European Communities and its member States – Tariff Treatment of Certain Information Technology Products **(WT/DS375, WT/DS376, WT/DS377)**

Executive Summary of the Opening Statement of the United States of America at the First Substantive Meeting of the Panel

May 22, 2009

1. This dispute centers on concessions made in connection with and following the conclusion of the Information Technology Agreement, or ITA. The ITA remains a major achievement of the post-Uruguay Round WTO system. Through the ITA, Members eliminated duties on a wide range of information technology products, in order to foster development, innovation, and the spread of technology across the globe. In the Preamble of the Agreement, Ministers acknowledged these vital goals.

EC Implementation of ITA and Imposition of Duties on ITA Products

2. One of the ITA's more significant features is a dual approach to product coverage: using tariff nomenclature as well as general product descriptions (Attachment B) to ensure duty-free treatment for information technology products "wherever...classified." Products may be covered by one or both of Attachments A and B. As a result of the ITA, the EC and certain of its member States modified their Schedules of Concessions in two ways: first they bound at zero duties on individual tariff items and second, they incorporated a headnote to their Schedules providing for duty-free treatment for Attachment B products "wherever...classified". In the process, the EC and its member States bound themselves to provide duty free treatment to a wide range of IT products, including the three products at issue in this case: set top boxes with a communication function, flat panel display devices, and multifunction digital machines. Yet, notwithstanding these express commitments, the EC and its member States (hereafter, "EC") now imposes duties on these products.

3. They have done so through a steady stream of measures singling out arbitrary technical characteristics to exclude a product from duty free treatment — such as the presence of a hard disk or the type of modem technology a product uses to communicate, the presence of a DVI interface, or the ability to reproduce more than 12 pages per minute. As products with these particular technical characteristics become increasingly ubiquitous, the effect of the measures becomes more pernicious. Half of LCD monitors today are equipped with a DVI plug, and therefore they in the EC's view fall outside the coverage of their concessions resulting from the ITA. A large and growing majority of MFMs can reproduce more than 12 pages per minute — *ergo*, they are subject to EC duties. Set top boxes increasingly use newer modem technologies or incorporate a hard disk and are thus according to the EC excluded from its duty-free obligations. Under the EC measures, the more industry innovates — even incremental improvements such as faster print speed or a new connector cable — the more duties will be levied on IT products entering the EC. As we will discuss, this approach is flatly inconsistent with the letter of the EC's WTO tariff schedule. It is also a perverse upending of the ITA and inconsistent with Ministers' stated intent to "encourage continued technological development."

Overview of Key Themes in EC Submission

4. Before responding to the EC's arguments on particular products, I would like to begin by briefly discussing three key themes evident in the EC's response, reflecting an overarching effort on the EC's part to distract from the core legal issues at hand: first, professing confusion about what products are at issue, when the measures themselves define the products; second, professing confusion about what concessions are at issue, despite individual tariff lines and a headnote that are identified clearly in the panel request and complainants' submissions; and third, professing uncertainty about the measures at issue, claiming variously that the measures do not mean what they say because of CN amendments, court judgments, temporary duty suspensions, *et cetera*. What the EC never does in its 148 page submission, however, is face up squarely to the complainants' challenge of its measures and defend them on their own terms.

5. First, there is the matter of the product. Throughout its submission, the EC claims confusion about the products at issue in the dispute, and on this basis proceeds to recast the dispute as one over entirely different products than the ones the complainants have identified in their panel request and submissions. The EC's apparent confusion is curious, given that the EC's own measures define the scope of products that they improperly assume to be dutiable. In any event, the complainants have been clear. To supplement our discussion of the EC measures, we have offered detailed descriptions and supporting evidence concerning each of the products affected by those measures: (1) set top boxes which have a communication function – a type of electronic apparatus that sits atop (or below) a TV with the ability to communicate over the Internet, (2) multifunction digital machines – computer peripherals that can scan, print, copy and/or fax; and (3) flat panel display devices for computers – computer displays using technology such as LCD allowing them to achieve a thinner profile than conventional cathode ray tube monitors. These are the products described in and affected by the EC measures — not, as the EC claims, video recorders, or photocopiers, or so-called "multifunction monitors."

6. Beyond simple obfuscation, the EC's apparent insistence on a model-by-model description of each product appears either intended to convert this case into a classification matter (which it decidedly is not) or to set an impossibly high burden for demonstrating an "as such" breach of Article II. This is a tariff dispute. The question is whether the measures result in imposition of a tariff that is not consistent with Article II. To show that the measures are "as such" inconsistent, we are not required to demonstrate that they result in duties on every single model of FPD, STB, or MFM that crosses the EC border — rather, we need to show that the measures necessarily lead EC customs authorities to impose duties on one or more products subject to their commitments. As the United States demonstrated in its submission, by excluding from duty free treatment *any* FPD, or STB, or MFM, with a given technical characteristic — such as DVI, or a particular type of modem or presence of a hard drive, or the ability to reproduce more than 12 pages per minute — the measures result in the imposition of duties on products covered by the EC's duty-free tariff obligations. Thus, the EC measures do not accord with Article II.

7. Second, the EC ignores the text of the concessions at issue, contrary to the customary rules

of interpretation reflected in the Vienna Convention on the Law of Treaties (VCLT). Sometimes it does so in favor of other concessions describing products that are not at issue in this dispute (such as CRT monitors or photocopiers). In other cases, it focuses on various extraneous material – miscellaneous ITA committee meeting documents, uninformative negotiating material, or assorted U.S. customs classification opinions. Most of this material is simply irrelevant to interpreting the text at issue, and more careful review makes clear that none in fact even supports the EC interpretation. In the one instance in which the EC takes interest in the actual text of a concession that is the subject of this dispute — the Attachment B description of set top boxes — its argument is flatly contradicted by the text of a related concession it made in 2000. As we will shortly describe, "set top boxes *with* a communication function" was a concession that *the EC itself* drafted and formally added to its Schedule in 2000. The complainants have misquoted nothing; it is the EC that appears intent on disregarding the terms of its commitments.

8. The EC avoids directly addressing other important text in its Schedule: its commitment, made to implement ITA Attachment B, to provide duty free treatment to the products in question "wherever…classified." As the United States explained in its First Submission, this sentence was incorporated into the EC's Schedules of Concessions, as a headnote. The concession in question was repeatedly quoted throughout the U.S. submission and is contained in Exhibit US-7. Thus, when the United States and the co-complainants refer to this commitment, there should be no confusion about where the obligation rests. The commitment is explicit in the EC's Schedules. Rather than discuss the relevant concession, the EC claims confusion and instead focuses on particular tariff lines or provisions relating to entirely different products. Neither the concessions in particular tariff lines nor those for other products substitute for the overarching obligation to provide duty-free treatment to the Attachment B products in question "wherever …classified". Furthermore, while the EC concedes that the logic of the Harmonized System is not relevant to interpreting Attachment B concessions, it nonetheless relies on the HS throughout its submission — even when discussing Attachment B.

9. Finally, throughout its submission, the EC attempts to distract from the very actions that prompted this dispute: the Regulations, Explanatory Notes, provisions of the CN, *et cetera*, that have resulted in WTO-inconsistent tariff treatment. Instead, it describes the recent extension of a temporary duty suspension on monitors without even responding to complainants' claim that a temporary duty suspension provides less favorable treatment than that required by the EC's Schedule. It offers — and mischaracterizes — a handful of U.S. customs classification opinions. Perhaps most remarkably, it attempts to defend its actions with two recent ECJ opinions that decidedly do not support the EC's position. The United States invites the Panel to review those opinions, some of the more salient elements of which are excerpted by Singapore in its third party submission. With regard to the measures at issue, the EC variously claims that they are not binding, that, owing to clarifications of "current EC law" provided by the ECJ, they do not mean what they say, that they have "effectively" lost their relevance due to modifications of the CN, or that the EC is "reviewing" them and may make "adjustments." If anything, these statements merely suggest that even the EC recognizes the flaws inherent in its own measures.

10. With these general themes in mind, I will now proceed to discuss the U.S. claims regarding set-top boxes, responding to significant assertions by the EC. After that, I will turn briefly to highlight some of the more significant issues relating to FPDs and MFMs.

Set top boxes "with" a communication function (and set top boxes "which have" a communication function)

11. As the United States explained in its first submission, set top boxes which have a communication function were included in the ITA. In the headnote to its Schedules, the EC committed to provide duty-free treatment to these products "wherever...classified." Furthermore, it bound at zero duty four individual tariff lines which it identified as including the STBs described in Attachment B. As explained in the U.S. submission, three of those lines were bound in 1997; the fourth was added in 2000, covering set top boxes "with" a communication function. However, as a result of the EC measures, any such device with a hard disk is no longer entitled to duty-free treatment when imported into the EC. Likewise, any such device with an Ethernet, WLAN, or ISDN modem, including any device that does not have a tuner, is subject to duties.

12. The EC first claims that the CNEN that led to this result is not binding. While we of course would be pleased if the CNEN did not apply, ample evidence submitted by complainants — including BTI, statements of the Customs Code Committee, ECJ opinions, and the EC's own statements in previous WTO disputes — demonstrates its legal effect. Following the CNEN, member State customs authorities consistently impose duties on any device with a hard disk or the particular modems described above. In some cases, they have even cited to the Customs Code Committee decision approving the CNEN as a basis for their action. The EC offers no evidence to the contrary. Related to its argument that the CNEN is non-binding, the EC asserts in this proceeding that the presence of a hard disk can be a "significant" element in its consideration of where to classify a product, but is not "taken in isolation of the other elements." Yet again, the EC points to no instance since the CNEN was issued in which an STB with a hard disk has been accorded duty-free treatment by the EC. We can only conclude that this is because the CNEN has had its intended effect. The EC also points to nothing in the plain language of the CNEN that supports its insinuation that the presence of a hard disk is not dispositive — to the contrary, as the United States explains in its written submission, the text of the CNEN provides that if a set-top box contains a hard disk it is to be classified in a dutiable category. And this is precisely what EC customs authorities have done – any device with a hard disk is classified in the dutiable heading, regardless of other "objective characteristics" the product may have.

13. Beyond claiming (without support) that the measure does not result in the imposition of duties on STBs, the EC now attaches great significance to the use of the phase "which have" rather than "with" in Attachment B. It argues that this limits the concession to products that are *solely* comprised of the three characteristics enumerated after the colon in Attachment B. First, contrary to what the EC suggests, the United States has accurately quoted Attachment B in our submission. Furthermore, the substantive distinction between "with" and "which have" the EC now claims exists is without basis. The EC *itself* recognizes this. It added a tariff line to its Schedule in 2000, which

it bound at zero, covering — and I quote — "set top boxes *with* a communication function." In that tariff line, *the EC itself* used the phrase "set top boxes *with* a communication function." Thus, the EC's Schedule also contains a concession with respect to "set top boxes *with* a communication function." Moreover, the EC indicated that goods meeting the Attachment B description of set top boxes were classified in that tariff line. If "which have" had the meaning the EC now attaches to it, this begs the question of why the EC itself opted to use "with" in place of "which have" when modifying its Schedule in 2000.

14. More remarkably, in addition to ignoring the text of its Schedule as modified in 2000, the EC claims that the 2000 modification covered a product not included in the ITA. It does so notwithstanding the fact that its own notification repeatedly refers to the product at issue as an "ITA product" and attaches the tariff line in question to the description of STBs in Attachment B. The EC now argues that set top boxes with a tuner "were not initially supposed to be covered by the ITA," and claims that it provided duty free treatment to this "new" product merely in response to a request from the United States. (I would note that this argument is rather ironic, given that, as the United States explained in its submission, the EC is also denying duty-free treatment to STBs *without* a tuner – the IP-streaming STB.) In any event, these assertions are quite simply contradicted by the facts, and in particular the notification submitted by the EC in 2000 and contained in Exhibit US-26. We would encourage the Panel to review this document. Furthermore, even if there were a substantive distinction between "which have" and "with" (and there is not), with the resulting modification to its Schedule, the EC is obliged to provide duty free treatment to set top boxes *which have* a communication function, by virtue of the headnote and Attachment B, *and* is obliged to provide duty-free treatment to set top boxes *with* a communication function by virtue of the tariff concession it made for tariff line 8528 71 13. Both phrases are in its Schedule, and therefore both may be used to describe the EC's obligations.

15. This begs the question of why the EC now goes to such lengths to disavow the action it took in 2000. Considering the rest of its argument, the reason is clear. The EC's acknowledgment in 2000 that STBs with tuners were covered by Attachment B is at odds with its assertion today that, if a device has components beyond the three elements contained in the Attachment B description, it is excluded from the ITA. Just as a device with a tuner may meet the terms of the description of an STB in Attachment B, even though the text does not specify tuners as one of the required attributes of an STB, a device with a hard disk or different type of modem may meet the terms of Attachment B, provided it has the three attributes specified therein.

16. The EC proceeds to protest that covered devices "cannot endlessly assume other additional features and technical elements" — yet this misses the point, and distorts the U.S. position. The STBs in question do not "endlessly assume" additional features or technologies. They are STBs which have a communication function, within the ordinary meaning of the concession: they are microprocessor-based devices, incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange. For the EC, it is irrelevant that they have all of these essential attributes. The presence of but one additional feature — a hard disk — or the fact that they rely on a different modem technology is, according to the EC, a basis to deem them a "new" product

and exclude them from duty-free treatment. Thus, the issue in this dispute is not, as the EC claims, whether a device is 1% STB and 99% "other." Under the EC measures, customs authorities look no further than the presence of a hard disk or a particular type of modem to exclude the devices from duty-free treatment.

17. The EC's position regarding modems illustrates how far from its "99%" hypothetical the measures in question in fact operate. For example, the EC concedes that, just like some of the devices it considers modems, an ISDN modem communicates using a telephone line. Yet, according to the EC, because it uses a technology "allowing for a faster transfer" than other telephony-based modems, it is not a modem. On that basis alone, it excludes any device with an ISDN modem from duty-free treatment. Yet, as explained in the U.S. submission, all the devices in question, including ISDN modems, meet the ordinary meaning of the term "modem" – they modulate and demodulate signals. As this example illustrates, we are not confronted with devices so far afield even from those on the market when the concession was negotiated as to pose the difficult questions the EC claims are now presented. The devices in question contain fairly simple but important improvements over those that were available on the market at the time the ITA was negotiated — faster modem technologies, a hard disk. Most importantly, they meet the description in the text of the concession. The EC's tariff concessions do not disappear merely because a technology improves. Rather, provided the product in question meets the terms of the text, it is covered by the concession.

18. As with the other claims at issue in this dispute, the EC introduces various other ancillary material in what can only be described as an attempt to distract from the ordinary meaning of the core obligations at issue. First, in an apparent attempt to suggest that the scope of the concession is more limited than the ordinary meaning of the text itself, the EC describes a number of documents that were prepared during the negotiations. Some of these items describe proposals made during the negotiations, others offer an example of a product — WebTV — that Japan suggested would be covered. On the basis of this document, the EC claims that this proposal meant that only "WebTV-like" products were covered by the final concession. Yet another document appears to reflect notes prepared by an EC delegate which the EC asserts represents a failed proposal to modify the text of the concession from "which have" to "with". Strangely enough, after introducing these documents, the EC concedes that none sheds any light on the meaning of the actual terms used in the concession to which participants ultimately agreed.

19. Nevertheless, it must be emphasized that this material is at most negotiating history. The EC, in an attempt to elevate its importance, characterizes it as "surrounding circumstances" and claims that it may be used to understand the *ordinary meaning* of the text. This interpretative sleight of hand cannot be accepted: It is well established that, under VCLT Article 32, negotiating history and the circumstances of conclusion of a treaty may only be resorted to in order to confirm the ordinary meaning, or where the ordinary meaning is ambiguous or leads to a manifestly absurd or unreasonable result. The EC has failed to demonstrate that either is the case here, and therefore, even if it qualifies as negotiating history, the material in question is irrelevant.

20. With regard to the material the EC offers as context, here again, the EC attempts to read a concession out of the Agreement by relying on the tariff lines it and other participants identified in 1997 (as lines in which they classified the product) to define the universe of products covered today. The EC misses the point: Attachment B products receive duty-free treatment "wherever…classified." ITA participants did not limit the obligation to a single tariff line or group of tariff lines. Nor did they all specify the same lines in which the product was at the time classified. To narrow the concession based on participants' notification of the lines in which the products at the time were classified is to render the headnote inutile. That is, if the tariff lines themselves defined the scope of the commitment, it would have been unnecessary for participants to include the Attachment B headnote in their Schedules. They simply could have bound the relevant tariff lines at zero. Clearly, they did not do so.

21. Finally, as the EC correctly notes, the United States, like the other complainants, has not argued that the EC's classification of the products in question is otherwise inconsistent with its classification law. That is because classification is a question for the EC and its courts to decide; it is not a matter for this Panel to resolve. Yet the EC frequently confuses the issue of tariff treatment with that of classification. For example, the EC's assertion that it would not be feasible for its customs authorities to rely "solely on the narrative descriptions in the ITA" to classify goods is a *non sequitur*. The headnote to the EC's Schedule provides that the EC must provide duty free treatment to set top boxes with a communication function wherever classified. How the EC accomplishes that task is for it to decide, provided it does so in a manner consistent with its WTO obligations. It has failed to do so in this case.

22. **Article X**: As the United States explained in its submission, the set top box CNEN has not only resulted in the imposition of duties on STBs covered by the EC's duty-free concession, contrary to Article II. In addition, the EC did not publish it for over a year after it was approved, and applied it to collect the WTO-inconsistent duties even before it was published. The EC's response to the U.S. claim regarding Article X, and Article X paragraphs 1 and 2, is equally unavailing. The EC claims that CNENs are not binding and that in any event votes of the Customs Code Committee are "merely a step in the procedure" for adopting CNENs. With regard to the former issue, the legal and practical consequences of CNENs are clear and I would refer the Panel to my earlier remarks on that subject. On the latter, the EC asks this Panel to disregard repeated statements by the chair of the Customs Code Committee to the contrary, as well as the BTI Guidelines, and begs the question of why member States would refer to the action of the Customs Code Committee in their decisions (and indeed why one would refer to it as a "decision"). The express reliance of member States on the CNEN, in combination with the General Interpretative Rules and CN, demonstrate that the GIRs and CN alone did not guide member State decisions.

23. Moreover, the fact that some member States were classifying devices in the dutiable heading before the CNEN was voted on does not support the conclusion that the vote itself had no impact on classification in the EC. If anything, it merely demonstrates that some member States had been acting inconsistently with Article II even before the CNEN was issued. With the CNEN, the EC, as well as all the member States, have come to act inconsistently with Article II. In effect,

the EC attempts to hide behind the WTO-inconsistent actions of certain member States to suggest that its own WTO-inconsistent action has no consequence. This position is contradicted by multiple statements of the Customs Code Committee, the references in the BTI issued by member States, and the EC's own statements in other settings, and should not be accepted by this Panel.

24. Finally, regarding the EC procedural account of the measure's adoption: publication of the minutes of the Customs Code Committee meeting on the Internet is not, as the EC claims, sufficient to satisfy the obligation in Article X to publish the measure. The minutes of the meeting do not contain the measure itself nor do they even contain enough detail to allow a trader to know what rule is in effect. Furthermore, the EC's claim that it waited until May 2008 to publish the final measure due to the possibility of additional elements being added to it is premised on the notion that it could not have published those elements that were in effect before applying them. This is quite simply wrong. Even if the EC intended to adopt additional restrictions on duty-free treatment for STBs, it need not have waited for an entire year to publish those already in effect, or to have imposed duties on imports based on those decisions prior to their publication. Nor is doing so consistent with the obligations contained in Article X.

Flat Panel Display Devices

25. As it did with STBs, the EC mischaracterizes the products at issue — focusing on the so-called "multifunctional monitor" and pointing to other concessions in its Schedule rather than the text of the concessions complainants have identified. This is a dispute about the tariff treatment of flat panel display devices for computers. The EC measures subject those devices to duties, whenever they have a DVI interface or are capable of connecting to a device other than a computer. This is not a dispute concerning so-called "multifunctional monitors," as the EC claims in its submission. Indeed, it is unclear what the EC even means by "multifunctional monitor." Whatever that term means, it fails to capture the FPDs affected by the EC's measures, such as those that are primarily used with computers. In fact, the EC measures even result in duties on devices that are physically incapable of being used without a computer –- simply because they have DVI.

26. Furthermore, the EC has failed to demonstrate that there is any ambiguity about the FPD concession. Instead, the EC again distracts, by focusing on an irrelevant discussion in the ITA Committee regarding whether "parts" were covered by the concession. *This* dispute pertains to finished products and on that question the EC itself has taken the view that the ITA provision does apply.

27. Moreover, while the EC attempts to attribute great significance to the CRT monitor concession in its Schedule, the concession at issue is that pertaining to flat panel display devices. Neither the United States nor any of the other complainants have contested in this dispute the EC's treatment of CRT monitors. The EC claims that "it is not particularly important to distinguish between immediate and broader context," contradicting the approach that has been endorsed by the Appellate Body on multiple occasions. The concession it discusses explicitly pertains to a device not at issue in this case: monitors using CRT technology. The EC does not explain why the CRT

monitor concession is relevant "context" for the FPD concession, nor why a sentence in that provision which does not appear in the FPD concession should nonetheless be read into the FPD concession.

28. Taken together, the EC's mischaracterization of the product as a "multifunctional monitor", its insinuation that the FPD concession only covers parts, and its discourse on CRT monitors, lead to one conclusion: the EC is attempting to argue that the CRT monitor commitment is the *only* commitment in Attachment B on "ADP monitors," suggesting that in its view it has no obligation under its headnote to provide duty free treatment to *any* LCD monitors. This position is simply at odds with the text of the concessions.

29. With respect to complainants' claim on the EC's tariff concession for subheading 8471 60 — *i.e.*, "input or output units" of ADP machines — the EC simply passes over the ordinary meaning of the terms used therein. The EC asserts that "there is no need to examine the arguments of the complainants in respect of the ordinary meaning of the tariff term." Thus, it does not even attempt to explain why it believes that FPDs do not fall within the ordinary meaning of terms used in the tariff concession. It fails to explain why, for example, FPDs with a DVI connector, or FPDs merely capable of connecting to a device other than an ADP system, necessarily fall outside of that concession. Instead, it discusses the text of various *different* concessions not relevant to complainants' claim, and ignores the challenged measures entirely. In so doing, it fails to respond to complainants' claims.

Multifunction Digital Machines

30. Finally, with respect to multifunction digital machines, the EC's position appears to be as follows: notwithstanding the fact that printers, scanners, and fax machines are all covered by the ITA, when these products are combined into a single unit, that unit becomes a photocopier and falls outside of the ITA, rather than an "input or output unit" or "facsimile machine". From a technical perspective as well as based on the ordinary meaning of the text of the concessions, this position is unfounded.

31. As with the other claims in this dispute, the EC does not mount a direct defense to the claim on multifunctional digital machines. Instead, the EC again seeks to point the Panel's attention to other terms in its Schedule and inapposite, ancillary materials — rather than grappling with the language of the EC measures and the text of the EC concessions that are subject to this dispute. For instance, remarkably, the EC's argument on "ordinary meaning" is dedicated not to the ordinary meaning of the phrase "input or output unit" — the concession complainants have identified as subject to this dispute — but to an entirely different concession, that with respect to photocopiers.

32. Digital copiers are not "photocopiers". Only by characterizing the scanner as a system of "lamps, lenses, and mirrors," ignoring the fact that an MFM does not use light to produce a copy but rather to collect digital data, and incorrectly asserting that an MFM projects the image of the original document onto a photosensitive surface, can the EC reach the opposite conclusion. To be

clear, an MFM operates as follows: a scanner records individual points of light reflected from the image as it is scanned, the scanned image is sent to the print controller, and is either stored as a file or is processed by the print controller and sent to a print engine.

33. The EC makes much of the fact that in the lexicon of sales brochures and other nontechnical sources, the term "photocopying" has acquired a popular usage that extends beyond its technical meaning to include the act of reproducing documents on an MFM. This is akin to the popular usage of the term "typing" to describe the act of word-processing on a computer, notwithstanding the fact that no typewriter is involved. This popular meaning has no relevance to a proper interpretation of the text of the concession, which is based on technical terminology.

34. Furthermore, as with the other products, the EC again relies on various ancillary documents in an attempt to support its position. As a threshold matter, unless the EC demonstrates that the ordinary meaning of the concession in context is ambiguous or leads to an absurd result, or is confirming the ordinary meaning, there is no basis under the Vienna Convention to resort to the various supplementary material it provides. The EC has not done so. Even were the material relevant, it does not support the proposition that the EC advances.

35. Finally, while the EC offers a lengthy defense of the standard articulated by the European Court of Justice in *Kip* for determining whether a product is classifiable in the duty-free heading, it ignores the actual measure in dispute in this case: the provisions in the CCT imposing duties on any device capable of copying more than 12 pages per minute (and, indeed, some devices regardless of their speed). It nowhere explains how that measure is consistent with its obligations (or even with the *Kip* standard), and indeed concedes that it may need to be amended. This aspect of the EC's submission is most telling of all. In effect, the EC's argument may be read as an admission that the 12 page per minute standard constitutes an utterly arbitrary criterion that results in the imposition of duties on a significant share of MFMs on the market today, contrary to EC and member State obligations.

Conclusion

36. Throughout its submission, the EC reveals its view that *any* change to a device results in a "new product" excluded from the ITA. This view is unsupported by the text of the concessions at issue. Furthermore, if this position were accepted, virtually no products on the market today would be covered by the ITA. Products have improved over time, incorporated advanced features or improved technologies, yet they still fall within the ordinary meaning of the original concessions. As the co-complainants have explained in their submissions, the prospect of technological change was well understood by the negotiators of the ITA. Had they believed that such change would rapidly eviscerate the commitments made, as the EC appears to believe, one may question why so many Members to this day attach such significance to the Agreement. Indeed, just two years ago, the ITA was characterized as a "major success since the establishment of the WTO." This sentiment cannot be reconciled with the EC's belief that, with every technological improvement, every new feature added, products fall out of the scope of the concessions, such that, from the

moment the ink dried on the page, the list of ITA-covered products has been steadily dwindling to nothing.