include both FPD devices for ADP

---

94 *EC – Computer Equipment,* para. 67.

95 EC FWS, at paras. 39-40.

96 Japan FWS, at paras. 216-218. Japan Answers, at paras. 123-127.

machines and FPD devices for other ITA products other than ADP machines.

132. The EC efforts to read ambiguities in this statement of the products covered by the claims are misguided.[97] Japan has illustrated its claim with a discussion of LCD technologies, but Japan has not limited its claim to that of LCD technology. Similarly, Japan has discussed DVI as a leading example of an interface technology, but has not limited its claim just to FPD devices with DVI. As Japan confirmed in its answers to Panel questions, the claims include all FPD devices that are capable of operating with a computer or some other non-computer ITA product,[98] without regard to whether they can also operate with some other non-ITA device (such as a television receiver).

2. Japan has properly defined the concessions and the measures at issue.

133. Japan has also properly defined the concessions and the measures at issue. The parties all agree on the key documents that create the EC concessions that are at issue here.[99] The parties also apparently agree that the various EC measures are related to the EC decision to assess duties on certain products. The alleged failure to identify the concession is simply not true.[100] Japan identified the specific EC concessions at issue.[101] It is the EC's concessions rather than the ITA that is the legal basis for Japan's claims.

3. Japan has met the requirements for an "as such" claim.

134. Contrary to the EC argument,[102] Japan has identified the features that necessarily lead to a WTO inconsistency. We note that this dispute involves tariff concessions, and whether certain products should be treated as dutiable or not. For such measures, the EC suggestion[103] that complainants must prove that every single model – or every single transaction – has been subject to duties improperly based on case-by-case consideration of all the characteristics at issue in each situation cannot find any foundation in the *WTO Agreement* and its jurisprudence.

---

97 EC FWS, at para. 40.
98 Japan Answers, at para. 127.
99 EC Answers, at para. 20. Japan Answers, at para. 17.
100 EC FWS, at para. 51. EC Oral Statement, at para. 18.
101 Japan FWS, at para. 262 (Attachment B); para, 295 (Attachment A).
102 EC FWS, at paras. 64-70.
103 EC Answers, at para. 84.

135. *China – Auto Parts* confirms this view. The EC cites[104] two paragraphs that use the words "always" and "necessarily" but in doing so misses the main point of *China – Auto Parts*. Paragraph 7.584 cited by the EC for "always" and paragraph 7.588 cited by the EC for "necessarily" in fact show that an element of a challenged measure that requires a certain classification and duty treatment – for example, the repeated EC measures that any FPD device that can receive a signal from a non-ITA product must fall outside the concession[105] – can require classification and duty treatment that is consistent with the terms of a particular concession. Neither these paragraphs nor any other part of *China – Auto Parts* supports the EC argument that every application regarding every model of a particular product must be shown to be inconsistent. Indeed, elsewhere in *China – Auto Parts* the Panel noted explicitly that it need only determine whether "any aspect of the criteria set out in the measures will necessarily lead to a violation."[106]

136. The EC argues that the Complainants have not defined the product at issue sufficiently precisely, and have identified only one of many possibly relevant characteristics,[107] but this argument fundamentally misunderstands the issue. The EC apparently believes it is making case-by-case determinations based on variable product characteristics, but in fact the EC measures on their face reflect a rigid rule that excludes from duty-free treatment those FPD devices capable of receiving a signal from some non-ITA product, such as televisions. These measures thus constitute an as such violation of EC WTO obligations to accord these products duty-free treatment.

137. Japan has made clear the scope of the concessions. Indeed, the scope of the concessions on FPD devices made pursuant to Attachment A and Attachment B can be defined based on the language of those concessions. The concession pursuant to Attachment A covers those FPD devices that qualify as "output units" of computers.[108] The concession pursuant to Attachment B covers those FPD devices that are capable of operating with any ITA product, which includes those capable of operating with a computer.[109]

138. Japan has also made clear the scope of the FPD devices improperly subject to duties based on the EC measures at issue. For example, Council Regulation (EC) No 493/2005 of 16 March 2005 makes quite explicit that even

---

104 EC Oral Statement, at para. 37.

105 Japan FWS, at paras. 243-250.

106 Panel Report, *China – Auto Parts*, at para. 7.540.

107 EC Answers, at para. 84.

108 Japan FWS, at paras. 295-302. Japan Answers at paras. 123-127. Japan SWS at Section IV.D.

109 Japan FWS, at paras. 266-269. Japan Answers at paras. 123-127. Japan SWS at Section IV.C.

though a FPD device was mainly to be used as an "output unit" for a computer, that FPD device would still be subjected to duties simply because it was also capable of receiving some other signal.[110] The EC applied the same logic in Commission Regulation (EC) No 2171/2005 of 23 December 2005,[111] finding that because the FPD devices at issue could receive signals from devices other than a computer, such FPD devices were subject to duties. Such a rule directly contradicts the language of the concession pursuant to Attachment A that all "output units" should be duty-free. Such a rule also directly contradicts the concession pursuant to Attachment B that all FPD devices capable of operating with an ITA product, which includes computers, should be duty-free.

139. Having described the scope of the duty-free concessions, and having shown that many FPD devices that are in fact properly within the scope of the concessions but are being systematically excluded from duty-free treatment, Japan has made out a *prima facie* case for its "as such" claim in this dispute. The fact that the measures may exclude some FPD devices properly does not save the measures. The fact that the measures necessarily exclude FPD devices specified by certain features – in other words, a FPD device that would otherwise be duty-free is excluded because it can receive a signal from a non-ITA product – establishes the "as such" violation.

140. Although the EC argues that the measures at issue do not apply a single criterion,[112] they actually do apply a single criterion. For example, the EC necessarily impose duties on FPD devices provided that they can receive a signal from other non-computer devices, without regard to any other specification. That EC rule emerges quite explicitly from the various EC measures at issue – this single characteristic is an automatic disqualifier.[113] The EC apparently believes that by discussing other product characteristics in the measures, the measures somehow become WTO-consistent and that the WTO inconsistent disqualifier is somehow neutralized. The fact that the measures acknowledge or discuss other characteristics, however, does not change the WTO inconsistency of the automatic disqualifier that systematically excludes FPD devices based on their ability to receive signals from other non-ITA products.

4. The decision to suspend duties does not eliminate the WTO inconsistency.

141. The EC erroneously argues that the current suspension of duties eliminates the inconsistency between its measures and the concessions under the

110 Japan FWS, at paras. 228-230. See Exhibit JPN-19.
111 Japan FWS, at paras. 225. Exhibit JPN-17.
112 EC FWS, at para. 68. EC Answers at para. 84.
113 Japan FWS, at paras. 219-230.

WTO.[114] As TPKM has explained persuasively,[115] however, the EC's suspension of duties is temporary and conditional. In contrast, the EC's concessions on FPD devices are neither temporary nor conditional. WTO Members are entitled to legal certainty of the EC's duty free treatment, not only of the duty suspension. The violation of Article II of the GATT 1994 thus remains and has not been eliminated.

5. The EC's argument that some of the measures at issue are invalid and irrelevant to this case is without foundation.

142. The parties may disagree about whether some of those measures are still in effect. Japan cannot confirm that they have no legal effect unless and until the EC presents sufficient evidence that the measures have been formally repealed and rendered null and void under EC law. Indeed, the EC itself has now acknowledged that some of the superseded measures continue to have interpretative value.[116] Moreover, even if they are no longer in effect as a legal matter, the prior measures and EC practice in applying those measures help explain the current version of the measure at issue.[117]

B. Relationship of the Concessions Pursuant to Attachment A and Attachment B.

143. Obligations in tariff concessions made pursuant to the description of products in Attachment A and those made pursuant to the description of products listed in and for Attachment B are legally independent of each other, and both must be respected. Thus, remedies granted to the complaining parties may differ depending on which concessions the Panel relies. The Panel needs to consider both, and should not exercise judicial economy.

C. Contrary to the EC Argument, the Concessions Pursuant to Attachment B Cover Flat Panel Display Devices "For" Products Covered by the ITA, Including Flat Panel Display Devices Capable of Operating With a Computer, Regardless of Whether They Can Receive a Signal from Other Devices.

144. The EC tries to narrow the scope of its concession pursuant to Attachment B. At its heart the EC argument is that because the concession on CRT monitors carved out those devices that could receive a signal from other non-ITA products (such as TVs), and because FPD devices have now largely replaced CRT monitors, then the limitations that applied to CRT monitors must now apply

114 EC FWS, at para. 62-63.
115 TPKM Oral Statement, at para. 15.
116 EC Answers, at para. 105.
117 Japan Answers, at paras. 46-47.

to FPD devices. The various EC arguments about ordinary meaning and context all try to support this basic argument.

145. Yet the EC cannot avoid the fundamental problem that this argument cannot be reconciled with the ordinary meaning of the text of the concession or the context. The key term "for" ITA products cannot be narrowed to "only for" or "mainly for" – these limiting words are simply not part of the relevant text. Nor does the EC contextual argument help. The EC draws the incorrect conclusion from the concession on CRT monitors, which actually highlights the absence of the very carve-out the EC wishes to read into the concession on FPD devices made pursuant to Attachment B. Having made the carve-out for CRT monitors, the absence of any such carve out for FPD devices speaks to the importance about the ordinary meaning of that language in context.

146. The other EC arguments do not save its flawed interpretation of the concessions. The *Kamino* decision just underscores the legal errors of the current EC measures. Moreover, the EC arguments on object and purpose highly serve to the extreme unpredictability of the EC approach. Rather than focus on the meaning of the language, which is stable over time, the EC tries to shift the focus to the changing products and technologies. This unpredictability in the EC approach is utterly at odds with the object and purpose of the *WTO Agreement* and GATT 1994, pursuant to which the EC made the concession at issue here.

1. The EC improperly ignores the ordinary meaning of the language of the concession on "flat panel display devices" made pursuant to Attachment B.

147. The language of Attachment B concerning FPD devices is straightforward and has a readily ascertained ordinary meaning. As Japan discussed in its First Written Submission, the key term is "for," and when a FPD device will be deemed to be for a computer or some other ITA product.[118] The EC deems many FPD devices that are "for" computers to be dutiable, and in doing so has ignored the obligations in its tariff concessions.

148. The EC tries to create ambiguity about the text where there really is none.[119] The EC argument makes several errors. First, the words of the concession have an ordinary meaning. The EC asserts there is something special about the language of this concession "within the meaning of the EC Schedule and the ITA,"[120] but in making this argument, it is the EC that is trying to graft context

---

118 Japan FWS, at paras. 262-270.
119 EC FWS, at paras. 105-106.
120 EC FWS, at para. 106.

and its own expectations onto the ordinary meaning of the words. The words mean what they say.

149. Second, the EC confuses the meaning of the language with the nature of the products. The language has its own meaning, regardless of the differences in specific products that may or may not be covered by that language. As a matter of interpretation, one must start with the language and ascertain its meaning. Only then can a specific product be evaluated to see whether it falls within the meaning of the language.

150. Thus, the EC is attacking a single sentence out of context,[121] when Japan's argument about the ordinary meaning is quite clear and straightforward. First, LCD monitors are "flat panel displays" – indeed, the language of the Attachment B product description itself lists LCD technology as an example of FPD devices. Second, FPD devices that are capable of operating with a computer – the definition of the products at issue in this dispute – will by definition be "for" the display of data from an ADP machine. There may be other LCD devices that are not capable of operating with a computer (or with any other ITA products) – we do not dispute that point[122] – and they would not be covered by the EC concessions in Attachment B. But the products covered by this dispute, including the examples Japan presented in Exhibit JPN-15, are exactly covered by the EC concessions.

(a) The ordinary meaning of "for"

151. The central interpretative dispute is about the ordinary meaning of the term "for," in the phrase "devices…for products falling within" the ITA. The EC misinterprets the meaning of "for" products falling under the ITA.[123] The EC asserts the term "for" could cover many other meanings, and illustrates by adding words to the term "for" – "only for," "mainly for" – that simply do not exist in the text. There is simply no basis in the ordinary meaning of the term "for" to give the word the restrictive meaning the EC tries to assign this term.

152. In essence, the EC interpretation of the word "for" stands the ordinary meaning of this word on its head. The EC argues that the word "for" is a word with broad meaning, sufficient to encompass "only for" or "mainly for." Therefore, the EC seems to say, the meaning "only for" is a permissible meaning of the term "for." This is a complete *non sequitur*. The ordinary meaning of the word "for," by itself, is broad; to be read more narrowly, it must have a qualifying adverb. Yet the language of the concession made pursuant to Attachment B is

121 EC FWS, at para. 105.
122 EC FWS, at para. 113.
123 EC FWS, at para. 116.

explicitly *not* qualified by the words "only," "mainly" or "solely." Where the drafters wanted to narrow the meaning of "for," they actually did so by using the limiting terms such as "solely or principally." The fact that the drafters of the concession did not use such limiting language can only mean that they did not mean the word "for" to be limited when used in the phrase "devices…for products falling within" the ITA.[124]

153. We do not dispute that ordinary meaning must be viewed in context, but the EC tries to use context to trump the text itself. The fact that the tariff concession covers many products does not change the meaning of "for," whether that term is viewed in isolation or in context. Moreover, the absence of "only" or "mainly" from the text of the concession creates a very strong indication that these limitations are not part of the text. It would require particularly strong contextual arguments to graft these words onto a text that does not include these words. Yet as we shall see below, the context in fact confirms Japan's reading of "for" as meaning just what it says – "for" a product, not as the EC wishes to argue "only for" a product.

(b) The factual circumstances at the time

154. The EC is also not correct in claiming that so-called "multifunctional" FPD devices did not exist.[125] The EC makes this argument the centerpiece of its defense, preferring this argument in its oral statement to its technical arguments on ordinary meaning.[126]

155. Yet the EC builds this argument on flawed legal and factual premises. Legally, the existence of a particular product in 1996 does not matter. The issue is whether the relevant EC tariff concession grants duty-free treatment to the FPD devices at issue, and the Panel's examination must be conducted objectively in light of the text and context of the tariff concession. Whether a Member perceives a product to be "new" or not provides no legally relevant guidance. If the text covers the product, whether the product is a new product does not matter.

156. The EC arguments about the changing technology miss the point,[127] and try to introduce ambiguity where there is none. Technology does change, but

---

124 As the EC concedes in its Answers at para. 187, the term in concessions should be interpreted in its proper context. Thus, as Japan argued in its Answers at paras. 153-156, the interpretation of term "for" should be different when used in the concessions made pursuant to Attachment A from that when used in the concessions made pursuant to Attachment B.

125 EC FWS, at para. 118.

126 EC Oral Statement, at paras. 25-26, 28.

127 EC Oral Statement, at paras. 14-16.

the language used in specific concessions on FPD devices effectively anticipated this change. As the EC itself notes,[128] when the language of the concession is drafted without specific description of technology, then the concessions can more easily adapt to technological change. That is precisely the situation here. The concessions made pursuant to both Attachment A and Attachment B are such that they are not limited by the technology, size, or other limiting features, and continue to cover FPD devices even as the technology evolves. The only requirement is that the FPD devices at issue meet the other requirements, if any, set forth in the language of the concessions.

157. Factually, the EC is simply incorrect in saying that multifunction devices and the convergence of uses did not exist in 1996. The emergence of FPD devices as computer monitors to replace the older CRT technology was well underway.[129] The convergence of computers and entertainment media was also well underway at the time of the concessions.[130] No one would reasonably think that FPD devices were or would remain single function devices, or that they would not be part of these industry trends. Yet under these circumstances the drafters of the language of this concession still use ”for” alone, and did not seek to limit the broad meaning of ”for” by adding restrictive words such as ”only” or ”mainly.” It is simply not credible for the EC to argue that the parties meant to include such restrictive language, but did not realize they needed to do so. The factual circumstances in fact reinforce Japan's argument that the parties used the unrestricted term ”for” fully aware of the ordinary meaning and the implications of that ordinary meaning of the word.

2. The EC misinterprets the context of the narrative description in Attachment B, which in fact confirms that FPD devices ”for” a computer or some other ITA products are within the scope of the concession.

158. Japan's First Written Submission stressed contextual arguments that reinforce this reading of the key term ”for” in the narrative description of the EC concession.[131] The fact that the drafters used more restrictive language elsewhere reinforces the ordinary meaning of the term ”for” used alone as not having those same restrictions. The EC uses contextual arguments to support its efforts to graft limitations on the term ”for” that do not exist. These arguments all ultimately fail:

- As Japan has noted, the language of the concession made pursuant to Attachment B has no language of limitation. Hence, the EC's claim

128 EC Answers, at paras. 170, 172.
129 Japan FWS, at paras. 271-280.
130 Japan Oral Statement, at para. 47. *See also* Exhibit JPN-25.
131 Japan FWS, at paras. 281-287.

that the listing of CN codes for each narrative description somehow defines the scope of the concession is without any foundation. It would make no sense for the concession to have a broad scope on its face only to have the CN codes restrict that scope. Rather, the CN's codes simply illustrate the scope of the narrative description, and do not exhaustively define the scope. The EC agreed on this point[132].

- The express carve-out of devices capable of receiving television signals or other non-computer input signals from the concession on "[m]onitors" pursuant to Attachment B highlights the absence of any such carve out from the concession on FPD devices.

- Similarly, the limitation to devices "solely or principally" for a certain use in the concession on "network equipment" pursuant to Attachment B highlights the absence of any such limitation in the concession on FPD devices.

- The absence of any similar restrictions in the concession on "projection type flat panel display units" pursuant to Attachment B and the use instead of the term "can" reinforces Japan's interpretation of "for" as meaning any device capable of operating with a computer or some other ITA product.

- The HS materials do not affect this analysis, because the HS does not apply to concessions made pursuant to Attachment B that are explicitly not based on the HS.

159. Taken together, these contextual arguments strongly support Japan's interpretation of the meaning of the key term "for" in the EC concession on FPD devices. The presence of restrictions in other concessions simply reaffirms the interpretative significance of the absence of any of those same restrictions in the concessions on FPD devices.

(a) The listed CN codes – in the EC schedule and the schedules of other countries – simply illustrate and do not narrow the scope of product descriptions in the EC concession.

160. As Japan has explained,[133] the listed CN codes serve different purposes depending on where they appear. For purposes of Attachment B, this listing of codes serves to illustrate the range of products that might fall within the

132 EC Answers, at para. 18.

133 Japan Answers, at paras. 13-16.

scope of this narrative description. The scope of the concession is determined by the language used, not the listing of tariff codes. The fact that different countries listed different tariff codes does not mean that the language of concessions means different things to different countries. Instead, it shows that different countries have different national systems for classifying the same underlying product scope defined by the language of the concession.

161. The fact that different countries used different tariff codes,[134] confirms that these codes are illustrative, not exhaustive. If these codes were exhaustive, then different countries would be defining the language of the tariff concession differently, which cannot be the case. As Japan has repeatedly emphasized, the focus of the analysis must be on the language of the concession itself, which is broad and inclusive. That broad concession, having been agreed upon by all parties, must bind all parties equally. If the listing of CN codes were exhaustive, it would mean that the listing of codes would allow individual countries to trump or restrict the broad language of the concession that they had all agreed upon. This simply cannot be the case.

162. Having initially argued the CN codes define and exhaust the meaning of the language,[135] the EC now seems to recognize at least the possibility of the headnote creating a "safety net" whereby the language of the product narrative is broader than simply the sum of the various headings associated with the designated CN codes.[136] The EC states that even under this theory the headnote is "exhausted"[137] and then tries to further downplay this point by noting that it could not identify any discrepancies. But in fact this recognition that the product description defines the scope of the concession reflects a better and more consistent interpretation of the treaty text. Whether the CN codes are being used to illustrate the product description or are being used to create a safety net, in both situations they are being used to clarify but not control the scope of the language provided in the product description.

(b) The language on "[m]onitors" in fact provides strong contextual support that the EC concession on "flat panel display devices" does not have a carve-out for those devices that can also receive other types of input.

163. The EC argues that the concession on "[m]onitors" provides "by far the most important contextual relevance,"[138] but ironically fails to realize the

134 EC FWS, at paras. 142-145.
135 EC FWS, at paras. 124-126.
136 EC Answers, at para. 18.
137 EC Answers, at para. 31.
138 EC FWS, at para. 128.

extent to which this argument actually supports Complainants position. This language on CRT monitors provides a specific carve-out for products "capable of receiving and processing" television signals or other non-computer input signals. The EC then tries to extrapolate this same limitation onto the very different language of the concession on FPD devices.

164. This EC argument fails in several respects. First, the EC ignores the language of the two concessions. The concession on "[m]onitors" is limited on its face to CRT monitors, a very specific technology. Moreover, the concession on FPD devices does not have this same limitation. If the specific language used in these two concessions demonstrates anything, it demonstrates that when the drafters wished to draft restrictive language they knew how to do so. The presence of this restriction in the concession on monitors thus provides important contextual guidance for the absence of any such restriction in the concession on FPD devices.[139]

165. Second, the EC ignores the technological distinction between CRT monitors and FPD monitors.[140] CRT monitors are analogue products, while FPD monitors are digital products, and thus are technologically closer to computers. This technological distinction prevents the carve-out for "[m]onitors" from being applied to FPD monitors. For example, "dot screen pitch" is relevant only to CRT monitors, while "pixel pitch" is used for FPD devices.

166. There existed CRT monitors capable of receiving and processing television signals in 1996, and so the desire explicitly to exclude televisions made sense. But this same issue existed for FPD devices, even though FPD devices are a digital product. As Japan has shown,[141] LCD devices capable of receiving and processing television signals existed as early as the late 1980s. Under these circumstances, a desire, if any, to carve out those devices that are capable of receiving and processing television signals would have been reflected in the text of the FPD device concession, as it was in the text of the monitor concession; but it was not.

167. Essentially, the EC argument is that the explicit exclusion of those devices capable of receiving television signals or other non-computer input signals from the concession on "[m]onitors" should be used to read into the concession on FPD devices the same limitation. The EC apparently believes that the market shift from CRT monitors to FPD monitors allows the limitation on CRT monitors to shift as well. But this argument ignores the language of the concessions at issue. It is simply wrong to graft onto the concession on FPD devices a restriction that

---

139 Japan Answers, at para. 132.

140 Japan Answers, at paras. 133-134.

141 Japan Oral Statement, at para. 47. *See* Exhibit JPN-25.

cannot be found in the text of that concession. No amount of contextual argument can transform the ordinary meaning of the term "for" to have the dramatic limitation the EC wishes to assign that term.

(c) The language on "network equipment" provides further contextual support that the EC concession on "flat panel display devices" is not limited to those "solely or principally" used for ITA products.

168. Japan's argument on "network equipment" is quite straightforward. The language of this concession has the express restriction "dedicated for use solely or principally" to connect computers and units of computers. The explicit use of a restriction here confirms that the absence of such a restriction – or for that matter, any restriction – in the concession on FPD devices must have meaning.[142]

169. The EC response accuses Japan of missing the point,[143] but it is the EC that is missing the point. The EC argues that "for" simply means the concession had to cover a number of different products. That may be true, but that does not justify reading into "for" a restriction that does not exist in the ordinary meaning of the term, and that does not exist in the overall language of the concession on FPD devices.

170. The EC says that the term "for" does not "necessarily exclude" the concept of solely or principally,[144] which is a rather strained interpretation of the term "for." Even without the concession on network equipment, it would strain the term "for" to the breaking point to add onto that word the notion of "solely or principally for." Japan's point is simply that the express use of this limitation in the concession on network equipment highlights the absence of any such limitation in the concession of FPD devices.

(d) The language on "projection type flat panel display units" provides further contextual support that the EC concession on "flat panel display devices" is not limited to those with a single use.

171. The concessions on CRT monitors and network equipment provide express limitation, and thus provide a certain type of contextual support – namely that the lack of any such restrictions in the concession on FPD devices must have some meaning. The concession on "projection-type flat panel display units" makes a different point. For this concession, the language does not provide any similar limitations, and instead provides that that any device that "can" display

142 Japan FWS, at paras. 281-283.
143 EC FWS, at para. 136.
144 EC FWS, at para. 136.

digital information from the computer will be covered. Given the close technological relationship between FPD devices in general, and the subset of FPDs used for projection of computer signals, Japan believes this use of the term ”can” reinforces our interpretation of the term ”for” in the concession on FPD devices.[145]

172. The EC tries to shift the focus away from the term ”can” to other language in the concession on ”projection type flat panel display units.”[146] The point is not whether the FPD device at issue is a ”unit” or not, or an ITA covered product or not. The point is that in the only concession speaking directly to FPD devices, the language of the concession did not include any of the express limitations like the concessions on ”[m]onitors” or ”network equipment,” and rather did use a more expansive term ”can” to cover devices that have the capability to do something. This use of ”can” is thus consistent with Japan's reading of the term ”for” as including any products that are capable of displaying a computer signal or of operating with some other ITA products. This use of ”can,” however, is inconsistent with the EC argument trying to graft restrictions onto the meaning of ”for” that simply do not exist.

(e) The HS does not provide any relevant context for concessions made pursuant to Attachment B.

173. In its First Written Submission, the EC distinguishes Attachment A from Attachment B for its argument on ordinary meaning,[147] but does not do so for its argument on context.[148] This approach is legally incorrect, because the context for the two different Attachments is very different. The HS can provide context for the concessions made pursuant to Attachment A, but cannot provide any context for the concessions made pursuant to Attachment B. The very point of the concessions made pursuant to Attachment B was to use product descriptions in those areas where the existing headings provided by the HS nomenclature were deemed insufficient.

3. The other EC arguments are equally unpersuasive.

145 Japan FWS, at paras. 284-287.
146 EC FWS, at para. 137.
147 EC FWS, at paras. 99-118.
148 EC FWS, at paras. 119-169.

(a) The ECJ decision in *Kamino* does not remedy the EC WTO inconsistencies.

174. The EC has acknowledged the relevance of the February 2009 ECJ decision in *Kamino*, stressing that the ECJ decision has changed the state of the EC law on these points.[149] But Japan would like to stress two points.

175. First, the *Kamino* decision has not addressed or provided any remedy for the WTO inconsistencies of the EC measures in dispute. The EC has acknowledged "incorrect tariff classifications,"[150] but declined to answer directly the specific questions whether this decision confirms that current measures are WTO inconsistent, at least partially. The EC seems to be implicitly conceding this point, without ever explicitly admitting so.

176. Second, the Panel still needs to address and confirm these WTO inconsistencies, even while the EC is undertaking its internal review.[151] We have no idea what this internal review will produce, but Japan remains concerned that absent explicit guidance and instructions from the Panel (and the WTO dispute settlement process), the EC changes will leave in place significant WTO inconsistencies.

(b) The object and purpose of the *WTO Agreements* and the GATT 1994 confirm that FPD devices "for" a computer or some other ITA product are within the scope of the concession

177. Contrary to the EC argument,[152] Japan has focused its argument on the object and purpose of the legal framework that created the EC concessions – the *WTO Agreements* and the GATT 1994, not the ITA itself.[153]

178. The point is not to construe tariff concessions broadly or narrowly, but to respect the language of each concession. As the EC itself notes in connection with the role of technological development regarding FPD devices, "certain concessions are open ended in respect of the precise technology used by a given device or apparatus,"[154] and that other concessions are "limited to the products and technology existing at the time."[155] That is precisely our point. But the predictability of those concessions that are "open ended" – either with

149 EC FWS, at paras. 160-173. *See also* EC Answers, at para. 177.
150 EC Answers, at para. 177.
151 EC Answers, at para. 177.
152 EC FWS, at paras. 170-172.
153 Japan FWS, at paras. 288-294.
154 EC Answers, at para. 170.
155 EC Answers, at para. 172.

regard to the technology involved or otherwise based on the language – cannot be eliminated while the EC wishes to add new limitations that do not exist in the language of the concession.

179. Contrary to the EC claim that we have not shown greater predictability,[156] we have shown greater predictability by allowing the language of the concession to mean what it says. The EC contextual argument tries to graft onto the FPD device concession restrictions and limitations that are simply not there. The EC also tries to use the changing technological environment to justify moving the restriction from the CRT monitor concession to the FPD device concession simply because CRT monitors have faded from the market and have been largely replaced by FPD devices. But that is precisely the type of shifted concessions the WTO interpretative framework seeks to avoid. The security and predictability of concessions rests on the concession itself meaning the same thing over time. The products may emerge or fade – with more or fewer products falling under various concessions – but the scope of the concessions remains unchanged. That is Japan's argument, and the EC has not reconciled its interpretation with the need for the scope of concessions to remain unchanged over time. The text of the relevant concessions determines whether technological developments are covered.

(c) The classification practices of other countries are irrelevant in this dispute.

180. As with MFMs, the EC appears to place significant weight on the classification practice of a few member countries.[157] The EC seems to be relying on Article 31(3)(b) of the *Vienna Convention* concerning "subsequent practice" in the application of a treaty. Yet as the Appellate Body has made clear, subsequent practice only has interpretative weight when it is the consistent practice of many countries.[158] The EC arguments fail to satisfy this test.

181. The practice of the ITA parties on the classification issues is not relevant for interpreting the meaning of the FPD device concession. The parties are not even attempting to define the meaning of the language, and are instead simply listing with tariff codes they believe illustrative for the range of products covered by the concession itself. Indeed, this list of products shows the examples to which different countries place the FPD devices at issue in this dispute under a wide variety of HS headings, as a matter of national law.

---

156 EC FWS, at para. 173.

157 EC FWS, at paras. 174-177.

158 Appellate Body Report, *EC-Chicken Cuts*, at paras 265-266.

(d) The negotiating histories of the ITA and ITA II are irrelevant in this dispute.

182. The EC tries to use the negotiating history of the ITA as an interpretative tool,[159] but this effort fails. These materials do not meet the legal requirement of Article 32 of the *Vienna Convention* because the ITA itself is not a "treaty" under Article 31 and 32 of the *Vienna Convention* and the negotiating history of the ITA cannot be a "preparatory work of the treaty" under Article 32 of the *Vienna Convention*. More importantly these materials provide no useful guidance on issues that can be resolved entirely with the interpretative tools of Article 31 of the *Vienna Convention*.[160]

183. The EC also tries to use the negotiating history of the ITA II as an interpretative tool.[161] Indeed, by listing this argument first, the EC implies the ITA II history is somehow more relevant than the ITA history, a rather odd claim. But this effort also fails. As limited as negotiating history for a particular text may be, negotiating history after the adoption of some text is even more limited particularly when that "negotiating" history never produced any agreement of the parties.

184. It appears the EC objective in citing these materials is to identify instances in which some document submitted by one or more of the Complaining Parties seems to be odds with the arguments being made here. None of these materials involve specific analysis that might shed some light on the interpretative issues at stake here. With all due respect, such rhetorical points simply do not advance the interpretative exercise that should be the focus of this Panel's work.

D. The Concessions Pursuant to Attachment A Also Cover Flat Panel Display Devices Capable of Operating With a Computer Even if They Can Receive Signals from Other Devices.

185. The language of the concession pursuant to Attachment A defines a scope, and does not include the limiting language the EC tries to graft onto this scope. The concession provides duty-free treatment under heading 84.71 for units "of" ADP machines ("thereof"). As Japan has noted throughout its submissions in this case, there is no language of limitation in either heading 84.71 or subheading 8471.60 on the use of the term "thereof." Giving the language of the HS headings and subheadings and its ordinary meaning, there is nothing that would restrict the scope of the concession to units that are "only" used with an ADP machine and cannot be used in connection with any other type of machine.

---

159 EC FWS, at paras. 181-188.

160 Japan Answers, at paras. 31-32.

161 EC Answers, at paras. 178-180.

At a minimum, a unit that is principally used with an ADP machine is a unit "of" an ADP machine, even if it has alternative uses.

1. The EC improperly ignores the ordinary meaning of the language of the concession pursuant to Attachment A on heading 84.71.

186. Japan believes that the ordinary meaning of the language of heading 84.71 encompasses FPD devices that interface with an ADP machine. Article 31 of the *Vienna Convention* requires that the terms be given their ordinary meaning in context. At a minimum, this means that the ordinary meaning of the terms may not be ignored in treaty interpretation. The EC, however, largely ignores the ordinary meaning of heading 84.71 and argues that the heading is inapplicable to this dispute.[162] The EC concedes that ADP monitors fall within the heading, but argues that the language of heading 84.71 cannot cover the type of "multifunctional" FPD devices subject to this dispute.

187. To make this argument, the EC must completely overlook the ordinary meaning of the language at issue. Heading 84.71 covers "units" for computers, and subheading 8471.60 specifically covers both "input or output units." These terms have ordinary meaning that must be considered in both the dictionary sense of these words and the technology sense of these words. The phrase "units thereof" refers to devices designed and engineered to be connected to and used in an integrated fashion with computers. The phrase "output units" reinforces this interconnectivity between the computer and any units used to "output" information from the computer.

188. It means that an FPD device that has an interface that connects with a computer and that is principally used with a computer is a "unit" of a computer. Although noting that a "genuine" ADP monitor would fall within the language of the heading,[163] the EC offers no explanation of what a "genuine" ADP monitor is. The EC cannot explain why an FPD device that is principally used for computers, but is also capable of receiving a signal from any other source, is still not a "genuine" ADP monitor. The EC therefore cannot explain why a device that is principally used with a computer but also has additional capabilities is not a "unit" of an ADP machine within the ordinary meaning of the language in heading 84.71. The EC never articulates a reason why the language in heading 84.71 supports the EC reading that only FPD devices exclusively for use with a computer can be covered.

---

162 EC FWS, at paras. 100-101.

163 EC FWS, at para. 100.

2. The EC misinterprets the context of heading 84.71 by imposing duties on any FPD device which can receive signals from devices other than a computer.

189. There is no doubt that in the holistic interpretation of the ordinary meaning of the words of a concession, context always needs to be examined. With respect to concessions made pursuant to Attachment A on FPD devices, the HS can provide interpretative guidance concerning the meaning of the language of the tariff concessions. A rational reading of the applicable HS materials confirms that the EC's restriction of the concessions to FPD devices that are ”exclusively” used with an ADP machine is inconsistent with its concession on subheading 8471.60.

(a) The HS confirms that the EC measure is inconsistent with the concessions pursuant to Attachment A.

190. Having brushed past the ordinary meaning of the language in heading 84.71, the EC devotes most of its attention to HS materials.[164] Yet contrary to the EC arguments, the HS materials actually serve to confirm that the ”solely” standard used by the EC is inconsistent with its concession on heading 8471.60.

191. Although the EC provided extensive citation and recitation of HS materials, the EC overlooks the binding chapter and section notes, and instead focuses on the non-binding HSEN. The problem with this approach is that the EC’s reliance on the part of the HSEN in question contradicts the binding Note 5 to Chapter 84, and therefore must be rejected.

192. Despite acknowledging that Note 5 has the most interpretive relevance after the language of the heading itself, the EC offers only minimal analysis of this Note. Japan submits that Note 5(C), which relates to FPD devices, applies because it discusses ”separately presented units of an automatic data processing machine.”[165] This paragraph provides the broadest possible reading of heading 84.71, as it includes any unit ”of” an ADP machine.

193. Note 5(B) also provides important contextual guidance here for interpretation of the concessions pursuant to Attachment A. Note 5(B) only requires units to be of a kind ”solely or principally” used for computers in paragraph (B)(a). Although the HSEN cannot override the HS note, the EC relies so heavily on one limited portion of the HSEN that it appears to interpret the HSEN to prevail over the text of this binding chapter note. Indeed, this contradiction lead the ECJ in the *Kamino* case to conclude that the EC measures,

---

164 EC FWS, at paras. 146-159.

165 Japan FWS, at para. 324.

responsible for classifying FPD devices under subheading 8471.60 only if they receive signals exclusively from computers, are "in most cases too rigid…."[166] We find it remarkable that the EC has relied so heavily on the portion of the HSEN that reflects such an obvious legal error.

194. The EC also urges resort to GIR 3(c), observing that in most cases it is impossible to identify the principal function of a given monitor.[167] But GIR 3 does not apply at all if the interpretive question can be resolved by reference to the language of the heading, read in context. The EC's resort to GIR 3 reflects its refusal to consider the ordinary meaning of the language in the heading.

3. The other EC arguments are equally unpersuasive.

195. We note that other than when discussing the ordinary meaning of the language, the EC does not distinguish between its concession pursuant to Attachment A on "output units" under heading 84.71 and its concession pursuant to Attachment B on FPD devices "for" computers and other ITA products. These other arguments about object and purpose, about the classification practices of other countries, and about the negotiating history of the ITA should be rejected for the reasons already discussed above in Section IV.C.3 concerning the concession made pursuant to Attachment B.

V. 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 THE GATT 1994.

A. The Products and Measures at Issue

1. Identification of the products at issue.

196. The EC repeatedly complains about the Complainants' alleged failure to describe the products at issue. For instance, in its oral statement, the EC argued that "the complainants did not specifically identify any product at issue or even any specific and closed category of products"[168] The EC seems to believe that identification of a specific category of STBs that has a communication function or even the specific models of STBs that have a communication function would be necessary.

197. The EC simply mischaracterizes Japan's claim. This claim is not about the tariff treatment of a specific model of STBs but about a number of

166 EC FWS, para. 167.
167 EC FWS, para. 169.
168 EC Oral Statement, at para. 35. *See also* EC Answers, at para. 197.

criteria used by the EC to determine the tariff treatment of a category of products, namely STBs which have a communication function. In that framework, several aspects of the measures at issue are inconsistent with the EC's obligations under the WTO. The EC excludes from duty-free treatment through the measures at issue (1) all STBs incorporating "a device performing a recording or reproducing function (for example, a hard disk or DVD drive);" (2) all STBs incorporating a device "performing a similar function to that of a modem but which do not modulate or demodulate signals" such as "ISDN-, WLAN- or Ethernet devices;" (3) STBs which have a communication function that do not have a "built-in modem" but an external modem; and (4) STBs that do not incorporate a video tuner.

2. Japan has properly defined the concessions and the measure at issue.

198. The EC claims that the Complainants "fail to explain what constitutes the EC concession [with respect to set-top boxes] and where it is provided for".[169] The EC appears to argue that it is not clear whether the concession is in the ITA itself or in the EC Schedule.

199. The EC's claim is hardly understandable given that Japan has clearly identified what constitutes the EC concession – specifically, in paragraphs. 344 to 345 of its First Written Submission and has clearly stated that the concession is included in the EC Schedule itself and not in the ITA.

200. The EC further claims that the Complainants refer to the "headnote" but do not explain "what the headnote means for the rest of the EC Schedule, including the codes that were notified to WTO".[170]

201. The "headnote" is central in the EC Schedule because it is through the headnote that EC committed to grant duty-free treatment to all products described in or for Attachment B to the ITA, wherever the product is classified[171]. The codes that the EC provided to the WTO in accordance with paragraph 2 of the Annex to the ITA are indicative rather than exhaustive, where in the CN the EC considered the product to be classified at that time. These codes thus in no way limit the scope of the concession made with respect to a specific product description.

3. Japan has met the requirements for an "as such" claim.

169 EC FWS, at para. 190.
170 EC FWS, at para. 194.
171 Japan's Answers, at para. 19.

202. Japan would like to emphasize that it is irrelevant that in some instances application of the challenged measures may lead to a WTO-consistent outcome. Indeed, to succeed in an ”as such” claim, it is sufficient to demonstrate that *any aspect* of the criteria set out in the measures that are being challenged will necessarily lead to a violation of the EC's obligations under its Schedule and consequently Article II of the GATT 1994.

203. The EC repeatedly claims that ”it does not exclude any STBs from duty-free treatment due to the presence of a hard disk or other apparatus”[172]. According to the EC, it takes into account *all* the objective characteristics of the product to determine the relevant classification and the applicable tariff treatment. Yet, the EC does not provide any evidence of instances where a STB with a hard disk has been accorded duty-free treatment by the EC.

204. Indeed, customs authorities are following the CNEN at issue that expressly states that ”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)”. [173]

205. The EC is claiming that it is the *recording or reproducing function* and not the presence of hard disk that would be the criterion[174]. The text of the CNEN, however, explicitly identifies the criterion to be a ”*device* performing a recording or reproducing function” and gives the example of a ”hard disk or DVD drive”. The only evidence submitted by the EC to support its claim consists of the description of models of STBs that contain hard disks of 1.1 and 5.1 gigabytes but without showing that these products effectively receive duty-free treatment in the EC.

206. When the Panel requested the EC to explain how the CNEN allows for a case-by-case analysis, the EC merely repeats that classification is to take place with consideration all relevant features and technical characteristics. However, the EC fails to provide any evidence of cases in which STBs with a hard disk or a DVD drive benefit from duty-free treatment.

207. In other words, as expressly stated in the CNEN, the mere presence of a hard disk or DVD drive in a STB which has a communication function leads to the exclusion of that STB from duty-free treatment. Thereby, the EC violates its obligations under Article II:1(a) and II:1(b) of the GATT 1994.

---

172 *E.g.* EC FWS, at para. 286.

173 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.

174 EC Oral Statement, at para. 30.

B. Contrary to the EC Argument, the Concessions Pursuant to Attachment B Cover Set Top Boxes which have a Communication Function.

208. The concession concerning STBs that a communication function has been made by the EC in its Schedule through the headnote that provides that:

"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."

209. The product description provides that "set top boxes which have a communication function: a micro-processor based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange."

1. The EC improperly ignores the ordinary meaning of the language of the concession on "set top boxes which have a communication function.

210. In accordance with Article 31 of the *Vienna Convention*, Japan would like to start analysis with the ordinary meaning of the words of the concession.

(a) STBs incorporating a hard disk or DVD recorder

211. The ordinary meaning of the terms of the concession does not imply any exclusion from the scope of the concession on STBs which have a communication function merely because the STBs at issue have a recording or reproducing function.

212. In its section entitled "ordinary meaning of the narrative description"[175], the EC simply fails to examine the ordinary meaning of the concession. The EC's analysis of the ordinary meaning only focuses on the structure of the sentence and on the presence of a colon. According to the EC, to the extent that the description after the colon is a definition of "set top boxes which have a communication function", the product covered by the concession is limited in its features and functionalities to those described in that definition. According to the EC, the product covered by the concession "cannot endlessly

[175] EC FWS, at paras. 210 – 218.

assume other additional features and technical elements while remaining a "set top box which has a communication function".[176]

213. Even assuming, however, that the text after the colon provides a definition of what is a "set top box which has a communication function", it contains nothing that would imply that additional features or functionalities would exclude a set top box from the scope of the concession. Actually, the EC even acknowledges this fundamental point when stating that the product covered by the concession "cannot *endlessly* assume other features or technical elements". The EC thereby recognizes that the concession permits the product covered by the concession to have additional features or functionalities. Thus, this establishes that there is *a priori* no exclusion from the scope of the concession on STBs which have features or functionalities other than or in addition to a "communication function". As long as the product meets the description of a "set top box which has a communication function", it must receive duty-free treatment, regardless of any additional feature or functionalities it may also have.

214. The EC is incorrect when stating that the Complainants argue that the concession is "open-ended".[177] It is not so. The concession has a scope that is limited. The limits are determined by the ordinary meaning of the language of the concession. The terms of the concession, however, do not in any way prohibit the presence of additional functions to be covered by the concession. In other words, the concession does not exclude from the scope of the concessions STBs which have a communication function merely because they have a recording or reproducing function.

215. In conclusion, the analysis of the ordinary meaning of the concession demonstrates that the concession does not exclude set top boxes which have a communication function because they have other features or functionalities.

(b) STBs and modems

216. According to the EC, STBs which have a communication function but have a "device performing a similar function to that of a modem but which do not modulate or demodulate signals are not considered to be modems." In particular, a STB which has a communication function is excluded from the scope of the duty-free tariff concession simply because it gains access to the Internet with a device that operates through an Ethernet or network connection, a wireless based (WLAN) connection or a digital communication network (ISDN).

176 EC FWS, at para. 214.
177 EC FWS, at para. 285.

217. This approach is contradicted by the definition of a "modem." A technical dictionary, the IEEE Standard Dictionary of Electrical and Electronics Terms, defines modem as a "contraction of Modulator – DEModulator, an equipment that connects data terminal equipment to a communication line" [178]. In accordance with that definition, the Ethernet, ISDN-modems, and WLAN-modems all modulate and demodulate. 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.

218. As far as WLAN and Ethernet modems are concerned, the EC is trying to argue that they are excluded because "the device connecting to the telephone line, i.e. the modem, is simply not incorporated in the set top boxes communicating through Ethernet or WLAN devices"[179]. It must be noted that the reference in the definition of the Oxford Dictionary to "connect a computer to a telephone line" is an example as shown by the use of the words "used esp." It is not limiting. As noted in the definition of the technical dictionary referred to above, a modem is a "piece of equipment that connects data terminal equipment to *a communication line*."[180] Devices that operate through an Ethernet or network connection, a WLAN connection or an ISDN are modems: they connect the STB to a communication line and convert signals produced by one type of device to a form compatible with another.

2. The EC misinterprets the context of the narrative description in Attachment B, which in fact confirms that STBs which have a communication function are within the scope of the concession.

219. Japan considers that the CN codes that the EC has provided to the WTO in accordance with paragraph 2 of the Annex to the ITA do not determine the scope of the concessions. Rather, they are indications of where in the CN the EC considered the STBs which have a communication function to be included at the time. The CN codes may, in the interpretative exercise, only qualify as part of the "context".

220. With regard to the information that these CN codes provide for the interpretation of the scope of the concession, this analysis does not support the EC's position that STBs which have a communication function and include a hard disk are excluded from the scope of the concession.

---

178 The IEEE Standard Dictionary of Electrical and Electronics Terms (1996), p. 660. *See* Exhibit JPN-11.

179 EC Oral Statement, at para. 44.

180 Japan FWS, at para. 390.

221. In any case, the EC's attempt to draw conclusions from the fact that no CN code under heading 8521 and 8528 was provided is equivalent to submitting that the tariff lines define the scope of the commitments. If CN codes were intended to define the scope of the concession, however, it would have been unnecessary to include the headnote that explicitly provides for duty-free treatment wherever the product is classified.

222. The table included in para. 243 of the EC FWS showing the codes provided by the ITA participants as to where they classify STBs which have a communication function is not in any way relevant to determine the scope of the concession. Indeed, it is clear that for all products described in or for Attachment B, the ITA participants agreed to apply duty-free treatment wherever these products are classified in the HS. It is very clear that for STBs which have a communication function, the parties granted duty-free treatment regardless of where they are classified. The table merely supports the view that at the time of the ITA were no uniformly agreed upon classification headings for STBs which have a communication function. That is precisely the reason why the commitment has been made with respect to a product description wherever classified and regardless of its classification by individual participants.

VI. CONCLUSIONS

223. For all of the reasons set forth in its First Written Submission and those set forth above in this submission, Japan requests that the Panel find that:

(a) the EC measures concerning MFMs are inconsistent with Articles II:1(a) and II:1(b) of GATT 1994 because they impose duties on MFMs that are entitled to duty-free treatment either as "output units" under subheading 8471.60 or as "facsimile machines" under subheading 8517.21, regardless of whether these MFMs may have a copying function;

(b) the EC measures concerning FPD devices are inconsistent with Articles II:1(a) and II:1(b) of GATT 1994 because they impose duties on FPD devices that are capable of operating with a computer or some other ITA products that are entitled to duty-free treatment under the concession pursuant to Attachment B on FPD devices, and independently under the concession on "output units" under subheading 8471.60, regardless of whether these FPD devices can also receive a signal from some non-ITA product; and.

(c) the EC measures concerning STBs are inconsistent with Articles II:1(a) and II:1(b) of GATT 1994 because they impose duties on STBs with a communications function that are entitled to duty-free

treatment under the concession pursuant to Attachment B on STBs, regardless of whether these STBs may have other functions.

* * *