

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

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

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<i>China – Auto Parts (AB)</i>	Appellate Body Report, <i>China – Measures Affecting Imports of Automobile Parts</i> , WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R, adopted 11 December 2006
<i>EC – Chicken Cuts (Panel)</i>	Panel Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts</i> , WT/DS269/R, WT/DS286/R, adopted 27 September 2005, as modified by the Appellate Body Report, WT/DS269/AB/R, WT/DS286/AB/R
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## **I. INTRODUCTION**

1. The Information Technology Agreement (ITA) remains a crowning achievement of the post-Uruguay Round WTO system, widely hailed for eliminating duties on a vast range of information technology (IT) products and promoting the spread of innovative technologies throughout the developed and developing world. As a result of the ITA, the European Communities (“EC”), in its WTO Schedule of tariff concessions, committed to permit the importation of certain IT products duty-free. This dispute centers on recent actions by the EC and its member States to methodically dismantle tariff commitments that they made as part of the ITA.

2. Three ITA products are at the core of this dispute:

- (1) set top boxes with a communication function (a type of cable box)
- (2) flat panel display devices (computer monitors), and
- (3) multifunction digital machines (facsimile machines and computer peripherals capable of printing, scanning, faxing, and/or copying).

While the particular measures the EC has adopted to eliminate duty-free treatment for the products in question differ, all share a common theme: the use of arbitrarily chosen technical characteristics to reclassify products and thereby exclude an increasingly significant share of products from duty-free treatment.

3. For set top boxes with a communication function, beginning in 2006, the EC has claimed two technical characteristics exclude products from duty-free treatment – the presence of a hard disk and the type of modem a device uses to communicate. Any product with a hard disk is automatically reclassified as something other than a set top box with a communication function and assigned a 14% duty – notwithstanding the fact that the device is in every respect a set top



box with a communication function, the product that the EC bound at zero duty. Likewise, under the EC and member State measures, only a product with a telephony-based or cable modem qualifies for duty-free treatment — any product that communicates using a wireless, ISDN, or Ethernet modem is reclassified out of the duty-free tariff line. As a result, the EC and its member States subject to a 14% duty a significant and growing share of set top boxes with a communication function. These 14% duties have a serious impact on trade, particularly as the features the EC has singled out become standard on many devices.

4. For flat panel display devices, the EC has claimed that the presence of Digital Visual Interface, or DVI – a connector that was developed specifically as a standard *for computer monitors* and is routinely used to allow for digital-to-digital communication between a computer and a display – disqualifies a product from duty free treatment. Under EC and member State measures adopted beginning in 2005, any device with DVI is not a computer monitor and is reclassified into a tariff line carrying a 14% duty, merely because it has a DVI connector. Notwithstanding the fact that the EC concession extends duty-free treatment to any and all flat panel display devices “for” products falling within the ITA, the EC and its member States excludes any monitor from duty-free treatment if there exists *even the possibility* that it could be connected to something other than a computer (and, indeed, in some cases where there is no such possibility). As with set top boxes, the feature that the EC has chosen as a basis to exclude products from duty-free treatment is typical of a very large and growing share of computer monitors, and thus the 14% duty has had an increasingly significant adverse impact on trade.

5. For multifunction digital machines (MFMs), the EC claims that the mere ability to reproduce more than 12 pages per minute renders a device ineligible for duty-free treatment.

Despite the fact that the ITA clearly covers a wide range of computer peripherals (including printers and scanners – the two devices that, combined, enable an MFM to operate), as well as facsimile machines, the EC measures subject products combining these technologies to a 6% duty, simply because they can reproduce more than 12 pages per minute. This criterion – besides being utterly arbitrary – means that duties are imposed on most “all-in-one” products, as the majority of multifunction devices on the market today are capable of reproducing more than 12 pages per minute.

6. All three of these products were included in the ITA. The tariff commitments at issue are contained in the EC Schedule, which was modified after the ITA was concluded to incorporate ITA tariff concessions and bind at zero duty all products covered by the ITA. As such, the EC’s actions to impose duties on the products in question are inconsistent with Article II:1(a) and (b) of the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”).

7. It is important to recall that, while the increased duties are imposed in significant part through classification actions by EC and member State customs authorities, this dispute concerns tariff treatment, not customs classification, and in particular whether the EC and its member States are providing the correct tariff treatment to the products in question. As will be demonstrated below, they are not.

8. The fact that the EC and its member States are using classification measures to impose duties on products is nonetheless particularly striking given the lengths to which ITA negotiators went to ensure that duty treatment would be maintained without regard to classification. In that regard, participants committed to broad coverage — in several cases, participants bound at zero entire four digit headings in their Schedules, some of which include the products at issue in this

dispute. Furthermore, participants adopted a dual approach to product coverage — identifying products with general product descriptions “wherever...classified”, as well as with tariff nomenclature. Participants, including the EC, then modified their Schedules by binding particular tariff lines at zero and by incorporating a headnote to affirm the duty treatment to be accorded to products falling within the general descriptions, wherever classified.

9. It must also be emphasized that, while the measures at issue relate to three specific products, the EC’s actions have serious implications for the ITA as a whole. Virtually all ITA products — including computers, peripherals, cell phones, and digital cameras — incorporate significantly improved technologies and features as compared to the devices that were available at the time the agreement was concluded. If, as the EC and member State measures suggest, the mere fact that an ITA product incorporates a particular technology or feature means that tariff concessions need no longer be honored, then countless ITA products could be subjected to duties. The billions of dollars in tariff savings and expanded trade that have resulted from the ITA would be in jeopardy.

10. The notion that technological evolution eviscerates tariff commitments is at odds with a core purpose, agreed upon by the negotiators, of the ITA: to “encourage the continued technological development of the information technology industry on a world-wide basis.” The EC’s position is equally at odds with the exhortation in the ITA for participants’ trade regimes to “evolve in a manner that enhances market access opportunities for information technology products.” Thus, beyond being inconsistent with the text of its Schedule of Commitments, as well as several core principles of the ITA, the EC and member State actions have serious detrimental implications for worldwide IT trade. Given the current economic conditions, it is

more important than ever to maintain trade. For all of these reasons, the actions of the EC and its member States cannot be sustained.

## **II. PROCEDURAL BACKGROUND**

11. On May 28, 2008, the United States requested consultations with the EC and its member States pursuant to Articles 1 and 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”) and Article XXII:1 of the GATT 1994, with respect to the tariff treatment the EC and its member States accord to set-top boxes with a communication function, flat panel displays, “input or output units,” and facsimile machines.

12. This request was circulated to WTO Members on June 2, 2008 (WT/DS375/1). Japan requested consultations with the EC and its member States on the same matter on May 28, 2008, and the request was circulated on June 2, 2008 (WT/DS376/1). The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu requested consultations with the EC and its member States on the same matter on June 12, 2008, and the request was circulated on June 18, 2008 (WT/DS377/1). The United States, Japan, and Chinese Taipei notified each other and the EC of their desire to be joined in their respective consultations, pursuant to Article 4.11 of the DSU. In addition, four other Members (Thailand, China, Singapore, and the Philippines) notified the parties of their interest in joining the consultations. With the exception of China’s request to join the consultations requested by Chinese Taipei, the EC rejected each of those requests, asserting that none of the Members had a substantial trade interest in the consultations.

13. The United States and the EC and its member States held consultations on June 25-26, 2008, and July 14-15, 2008, in Geneva. Japan and the EC and its member States held consultations on June 26, 2008, and July 16-17, 2008 in Geneva. The Separate Customs

Territory of Taiwan, Penghu, Kinmen and Matsu and the EC and its member States held consultations on July 3, 2008, July 18, 2008, and July 25, 2008 in Geneva. Those consultations were held with a view to reaching a mutually satisfactory solution. Unfortunately, the consultations failed to find such a solution.

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

15. On September 23, 2008, the United States, Japan, and Chinese Taipei renewed their joint request for the establishment of a panel. The Panel was established at the DSB meeting of September 23, 2008, with the following standard terms of reference:

To examine, in the light of the relevant provisions in the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the United States, Japan, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu in document WT/DS375/8, WT/DS376/8, and WT/DS377/6, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.<sup>1</sup>

16. The Panel was constituted on January 22, 2009.<sup>2</sup>

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<sup>1</sup>*Dispute Settlement Body: Minutes of the Meeting Held on 23 September 2008*, WT/DSB/M/256, para. 52; *Note by the Secretariat: Constitution of the Panel Established at the Request of the United States, Japan, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu*, WT/DS375/9, WT/DS376/9, WT/DS377/7, circulated 26 January 2009, para. 2.

<sup>2</sup>*Note by the Secretariat: Constitution of the Panel Established at the Request of the United States, Japan, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu*, WT/DS375/9, WT/DS376/9, WT/DS377/7, circulated 26 January 2009, para. 4.

### **III. FACTUAL BACKGROUND**

#### **A. The Information Technology Agreement**

##### **1. Negotiation and Conclusion**

17. The Ministerial Declaration on Trade in Information Technology Products (commonly known as the Information Technology Agreement, or ITA) was concluded at the Singapore Ministerial Conference in December 1996.<sup>3</sup> In a major achievement of the post-Uruguay Round WTO system, Members representing over 90 percent of world trade in information technology (IT) products<sup>4</sup> committed to eliminate customs duties and other duties and charges on a wide range of IT products that millions of people use every day at work and at home, including computers and computer peripherals (such as printers, scanners, and monitors), certain set top boxes, digital cameras, fax machines, and most telecommunication and semiconductor equipment. Participants committed to bind and eliminate duties through equal rate reductions

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<sup>3</sup>Ministerial Declaration on Trade in Information Technology Products, WT/MIN(96)/16 (13 December 1996) (“ITA”) (Exhibit US-1).

<sup>4</sup>At the time of the Singapore Ministerial, 29 separate countries or customs territories signed the declaration, accounting for 83 percent of world trade in information technology (IT) products. In the months after the Singapore Ministerial, a number of other countries expressed an interest in becoming ITA participants and notified their acceptance, such that, by April 1, 1997, as required under the ITA, participants represented approximately 90 percent of world trade in IT products and the ITA entered into force.

beginning in 1997 and concluding in 2000.<sup>5</sup> In 1996, the ITA was estimated to result in \$50 billion in savings to consumers.<sup>6</sup>

18. Beyond the immediate tariff benefits of the agreement, the ITA was widely recognized as laying the groundwork for economic development and enhanced competitiveness worldwide. As the WTO Director General observed during the negotiations:

Negotiating an ITA would be a remarkable accomplishment. Trade in information technology products amounts to more than \$400 billion, roughly the same as global trade in agriculture. Just as significant, an ITA and an agreement on telecommunications trade by the 15 February deadline, would lay the foundation for trading into the future. These are the critical technologies of the 21st century, vital to the future competitiveness of every nation. By disseminating information so widely we can educate our peoples on a scale unimaginable 20, or even 10 years ago. This is the human dimension of globalization and it offers an unprecedented opportunity not just for growth and development, but also for security and peace.<sup>7</sup>

19. As of October 17, 2008, the ITA had 44 participants (covering 71 Members and States or separate customs territories in the process of acceding to the WTO), representing approximately

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<sup>5</sup>ITA, para. 2 (“Pursuant to the modalities set forth in the Annex to this Declaration, each party shall bind and eliminate customs duties and other duties and charges of any kind, within the meaning of Article II:1(b) of the General Agreement on Tariffs and Trade 1994, with respect to the following:

- (a) all products classified (or classifiable) with Harmonized System (1996) (“HS”) headings listed in Attachment A to the Annex to this Declaration; and
- (b) all products specified in Attachment B to the Annex to this Declaration, whether or not they are included in Attachment A;

through equal rate reductions of customs duties beginning in 1997 and concluding in 2000, recognizing that extended staging of reductions and, before implementation, expansion of product coverage may be necessary in limited circumstances.”).

<sup>6</sup>“Consumer Group Recommends Items for ITA,” *International Trade Reporter*, November 27, 1996, p. 1830.

<sup>7</sup>WTO, Press Release: Director-General, World Trade Organization (November 1996) (Exhibit US-2).

97 percent of world trade in information technology products.<sup>8</sup> The commitments undertaken under the ITA in the WTO are on an MFN basis, and therefore benefits accrue to all other WTO Members.

20. WTO Members, consumers, and representatives of global IT industry continue to recognize the important contributions the ITA has made to growth and development. On the tenth anniversary of implementation of the agreement, presenters at the March 2007 WTO Information Technology Symposium recognized the ITA's role in more than doubling world exports of ITA products and decreasing average import prices of IT products by almost half.<sup>9</sup> In particular, presenters acknowledged the benefits that have accrued to developing countries, which today constitute the majority of ITA participants, and which have experienced new opportunities for growth and employment in the IT sector. As WTO Director General Pascal Lamy noted, "the elimination of tariffs for ITA products makes it possible to use the potential of these technologies for the benefit of millions of people in all corners of the world. Information intensive and IT-enabled industries and services — e-commerce, e-tourism, on-line travel or hotel reservations, financial, transport, and professional services — have developed through lower-cost communications networks as well as IT equipment made cheaper through economies

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<sup>8</sup>Committee of Participants on the Expansion of Trade in Information Technology Products, Note by the Secretariat: Status of Implementation, G/IT/1/Rev.41 (23 October 2008) (Exhibit US-3).

<sup>9</sup>*E.g.*, WTO, Statement by Pascal Lamy (28 March 2007), [http://www.wto.org/english/news\\_e/sppl\\_e\\_spl158\\_e.htm](http://www.wto.org/english/news_e/sppl_e_spl158_e.htm) ("2007 Lamy Statement") (Exhibit US-4) ("World exports of ITA products over the past 10 years have more than doubled in dollar terms, reaching US\$ 1450 billion in 2005 with annual average growth of 8.5 per cent. In 2005, trade on ITA products accounted for 14 per cent of the world merchandise exports, exceeding that of agricultural products, and textiles and clothing together. I believe that it is therefore fair to say that the ITA has been a major success since the establishment of the WTO.").



of scale in the global economy. Furthermore, manufacturing processes, agricultural distribution networks, and even producers of primary products benefit by linking with customers in a timely, efficient, and less costly manner.”<sup>10</sup>

## **2. ITA Implementation Process**

21. Paragraph 2 of the ITA provides that:

Pursuant to the modalities set forth in the Annex to this Declaration, each party shall bind and eliminate customs duties and other duties and charges of any kind, within the meaning of Article II:1(b) of the General Agreement on Tariffs and Trade 1994, with respect to the following:

- (a) all products classified (or classifiable) with Harmonized System (1996) (“HS”) headings listed in Attachment A to the Annex to this Declaration; and
- (b) all products specified in Attachment B to the Annex to this Declaration, whether or not they are included in Attachment A;

through equal rate reductions of customs duties beginning in 1997 and concluding in 2000, recognizing that extended staging of reductions and, before implementation, expansion of product coverage may be necessary in limited circumstances.<sup>11</sup>

22. In accordance with the requirement in the chapeau to paragraph 2 to “bind and eliminate” duties, after the ITA was concluded participants bound their ITA tariff commitments by formally modifying their schedules of tariff concessions to the GATT 1994. The EC is an original participant in the ITA. Participants that were WTO Members at the time of their joining the ITA, including the EC, followed the procedures for the formal rectification and modification of schedules contained in the Decision of 26 March 1980 on Procedures for Modification and Rectification of Schedules of Tariff Concessions, pursuant to paragraph 2 of the Annex to the

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<sup>10</sup>2007 Lamy Statement.

<sup>11</sup>ITA, para. 2.

Ministerial Declaration.<sup>12</sup> In accordance with these procedures, the EC modified its Schedule.

Proposed modifications to the EC Schedule were communicated to Members on April 2, 1997,<sup>13</sup> and, on July 2, 1997, the Director-General certified these modifications, reflecting the EC's ITA tariff concessions.<sup>14</sup>

23. The modifications to the bound tariff rates made by participants cover all products specified in subparagraphs (a) and (b) of paragraph 2. As those paragraphs suggest, the ITA has a dual approach to product coverage: the use of HS classification codes to describe a list of products; and in Attachment B, a set of product descriptions to delineate a list of products (regardless of whether those products are included in Attachment A). The two attachments to the ITA – which each contain lists of covered products – reflect the dual approach. As stated in the ITA Annex, “Attachment A lists the HS headings or parts thereof to be covered” and “Attachment B lists specific products to be covered by an ITA wherever they are classified in the HS.”<sup>15</sup> Products may be covered by either or both Attachment A and Attachment B.

24. Members' WTO Schedules of Concessions describe the tariff treatment Members must accord to products, and often use HS terminology to do so. However, as has been noted in previous disputes, the HS Convention does not contain obligations with respect to tariff

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<sup>12</sup>GATT, Procedures for Modification and Rectification of Schedule of Tariff Concessions: Decision of 26 March 1980, L/4962 (28 March 1980) (Exhibit US-5).

<sup>13</sup>European Communities, Rectifications and Modifications of Schedules, Schedule CXL - European Communities, G/MA/TAR/RS/16 (2 April 1997), p. 1 (Exhibit US-6); WTO, Certification of Modifications to Schedule LXXX: European Communities, WT/Let/156 (2 July 1997) (“EC ITA Schedule Modifications”) (Exhibit US-7).

<sup>14</sup>EC ITA Schedule Modifications, Section 2, p. 1.

<sup>15</sup>ITA, Annex. Note that Attachment A-2 also includes products “for” Attachment B.

treatment,<sup>16</sup> nor can it serve as a basis to “add to or diminish the rights and obligations provided in the covered agreements.”<sup>17</sup> This is equally true of the concessions Members made following the ITA: a Member’s tariff commitments are set forth in the terms of its Schedule, and therefore the Schedule – not the HS – dictates the nature and extent of those commitments. Although in prior reports the Appellate Body has stated that the HS may be relevant context for interpreting HS-derived language used in the description of a tariff concession in a Member’s Schedule,<sup>18</sup> the tariff obligation is contained in the Schedule, and the HS cannot be used to add to or diminish that obligation.

25. While it is well-established that the HS and individual customs classification practices cannot alter a Member’s tariff concessions, ITA negotiators also recognized that Members’ classification actions may affect tariff treatment that the Member provides in practice and that such classification actions consequently have led, not infrequently, to trade disagreements and even dispute settlement proceedings. Indeed, in November 1996, when the ITA negotiations were underway, the United States filed a request for consultations under the DSU with the EC and its member States regarding measures reclassifying certain LAN adapter cards and personal

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<sup>16</sup>International Convention on the Harmonized Commodity Description and Coding System, June 14, 1983, art. 9, 1035 U.N.T.S. 3 (“HS Convention”) (“The Contracting Parties do not assume by this Convention any obligation in relation to rates of Customs duty.”) (Exhibit US-8).

<sup>17</sup>*China – Auto Parts (Panel)*, para. 7.188 (“[E]ven if we were to base our ruling in the present section of these Reports on the alleged rights under the HS, which we are not, we would be guided by our duty not to ‘add to or diminish the rights and obligations provided in the covered agreements.’”) (citing DSU art. 3.2).

<sup>18</sup>*E.g.*, *EC – Computer Equipment (AB)*, para. 90; *EC – Chicken Cuts (AB)*, para. 199; *China – Auto Parts (AB)*, para. 149.

computers with multimedia capability into tariff codes with higher duties than those provided in the EC's Schedules of Concessions.<sup>19</sup>

26. Thus, negotiators understood that some customs authorities might reclassify merchandise covered by the ITA, and that this could inadvertently, and contrary to the objectives of the ITA, result in the imposition of higher duties on ITA products than were provided for in the agreement. Such reclassifications might occur for various reasons, including as a result of developments in technology. Indeed, as the Preamble to the ITA suggests, the ITA was concluded in part *for the purpose of* encouraging innovation and the spread of technology throughout the world.<sup>20</sup>

27. To avoid costly disagreements over tariff treatment that might arise, both the agreement and, as explained below, the modifications subsequently made by participants to their GATT 1994 tariff schedules, included various provisions designed to provide additional assurance that duty-free treatment would be maintained even in the event that customs authorities reclassified products.

28. In this connection, participants incorporated in the very first paragraph of the ITA the statement that their trade regimes “should evolve in a manner that enhances market access opportunities for information technology products.”<sup>21</sup> This statement reflects an important principle underlying the ITA, in particular that the participants contemplated a positive evolution

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<sup>19</sup>*EC – Computer Equipment*, WT/DS62/1.

<sup>20</sup>See ITA, preamble, para. 5 (“Desiring to encourage the continued technological development of the information technology industry on a world-wide basis...”).

<sup>21</sup>ITA, para. 1.

in market access, not the steady narrowing of duty-free treatment that, as explained below, has resulted from the actions of EC and member State customs authorities.

29. The dual approach to product coverage described in paragraph 23, *supra*, underscores the importance the negotiators attached to ensuring that duty-free treatment would be maintained, and that classification developments would not undermine the overarching policy goals of the agreement; the dual approach is also a technique through which the negotiators implemented that objective. The dual approach was thus carried through when participants modified their tariff schedules to implement their ITA commitments. For the products identified by a particular HS line and the products covered “wherever...classified”, ITA participants made two types of modifications to their tariff schedules. First, they modified the tariff treatment in their Schedules for each specific HS tariff line describing an ITA product, such that these lines would be bound at zero duty by January 1, 2000.

30. Second, each ITA participant added a headnote to its Schedule, providing 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 (within the meaning of Article II:1(b) of the General Agreement on Tariffs and Trade 1994), shall be bound and eliminated, as set forth in paragraph 2(a) of the Annex to the Declaration, wherever the product is classified.

In addition to incorporating this commitment to provide duty-free treatment to Attachment B products “wherever...classified”, each participant also included a headnote containing the descriptive list of products in Attachment B as well as products contained in Attachment A-2 which were identified as “for” Attachment B, with a list of the HS headings that at the time were identified as covering those products. (Under paragraph 2 of the ITA Annex, participants were

required to provide “a detailed list of the HS headings involved for products specified in Attachment B.”<sup>22</sup>)

31. As will be described in more detail below, the EC incorporated the tariff commitments set out in Attachment A and the tariff commitments set out in Attachment B into its Schedule.<sup>23</sup>

Those commitments thus became a part of the EC “Schedule”, as that term is used in GATT 1994 Article II:1; and as a result, those tariff commitments became WTO obligations of the EC pursuant to Article II:1(a) and II:1(b) of the GATT 1994.<sup>24</sup> This dispute arises because the EC has not honored certain of those commitments, and therefore is not in compliance with its obligations under Article II:1 of the GATT 1994.

32. In this connection it is important to emphasize that a product entering the EC should qualify for duty-free treatment if the product is covered by either a tariff commitment set out in Attachment A, or a commitment set out in Attachment B, or both.

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<sup>22</sup>ITA Annex, para. 2 (“[A]s early as possible and no later than 1 March 1997 each participant shall provide all other participants a document containing (a) the details concerning how the appropriate duty treatment will be provided in its WTO schedule of concessions, and (b) a list of the detailed HS headings involved for products specified in Attachment B.”).

<sup>23</sup>EC ITA Schedule Modifications. In this submission, references to concessions in the EC’s Schedule include concessions in Schedule LXXX, as certified by Members, and those in Schedule CXL, which the EC has committed to respect, pending submission of a new schedule. See WTO, Situation of Schedules of WTO Members, G/MA/W/23/Rev.5 (7 October 2008), n. vii-xi. The EC implemented its ITA commitments in its domestic law pursuant to Council Decision of 24 March 1997 concerning the elimination of duties on information technology products, O.J. L 155 (12 June 1997), p. 1 (as modified by Council Decision at 2005th Meeting of Ministers (May 14-15, 1997) approving corrected version of ITA, containing certain technical changes, see *infra* note 71)) (Exhibit US-9).

<sup>24</sup>GATT 1994 Article II:1(a) and (b). In addition to the reference in Article II:1, under GATT 1994 Article II:7, a Member’s Schedules are an integral part of the GATT 1994. GATT 1994 Article II:7; see also *EC – Computer Equipment (AB)*, para. 84; *EC – Chicken Cuts (Panel)*, para. 7.6; *EC – Bananas (21.5 – U.S.)*, para. 7.409.

## **B. Tariff Treatment and Classification in the EC**

33. This dispute concerns several different types of measures adopted by the EC and its member States that affect the tariff treatment of particular ITA products. In this section, we provide a brief overview of the operation of EC customs law relating to classification and tariff treatment. The sections that follow describe the particular measures that have resulted in WTO-inconsistent tariff treatment with respect to each product. As will be explained in detail below, the measures at issue include the Combined Nomenclature of the EC, various Commission or Council Regulations, Explanatory Notes of the Combined Nomenclature, as well as actions of the Customs Code Committee.

### **1. The Common Customs Tariff and the Combined Nomenclature**

34. As a customs union, the EC and its member States apply a Common Customs Tariff (CCT) on imports from third countries. Responsibility for administering the customs system is divided between the Commission and the member States.<sup>25</sup> The Commission is responsible for adopting a complete version of the Combined Nomenclature (“CN”) as well as the corresponding rates of duty of the CCT. Customs authorities of the member State through which a good is imported into the EC territory apply the CN and CCT to particular importations, and thereby are responsible for determining at the border the proper classification of the good and collecting the applicable tariff.

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<sup>25</sup>Treaty Establishing the European Communities, arts. 25–27 (*in* Consolidated Version of the Treaty Establishing the European Community, O.J. C 321 E, p. 37, 52 (December 29, 2006)) (Exhibit US-10).

35. Annex I to Council Regulation (EC) No. 2658/87 of 23 July 1987, as amended (“1987 CN/CCT Regulation”) sets forth the CN of the EC as well as CCT duty rates. The EC Combined Nomenclature contains the common nomenclature (i.e., common descriptions of goods with numerical codes) applicable to imports into the EC and the corresponding rates of duty for the good provided under the Common Customs Tariff. Pursuant to Article 12 of the 1987 CN/CCT Regulation, the EC Commission adopts each year by means of a regulation a complete updated version of the CN together with the corresponding rates of duty of the CCT, as an amendment to Annex I of the 1987 CN/CCT Regulation. The most recent update is contained in Commission Regulation (EC) No. 1031/2008, which was published in the EC Official Journal on October 31, 2008 and came into force on January 1, 2009.<sup>26</sup>

36. The EC and its member States are also parties to the Harmonized Commodity Description and Coding System (Harmonized System or HS) Convention of the World Customs Organization (WCO), which most recently amended the HS nomenclature in 2007.<sup>27</sup> The HS nomenclature comprises about 1200 headings that are grouped in 96 chapters. Each HS heading is identified by a 4-digit code, the first two digits of which indicate the Chapter to which the heading belongs and the remainder of which indicate the position of the heading in the Chapter. Most headings are further subdivided into subheadings which are identified by a six-digit code. WCO members may establish additional subdivisions at the national level, beyond the six-digit codes set forth in

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<sup>26</sup>Commission Regulation (EC) No. 1031/2008 of 19 September 2008 amending Annex 1 to Council Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, O.J. L 291 (October 31, 2008) (Exhibit US-11).

<sup>27</sup>WCO, *Harmonized Commodity Description and Coding System* (4th ed. 2007).



the HS, provided they do not narrow or expand the scope of the agreed-upon text.<sup>28</sup> In the CN, the EC has defined subheadings at the eight digit level (as well as nine or ten digit codes in some cases for purposes of the Integrated Tariff of the EC (“Taric”)).<sup>29</sup>

37. Numerical coding, common descriptions, and rates of duty for products (including the products at issue in this dispute) may change as a result of updates to the CN, which are required to occur at least annually.<sup>30</sup> Some changes to the CN are EC-specific; others are the result of rules adopted by participants in the HS Convention. With respect to all three products subject to this dispute, the actions of the EC described below occurred over a period of several years, during which time the CN was repeatedly modified, by measures that are subject to the dispute as well as for technical reasons unrelated to the matter in dispute.<sup>31</sup> In describing the EC measures, unless otherwise indicated, this submission references the numerical codes in effect following EC implementation of the most recent update to the HS nomenclature (2007), with accompanying footnotes to explain significant technical changes to the codes over the period of

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<sup>28</sup>HS Convention, art. 3(3).

<sup>29</sup>Integrated Tariff of the European Communities (known as “TARIC” from its French title, “tarif intégré de la Communauté”). As explained in the introduction to the TARIC, it is “designed to show the various rules applying to specific products when imported into the customs territory of the Community or, in some cases, when exported from it.” The TARIC incorporates the Harmonized System (the international convention-based system on which the Tariff is based), the Combined Nomenclature, and specific provisions of EC law (*e.g.*, tariff quotas, preferences, duty suspensions). Integrated Tariff of the European Communities (TARIC) established by virtue of Article 2 of Council Regulation (EEC) No. 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, O.J. C 103, p. 3-31 (April 30, 2003) (Exhibit US-12).

<sup>30</sup>Council Regulation (EEC) No. 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (“1987 CN/CCT Regulation”), art. 12, O.J. L 256, p. 5 (September 7, 1987) (Exhibit US-13).

<sup>31</sup>For example, the EC, like other customs authorities, may periodically renumber eight digit tariff lines for administrative reasons.

discussion. For convenience, where a measure being quoted uses an earlier code, the code currently in effect is identified in a footnote.<sup>32</sup>

## **2. Other Council and Commission Measures Affecting Classification Or Otherwise Modifying the CN**

38. The Commission or Council may modify the CN periodically through regulations, or provide additional classification rules for particular products.<sup>33</sup> One such measure is a classification regulation. Classification regulations are adopted by the Commission, after seeking the opinion of the Customs Code Committee (a body comprised of representatives of each member State and chaired by a representative of the Commission) in accordance with the “management procedure” set forth in Article 10 of the 1987 CN/CCT Regulation.<sup>34</sup> Classification regulations determine the tariff subheading to be applied to the specific good described in the classification regulation, but may also be applied by analogy to products considered similar to those described in the regulation.<sup>35</sup> Based on these measures, a product may be reclassified in a different tariff line in the CN, which can result in the application of a different duty rate. For example, as explained below, Commission Regulation (EC) No 2171/2005 contains classification rules which resulted in the imposition of duties on certain flat panel display devices.<sup>36</sup>

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<sup>32</sup>Where relevant, this submission may also reference HS codes and descriptions in connection with analysis of the EC Schedule of Commitments, using the nomenclature in effect when the Schedule was concluded (HS96).

<sup>33</sup>1987 CN/CCT Regulation, art. 9(1).

<sup>34</sup>1987 CN/CCT Regulation, art. 10.

<sup>35</sup>Case C-130/02, *Krings GmbH v Oberfinanzdirektion Nurnberg*, E.C.R. I-2121 [2004], para. 35 (Exhibit US-14).

<sup>36</sup>Commission Regulation (EC) No. 2171/2005 of 23 December 2005 concerning the classification of certain goods in the Combined Nomenclature, O.J. L 346, p. 7-9 (December 29,

### **3. Explanatory Notes to the Combined Nomenclature (CNENs)**

39. Pursuant to Article 9(1)(a) of the 1987 CN/CCT Regulation, the EC Commission may issue Explanatory Notes in order to provide additional clarifications to the CN.<sup>37</sup> Explanatory Notes to the CN (CNENs) are adopted by the Commission, after consulting with the Customs Code Committee in accordance with the procedures set forth in the 1987 CN/CCT Regulation. As the EC has stated in previous submissions to the WTO and as the ECJ has consistently held, CNENs “are an important aid in the interpretation of the CN.”<sup>38</sup> In addition to providing guidance to member States on the application of the CN, CNENs have other important legal consequences – for example, once adopted, Binding Tariff Information (a type of EC classification measure described below) that contradicts the guidance set forth in a CNEN is no longer valid.<sup>39</sup> Like a regulation, a CNEN can result in reclassification of products to a different tariff line in the CN, and the application of a different duty rate.

### **4. Opinions and Statements of the Customs Code Committee**

40. The Customs Code Committee, which is established pursuant to Articles 247a(1) and 248a(1) of the Community Customs Code, is comprised of representatives of the member States

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2005) (“December 2005 FPD Regulation”) (Exhibit US-15). *See infra*, para. 65.

<sup>37</sup>1987 CN/CCT Regulation, art. 9(1)(a). CN Explanatory Notes are to be distinguished from HS Explanatory Notes, which are issued by the WCO.

<sup>38</sup>*EC – Customs (Panel)*, para. 2.39 (citing Case C-396/02, *DFDS BV v. Inspecteur der Belastingdienst*, E.C.R. I-8439 [2004], para. 28 (Exhibit US-16); Case C-259/97, *Clees v Hauptzollamt Wuppertal*, 1998 E.C.R. I-08127 [1998], para. 12 (Exhibit US-17)).

<sup>39</sup>E.g., European Commission, *Administrative Guidelines on the European Binding Tariff Information (EBTI) System and Its Operation* (October 28, 2004), art. 11 (stating that “[a] BTI ceases to be valid...[w]here the BTI is no longer compatible with the interpretation of one of the customs nomenclatures, e.g. following amendments to the CN Explanatory notes...”) (“BTI Guidelines”) (Exhibit US-18); see also Community Customs Code, article 12.5(a)(ii) (Exhibit US-19).

and chaired by a representative of the EC Commission. In accordance with Article 8 of the 1987 CN/CCT Regulation, the Customs Code Committee examines any matter referred to it by its Chairman concerning the CN. In particular, the Committee may render opinions on questions relating to the application and interpretation of the CN. Opinions may affect the duty treatment accorded to a product. For example, at the 433rd meeting of the Customs Code Committee, the Chairman explained that “as soon as the Committee has rendered an opinion on the classification of a specific type of product, no BTI should be issued contrary to that opinion and...this opinion should be respected by all member States.”<sup>40</sup> Furthermore, he stated that “[i]t follows from the above that as soon as an opinion has been voted, member States can issue BTIs for the products concerned, even before the measure has been adopted by the Commission and published in the Official Journal.”<sup>41</sup>

## **5. Binding Tariff Information (BTI)**

41. BTIs are decisions issued by customs authorities of individual EC member States on the correct classification of a particular product in the relevant nomenclature.<sup>42</sup> Under the BTI system, an economic operator (such as an importer) applies to a member State’s customs authorities for issuance of BTI confirming the classification that will be assigned to particular goods on importation into the territory of that member State. Once issued, BTI is “binding on the

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<sup>40</sup>Customs Code Committee – Tariff and Statistical Nomenclature Section (Heads of Tariff), 433rd meeting, Summary Report, point 5 (Exhibit US-20).

<sup>41</sup>Customs Code Committee – Tariff and Statistical Nomenclature Section (Heads of Tariff), 433rd meeting, Summary Report, point 5 (Exhibit US-20).

<sup>42</sup>See Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, art. 12, O.J. L 302, p. 8 (October 19, 1992) (Exhibit US-19); Commission Regulation (EEC) No. 2454/93 of 2 July 1993, O.J. L 253, p. 1, 6-11 (October 11, 1993) (“Community Customs Code Regulations”) (Exhibit US-21).

customs authorities as against the holder of the information.”<sup>43</sup> EC regulations implementing the Community Customs Code provide that member State customs authorities are obliged to follow BTIs issued by other member States.<sup>44</sup> BTIs are normally valid for six years from the date of issue, but may cease to be valid if, for example, a contrary CNEN is issued.

### **C. Set-Top Boxes with a Communication Function**

#### **1. The Product at Issue**

42. A set top box (STB) is an electronic apparatus that connects to a communication channel, such as a phone, ISDN (integrated services digital network) or cable television line, and produces output on a conventional television screen.<sup>45</sup> STBs “vary greatly in their complexity.”<sup>46</sup> They enable a television set to receive and decode digital television (DTV) broadcasts and are often referred to as “cable boxes” or “receivers”.<sup>47</sup> STBs with a communication function additionally enable a user to connect to the Internet and send and receive information (engage in “interactive” information exchange).<sup>48</sup>

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<sup>43</sup>1987 CN/CCT Regulation, art. 12(2).

<sup>44</sup>Community Customs Code Regulations, art. 11.

<sup>45</sup>E.g., Set-top boxes, Informitv glossary, <http://informitv.com/glossary/settopbox/> (describing a set top box as a “[r]eceiver device that processes an incoming signal from a satellite dish, aerial, cable, network or telephone line”) (Exhibit US-22); see also Set-top Boxes, ITV Dictionary, <http://www.itvdictionary.com> (“A set-top box (STB) is a device that connects to an external signal source and decodes that signal into content that can be presented on a display unit such as a TV.”) (Exhibit US-23).

<sup>46</sup>Definition of “STB” in Newton’s Telecom Dictionary (10th ed. 1996), p. 1041 (Exhibit US-24).

<sup>47</sup>Definition of “STB” in Newton’s Telecom Dictionary (10th ed. 1996), p.1041 (Exhibit US-24).

<sup>48</sup>ITA, Attachment B. See also Annabel Z. Dodd, *The Essential Guide to Telecommunications* (3rd ed. 2001), p. 308 (“Digital set top boxes are available to take advantage of the two-way capability of digital cable TV and satellite TV.”) (Exhibit US-25).

## **2. Modifications to EC Schedule of Concessions Providing Duty-free Treatment for STBs with a Communication Function**

43. Set top boxes with a communication function were included in the ITA. Attachment B of the ITA provides for duty-free treatment, “wherever classified”, for:

set-top boxes which have a communication function: a microprocessor-based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange.<sup>49</sup>

44. As explained above, in order to bind its commitment with respect to Attachment B, the EC incorporated a headnote into its Schedule stating 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 (within the meaning of Article II:1(b) of the General Agreement on Tariffs and Trade 1994), shall be bound and eliminated, as set forth in paragraph 2(a) of the Annex to the Declaration, wherever the product is classified.<sup>50</sup>

45. Attachment A of the ITA also provides for duty-free treatment for three HS tariff subheadings that include STBs with a communication function. In particular, the ITA required parties to bind at zero three tariff lines that include STBs with a communication function: 8517.50 (HS96) (“Electrical apparatus for line telephony or line telegraphy, including line telephone sets with cordless handsets and telecommunication apparatus for carrier-current line systems or for digital line systems; videophones”...“Other apparatus, for carrier-current line systems or for digital line systems”), 8517.80 (HS96) (...“Other apparatus including entry-phone systems”) and 8525.20 (HS96) (“Transmission apparatus incorporating reception apparatus”).

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<sup>49</sup> ITA, Attachment B.

<sup>50</sup>EC ITA Schedule Modifications, EC ITA Schedule Modifications, Section 2, p. 1.

The EC bound each of these three lines at zero. It then created 8528 12 91 in 2000, to cover “[a]pparatus with a microprocessor-based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange, capable of receiving television signals,” and modified its Schedule accordingly to provide for duty-free treatment to those products.<sup>51</sup>

### **3. EC Actions to Impose Duties on STBs with a Communication Function**

46. For years after the ITA was implemented by the EC, STBs with a communication function were imported into the EC duty-free, in accordance with the EC’s commitments under the ITA. However, over a period of two years, that changed, as the EC adopted measures that resulted in significant numbers of these STBs losing duty-free access to the EC market. Along the way, before the EC process was even finished, individual EC member States began to impose duties on STBs with a communication function, thereby eroding the duty-free access that WTO Members had negotiated. The following describes how these products, once duty-free, came to be subject to duties of 14% upon importation into the EC.

47. At the time the EC implemented its ITA obligations, STBs with a communication function were generally classified in 8528 71 13 of the EC’s Combined Nomenclature (CN) or its predecessor lines<sup>52</sup> when imported into the EC and were duty-free. However, in 2006, the Tariff and Statistical Nomenclature Section of the EC Customs Code Committee began considering the

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<sup>51</sup>Committee on Market Access, Rectifications and Modifications of Schedules, Schedule CXL - European Communities, G/MA/TAR/RS/74 (15 December 2000) (Exhibit US-26).

<sup>52</sup>CN 8528 71 13 is HS2007 nomenclature for what was previously tariff line 8528 12 91. For an explanation of the harmonized system nomenclature, its relationship to the EC Combined Nomenclature, and the transposition process, see paras. 37-38, *supra*.

adoption of two amendments to the Explanatory Notes to the CN that would redefine the scope of CN code 8528 71 13 and thereby exclude from duty-free treatment a significant share of STBs on the market.

48. In October 2006, the Customs Committee approved a proposed amendment providing that 8528 71 13<sup>53</sup> no longer includes set top boxes that have ISDN-, WLAN- or Ethernet modems,<sup>54</sup> and that STBs of the duty-free tariff line must incorporate a video tuner.<sup>55</sup> As a result, devices with certain types of modems and devices which receive television signals through a broadband connection (IPTV) rather than a tuner were reclassified by EC customs authorities into heading 8528 71 19 and assigned a 14% duty.<sup>56</sup> Then, in May 2007, the Customs Committee approved a second amendment, providing that set top boxes with a “recording function” would be “excluded from” CN code 8528 71 13 and that CN code 8521 90 00 – a code carrying a 13.9% duty – “includes set top boxes which incorporate a device performing a recording function (e.g., a hard disk or DVD drive).”<sup>57</sup> Using the reasoning contained in the amended CNENs, various EC member States began issuing Binding Tariff Information

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<sup>53</sup>Formerly 8528 12 91.

<sup>54</sup>EC Commission, Summary of Conclusions of the 407th meeting of the Customs Code Committee held in Brussels from 18 to 20 October 2006, TAXUD B3 Adonis D 8003 (8 January 2007), Annex VI (Exhibit US-27).

<sup>55</sup>Amended STB CNEN, p. 8-9 (stating that dutiable line CN 8528 71 90 “includes products without a screen which are reception apparatus for television but which do not incorporate a video tuner (for example, so-called ‘IP-streaming boxes’)”).

<sup>56</sup>*E.g.*, NLRD-2008-000713 (Netherlands, May 20, 2008); BGBG/2008/000072 (Bulgaria, May 26, 2008) (Exhibit US-28).

<sup>57</sup>European Commission, Taxation and Customs Union, Satellite Receivers with Hard Disk or DVD Drive (TAXUD-0590-2007) (March 13, 2007), at 2-3 (Exhibit US-29).



classifying STBs with a communication function in a dutiable provision and imposing duties on the products.<sup>58</sup> Member States did so prior to publication of the amended CNENs.<sup>59</sup>

49. Over a year and a half after the first opinion was approved, and a year after the second opinion was approved, the EC published the amended CNEN in its Official Journal on May 7, 2008.<sup>60</sup>

## **D. Flat Panel Display Devices**

### **1. The Product at Issue**

50. A flat panel display device (“FPD”) is a type of monitor that is thinner and typically uses less energy than devices using conventional cathode ray tube (CRT) technology.<sup>61</sup> FPDs may rely on a variety of technologies to achieve a thinner profile, including liquid crystal or plasma.

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<sup>58</sup>*E.g.*, FR-E4-2007-002839R1 (France, July 11, 2007), FR-E4-2007-001251 (France, July 11, 2007), FR-E4-2007-00261 (France, July 11, 2007), BED.T. 248.255 (Belgium, January 23, 2008); NLRTD-2008-000714 (Netherlands, May 20, 2008); DEM-3358-05-1 (Germany, August 11, 2005); CZ05-0187-2008 (Czech Republic, April 23, 2008); CZ05-0478-2008 (Czech Republic, June 10, 2008) (Exhibit US-28). Some member States relied on the deliberations of the Committee to impose duties on STBs as early as March 2006. DEM/4638/06-1 (Germany, July 24, 2006), DEM/3971/06-1 (Germany, June 13, 2006), BED.T.245.774 (Belgium, March 23, 2006) (Exhibit US-28).

<sup>59</sup>*E.g.*, FR-E4-2007-002839R1 (France, July 11, 2007) (imposing duties while referencing unpublished decision of Customs Code Committee), FR-E4-2007-001251 (France, July 11, 2007) (imposing duties while referencing unpublished decision of Customs Code Committee), FR-E4-2007-00261 (France, July 11, 2007), BED.T. 248.255 (Belgium, January 23, 2008) (Exhibit US-28).

<sup>60</sup>Explanatory Notes to the Combined Nomenclature of the European Communities, O.J. 2008/C 112/03 (May 7, 2008) (“Amended STB CNEN”), p. 8 (Exhibit US-30).

<sup>61</sup>Energy Star, LCD Basics, <http://www.energystar.gov/index.cfm?c=monitors.lcd> (“Now, LCD monitors or flat-panel displays, are quickly replacing traditional cathode ray tube (CRT) computer monitors. LCDs use less space than traditional monitors, but did you know they also use less energy? ... LCD monitors can offer the consumer considerable savings over the product’s total lifetime. In some cases, the energy-consumption of an average LCD display can be half to two-thirds of that for an average CRT.”) (Exhibit US-31).

Liquid crystal display (LCD) technology is commonly used for computer monitors, and involves aligning material suspended in a liquid under the influence of a low voltage so that it reflects ambient light.<sup>62</sup> Virtually all computer monitors marketed and sold today use LCD technology.

51. Originally, the primary display devices for computers were based on cathode ray tube (“CRT”) technology. The signal generated by the computer, being a digital signal, had to be converted from digital to analog before delivery to the CRT.<sup>63</sup> This conversion was done through a digital-analog interface located in the computer. The signal was then transmitted to the CRT through a standard Video Graphics Array (VGA) connector,<sup>64</sup> a device capable of transmitting the analog signal from the computer to the analog CRT.

52. Unlike CRT monitors, FPDs are able to receive and process the digital signal sent by a computer without analog conversion.<sup>65</sup> The first serious attempts at developing the active matrix technology used in LCDs for computer displays occurred in the early 1970s, and LCD technology began to be commercialized in the 1980s.<sup>66</sup> LCD FPDs were thus well-known and an

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<sup>62</sup>Hirohisa Kawamoto, *The History of Liquid-Crystal Displays*, Proceedings of the IEEE (Vol. 90, No. 4) (April 2002), p. 466 (discussing the reflection process) (“Kawamoto 2002”) (Exhibit US-32); Definition of “LCD” in *Newton’s Telecom Dictionary*, p. 555 (24th ed., 2008) (Exhibit US-33).

<sup>63</sup>Jeff Tyson and Carmen Carmack, *How Computer Monitors Work*, <http://computer.howstuffworks.com/monitor.htm/printable>, p. 4-5 (“How Monitors Work”) (Exhibit US-34).

<sup>64</sup>Also known as an RGB connector, D-sub 15 connector, or mini-sub D15. Jeff Tyson and Carmen Carmack, *How Monitors Work*, p. 4.

<sup>65</sup>*How Monitors Work*, p. 4 (“[M]ost CRT monitors require the signal information in analog (continuous electrical signals or waves) form and not digital (pulses equivalent to the binary digits 0 and 1)...”).

<sup>66</sup>Kawamoto 2002.

increasingly important part of the market during the mid-1990s, when the ITA was being negotiated.

53. FPDs may connect to the computer using various technologies, including technologies specifically developed to take advantage of the FPD's ability to accept digital signals. One such connection is the Digital Visual Interface, or DVI, connection. A DVI interface is a connector that typically consists of three rows of pins arrayed on a plug with a screw on either side. DVI was developed in 1998 by the Digital Display Working Group (DDWG), an open industry working group comprised of leading computer manufacturers.<sup>67</sup> The DDWG's objective was to address the computer industry's need for a digital-to-digital connection standard for high-performance personal computers and digital displays.<sup>68</sup> When publishing this new standard in April 1999, the group explained that the DVI specification

provides a high-speed digital connection for visual data types that is display technology independent. The interface is primarily focused at providing a connection between a computer and its display device. The DVI specification meets the needs of all segments of the PC industry (workstation, desktop, laptop, etc) and will enable these different segments to unite around one monitor interface standard.<sup>69</sup>

54. DVI remains the industry standard for connecting a computer to a flat panel display device. Approximately half of all LCD monitors on the market are equipped with a DVI interface.

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<sup>67</sup>Digital Display Working Group, Digital Visual Interface (DVI) Revision 1.0p, p.5 (March 30, 1999) ("DDWG Paper") (Exhibit US-35).

<sup>68</sup>DDWG Paper, p. 5.

<sup>69</sup>DDWG Paper, p. 5.

## **2. Modifications to EC Schedule of Concessions Providing Duty-free Treatment for Flat Panel Display Devices**

55. Certain flat panel display devices were included in the ITA. Specifically, Attachment B of the ITA provides that participants shall “bind and eliminate” customs duties with respect to:

Flat panel display devices (including LCD, Electro Luminescence, Plasma, Vacuum-Fluorescence and other technologies) for products falling within this agreement, and parts thereof<sup>70</sup>

56. “Automatic data processing machines,” such as computers, “fall within” the ITA.<sup>71</sup> Thus, this commitment includes flat panel display devices “for” computers – that is, flat panel computer displays such as LCD monitors. The ITA further provides that such products shall receive duty-free treatment “wherever they are classified” in the Harmonized System. In order to bind this commitment in its Schedule, the EC incorporated a headnote providing for duty-free treatment for this and other Attachment B products, “wherever...classified.”<sup>72</sup>

57. These devices were also included in Attachment A of the ITA. Attachment A provides, among other things, that participants shall “bind and eliminate” customs duties with respect to “input or output units, whether or not containing storage units in the same housing” under item

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<sup>70</sup>ITA at para. 2, Annex at para. 2(a), and Attachment B. Shortly after the ITA was concluded, participants approved a handful of technical clarifications, before the submission of implementing schedules. Among these technical clarifications were two changes to the flat panel display device language: the addition of the term “devices” and the addition of a reference to “Vacuum-Fluorescence” technology. See WT/MIN(96)/16/Corr.1 (13 October 1997) (Exhibit US-36); WTO, Implementation of the Ministerial Declaration on Trade in Information Technology Products, Note by the Secretariat, Informal Meeting of 26 March 1997, Revision, G/L/159/Rev.1 (24 April 1997) (Exhibit US-37). These modifications are reflected in the headnote to the EC Schedule listing products included in Attachment A-2 and Attachment B.

<sup>71</sup>ITA, Attachment A and Attachment B.

<sup>72</sup>EC ITA Schedule Modifications, EC ITA Schedule Modifications, Section 2, p. 1.

8471 60 (HS96). Pursuant to this concession, the EC modified its Schedule to eliminate duties on “input or output units, whether or not containing storage units in the same housing”.<sup>73</sup>

### 3. EC Measures Affecting Tariff Treatment of Flat Panel Display Devices

58. FPDs entered the EC duty-free for years after the ITA was concluded and implemented, as required by the EC’s tariff concessions under the ITA. Then, as with set top boxes with a communication function, the EC changed course and over a period of three years, from 2004 to 2007, adopted a series of measures that resulted in the end of lasting duty-free treatment for virtually all LCD flat panel display devices exported to the EC. The following describes how these products, once duty-free, came to be subject to duties as high as 14% upon importation into the EC.

59. Following the conclusion of the ITA, what is now CN 8528 51 00 and its predecessors<sup>74</sup> were the principal tariff lines in which the EC classified flat panel display devices such as LCD monitors. This code carries a zero duty. In 2004, however, the EC’s treatment of FPDs began to change.<sup>75</sup> First, the EC customs authorities took action to reclassify various plasma flat panel display devices, providing in an April 2004 regulation that plasma devices with a DVI connector

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<sup>73</sup>EC ITA Schedule Modifications, Section 1, p. 8.

<sup>74</sup>CN code 8471 60 90 at the time the ITA was concluded. 8471 60 90 became 8471 60 80, due to a renumbering; following implementation of HS07, it became 8528 51 00.

<sup>75</sup>It was with respect to the 2004 period that the panel in *EC – Customs* found that the EC’s tariff classification “of liquid crystal display monitors with digital video interface amounts to non-uniform administration within the meaning of Article X:3(a) of the GATT 1994.” *EC–Customs* (Panel), para. 7.305 (upheld by *EC–Customs* (AB), para. 260). It should be noted that this dispute concerns the issue of whether the tariff treatment the EC accords to flat panel display devices is consistent with its obligations under Article II:1(a) and (b), not whether the EC administers its tariff classification system in a uniform manner.

would be classified in heading 85.28 and be assigned a 14% duty,<sup>76</sup> and stating that “[u]nless an importer can demonstrate that a monitor is *only* for use with an ADP machine or to be used as an indicator panel (heading 8531), it has to be classified in heading 85.28.”<sup>77</sup> At the prompting of the EC Customs Code Committee, this decision was then applied by several member States “by analogy” to LCD flat panel display devices.<sup>78</sup> Referring to Regulation 754/2004, for example, in October 2004 the United Kingdom reclassified LCD monitors with DVI to a dutiable line in heading 85.28.<sup>79</sup>

60. By November 2004, reclassification was underway in most member States, with the notable exception of Germany, which continued to classify LCD monitors with DVI in the duty-free heading. The EC Customs Code Committee reported that “[a]ll MS present, except one, confirmed that they classify plasma monitors and LCD monitors with a DVI connector in heading 85.28, unless the importer can demonstrate that the monitor is to be used *only* with an

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<sup>76</sup>Commission Regulation (EC) No. 754/2004 of 21 April 2004 concerning the classification of certain goods in the Combined Nomenclature, O.J. L 118, p. 32 (April 23, 2004) (Exhibit US-38).

<sup>77</sup>Customs Code Committee – Tariff and Statistical Nomenclature Section (Mechanical/Miscellaneous Sector), Conclusions of the 346th Meeting of the Committee held from 30 June to 2 July 2004, p. 14 (emphasis added) (Exhibit US-39).

<sup>78</sup>Customs Code Committee – Tariff and Statistical Nomenclature Section (Mechanical/Miscellaneous Sector), Conclusions of the 346th Meeting of the Committee held from 30 June to 2 July 2004, p. 10 (Exhibit US-39) (“Plasma regulation can be used to revoke BTIs classifying plasma monitors in 84.71; by analogy this can be done for LCD monitors; classification is a matter of facts and law.”).

<sup>79</sup>HM Customs & Excise, Tariff Notice 13/04: Tariff Classification of LCD Monitors Incorporating a Digital Visual Interface (DVI) Connector (cited in *EC-Customs* (Panel), para. 7.300 and n. 573) (noting that the action “represents a UK change of classification practice insofar as certain LCD/TFT monitors with DVI connector were previously classified under heading 84.71.”) (Exhibit US-40).

ADP machine (heading 84.71), or to be used in an indicator panel (heading 85.31).”<sup>80</sup> During the September 2004 meeting of the Customs Code Committee, the Chairman reminded member States “to make sure they follow the line agreed in the 346<sup>th</sup> meeting.”<sup>81</sup> In the November meeting, the Commission informed member States that it was “preparing decisions invalidating incorrect BTIs” and would launch infringement proceedings where “one (or more) MS are found, in a consistent manner, to maintain and/or issue incorrect BTIs.”<sup>82</sup> Germany continued to provide duty-free treatment – in February 2005, it even published a national Explanatory Note to the CN classifying LCD FPDs with DVI under a duty-free tariff line.<sup>83</sup>

61. Then, on March 16, 2005, in a further effort to compel member State customs authorities to classify LCD monitors in a dutiable tariff line, the EC issued Council Regulation (EC) No 493/2005, which stated that “the CN codes for monitors are 8471 and 8528.”<sup>84</sup> Heading 8528 at

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<sup>80</sup>Customs Code Committee – Tariff and Statistical Nomenclature Section (Mechanical/Miscellaneous Sector), Conclusions of the 354th Meeting of the Committee held on 11 and 12 November 2004, point 6, TAXUD/3073/2004-EN (December 6, 2004) (emphasis added) (Exhibit US-41). The devices at issue that were classifiable in heading 8471 are now in line 8528 51 00 (duty-free). The devices at issue that were classifiable in heading 8528 are now in line 8528 59 90 (14%).

<sup>81</sup>Customs Code Committee – Tariff and Statistical Nomenclature Section (Mechanical/Miscellaneous Sector), Conclusions of the 350th Meeting of the Committee held on 20 September 2004 (Exhibit US-42).

<sup>82</sup>Customs Code Committee – Tariff and Statistical Nomenclature Section (Mechanical/Miscellaneous Sector), Conclusions of the 354th Meeting of the Committee held on 11 and 12 November 2004 (Exhibit US-41).

<sup>83</sup>VSF-Nachrichten of 25 February 2005 in: *Vorschriftensammlung der Bundesfinanzverwaltung N 22 2005* (publishing National Explanatory Note to the Combined Nomenclature classifying LCD FPDs of all sizes with DVI under heading 8471) (Exhibit US-43).

<sup>84</sup>Council Regulation (EC) No. 493/2005 of 16 March 2005 amending Annex I to Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, O.J. L 82, p. 1 (March 31, 2005) (“March 2005 FPD Regulation”) (Exhibit US-44).

the time pertained to “Reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus.” Color LCD video monitors were classified in what was then 8528 21 90,<sup>85</sup> and received a 14% duty. In Council Regulation 493/2005, the EC claimed that due to the “convergence” of technologies it had become “impossible” to determine the main purpose of a monitor.<sup>86</sup> The EC conceded that trade data suggested that LCD monitors of 19 inches or less and standard (*i.e.*, non-widescreen) dimensions were “mainly used as output units of automatic data-processing machines,” but asserted that “such monitors are frequently also capable of reproducing video images from a source other than an automatic data-processing machine and therefore do not meet the condition of being solely or principally for use with such machines.”<sup>87</sup> The EC therefore concluded that LCD monitors of 19 inches or less and standard (*i.e.*, non-widescreen) dimensions “are therefore not covered by the Agreement on trade in information technology products or by the Communication on its implementation...”<sup>88</sup>

62. In that Regulation, the EC decided to suspend until December 31, 2006 duties on monitors classifiable under what is now CN code 8528 59 90 30<sup>89</sup> (color monitors with a diagonal measurement of the screen of 48,5 cm or less and with an aspect ratio of 4:3 or 5:4).<sup>90</sup>

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<sup>85</sup>Now 8528 59 90 (CN07).

<sup>86</sup>March 2005 FPD Regulation, p. 1.

<sup>87</sup>March 2005 FPD Regulation, p. 1.

<sup>88</sup>March 2005 FPD Regulation, p. 1.

<sup>89</sup>What was then 8528 21 90 30.

<sup>90</sup> March 2005 FPD Regulation, p. 1.



In December 2006, this duty suspension was extended until December 31, 2008.<sup>91</sup> No suspension is currently in effect.

63. On April 26, 2005, the EC issued Commission Regulation (EC) No 634/2005, which provided that certain LCD monitors would be classified in 8528 21 90 and subject to a 14% duty, if they had certain attributes, including a “DVI interface enabling the product to display signals received from various sources, such as an automatic data processing machine, a closed circuit television system, a DVD player, [or] a camcorder.”<sup>92</sup> The EC indicated that in its view, these devices are not “of a kind solely or principally used in an automatic data-processing system...in view of its *capabilities* to display signals from various sources.”<sup>93</sup>

64. On December 23, 2005, the Commission issued Regulation (EC) No 2171/2005, which provided that certain LCD monitors would be classified in what is now 8528 59 90,<sup>94</sup> if they had certain attributes, including a “DVI interface enabling the product to display signals received from an automatic data processing machine via a graphic card”, and machines that “can display signals received from various sources such as a closed circuit television system, a DVD player, a camcorder or an automatic data-processing machine.”<sup>95</sup> The EC indicated that in its view these

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<sup>91</sup>Council Regulation (EC) No. 301/2007 amending Annex I to Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and on the Common Customs tariff, O.J. L 81, p. 11 (March 22, 2007) (Exhibit US-45).

<sup>92</sup>Commission Regulation (EC) No. 634/2005 of 26 April 2005 concerning the classification of certain goods in the Combined Nomenclature, O.J. L 106, p. 9 (April 27, 2005) (“April 2005 FPD Regulation”) (Exhibit US-46).

<sup>93</sup>April 2005 FPD Regulation, p. 9 (emphasis added).

<sup>94</sup>What was then CN 8528 21 90.

<sup>95</sup>December 2005 FPD Regulation, p. 7.

devices are not “of a kind solely or principally used in an automatic data-processing system” since they are “capable of displaying signals from various sources.”<sup>96</sup>

65. On October 17, 2006, the Commission issued the amended CN for 2007.<sup>97</sup> As a result of these amendments, duty free heading CN 8471 60 80 was replaced by CN 8528 51 00 and dutiable heading CN 8528 21 90 was replaced by CN 8528 59 90.<sup>98</sup> On December 30, 2006, the EC published amendments to the Explanatory Notes to accompany what is now CN 8528 51 00<sup>99</sup> and CN 8528 59 90.<sup>100</sup> Like the EC regulation, the amended explanatory note indicates that LCD monitors with certain attributes would not be classified in 8528 51 00. For example, the explanatory note states that, with respect to 8528 51 00:

- “monitors of this subheading *cannot*...be connected to a video source such as a DVD recorder or reproducer...be fitted with interfaces such as DVI-D, DVI-I...be used in systems other than automatic data-processing systems”

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<sup>96</sup>December 2005 FPD Regulation, p. 7.

<sup>97</sup>Commission Regulation (EC) No. 1549/2006 of 17 October 2006 amending Annex 1 to Council Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, O.J. L 301, p. 1 (Exhibit US-47).

<sup>98</sup>These subheading numbers are unchanged in the amended CN for 2009. Commission Regulation (EC) No. 1031/2008, O.J. L 291 (Oct. 31, 2008) (Exhibit US-11).

<sup>99</sup>At the time, CN 8471 60 80.

<sup>100</sup>At the time, CN 8528 21 90. Uniform Application of the Combined Nomenclature (CN) (Classification of Goods) (2006/C 332/05): Explanatory Notes adopted in accordance with the procedure defined in Article 10(1) of Council Regulation (EEC) No. 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, O.J. C 332, p. 7 (December 30, 2006) (“Amended FPD CNENs”) (Exhibit US-48). *See also* Explanatory Notes to the Combined Nomenclature of the European Communities: Publication Made in Accordance with Article 9(1) of Council Regulation (EEC), No. 2658/87 of 23 July 1987 on the Tariff and Statistical Nomenclature and on the Common Customs Tariff, O.J. C 133 (May 30, 2008), p. 352 (including Amended FPD CNENs in compendium of CNENs published periodically by EC) (“Amended FPD CNENs (2008)”) (Exhibit US-49).

- “monitors of this subheading...are capable of accepting a signal *only* from the central processing unit of an automatic data-processing machine of heading 8471.”<sup>101</sup>

66. With respect to 8528 59 90, the explanatory note states that “[t]hese monitors *may also* be fitted with interfaces for automatic data-processing machines of heading 8471.”<sup>102</sup> Thus, even if a monitor is principally for use with an automatic data processing machine, it is classified under 8528 59 90 – drawing a 14% duty – if it is merely capable of being connected to a non-ADP machine.

67. Pursuant to the Commission’s actions, described above, several EC member States have issued BTIs reclassifying flat panel display devices as “video monitors” due to the connector they use, in particular DVI.<sup>103</sup> At least one member State issued revised classification guidance providing that “LCD monitor with DVI inputs and a diagonal measurement of the screen of [19 inches] or less and with an aspect ratio of 4:3 or 5:4” ... “with video or DVI inputs” is classified in 8528.59.90.<sup>104</sup>

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<sup>101</sup>Amended FPD CNENs, p. 7 (emphasis added); Amended FPD CNENs (2008), p. 352-53 (emphasis added).

<sup>102</sup>Amended FPD CNENs, p. 7; Amended FPD CNENs (2008), p. 352-53 (see note to subheading 8528 41 00 and 8528 51 00 (providing that notes to subheading 8528 41 00 apply mutatis mutandis to 8528 51 00)).

<sup>103</sup>See e.g., NL RTD-2007-000535 (Netherlands December 11, 2006), NL RTD-2007-000536 (Netherlands December 11, 2006), IE 06NT-14-501-03 (Ireland, September 27, 2006), IE 06NT-14-501-01 (Ireland, September 27, 2006), IE 06NT-14-501-02 (Ireland, September 27, 2006) (Exhibit US-50).

<sup>104</sup>UK Customs, Tariff Classification Guidance for Chapters 84 and 85 Computers and Software (July 2006) (“UK 2006 FPD Guidance”) (Exhibit US-51). Following HS2007, the relevant lines are now 8528.51.00 (other monitors -- of a kind solely or principally used in an ADP system of heading 8471) (0%); and 8528.59.90 (other monitors – other -- colour) (14%).

## **E. Multifunction Digital Machines**

### **1. The Product at Issue**

68. Multifunction digital machines (MFMs) are digital devices that generally incorporate both an input unit (a scanner unit to convert information into digital input for the device) and an output unit (a printer unit that allows the digital output from the device to be printed). Once a document has been converted into digital information, that information can be stored, manipulated on the computer, transmitted over phone lines, or sent over the internet.<sup>105</sup> The print unit allows that digital information to be printed in paper form. As explained later, MFMs are essentially technologically advanced printers. In this dispute, the United States uses the term “MFM” to refer to machines that perform, in addition to printing, one or more of the functions of scanning, copying, or facsimile transmission.

69. The MFMs at issue in this dispute encompass two categories of devices, subject to distinct tariff concessions. The first type of MFM is capable of directly connecting to an automatic data processing machine or to a computer network in a digital form.<sup>106</sup> Such MFMs include devices commercially known as “multifunction printers” (MFPs). As will be explained below, these MFMs are subject to tariff concessions that the EC made with respect to products under heading 8471 and, in particular, subheading 8471.60.

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<sup>105</sup>Definition of “All-In-One” *in* PC Magazine Encyclopedia, [www.pcmag.com](http://www.pcmag.com) (Exhibit US-52) (“A combination computer printer, scanner, copy machine and fax machine. Some all-in-ones exclude the fax capability or make it an option.”); see also, e.g., Wisegeek, What is a Multifunction Peripheral?, [www.wisegeek.com/what-is-a-multifunction-peripheral.htm](http://www.wisegeek.com/what-is-a-multifunction-peripheral.htm) (“Wisegeek, Multifunction Peripheral”) (Exhibit US-53).

<sup>106</sup>E.g., Wisegeek, Multifunction Peripheral.

70. The second type of MFM, commercially known as a facsimile machine, is not capable of connecting to a computer, though like the first device, it is a digital product performing one or more of the functions of printing, scanning, copying, or facsimile transmission. A facsimile MFM receives a signal from a telephone line or scans from a paper original fed through the scanner.<sup>107</sup> Documents can be printed on the print engine contained in the multifunction unit, or transmitted for printing on another device.<sup>108</sup> Rather than connect to a computer, these devices connect to a telephone line. The devices in question have a scanner which allows an image of the document to be converted into digital data, so that the data can be transmitted over a telephone line as a facsimile. These MFMs, which cannot connect to a computer, are facsimile machines, and as explained below, are subject to tariff concessions that the EC made on products under heading 85.17 and, in particular, subheading 8517.21.

71. MFMs are technologically distinct from photocopiers. As described above, the copying function (sometimes referred to as “digital copying”) is in fact performed by the scanner component of the MFM, which is used to create a digital master file of the document, operating in conjunction with the printer component, which converts the file into one or more prints.<sup>109</sup> This technology is purely digital and thus different from conventional light-lens copying technology, which does not contemplate connection to a computer.<sup>110</sup>

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<sup>107</sup>E.g., Multifunction Fax, About Multipurpose Fax Machines (2007) (Exhibit US-54).

<sup>108</sup>E.g., Wisegeek, Multifunction Peripheral.

<sup>109</sup>E.g., Wisegeek, Multifunction Peripheral.

<sup>110</sup>Wisegeek, How Do Digital Copiers Work?, [www.wisegeek.com/how-do-digital-copiers-work.htm](http://www.wisegeek.com/how-do-digital-copiers-work.htm) (Exhibit US-55) (“Digital copiers work like a computer document scanner; they store the data as a file that can then be reprinted repeatedly, altered, or saved. The printing mechanism of digital copiers acts like a modern laser printer.”); see also Wisegeek, What is a Digital Copier?, [www.wisegeek.com/what-is-a-digital-copier.htm](http://www.wisegeek.com/what-is-a-digital-copier.htm) (Exhibit US-56) (“Many

## **2. Modifications to EC Schedule of Concessions Providing Duty-free Treatment for MFMs**

72. The tariff concessions at issue in this dispute arose as part of the ITA. Attachment A of the ITA provides that Members shall “bind and eliminate” customs duties with respect all items in heading 8471 (HS96), and in particular with respect to “input or output units, whether or not containing storage units in the same housing” (8471 60) (HS96). Attachment A of the ITA also includes “facsimile machines” (8517 21) (HS96).<sup>111</sup> In plain language, pursuant to these concessions, the parties committed to treat as duty-free both (1) computer (“automatic data processing machine”) peripherals (“input or output units”) such as printers, scanners, and keyboards, and (2) facsimile machines.

73. Pursuant to the ITA, on July 2, 1997, the EC modified its Schedule to eliminate duties on all items covered by heading 8471, and in particular on “input or output units” of “automatic data processing machines,” as contained in subheading 8471 60 (HS96). As required by the ITA, the EC also eliminated duties on all items in this six-digit subheading (including specifically both “printers” of CN 8471 60 40 (HS96) and other input or output units of CN 8471 60 90 (HS96) (both previously subject to a 2 percent duty)), as well as facsimile machines of CN 8517 21 00

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copiers operate with an older process that is sometimes referred to as analog copying. Essentially, this older method involves the use of an internal mirror that copies the image of the master document onto a drum. Using static electricity, the analog copy machine utilizes particles of toner to create an image of what is found on the drum, uses a heat element to dry and fix the toner into place, and then produces the copy on a sheet of paper. Digital copiers do not employ the use of a mirror, drum, or toner to produce the copy. Instead a digital copier will actively scan the document and save the data into memory. Once the image of the document is securely in memory, most forms of the digital copier allow the document to be printed from the memory or in some cases transmitted electronically to other digital devices that are capable of receiving the transmission.”).

<sup>111</sup> ITA at para. 2, Annex at para. 2(a), and Attachment A.

(HS96) (previously subject to a 7.5 percent duty).

74. The ITA covers a wide range of input or output units (such as printers and scanners), as well as facsimile machines, and certain photocopiers,<sup>112</sup> but does not cover “indirect process” (i.e., traditional light lens) photocopiers classified under 9009 12 (HS96), described as “Photocopying apparatus incorporating an optical system or of the contact type and thermocopying apparatus -- Operating by reproducing the original image via an intermediate onto the copy (indirect process).” These devices use standard “light lens” photocopying technology to duplicate images. Electrostatic photocopiers operating by an indirect process are subject to a 6 percent duty when imported into the EC.<sup>113</sup>

### **3. EC Measures Affecting Tariff Treatment of MFMs**

75. MFMs were included in the ITA, yet beginning in 1999 the EC adopted measures that, over a period of several years, eroded its concessions – ultimately leading to the imposition of 6% duties on most MFMs imported into the EC. As with set top boxes with a communication function and LCD flat panel displays, the EC again resorted to arbitrary classification criteria to eliminate duty-free treatment for the bulk of these products.

76. In late 1997, the ECJ issued a judgment classifying a Xerox product in heading 90.09, rather than as an “other office machine” of heading 84.72.<sup>114</sup> While the decision dealt with a

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<sup>112</sup>Including photocopiers of 9009 11 (HS96) and 9009 21 (HS96).

<sup>113</sup>A traditional light lens photocopier is an “indirect process” device because it transmits an optical image onto a photosensitive plate and then transfers it onto ordinary paper to make photocopies. *See* Harmonized Commodity Description and Coding System, Explanatory Notes (2d ed., 1996) (Exhibit US-57).

<sup>114</sup>Case C-67/95, Rank Xerox Manufacturing (Nederland) BV v. Inspecteur der Invoerrechten en Accijnzen, [1997] ECR I-5401 (9 October 1997) (Exhibit US-58).

device that could not connect to a computer or network, and therefore was not an MFM of the type described in paragraph 70, *supra*, certain member State customs authorities began to urge the EC to adopt general measures to reclassify all MFMs as “indirect process electrostatic photocopiers” of what was then CN subheading 9009.12.<sup>115</sup>

77. The first formal step by the EC to eliminate duty-free treatment for MFMs took place in 1999, when the EC published Commission Regulation (EC) No 517/99 (“1999 MFM Regulation”).<sup>116</sup> In item 2 of Annex 1 of the Regulation, the EC concluded that devices capable of scanning, printing, faxing, and photocopying through an indirect process, that have “several paper feed trays,” and can copy up to 30 pages per minute, had no “principal function” or “essential character” that could be discerned.<sup>117</sup> It directed that these goods be classified under the CN subheading 9009.12<sup>118</sup> provision for “indirect process electrostatic photocopiers”.<sup>119</sup> As a result of this decision, these devices were subject to a 6 percent duty and previous BTI rulings which had classified these devices under CN subheading 8471.60 were revoked.<sup>120</sup> Thus, whereas the product in the Rank Xerox case could not connect to a computer, with the 1999 MFM Regulation the EC took the first step toward treating all devices as “photocopiers” rather than “input or output units”, even if they could connect to a computer.

78. The EC then began to formalize a new rule, relying on the number of pages per minute a

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<sup>115</sup>Now CN 8443 31 91, 8443 32 91, and 8443 39 10.

<sup>116</sup>Commission Regulation (EC) No. 517/1999 of 9 March 1999 concerning the classification of certain goods in the Combined Nomenclature, O.J. L 61, p. 23-24 (March 10, 1999) (“1999 MFM Regulation”) (Exhibit US-59).

<sup>117</sup>1999 MFM Regulation, p. 23.

<sup>118</sup>Now in CN heading 8443.

<sup>119</sup>1999 MFM Regulation, p. 24.

<sup>120</sup>1999 MFM Regulation, p. 23 (Article 2);



device could copy as the basis for determining whether a product was entitled to duty-free treatment or would be subject to the 6% duty on “photocopiers”. In January 2005, the EC Customs Code Committee issued a “statement on the classification of ‘multifunctional devices’” indicating that “if a multifunctional device (fax, printer, scanner copier) has the capability of photocopying in black and white 12 or more pages per minute (A4 format) this indicates that the product is classifiable in heading 9009 as a photocopying apparatus.”<sup>121</sup> Indirect electrostatic process photocopying apparatus was subject to a six percent duty. With this statement, the EC made explicit for the first time that output speed – pages per minute – would be the key criterion for determining whether or not a product would be subject to duties.

79. In 2006, the EC issued a new regulation, Commission Regulation (EC) 400/2006, which classified multifunction printers, having scanning, laser printing, and laser copying (indirect process) capabilities, under CN subheading 9009.12,<sup>122</sup> as indirect process electrostatic photocopiers.<sup>123</sup> As a result of these actions, various member States revoked BTIs classifying multifunction printers in 8471.60<sup>124</sup> and reclassified products under 9009, as photocopying

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<sup>121</sup>EC Customs Code Committee, Tariff and Statistical Nomenclature Section (Mechanical), Report of Conclusions of the 360th Meeting of the Committee held in Brussels from 26 January to 28 January 2005, TAXUD/555/2005-EN (March 2005), Annex VII (“The Committee agreed that if a multifunctional device (fax, printer, scanner, copier) has the capability of photocopying in black and white 12 or more pages per minute (A4 format) this indicates that the product is classifiable in heading 9009 as a photocopying apparatus.”) (Exhibit US-60).

<sup>122</sup>Now CN 8443 31 91, 8443 32 91, and 8443 39 10.

<sup>123</sup> Commission Regulation (EC) No. 400/2006 of 8 March 2006 concerning the classification of certain goods in the Combined Nomenclature, O.J. L 70, p. 9 (March 9, 2006) (“March 2006 MFM Regulation”) (Exhibit US-61).

<sup>124</sup>Now in CN heading 8443.

apparatus, carrying a 6% duty.<sup>125</sup>

80. Most recently, the EC continued this approach, in a new form. In 2005, parties to the Harmonized System of the WCO completed amendments to the HS nomenclature. As part of the revised nomenclature, WCO participants agreed to adopt a new heading and new subheadings 8443.31, 32 and 39. In connection with implementing these new subheadings, the EC issued Commission Regulation 1549/2006, revising Chapter 84 of the CN as follows:

<b>8443 31</b>	<b>-- Machines which perform two or more of the functions of printing, copying or facsimile transmission, capable of connecting to an automatic data-processing machine or to a network:</b>	
<b>8443 31 10</b>	<b>--- Machines performing the functions of copying and facsimile transmission, whether or not with a printing function, with a copying speed not exceeding 12 monochrome pages per minute</b>	<b>Free</b>
	<b>--- Other</b>	
<b>8443 31 91</b>	<b>---- Machines performing a copying function by scanning the original and printing the copies by means of an electrostatic print engine</b>	<b>6</b>
<b>8443 31 99</b>	<b>---- Other</b>	<b>Free</b>

81. The EC measure creates three new subcategories of particular significance for this dispute: CN 8443 31 10 (“[m]achines performing the functions of copying and facsimile transmission, whether or not with a printing function, with a copying speed not exceeding 12 monochrome pages per minute”), CN 8443 31 91 (“[o]ther; [m]achines performing a copying function by scanning the original and printing the copies by means of an electrostatic engine”) and CN 8443 31 99 (“[o]ther”). By virtue of these subcategories, MFMs with copying speeds of

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<sup>125</sup>E.g., FR-E4-2006-004708 (France, October 30, 2006); FR-E4-2006-004707 (France, October 30, 2006); GB 115839462 (UK, September 27, 2006); GB 115838465 (UK, September 27, 2006); GB115838367 (UK, September 27, 2006); GB115839364 (UK, September 27, 2006); GB115839266 (UK, September 27, 2006) (Exhibit US-62).

more than 12 monochrome pages per minute and with an electrostatic print engine are classified under CN 8443 31 91.<sup>126</sup> The duty rate for CN 8443 31 91 is 6%.

82. It should be emphasized that the 12 page per minute standard is entirely arbitrary. The mere fact that a device is capable of printing 12 pages per minute provides no indication of whether the device is or is not an “input or output unit” or a facsimile machine. Most MFMs marketed and sold today are capable of printing more than 12 monochrome pages per minute, and thus most MFMs are now subject to duty when imported into the EC.

83. Beyond extending its flawed reliance on pages per minute as a basis for determining whether or not a product is entitled to duty-free treatment, the latest EC regulation also serves to push into CN 8443 31 91 (and subject to duties) even some items that have an output speed of 12 pages or less per minute. MFMs that do not have a facsimile function necessarily fall outside of CN 8443 31 10 because that category only covers items that can both copy and send facsimilies. Such MFMs, when equipped with indirect process electrostatic print engines, would not be duty-free even if they had an output speed of 12 pages or less per minute, since they would be classified in CN 8443 31 91.

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<sup>126</sup>*E.g.*, IE-07NT-14-136-2 (November 15, 2007); IE-07NT-14-136-1 (Ireland, November 15, 2007), FR-E4-2007-002262-R (France, January 31, 2007), GB116669062 (UK, July 19, 2007), GB116669160 (UK, July 19, 2007), GB116669258 (UK, July 19, 2007), IE-07NT-14-1684-02 (Ireland, January 20, 2009) (Exhibit US-62).

#### **IV. ARGUMENT**

84. GATT 1994 Article II:1(a) provides that “[e]ach contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.”<sup>127</sup>

85. GATT 1994 Article II:1(b) provides that

The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.

86. As a result of the measures described above, the EC imposes duties on set top boxes with a communication function, certain flat panel displays, and multifunction digital machines in excess of the bound rate set forth in the EC Schedule, and provides treatment less favorable than that accorded by the Schedule.

**A. EC and its Member States Act Inconsistently with GATT 1994 Article II:1(a) and (b) in Imposing Duties on Set-top Boxes with a Communication Function**

**1. EC Schedule Provides for Duty-Free Treatment for Set-top Boxes with a Communication Function “Wherever...Classified”**

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<sup>127</sup>In accordance with explanatory note 2(a) to the GATT 1994, the reference to “contracting party” is to be deemed to read “Member.”

87. “Set top boxes with a communication function” are included in both Attachment A and Attachment B of the ITA. As explained in Part I, the EC Schedule contain a headnote, which 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 (within the meaning of Article II:1(b) of the General Agreement on Tariffs and Trade 1994), shall be bound and eliminated, as set forth in paragraph 2(a) of the Annex to the Declaration, *wherever the product is classified*.<sup>128</sup>

Attachment B describes set top boxes with a communication function as follows:

Set top boxes which have a communication function: a microprocessor-based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange<sup>129</sup>

88. Therefore, under GATT 1994 Article II:1 and pursuant to the headnote, the EC is obliged to accord duty-free treatment to set top boxes with a communication function – as defined in Attachment B of the ITA – *wherever they are classified*.

**2. EC and Member State Measures Result in the Application of Ordinary Customs Duties “In Excess of” the Bound Duty Rate Provided in the EC Schedule for “Set-top Boxes with a Communication Function,” Contrary to Article II:1(b)**

89. Following implementation of the ITA, set top boxes with a communication function imported into the EC were generally classified in CN line 8528 71 13 or its predecessor lines, and entered duty-free.<sup>130</sup> However, as a result of the STB CNEN Amendments approved in 2006

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<sup>128</sup>EC ITA Schedule Modifications, Section 2, p. 1 (emphasis added).

<sup>129</sup>ITA, Attachment B.

<sup>130</sup>The EC renumbered CN 8528 12 91 to 8528 12 92, and later to CN 8528 71 13 as part of HS2007 implementation.

and 2007, which impose a variety of arbitrary technical restrictions on qualifying for duty-free treatment, the EC and its member States began applying duties of 14% to set top boxes with a communication function.<sup>131</sup> These amendments were approved by the Tariff and Statistical Nomenclature Section of the Customs Code Committee (“EC Customs Committee”) in October 2006 and May 2007, respectively.

**(a) The EC and member States impose duties on set-top boxes with a communication function simply because they incorporate a hard disk or DVD drive**

90. The amendments to the CNEN for 8528 71 13 provide, among other things, 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).<sup>132</sup>

Likewise, the amendments to the CNEN for 8521 90 00 state that:

This subheading includes apparatus without a screen capable of receiving television signals, so called “set-top boxes”, which incorporate a device performing a recording or reproducing function (for example, a hard disk or DVD drive).<sup>133</sup>

91. Under the CN, goods classified in subheading 8521 90 00 receive a duty of 13.9%. Thus, under the amendments, any set top box having a communication function – i.e., a microprocessor based device, incorporating a modem for gaining access to the Internet and capable of interactive information exchange – is excluded from the duty-free heading and subject to a 13.9% duty – merely if it also happens to have a hard disk. A large and growing percentage of set top boxes marketed and sold today have a hard disk or similar device allowing them to store information

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<sup>131</sup>See paragraphs 47-50, *supra*.

<sup>132</sup>Amended STB CNEN, p. 8.

<sup>133</sup>Amended STB CNEN, p. 8.

received through the functions of the set-top box. Thus, the EC measure requires member States to impose duties on set top boxes with a communication function, and member States have done so.<sup>134</sup>

92. These actions do not accord with the commitment in the EC Schedule to provide duty-free treatment to set top boxes with a communication function, wherever classified. The EC Schedule provides a definition of a “set top box with a communication function.” This definition is reflected in ITA Attachment B. Under the terms of the Schedule, when a device has the following three characteristics, it is a set top box with a communication function (and thus is to be accorded duty-free treatment): (1) it is a microprocessor-based device; (2) incorporating a modem for gaining access to the Internet; and (3) having a function of interactive information exchange.

93. Consistent with the customary rules of interpretation of public international law reflected in Article 31 of the *Vienna Convention on the Law of Treaties*, the terms in the EC Schedule must be interpreted in accordance with their ordinary meaning in context and in light of the agreement’s object and purpose.<sup>135</sup>

94. The devices the EC subjects to duties are “set top boxes with a communication function,” and the EC has conceded as much. They are microprocessor-based devices (i.e., devices based

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<sup>134</sup>*E.g.*, FR-E4-2007-002839R1 (France, July 11, 2007), FR-E4-2007-001251 (France, July 11, 2007), FR-E4-2007-00261 (France, July 11, 2007), DEM/4638/06-1 (Germany, July 24, 2006), DEM/3971/06-1 (Germany, June 13, 2006), BED.T.245.774 (Belgium, March 23, 2006), BED.T. 248.255 (Belgium, January 23, 2008) (Exhibit US-28).

<sup>135</sup>*Vienna Convention on the Law of Treaties* (“Vienna Convention” or “VCLT”) Art. 31(1) (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”). See also *e.g.*, *US – Gasoline (AB)*, p. 17 (applying Vienna Convention in interpreting GATT 1994).

on an electronic circuit (or chip) performing functions with assistance of internal memory)<sup>136</sup>.

They incorporate modems for gaining access to the Internet, and have a function of interactive information exchange. Indeed, the EC concedes in the CNEN that devices subject to duties are “set top boxes,” and also has acknowledged that they have a communication function.<sup>137</sup>

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

96. This interpretation of the EC’s tariff concession is consistent with, for example, the view of the Group of Experts in the GATT dispute *Greek Increase in Bound Duty*. In that dispute, Germany argued that Greece had raised its tariff on long-playing gramophone records, despite the

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<sup>136</sup>Definition of “Microprocessor” in Newton’s Telecom Dictionary (10th ed. 1996), p. 731 (Exhibit US-63) (defining microprocessor as “[a]n electronic circuit, usually on a single chip, which performs arithmetic, logic and control operations, with the assistance of internal memory”).

<sup>137</sup>See Amended STB CNEN, p. 8 (referring to the devices excluded as “set top boxes”). Indeed, in a previous draft of the Explanatory Note, the Commission stated that “*set-top boxes* which incorporate a device performing a recording function are excluded from this subheading, *even when they have a communication function.*” Customs Code Committee – Tariff and Statistical Nomenclature Section (Mechanical), Satellite Receivers with Built-In Modem, (September 1, 2006) (TAXUD/667/2006-EN), p. 3 (Exhibit US-64) (emphasis added).



fact that “gramophone records” were bound in the Greek schedule.<sup>138</sup> Greece contended that the introduction of later-developed, long-playing gramophone records constituted a new item not subject to the earlier binding. The reviewing Group agreed with Germany that the disputed records were covered by the description of “gramophone records” in the bound item and found that Greece had violated its Article II obligations.<sup>139</sup> It noted that “when this item was negotiated the parties concerned did not place any qualification upon the words ‘gramophone record’.”

97. As was the case with respect to gramophone records, ITA participants did not qualify the words “set top box with a communication function” other than by specifying the three attributes described above. Thus, by arbitrarily excluding set top boxes with a communication function from duty-free treatment due to the presence of a hard disk or other apparatus, the EC and its member States have acted inconsistently with their obligations.

**(b) The EC and member States impose duties on set-top boxes with a communication function simply because they use certain types of modems to communicate**

98. The amendments to the EN for 8528 71 13 additionally operate to exclude from duty-free treatment devices that have particular types of modems. The EN states that “set top boxes with a communication function” must have a modem, and that “modems modulate and demodulate outgoing as well as incoming data signals.”<sup>140</sup> Among the examples provided of devices that the EC considers to be modems are “V.34-, V.90-, V.92, DSL-, or cable modems.” It states that “an

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<sup>138</sup>GATT Group of Experts Report, *Greek Increase in Bound Duty*, L/580, 9 November 1956, unadopted, pp. 115-16.

<sup>139</sup>*Greek Increase in Bound Duty*, pp. 168-70.

<sup>140</sup>Amended STB CNEN, p. 8.

indication of the presence of such a device is an RJ 11 connector.” However, the EC then proceeds to state that:

devices performing a similar function to that of a modem but which do not modulate and demodulate signals are not considered to be modems. Examples of such apparatus are ISDN-, WLAN- or Ethernet devices. An indication of the presence of such a device is an RJ 45 connector.<sup>141</sup>

99. STBs with a communication function that do not have “modems” as the EC defines the term receive a 14% duty. Thus, under the EC measure, a set top box with a communication function is disqualified from duty-free treatment merely because it gains access to the Internet with a device that operates through an Ethernet or network connection, a wireless based connection (i.e., WLAN or “wireless LAN), or a digital communications network (ISDN), using an RJ-45 connector, rather than an RJ-11 connector.<sup>142</sup> The EC also states that STBs of the duty-free tariff line must incorporate a video tuner, and that “IP-streaming boxes” – STBs which use decoders and other technology instead of a tuner to enable a television set to display television signals sent by the service provider – are classified in a dutiable tariff line, notwithstanding the fact that these devices have all the attributes of a set top box with a communication function.<sup>143</sup>

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<sup>141</sup>Amended STB CNEN, p. 8.

<sup>142</sup>Amended STB CNEN, p. 8. A registered jack-11 (RJ-11) connector is a plug that holds six telephone wires and is the connection most commonly used to plug a telephone into the wall. An RJ-45 connector holds eight telephone wires, and is most commonly used for data transmission over standard telephone wire. *See* Definition of “RJ11” and “RJ45” in Newton’s Telecom Dictionary (24th ed., 2008), pp. 794-95 (Exhibit US-65); *see also* Definition of “cable modem” in PC Magazine Encyclopedia, www.pcmag.com (“Cable modems connect to the computer via an Ethernet port, which is an always-on connection...RJ-45 plugs and sockets are used in Ethernet and Token Ring Type 3 devices.”) (Exhibit US-66).

<sup>143</sup>Amended STB CNEN, p. 8-9 (stating that dutiable line CN 8528 71 90 “includes products without a screen which are reception apparatus for television but which do not incorporate a video tuner (for example, so-called ‘IP-streaming boxes’)”).

100. Both from a technical standpoint and based on the ordinary meaning of the terms in its Schedule, the EC measure is contradictory and lacks basis in logic. First, there is no basis to conclude, based on the ordinary meaning of the terms, that devices that communicate using ISDN-, WLAN- or Ethernet technology are not “set top boxes which have a communication function” – devices which, among other things, “incorporat[e] a modem for gaining access to the Internet.”<sup>144</sup> A “modem” is equipment that connects data terminal equipment to a communication line.<sup>145</sup> Devices that operate through an Ethernet or network connection, a wireless based connection (i.e., WLAN or “wireless LAN”), or a digital communications network (ISDN) are modems — they connect the set top box to a communication line and convert signals produced by one type of device to a form compatible with another.<sup>146</sup>

101. In the amended CNEN, the EC claims that these devices “perform[] a similar function to that of a modem” but “do not modulate and demodulate signals,” and therefore are not entitled to duty-free treatment. Even as a technical matter this assertion is incorrect. Each of the devices in question modulates and demodulates signals — that is, they vary some characteristic of the

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<sup>144</sup>ITA, Attachment B; EC ITA Schedule Modifications, Section 2, p. 1.

<sup>145</sup>Definition of “Modem” *in* The IEEE Standard Dictionary of Electrical and Electronics Terms (6<sup>th</sup> ed. 1996), p. 660 (defining modem as “[a] contraction of Modulator-DEModulator, an equipment that connects data terminal equipment to a communication line.”) (Exhibit US-67).

<sup>146</sup>Definition of “Terminal Adaptor” *in* Newton’s Telecom Dictionary (24<sup>th</sup> ed., 2008), p. 922 (Exhibit US-68) (“A Terminal Adaptor, also known as an ISDN Modem, is an interface device that essentially is a protocol converter that serves to interface non-ISDN devices (e.g., PCs, fax machines and telephone sets) to an ISDN BRI (Basic Rate Interface) circuit...”). A wireless broadband modem operates in a manner similar to a cable modem, but receives and transmits signals without wires over various frequency bands. Wireless Broadband Modems, International Engineering Consortium, [www.iec.org](http://www.iec.org) (Exhibit US-69).

electrical signal as the information to be transmitted on the communication medium varies, which is precisely what enables the device to communicate with another source.<sup>147</sup>

102. The context in which the term “modem” appears in the EC Schedule (which under Article 31(1) of the Vienna Convention is also relevant to its interpretation) provides further support for this reading of the text. The text does not limit the term “modem” to devices of a particular type, and indeed the phrase “communication function” is broad. In this context, modems, of any type, which enable a set top box to gain access to the Internet, qualify as such. By arbitrarily singling out devices with certain types of modems (and certain connectors), the EC measure results in the imposition of 14% duties on set top boxes with a communication function.

103. Furthermore, as a technical matter, it is meaningless to rely on the type of connector – RJ-11 versus RJ-45 – as a basis to distinguish between the categories of devices that the EC claims are and are not modems. Indeed, cable modems (which the EN recognizes as a type of modem) typically have an RJ 45 connector.<sup>148</sup> By treating the presence of an RJ 45 connector as

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<sup>147</sup>Definition of “modulate” and “demodulate” in *The IEEE Standard Dictionary of Electrical and Electronics Terms* (6th ed. 1996), p. 703, 270 (defining “modulate” as “to convert voice or data signal for transmission over a communications network”; and “demodulate” as “to receive signals transmitted over a communications computer; and to convert them into electrical pulses that can serve as inputs to a computer system”) (Exhibit US-70). Even purely digital devices must convert signals to communicate. ISDN modems, for example, typically operate through pulse code modulation. See Hermann J. Helgert, “Pulse modulation”, in *AccessScience@McGraw-Hill*, <http://www.accessscience.com> (“The deployment of high-speed networks such as the Integrated Service Digital Network (ISDN) in many parts of the world has also relied heavily on PCM [pulse code modulation] technology.”) (Exhibit US-71).

<sup>148</sup>See e.g., Definition of “cable modem” in *Newton’s Telecom Dictionary* (24th ed. 2008), p. 191 (Exhibit US-72) (“Your cable modem will connect to your computer through a standard 10Base-T Ethernet RJ-45 interface. Data is transmitted between the cable modem and computer at standard Ethernet local area network speeds of 10 million bits per second...”); International Engineering Consortium, *Wireless Broadband Modems*, p. 4 (“[T]he cable modem is connected by way of Ethernet to the computer or multiple computers on an Ethernet LAN...”).

indicative of whether or not the product has a modem, the EC measure results in the application of duties to products that even in the EC’s view have modems.

104. Likewise, by excluding all devices that do not have a tuner – and, in particular, STBs with a communication function that receive signals via Internet Protocol (TCP/IP) – the EC imposes duties on STBs covered by its tariff concessions. An IPTV STB converts the television signals sent by the service provider to video and sound that can be displayed on a television<sup>149</sup> – the mere fact the STB receives the signal over a broadband connection and does not rely on a tuner provides no basis to conclude that it is something other than a set top box with a communication function.

105. By imposing ordinary customs duties on “set top boxes with a communication function” in excess of the bound duty-free rate established in their Schedule, the EC and its member States have acted inconsistently with Article II:1(b).

**(c) Other relevant context supports the conclusion that the EC and member States have acted inconsistently with their obligations**

106. Under the Vienna Convention, a treaty is to be interpreted based on the ordinary meaning of the terms of the treaty in their context.<sup>150</sup> While the ordinary meaning of the text of the Schedule is straightforward, additional context lends even further support the conclusion that the EC measures are not consistent with its obligations.

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<sup>149</sup>TVOver, IPTV Information, <http://www.tvover.net/ServiceProvider.aspx#UnitedStates>, p. 11 (“Internet Protocol Television (IPTV) is broadcast television that is delivered over a broadband connection like DSL. IPTV services often take on many different names from providers such as FiOS, Max, DVS, NexTV, etc.”) (Exhibit US-73).

<sup>150</sup>VCLT, art. 31(1).

107. The commitments at issue were incorporated into the EC Schedule as a result of the conclusion of the ITA, and indeed, the headnote in the EC Schedule expressly refers to the ITA. Article 1 of the ITA in turn provides that Members' tariff regimes should "evolve" in a manner that "enhances market access for information technology products". This context further supports the conclusion that the EC's interpretation of the commitments in its Schedule is incorrect.

108. Nor would it accord with other language contained in the Preamble to the ITA, including the stated desire of participants to "achieve maximum freedom of world trade in information technology products" and to "encourage the continued technological development of the information technology industry on a world-wide basis."<sup>151</sup> In this regard, as explained previously, the negotiators of the ITA were well aware of the issue of technological development, and the possibility that customs authorities might reclassify merchandise covered by the Agreement. The text of the ITA – including Attachment B – and the EC tariff concessions incorporated into its Schedule as a result – including the ITA headnote affirming that certain products receive duty-free treatment "wherever...classified" – are written to ensure that duty-free treatment would be maintained, even as, for example, technology evolved and a single digital product came to have additional purposes previously assigned to other products.<sup>152</sup> Thus, for example, the mere fact that a set top box with a communication function might include a hard disk or otherwise acquire some recording capability would not be a basis for denying duty-free treatment to the product. Indeed, under the headnote to the Schedule, these products are entitled

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<sup>151</sup>ITA, preamble.

<sup>152</sup>ITA, preamble and Attachment B; EC ITA Schedule Modifications, Section 2, p. 1.

to duty-free treatment “wherever classified” – even when the addition of functions or technologies such as a hard drive results in reclassification within the EC CN, the EC is obliged to maintain the tariff treatment contemplated by the Schedule for any device meeting the description of a “set top box with a communication function”. It has failed to do so.

**3. EC and Member State Measures Result in the Application of Ordinary Customs Duties “In Excess of” the Bound Duty Rate Provided in the EC Schedule, and Duty Treatment Less Favorable than that Provided in the EC Schedule, for Set-top Boxes with a Communication Function Described by 8528 12 91 and Three Other Individual Tariff Lines, Contrary to Article II:1(a) and (b)**

109. As noted previously, in addition to its obligation under the headnote to provide duty treatment to set top boxes with a communication function “wherever...classified”, the EC also committed to provide duty-free treatment to goods described by individual tariff lines in its Schedule. Attachment A includes goods described in subheadings 8517.50 (HS96) (“Electrical apparatus for line telephony or line telegraphy, including line telephone sets with cordless handsets and telecommunication apparatus for carrier-current line systems or for digital line systems; videophones”...“Other apparatus, for carrier-current line systems or for digital line systems”), 8517.80 (HS96) (...“Other apparatus including entry-phone systems”) and 8525.20 (HS96) (“Transmission apparatus incorporating reception apparatus”). In order to implement its obligations under the ITA, the EC bound these subheadings at zero duty. It also identified the following three eight digit tariff lines as including STBs with a communication function, within the meaning of Attachment B:<sup>153</sup>

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<sup>153</sup>See EC ITA Schedule Modifications, Section 1, pp. 16 and 21.

- 8517 50 90 Electrical apparatus for line telephony or line telegraphy... -- Other apparatus, for carrier-current line systems or for digital line systems... -- Other
- 8517 80 90 Electrical apparatus for line telephony or line telegraphy... -- Other apparatus ... -- Other
- 8525 20 99 Transmission apparatus for radio-telephony, radio-telegraphy, radio-broadcasting or television... -- Transmission apparatus incorporating reception apparatus... --- Other

Each of these tariff lines has a bound duty rate of zero in the EC Schedule.<sup>154</sup>

In 2000, the EC modified its Schedule to add another tariff line – 8528 12 91 – which it also identified as including set top boxes with a communication function within the meaning of Attachment B, and which it bound at zero duty.<sup>155</sup>

- 8528 12 91 Reception apparatus for television, whether or not incorporating radio broadcast receivers or sound or video recording or reproducing apparatus ... - - Colour ... --- Other ... ----- Apparatus with a microprocessor-based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange, capable of receiving television signals (“Set-top boxes with a communication function”)

The EC’s failure to provide duty-free treatment to set top boxes with a communication function is also inconsistent with its obligation to provide duty-free treatment to the goods described in these tariff lines.

110. In particular, tariff line 8528 12 91 describes set top boxes with a communication function as “apparatus with a microprocessor-based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange, capable of

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<sup>154</sup>See EC ITA Schedule Modifications, pp. 16 and 21.

<sup>155</sup>EC ITA Schedule Modifications; Committee on Market Access, Rectifications and Modifications of Schedules, Schedule CXL - European Communities, G/MA/TAR/RS/74 (15 December 2000) (Exhibit US-26).



receiving television signals.” As explained above, the devices in question are microprocessor-based devices, incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange. These devices are also capable of receiving television signals — as explained in paragraph 43, the devices enable a television set to receive and decode digital television (DTV) broadcasts. Therefore, in addition to failing to adhere to their obligations under the headnote, by imposing duties on these products, the EC and member States have acted inconsistently with their obligation to provide duty-free treatment for products described in tariff line 8528 12 91 and three other lines of the Schedule.

**4. EC and Member State Measures Also Result in Duty Treatment Less Favorable than that Provided in the EC Schedule for Set-top Boxes with a Communication Function, Contrary to Article II:1(a)**

111. As explained above, the EC and its member States have acted inconsistently with Article II:1(b) by imposing ordinary customs duties on “set top boxes with a communication function” in excess of the bound rate established in their Schedule. Consequently, consistent with the approach adopted by the Appellate Body in, for example, *Argentina – Footwear*, the measures also result in duty treatment less favorable than that provided in the EC Schedule, contrary to Article II:1(a) of GATT 1994.<sup>156</sup>

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<sup>156</sup>The Appellate Body noted this relationship between paragraphs 1(a) and 1(b) of GATT 1994 Article II in its report in *Argentina – Footwear*, in which it said that “[p]aragraph (a) of Article II:1 contains a general prohibition against according treatment less favourable to imports than that provided for in a Member’s Schedule. Paragraph (b) prohibits a specific kind of practice that will always be inconsistent with paragraph (a): that is, the application of ordinary customs duties in excess of those provided for in the Schedule.” *Argentina – Footwear (AB)*, para. 45.

**5. Failure to Publish STB CNEN Amendments Inconsistent with GATT  
1994 Article X:1 and X:2**

112. The CNEN amendments discussed above were approved by the Tariff and Statistical Nomenclature Section of the Customs Code Committee (Customs Committee) in October 2006 and May 2007, respectively. Yet the EC failed to publish the amendments in its official journal until May 2008, over a year after the amendments had been approved.

113. This delay is not consistent with GATT 1994 Article X:1, which provides that:

Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges... shall be published *promptly* in such a manner as to enable governments and traders to become acquainted with them. (Emphasis added.)

114. Amendments to the CN Explanatory Notes, in conjunction with the Combined Nomenclature, constitute “administrative rulings of general application”: they are used by administrative authorities in the member States as a basis for determining tariff classification of an entire category of merchandise. They do not apply to single shipments or particular importers, but rather to all set top boxes with a communication function imported into the EC.

115. These amendments, which plainly pertain to the classification of products for customs purposes, and affect the rates of duty for those products, were not published “promptly” as required by GATT 1994 Article X:1. Indeed, they did not appear in the EC’s official gazette for over a year after approval, making it virtually impossible for affected companies and other Members to access them in a reasonable manner.

116. At the same time, member States were applying duties on imports of set top boxes with a communication function using the reasoning set forth in the amendments. Article 12(5) of the

Community Customs Code provides that BTI shall cease to be valid “where it is no longer compatible with the interpretation of one of the nomenclatures referred to in Article 20(6).” Indeed, according to BTI Guidelines, “Member States should not issue new BTIs that are contradictory to a legal measure which has been voted in the Customs Code Committee, *even if this measure is not yet published.*”<sup>157</sup> Consistent with this view, during a discussion at the October 2007 meeting of the Customs Code Committee of “the use of statements in the minutes of the Committee and the application of voted measures before their publication,” the Chairman noted that “as soon as the Committee has rendered an opinion on the classification of a specific type of product, no BTI should be issued contrary to that opinion and... this opinion should be respected by all member States. It follows from the above that as soon as an opinion has been voted, member States can issue BTIs for the products concerned, *even before the measure has been adopted by the Commission and published in the Official Journal.*”<sup>158</sup>

117. The Customs Code Committee deliberations thus began having an impact on imports well before the measure was published, and indeed, even before the measure was adopted. Even before the Committee issued its decision, the Chairman urged member States to “wait to issue BTIs until the case is concluded.”<sup>159</sup> After the measure was issued but before it was published, the Chairman of the Customs Code Committee stated (in response to questions from member

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<sup>157</sup>BTI Guidelines, p. 19 (emphasis added).

<sup>158</sup>Customs Code Committee – Tariff and Statistical Nomenclature Section (Heads of Tariff), Summary Report of the 433rd meeting of the Committee held on 22 October 2007, p. 5 (emphasis added) (Exhibit US-20).

<sup>159</sup>Customs Code Committee – Tariff and Statistical Nomenclature Section (Heads of Tariff), Summary Report of the 395th meeting of the Committee held on 4-5 May 2006, p. 8 (Exhibit US-74).

States regarding the applicability of the STB CNENs) that member States “should follow the BTI guidelines.”<sup>160</sup> Based on the as-yet unpublished measure, member States began issuing BTIs resulting in the imposition of duties on STBs.<sup>161</sup>

118. GATT 1994 Article X:2 provides that:

No measure of general application taken by any contracting party effecting an advance in a rate of duty or other charge on importers under an established and uniform practice...shall be enforced before such measure has been officially published.

The CNEN constitutes a “measure of general application” – it is applied by EC and member State customs authorities in determining classification for all importers of flat panel display devices. The application of the CNEN resulted in the reclassification of STBs from a duty-free tariff line into a tariff line with duties of up to 14%, and thereby the CNEN “effect[ed] an advance in a rate of duty...on importers.” The CNEN created an “established and uniform practice” -- indeed, eliminating divergences in classification is an ostensible purpose of CNENs, and after the CNEN was adopted, member States began to impose duties consistently on imports of STBs with a communication function based on the criteria enumerated in the CNEN.<sup>162</sup> The EC’s failure to promptly publish these measures, while imposing duties on importers using the reasoning contained in them, created an untenable situation for importers and Members alike.

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<sup>160</sup>Customs Code Committee - Tariff and Statistical Nomenclature Section (Mechanical/Miscellaneous Sector), Conclusions of the 413rd meeting of the Committee held from 10 to 12 January 2007, point 5, “Issuing BTIs” (Exhibit US-75)

<sup>161</sup>*E.g.*, FR-E4-2007-002839R1 (France, July 11, 2007), FR-E4-2007-001251 (France, July 11, 2007), FR-E4-2007-00261 (France, July 11, 2007), BED.T. 248.255 (Belgium, January 23, 2008) (Exhibit US-28).

<sup>162</sup>Exhibit US-28.

119. As noted by the Panel in *EC-Customs*, “the title as well as the content of the various provisions of Article X of the GATT 1994 indicates that that Article, at least in part, is aimed at ensuring that due process is accorded to traders when they import or export.”<sup>163</sup> Through its actions, the EC failed to accord to traders the treatment to which they are entitled, and thus the EC acted inconsistently with GATT 1994 Articles X:1 and X:2.

**B. EC and Member States Act Inconsistently with GATT 1994 Article II:1(a) and (b) in Imposing Duties on Certain Flat Panel Display Devices**

**1. EC Schedule Provides for Duty-Free Treatment for Certain Flat Panel Display Devices “Wherever...Classified”**

120. Flat panel display devices are included in both Attachment A and Attachment B of the ITA. As explained above with respect to set top boxes, the EC Schedule contains a headnote, which 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 (within the meaning of Article II:1(b) of the General Agreement on Tariffs and Trade 1994), shall be bound and eliminated, as set forth in paragraph 2(a) of the Annex to the Declaration, wherever the product is classified.<sup>164</sup>

Attachment B describes certain flat panel display devices as follows:

Flat panel display devices (including LCD, Electro Luminescence, Plasma, Vacuum-Fluorescence and other technologies) for products falling within this agreement, and parts thereof.<sup>165</sup>

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<sup>163</sup>*EC-Customs (Panel)*, para. 7.107.

<sup>164</sup>EC ITA Schedule Modifications, Section 2, p. 1.

<sup>165</sup>ITA, Attachment B, as modified by G/L/159/Rev.1 (24 April 1997) (Exhibit US-37). In G/L/159/Rev.1, participants approved a handful of technical clarifications made after the conclusion of the negotiations and before the submission of implementing schedules. Among these technical clarifications were two changes to the flat panel display device language: the

121. Based on the ordinary meaning in context of the terms in the EC’s Schedule, LCD monitors are “flat panel display devices...for products falling within this agreement.” A flat panel display device is

“[a] video display with a shallow physical depth, based on technology other than the CRT (cathode-ray tube). Such displays are typically used in laptop computers. Common types of flat-panel displays are the electroluminescent display, the gas discharge display, and the LCD display.”<sup>166</sup>

In the ITA, the parenthetical following the terms “flat panel display devices” specifically identifies LCD flat panel display devices<sup>167</sup> as one example of a flat panel display device.

Computers (“automatic data processing machines”) are among the “products falling within” the ITA.<sup>168</sup> LCD monitors “for” computers are therefore among the devices covered by the EC’s

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addition of the term “devices” and the addition of a reference to “Vacuum-Fluorescence” technology. See WT/MIN(96)/16/Corr.1 (13 October 1997) (Exhibit US-36); WTO, Implementation of the Ministerial Declaration on Trade in Information Technology Products, Note by the Secretariat, Informal Meeting of 26 March 1997, Revision, G/L/159/Rev.1 (24 April 1997) (Exhibit US-37).

<sup>166</sup>Microsoft Computer Dictionary (5th ed., 2002), p. 155; *see also* Definition of “flat panel display” in McGraw Hill Dictionary of Scientific and Technical Terms (5th ed. 1994), p. 1437 (“An electronic display in which a large orthogonal array of display devices, such as electroluminescent devices or light emitting diodes, form a flat screen”) (Exhibit US-76).

<sup>167</sup>LCDs are “[a]n alphanumeric display using liquid crystal sealed between two pieces of glass. The display is divided into hundreds or thousands of individual dots, which are charged or not charged, reflecting or not reflecting external light to form characters, letters and numbers.” Definition of “LCD” in Newton’s Telecom Dictionary (24th ed. 2008), p. 545 (Exhibit US-33). See also Carmen Carmack and Jeff Tyson, How Computer Monitors Work, p. 1 (“Most desktop displays use liquid crystal display (LCD) or cathode ray tube (CRT) technology, while nearly all portable computing devices such as laptops incorporate LCD technology. Because of their slimmer design and lower energy consumption, monitors using LCD technology (also called flat panel or flat screen displays) are replacing the venerable CRT on most desktops.”).

<sup>168</sup>See ITA, Attachment B (listing computers, defined as “automatic data processing machines capable of 1) storing the processing program or programs and at least the data immediately necessary for the execution of the program; 2) being freely programmed in accordance with the requirements of the user; 3) performing arithmetical computations specified by the user; and 4) executing, without human intervention, a processing program which requires

commitment with respect to flat panel display devices. Therefore, under the headnote, the EC and its member States are obliged to accord duty-free treatment to flat panel display devices for ITA products, and in particular LCD monitors, *wherever they are classified*.

**2. EC and Member State Measures Result in the Application of Ordinary Customs Duties “In Excess of” the Bound Duty Rate Provided in the EC Schedule for Certain Flat Panel Display Devices, Contrary to Article II:1(b)**

122. Following implementation of the ITA, flat panel display devices such as LCD monitors imported into the EC were generally classified in CN line 8528 51 00 and its predecessor lines, and entered duty-free.<sup>169</sup> CN 8528 51 00 covers monitors “[o]f a kind solely or principally used in an automatic data processing system of heading 8471”. However, as a result of several regulations and a CNEN adopted between 2004 and 2007, the EC and its member States began classifying certain FPDs under what is now CN code 8528 59 90<sup>170</sup> and applying duties of 14% to these devices.<sup>171</sup>

123. The clearest indication that the EC and its member States no longer intended to accord duty-free treatment to flat panel display devices – LCD monitors in particular – came when the EC issued Council Regulation (EC) No 493/2005. As noted above, while the EC conceded that trade data suggested that LCD monitors of 19 inches or less and standard (i.e, non-widescreen)

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them to modify their execution, by logical decision during the processing run,” and noting that “[t]he agreement covers such automatic data processing machines whether or not they are able to receive and process with the assistance of central processing unit telephony signals, television signals or other analogue or digitally processed audio or video signals...”; see also ITA, Attachment A (listing various devices of heading 8471 as automatic data processing machines).

<sup>169</sup>The EC renumbered CN 8471 60 90 to 8471 60 80, and later transposed the heading to CN 8528 51 00 as part of HS2007 implementation.

<sup>170</sup>CN 8528 21 91 became CN 8528 59 90 following HS2007 implementation.

<sup>171</sup>See paragraphs 59-68, *supra*.

dimensions were “mainly used as output units of automatic data-processing machines”, it concluded that such monitors “are ... not covered by the Agreement on trade in information technology products or by the Communication on its implementation.”<sup>172</sup>

124. According to the EC, despite the fact that the LCD monitors in question were “mainly used” as computer monitors, the *mere possibility* that they could be connected to a source other than a computer meant that they were not covered by the ITA and therefore were not entitled to duty-free treatment.<sup>173</sup> While the EC granted a temporary two-year duty suspension to the products (which was extended in 2006 for another two years),<sup>174</sup> this regulation marked both the end of secure and predictable duty-free treatment for *all* LCD monitors and beginning of the end of duty-free tariff treatment for products larger than 19 inches (which comprise an increasingly significant share of LCD monitors sold today).

125. In regulations and amendments to the CNENs issued by the EC in late 2005 and 2006, the EC took further steps to exclude flat panel display devices from duty-free treatment in the EC. In these measures, the EC identified particular characteristics shared by approximately half of all LCD flat panel display devices – in particular, the presence of a DVI connector – as the basis for excluding the device.

126. In its December 2005 regulation, the EC provided that certain LCD monitors would be classified in what is now 8528 59 90,<sup>175</sup> if, for example, they had a “DVI interface enabling the

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<sup>172</sup>March 2005 FPD Regulation.

<sup>173</sup>March 2005 FPD Regulation, p. 1.

<sup>174</sup> European Commission, Proposal for a Council Regulation amending Annex 1 to Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, COM(2006) 788 final (December 12, 2006), p. 5-6 (Exhibit US-77).

<sup>175</sup>At the time, 8528 21 90.



product to display signals received from an automatic data processing machine via a graphic card.”<sup>176</sup> The EC indicated that in its view these devices are not “of a kind solely or principally used in an automatic data-processing system” since they are “capable of displaying signals from various sources.”<sup>177</sup> Likewise, the Amended FPD CNEN published in 2006 to accompany what is now CN 8528 51 00 and 8528 59 90<sup>178</sup> indicates that LCD monitors with certain attributes would not be classified in 8528 51 00. For example, the Amended FPD CNEN states that, with respect to the duty free heading 8528 51 00, “monitors of this subheading *cannot*...be connected to a video source such as a DVD recorder or reproducer...be fitted with interfaces such as DVI-D, DVI-I...be used in systems other than automatic data-processing systems” and can “only” accept a signal from a CPU of an ADP machine.<sup>179</sup> With respect to 8528 59 90, the Amended FPD CNEN states that “[t]hese monitors *may also* be fitted with interfaces for automatic data-processing machines of heading 8471.”<sup>180</sup> Thus, even if a monitor is “for” an automatic data processing machine, it is classified under 8528 59 90 – drawing a 14% duty – if it is merely capable of being connected to a non-ADP machine.

127. Several EC member States have issued BTIs reclassifying flat panel display devices as “video monitors” due to the presence of DVI.<sup>181</sup> At least one member State issued revised

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<sup>176</sup>December 2005 FPD Regulation, p. 7.

<sup>177</sup>December 2005 FPD Regulation, p. 7.

<sup>178</sup>Amended FPD CNEN, p. 7-8.

<sup>179</sup>Amended FPD CNEN, p. 8 (emphasis added).

<sup>180</sup>Amended FPD CNEN, p. 8 (emphasis added).

<sup>181</sup>*E.g.*, IE 06NT-14-501-03 (Ireland, September 27, 2006); IE 06NT-14-501-01 (Ireland, September 27, 2006); IE 06NT-14-501-02 (Ireland, September 27, 2006); GB500286094 (UK, April 13, 2007); NL RTD-2007-000535 (Netherlands, December 11, 2006); NL RTD-2007-000536 (Netherlands, December 11, 2006) (Exhibit US-50).

classification guidance providing that duty-free computer monitors “must be capable of receiving a signal from a computer and no other source,” and that “LCD monitor with DVI inputs and a diagonal measurement of the screen of [19 inches] or less and with an aspect ratio of 4:3 or 5:4”... “with video or DVI inputs” is classified in what is now 8528.59.90.<sup>182</sup>

128. These measures have resulted in the application of duties to “flat panel display devices for products falling within” the ITA. As will be explained below, they are flawed in at least two important respects. First, by relying on a single physical attribute – DVI, a standard computer connector – to exclude products from duty-free treatment, the EC measures result in the imposition of duties on products that clearly are covered by its concessions. Second, by excluding from duty-free treatment any product that is merely *capable* of being used with a device other than an automatic data processing machine, the EC and member State measures fail to provide duty-free treatment to all devices “for” products falling with the ITA, as required under the EC Schedule.

**(a) Reliance on a single physical attribute – DVI in particular – to exclude products from duty-free treatment results in imposition of duties on LCD monitors**

129. Under the EC measures, any device with DVI is excluded from its tariff concession, ostensibly because in the EC’s view it is not for a computer. Yet this single physical attribute provides little if any information about whether a FPD is “for” products falling within the ITA. DVI is a standard *computer* connector. As explained in paragraphs 45-55, *supra*, DVI was developed as a standard connector for the computer industry to allow computers to transmit

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<sup>182</sup>UK 2006 FPD Guidance, p. 8-9.

digital signals to a display device.<sup>183</sup> Approximately half of all LCD monitors have a DVI connector.

130. Indeed, some devices with a DVI connector must be connected to a computer in order to receive video signals. For example, certain monitors with DVI are configured to accept a single signal and a single bandwidth. As their product manuals indicate, these devices *cannot* operate without a computer to convert the signal from one frequency to another.<sup>184</sup> Yet even these devices are subject to duties in the EC simply because they have DVI.<sup>185</sup>

131. In sum, the mere presence of DVI provides no basis to conclude that a device is “for” something other than a computer; by relying on this criterion alone, the EC and its member States impose duties on FPDs for products falling within the ITA.

**(b) EC and member State measures limit duty-free treatment to devices that are “solely for” use with an automatic data processing machine,**

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<sup>183</sup>DDWG Paper, p. 1 (“The Digital Visual Interface (hereinafter DVI) specification provides a high-speed digital connection for visual data types that is display technology independent. The interface is primarily focused at providing a connection between a computer and its display device. The DVI specification meets the needs of all segments of the PC industry (workstation, desktop, laptop, etc) and will enable these different segments to unite around one monitor interface standard.”); see also Carmack and Tyson, *How Computer Monitors Work*, p. 5 (“DVI keeps data in digital form from the computer to the monitor. .. LCD monitors work in a digital mode and support the DVI format.... The DVI specification is based on Silicon Image’s Transition Minimized Differential Signaling (TMDS) and provides a high-speed digital interface.”).

<sup>184</sup>See Apple Cinema Displays: Technology Overview (May 2005), [http://images.apple.com/pro/pdf/L309968A\\_Display\\_TO.pdf](http://images.apple.com/pro/pdf/L309968A_Display_TO.pdf), p. 22 (listing a PC, Power Mac, or Powerbook computer as requirements for operability) (Exhibit US-78); see also GB500286094 (UK, April 13, 2007) (classifying a device with DVI in dutiable tariff line, while describing it as “solely for use with an automatic data processing system”) (Exhibit US-50).

<sup>185</sup>*E.g.*, GB500286094 (UK, April 13, 2007) (device “solely” for use with computer classified in dutiable tariff line); IE 06NT-14-501-03 (Ireland, September 27, 2006); IE 06NT-14-501-01 (Ireland, September 27, 2006); IE 06NT-14-501-02 (Ireland, September 27, 2006);(Exhibit US-50).

**rather than according duty-free treatment to all devices “for” ITA products**

132. Furthermore, by relying on individual technical characteristics to exclude devices simply because they *might* be used with something other than a computer, the EC and its member States fail to accord duty-free treatment to LCD monitors “for” a computer. As noted above, under the EC and member State measures, even if a monitor is mainly for use with an automatic data processing machine, it is dutiable if it is merely *capable of* being connected to a non-ADP machine.<sup>186</sup> The text, however, contains no such limitation – nowhere does it suggest that the mere *possibility* that a device could be connected to something other than an ITA product means that it is not “for” an ITA product. Rather, the commitment uses the general term “for” — “a function word to indicate purpose.”<sup>187</sup> Indeed, the EC’s own position on how the devices are used is contradictory — while the EC states in Regulation 493/2005 that LCD monitors are “mainly used as output units of automatic-data processing machines”, it then finds that the devices are not “principally” used in an automatic data processing system.<sup>188</sup> “Mainly” and “principally” are synonyms<sup>189</sup> — thus, in essence, the EC has concluded that the devices in question both are and are not principally for use with a computer, and in either event, are not

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<sup>186</sup> E.g., December 2005 FPD Regulation, p. 7 (excluding devices from duty-free treatment because they are “capable of displaying signals from various sources”); Amended FPD CNEN, p. 8 (Dec. 30, 2006) (stating that for a monitor to be classified in the duty-free line, it can “only” accept a signal from a CPU of an ADP machine); Amended FPD CNEN (2008) (same).

<sup>187</sup> Definition of “for” in Merriam Webster Collegiate Dictionary (10<sup>th</sup> ed., 1998), p. 454-55. (Exhibit US-79); see also New Shorter Oxford English Dictionary (3rd ed., 1993), p. 997 (defining for as “to be received by, to belong to; to be used with, or in connection with.”) (Exhibit US-80).

<sup>188</sup> March 2005 FPD Regulation, p. 1.

<sup>189</sup> See “Principally”, Roget’s 21st Century Thesaurus (3d ed. 2008), <http://dictionary.reference.com/browse/principally> (accessed March 3, 2009) (Exhibit US-81).

entitled to duty-free treatment. Similarly, the EC’s reliance on a “sole *or principal*” use standard cannot be reconciled with its repeated assertion that monitors “capable” of connecting to a device other than a computer are not entitled to duty-free treatment.<sup>190</sup> Thus, the EC’s position, even setting aside the ordinary meaning of the tariff concession and simply focusing on its own description of its measures, accords neither with logic nor the facts.

133. By providing duty-free treatment only to devices that are “solely” for use with a computer (and even excluding devices that *are* solely for use with a computer merely because they have a DVI connector), the EC and its member States fail to accord duty-free treatment to many LCD monitors that are “for” ITA products.

134. As was the case with set top boxes with a communication function, relevant context also supports the conclusion that the obligation in the EC Schedule regarding flat panel display devices is broader than the EC suggests in its measures. As noted previously, Article 1 of the ITA provides that Members’ tariff regimes should “evolve” in a manner that “enhances market access for information technology products.”<sup>191</sup> In that context, it is inappropriate to interpret the language in the EC Schedule in the manner that the EC and member State measures provide. As noted above, the tariff commitments in the ITA were designed to ensure that duty-free treatment would be maintained, even as new technologies, such as DVI, developed.<sup>192</sup> Flat panel display devices for ITA products are entitled to duty-free treatment “wherever classified” – even when

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<sup>190</sup>December 2005 FPD Regulation, p. 7 (excluding devices from duty-free treatment because they are “capable of displaying signals from various sources”); Amended FPD CNEN, p. 8 (stating that for a monitor to be classified in the duty-free line, it can “only” accept a signal from a CPU of an ADP machine); Amended FPD CNEN (2008) (same).

<sup>191</sup>ITA, art. 1.

<sup>192</sup>ITA, preamble.

the addition of technologies such as DVI results in reclassification within the EC CN, the EC and its member States are obliged to maintain the tariff treatment contemplated by the Schedule for any device meeting the description of a “flat panel display device for” an ITA product. They have failed to do so.

**3. EC and Member State Measures Result in the Application of Ordinary Customs Duties “In Excess of” the Bound Duty Rate Provided in the EC Schedule for Input or Output Units Described by 8471 60 90 and 13 other Duty-Free Tariff Lines, Contrary to Article II:1(b)**

135. In addition to its obligation under the headnote to provide duty-free treatment to flat panel display devices for ITA products “wherever...classified”, the EC and its member States also committed to provide duty-free treatment to goods identified in individual tariff lines in the Schedule. In particular, tariff line 8471 60 90 (HS96) describes “input or output units, whether or not containing storage units in the same housing, other, other.” LCD monitors are “input or output units” of this tariff line.

136. An input or output unit is a device which “accepts new data, sends it into the computer for processing, receives the results, and translates them into a useable medium.”<sup>193</sup> An LCD computer monitor is an input or output unit – it provides the results of processing to the user by providing a visual display of information received from the CPU. The mere fact that a device

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<sup>193</sup>Definition of “input/output device” *in* McGraw-Hill Dictionary of Scientific and Technical Terms (5th ed. 1994), p. 1021 (Exhibit US-82). The McGraw-Hill Dictionary of Scientific and Technical Terms defines “output unit” as follows: “In computers, a unit which delivers information from the computer to an external device or from internal storage to external storage”. Definition of “output unit” *in* McGraw-Hill Dictionary of Scientific and Technical Terms (5th ed. 1994), p. 1419 (Exhibit US-83).

uses a DVI connector to transmit the information displayed does not render it something other than an input or output unit.

137. Beyond the language used in the individual tariff line, other relevant context supports the conclusion that an LCD computer monitor, whether or not equipped with DVI and whether or not *solely* capable of being used with a computer, meets the description in 8471.60 (HS96). Heading 84.71 includes several subheadings that describe different types of computers, computer systems, and devices used in connection with computers, including printers, scanners, and other devices. Each one of these subheadings was included in the ITA, and all were included in the EC schedule of concessions. Thus, the inclusion of all of the items in heading 8471 in the ITA confirms that the parties contemplated and the EC committed to a very broad concession for computers and “units” of computers. This context supports the interpretation that LCD monitors were intended to fall within the scope of those concessions; likewise, other subheadings under heading 84.71 provide additional support for this view.<sup>194</sup> All types of computers and all types of computer units — separately or in various combinations — fall within heading 84.71. All of these items were included in the concessions negotiated and codified in the EC Schedule.<sup>195</sup> Nothing in the language or structure of heading 84.71 would support the conclusion that by virtue of the presence of a DVI connector, monitors fall outside the scope of heading 84.71 and its associated tariff commitments. Nor does the language or structure of heading 84.71 limit coverage to LCD monitors that can *only* receive input from an ADP machine.

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<sup>194</sup>*EC-Chicken Cuts (AB)*, para. 214 (considering the structure of chapter 2 of the EC Schedule as context for purposes of interpreting heading 02.10).

<sup>195</sup>EC ITA Schedule Modifications, Section 1, p. 7-9.

138. In previous reports, for the purpose of interpreting the text of a particular tariff line in a Member's Schedule of Commitments, the Appellate Body has stated that Harmonized System nomenclature may provide additional relevant context.<sup>196</sup> In this regard, Note 5(B-C) to Chapter 84 of HS(1996) provides that:

- (B)...[S]ubject to paragraph (E) below, a unit is to be regarded as being part of a complete [automatic data processing] system if it meets all of the following conditions:
- (a) It is of a kind solely or principally used in an automatic data processing system
  - (b) It is connectable to the central processing unit either directly or through one or more other units; and
  - (c) It is able to accept or deliver data in a form (codes or signals) which can be used by the system.
- (C) Separately presented units of an automatic data processing machine are to be classified in heading 8471.<sup>197</sup>

Subparagraph (a) of the note confirms that the *mere possibility* that a monitor could be connected to something other than an automatic data processing machine is not sufficient to exclude it from heading 8471. Rather, a device that is *either* “solely” *or* “principally” used in an automatic data processing system may be considered a “unit” for purposes of heading 8471. Under the EC and member State measures, however, as explained above, any device that is not “solely” for use with an ADP machine (and indeed some devices that are “solely” for use with an ADP machine) are excluded from heading 8471 and from duty-free treatment.

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<sup>196</sup>E.g., *EC – Computer Equipment (AB)*, para. 90; *EC– Chicken Cuts (AB)*, para. 199; *China – Auto Parts (AB)*, para. 149.

<sup>197</sup>Harmonized Commodity Description and Coding System, Explanatory Notes (2d ed., 1996), p. 303E (Note 5) (“HS96 Note 5”) (Exhibit US-84). Note 5(E) provides that “Machines performing a specific function other than data processing and incorporating or working in conjunction with an automatic data processing machine are to be classified in the headings appropriate to their respective functions or, failing that, in residual headings.” None of the devices in question perform a “specific function other than data processing” within the meaning of note 5(E).



139. Therefore, in addition to failing to adhere to their obligations under the headnote incorporated into the EC Schedule by virtue of Attachment B, by imposing duties on these products, the EC and its member States have acted inconsistently with its obligation to provide duty-free treatment for products described in tariff line 8471 60 90 (HS96) of the EC Schedule.

**4. EC and Member State Measures Result in Treatment “Less Favorable” than the Bound Duty Rate Provided in the EC Schedule for Certain Flat Panel Display Devices and Input or Output Units**

140. As explained above, the EC and its member States have acted inconsistently with Article II:1(b) by imposing ordinary customs duties on “flat panel display devices” for ITA products in excess of the bound rate established in their Schedule. Consequently, consistent with the approach adopted by the Appellate Body in, for example, *Argentina – Footwear*, the measures also result in duty treatment less favorable than that provided in the EC Schedule, contrary to Article II:1(a) of GATT 1994.

141. The EC and its member States have also provided less favorable treatment within the meaning of Article II:1(a) of GATT 1994 to products subject to the temporary duty suspension. As noted above, in Council Regulation (EC) No. 493/2005 of 16 March 2005, the EC stated that flat panel display devices of 19 inches or less were also not subject to its obligations in the ITA, but temporarily suspended the application of import duties on these devices until 31 December 2006.<sup>198</sup> The duty suspension was extended until 31 December 2008 by Council Regulation (EC) No. 301/2007 of 19 March 2007.<sup>199</sup>

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<sup>198</sup>March 2005 FPD Regulation, p. 1.

<sup>199</sup>Council Regulation (EC) No. 301/2007 amending Annex I to Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and on the Common Customs tariff, O.J. L 81, p. 11-12 (March 22, 2007) (Exhibit US-45).

142. By providing flat panel display devices of 19 inches or less with a duty suspension, rather than permanent duty-free treatment, the EC and its member States provide treatment “less favorable” than that provided in its Schedule for these devices as well. The headnote to the EC Schedule provides that the duties on Attachment B products, such as flat panel display devices, shall be “bound and eliminated.”<sup>200</sup> The duty suspension, however, is temporary – as the regulation states, it is provided “for a limited period” only,<sup>201</sup> lasting at most two years at a time. Furthermore, it is conditional: it may be terminated unilaterally at such time that the EC considers that the conditions for its continuation are no longer fulfilled. These conditions, it should be noted, are not contained in the EC Schedule. As the Commission has stated, duty suspensions “constitute an exception to the normal state of affairs” and are “reviewed regularly with the possibility of deletion on request of a party concerned.”<sup>202</sup> When “lasting” duty-free treatment is contemplated, the Commission does not merely grant suspensions; rather, it amends the autonomous duty rate in the CCT.<sup>203</sup>

143. The EC’s failure to provide permanent duty-free treatment to the products adversely affects imports — for instance, companies have no certainty that LCD monitors will receive duty-free treatment upon importation into the EC, particularly as the termination date of the duty

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<sup>200</sup>EC ITA Schedule Modifications, Section 2, p. 1.

<sup>201</sup>March 2005 FPD Regulation, p. 1.

<sup>202</sup>Commission communication concerning autonomous tariff suspensions and quotas, O.J. C 128 (April 25, 1998), p. 2 (paras. 2.2.1 and 2.3.2) (Exhibit US-85).

<sup>203</sup>Commission communication concerning autonomous tariff suspensions and quotas, O.J. C 128 (April 25, 1998), p. 2 (para. 2.3.2) (“In exceptional cases, where a continuation of a suspension implies the lasting need to supply the Community with certain products at reduced or zero rates ... the Commission may propose an amendment to the autonomous duty of the Common Customs Tariff.”) (Exhibit US-85).

suspension draws near. After the duty suspension has terminated (as is currently the case), they are subject to duties. As the panel found in *EC – Customs* with regard to divergent classification of LCD monitors, “the fact that traders may be subject to the same duty (or, for that matter, no duty) whether the LCD monitors they are importing into the European Communities are classified under heading 8471 or 8528 does not detract from our conclusion that the trading environment has been affected as a result of the divergent tariff classification.”<sup>204</sup> As with divergent tariff classification, the EC’s use of duty suspensions rather than permanent duty-free treatment adversely affects the trading environment in the EC, and results in less favorable treatment than the bound duty-free treatment accorded by the EC Schedule.

**C. EC and Member States Act Inconsistently with GATT 1994 Article II:1(a) and (b) in Imposing Duties on Certain Multifunction Digital Machines**

**1. EC Schedule Provide for Duty-Free Treatment for Multifunction Digital Machines in Two Tariff Subheadings**

144. Multifunction digital machines – devices that perform multiple functions such as printing, facsimile transmission, scanning, and digital copying – were included in Attachment A of the ITA, which provides for duty-free treatment for a wide range of computer peripherals and facsimile machines, including goods of subheading 8471.60 (HS96) (“Automatic data processing machines and units thereof” ... “Input or output units, whether or not containing storage units in the same housing,”) and subheading 8517.21 (HS96) (“Electrical apparatus for line telephony ... and telecommunications apparatus for carrier-current line systems or for digital line systems” ... “Facsimile machines”).

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<sup>204</sup>*EC–Customs (Panel)*, para. 7.304 n.579.

145. Through these commitments, the parties agreed to treat as duty-free both (1) computer (“automatic data processing machine”) peripherals (“input or output units”) such as printers and scanners; and (2) facsimile machines. Pursuant to the ITA, the EC modified its Schedule to bind the duty rate for these products at zero. As a result of these tariff concessions, multifunction digital machines are entitled to duty-free treatment.

**2. EC and Member State Measures Result in the Application of Ordinary Customs Duties “In Excess of” the Bound Duty Rate Provided in the EC Schedule for Input or Output Units Described by 8471 60**

146. At the time the ITA was concluded, MFMs entering the EC were classified in headings 8471.60 or 8517.21. However, following the adoption of a series of measures, culminating in a 2006 amendment to the Combined Nomenclature, the EC imposes duties on MFMs.

147. The first step the EC took to increase duties on MFMs occurred when it issued Commission Regulation (EC) No 517/1999, in which it decided to treat certain MFMs as “photocopiers” rather than “input or output” units. Regulation (EC) No 517/1999 provides that a “a multifunctional apparatus (so-called ‘digital copier’) capable of “scanning, printing, faxing,” and what it termed “photocopying (indirect process),” with the ability to reproduce up to 30 pages per minute, would be classified in what was then tariff line 9009 12 00.<sup>205</sup> Tariff line 9009 12 00 covered:

[p]hotocopying apparatus incorporating an optical system or of the contact type and thermo-copying apparatus, electrostatic photocopying apparatus ... operating by reproducing the original image via an intermediate onto the copy (indirect process)

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<sup>205</sup>Now CN 8443 31 91, 8443 32 91, and 8443 39 10.

Products classified in this tariff line were assigned a 6% duty. Following the issuance of this measure, customs authorities in certain EC member States began classifying multifunction digital machines in 9009 12 00, and subjecting them to a 6% duty.

148. Six years later, the EC went further, establishing an arbitrary page per minute rule upon which duty-free treatment would be conditioned. To that end, in January 2005, the EC Customs Code Committee issued a statement providing that “if a multifunctional device has the capability of photocopying in black and white 12 or more pages per minute (A4 format),” it would be classified in heading 90.09 as photocopying apparatus.<sup>206</sup> With this statement, the EC for the first time made clear that devices capable of printing 12 pages or more per minute would *per se* be excluded from duty-free treatment.

149. The EC issued yet another regulation in 2006, again classifying various MFMs under CN subheading 9009.12,<sup>207</sup> as indirect process electrostatic photocopiers,<sup>208</sup> which again led member States to reclassify products under 9009, as photocopying apparatus, carrying a 6% duty.<sup>209</sup>

150. Finally, on 31 October 2006, the EC amended Council Regulation (EEC) No. 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, creating three new subcategories reflecting the 12 page per minute rule: CN 8443 31 10

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<sup>206</sup>EC Customs Code Committee, Tariff and Statistical Nomenclature Section (Mechanical), Report of Conclusions of the 360th Meeting of the Committee held in Brussels from 26 January to 28 January 2005, TAXUD/555/2005-EN (March 2005), Annex VII (Exhibit US-60).

<sup>207</sup>Now CN 8443 31 91, 8443 32 91, and 8443 39 10.

<sup>208</sup>March 2006 MFM Regulation, p. 9.

<sup>209</sup>*E.g.*, FR-E4-2006-004708 (France, October 30, 2006); FR-E4-2006-004707 (France, October 30, 2006); GB 115839462 (UK, September 27, 2006); GB 115838465 (UK, September 27, 2006); GB115838367 (UK, September 27, 2006); GB115839364 (UK, September 27, 2006); GB115839266 (UK, September 27, 2006) (Exhibit US-62).

("[m]achines performing the functions of copying and facsimile transmission, whether or not with a printing function, with a copying speed not exceeding 12 monochrome pages per minute"), CN 8443 31 91 ("[o]ther; [m]achines performing a copying function by scanning the original and printing the copies by means of an electrostatic engine") and CN 8443 31 99 ("[o]ther"). By virtue of these new subcategories, MFMs with copying speeds of more than 12 monochrome pages per minute and with an electrostatic engine are classified under CN 8443 31 91.<sup>210</sup> The duty rate for CN 8443 31 91 is 6 percent.

151. Beyond extending its flawed use of 12 pages per minute as the basis for providing duty-free treatment, the 2006 regulation also serves to push into CN 8443 31 91 — and subject to duties — items that are not capable even of reproducing 12 pages per minute. MFMs that do not have a facsimile function necessarily fall outside of CN 8443 31 10 because that category only covers items that can both copy and send facsimiles. Instead, they are classified in CN 8443 31 91 and are subject to the 6 percent duty, even if they have an output speed of less than 12 pages per minute. Thus, MFMs that scan, print, and copy — without a facsimile feature — are subject to 6% duties, regardless of the number of pages they can reproduce per minute.

152. In so doing, the EC and its member States act inconsistently with its obligation to provide duty-free treatment to “input or output units.”

**(a) MFMs fall within the ordinary meaning of EC concession for “input or output unit”**

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<sup>210</sup>*E.g.*, IE-07NT-14-136-2 (November 15, 2007); IE-07NT-14-136-1 (Ireland, November 15, 2007) (Exhibit US-62).

153. The EC and its member States impose duties on certain MFMs which are “input or output units.” As explained in part II.B, *supra*, an “input or output” unit is a device which “accepts new data, sends it into the computer for processing, receives the results, and translates them into a useable medium.”<sup>211</sup> Multifunction digital machines which connect to computers are input or output units – they, for example, receive signals from the computer and provide the results to the user in the form of a printed page, and take information from a hard copy and process it into an electronic file provided to the computer for storage or transmission, or to be converted into a printed image and deleted.

154. The number of pages per minute that a device produces has *absolutely no bearing* on the ordinary meaning of “input or output unit,” nor any significance from a practical standpoint – most MFMs currently sold which connect to computers are capable of producing copies at a rate of more than 12 pages per minute. Instead, the ordinary meaning of the term focuses on the manner in which a device interacts with a computer. Thus, a page per minute standard, such as that adopted by the EC, does not provide a meaningful basis on which to identify “input or output units” eligible for duty-free treatment.

**(b) Context of other headings in EC Schedule confirm that MFMs are entitled to duty-free treatment as “input or output units”**

**(i) Heading 8471**

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<sup>211</sup>Definition of “input/output device” in McGraw-Hill Dictionary of Scientific and Technical Terms (5th ed. 1994), p. 1021 (Exhibit US-82). The McGraw-Hill Dictionary of Scientific and Technical Terms defines “output unit” as follows: “In computers, a unit which delivers information from the computer to an external device or from internal storage to external storage”. Definition of “output unit” in McGraw-Hill Dictionary of Scientific and Technical Terms (5th ed. 1994), p. 1419 (Exhibit US-83).

155. The terms of heading 8471 and its subheadings provide strong contextual support for the conclusion that MFMs with computer connectivity are included within the scope of the EC’s tariff concession for “input or output units”. First, as noted above,<sup>212</sup> the ITA covered a wide range of computer peripherals, including printers and scanners, as well as facsimile machines and some photocopiers.<sup>213</sup> All types of computers and all types of computer units — separately or in various combinations — fall within heading 84.71 (HS96), all of which was included in the EC’s ITA tariff concessions.<sup>214</sup> As explained in paragraph 69, *supra*, MFMs operate by combining a scanner and a printer — both devices covered by heading 8471 and included in the ITA. The notion that two devices that are computer units covered by heading 8471 (HS96) and entitled to duty-free treatment would no longer be entitled to duty-free treatment merely because they are combined into a single product (and one that itself constitutes a computer unit) does not accord with a proper reading of heading 8471.

156. In particular, the terms of other subheadings within heading 8471 demonstrate that 8471 covers devices when presented alone or in combination with other devices – including computers combined with input or output units (“systems” of subheading 8471.49), devices with a CPU and an input or output unit “in the same housing” (subheading 8471.41), and input or output units combined with storage units (subheading 8471.60). Thus, nothing in the language or structure of heading 84.71 (HS96) would support excluding MFMs – devices combining a scanner and

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<sup>212</sup>See paragraph 145, *supra*.

<sup>213</sup>Photocopiers of heading 9009.11 and 9009.21. ITA, Attachment A.

<sup>214</sup>EC ITA Schedule Modifications, Section 1, pp. 7-9.



printer, used in connection with computers both for inputting data through scanners and for outputting data through the printer unit – from the scope of heading 84.71 (HS96).

**(ii) Heading 9009**

157. Furthermore, the terms of heading 9009 – the provision in which the EC claims these devices fall – in fact supports the conclusion that the tariff concession in line 8471.60 (HS96), not heading 90.09 (HS96), covers MFMs. In particular, heading 9009 uses the term “*photocopying*.” MFMs are not “*photocopiers*”. First, MFMs perform a range of functions, including scanning and printing, that are not performed by a photocopier. The printer function of the device is in many respects the most significant – the printer unit of the MFM is by far the largest component of the MFM,<sup>215</sup> it is able to operate independently from the scanner or fax unit, and represents the largest portion of the cost of manufacturing a typical MFM.<sup>216</sup> Furthermore, data suggests that typical MFM users print far more often than they make digital copies.<sup>217</sup>

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<sup>215</sup>The printer unit is the largest component because it accommodates the throughput of paper or other media at least 8 1/2 inches wide (and commonly much wider). It incorporates a complex paper path system, which uses a series of motors, power supplies, belts and gears to transport paper through the device. It includes a xeromodule, developer housing and photoreceptor, all of which are also at least as wide as the paper that the printer unit will process. The printer unit also contains the toner cartridge, as well as a system for delivering toner to the photoreceptor area, and, most importantly, the laser module and, in many MFMs, the connectivity processors. Tom Harris, *How Laser Printers Work*, <http://computer.howstuffworks.com/laser-printer.htm/printable> (Exhibit US-86). By contrast, a scanner unit contains a lightbar scanner (which can be small and lightweight) or a platen scanner and supporting electronics, and no other components. For some illustrative examples of MFMs, see Sample MFM Product Specifications (Exhibit US-87).

<sup>216</sup>This is attributable to the fact that, as noted *supra*, n.216, the printer unit is the largest component of the MFM and, unlike the scanner or fax component, requires thousands of complex parts to operate.

<sup>217</sup>Survey Data, Exhibit US-88.

158. While an MFM also typically performs a copying function, the manner in which it does so sets it apart from a “photocopier” in important ways. Photocopiers operate by means of exposing a photosensitive material or surface with light that is reflected directly from the object to be copied.<sup>218</sup> This process uses an optical image – formed by a lens or mirror system from reflected, refracted, or diffracted light waves – exposed on a photosensitive surface to produce a copy.<sup>219</sup> MFMs, by contrast, use an optical scanner to reproduce an image by converting points of light into electrical signals and then digital data.<sup>220</sup> MFMs, unlike photocopiers, do not use a photographic process – exposure of an optical image on a photosensitive surface – to produce copies. Whereas a photocopier uses light each time a copy is produced, MFM scanners use light once – not to make either a direct or an indirect optical image of the document, but rather to convert the original document into digital data.<sup>221</sup> Thus, digital copiers do not perform the function of *photo* copying – they do not use light to reproduce an image.<sup>222</sup> In this regard, it

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<sup>218</sup>See Xerox, the Story of Xerography, <http://www.xerox.com/downloads/usa/en/s/Storyofxerography.pdf>, pp. 12-13 (diagram of the light-lens photocopying process) (Exhibit US-89).

<sup>219</sup>Dr. Dennis A. Abramsohn, A comparison of photocopying to digital printing from hardcopy, p. 1 (Exhibit US-90) (“Abramsohn – Photocopying”) (“In light-lens photocopying, the original to be copied is placed on a platen where it is illuminated by a source of light. By using lenses and mirrors, the optical image of the original is projected directly onto the photoreceptor sheet or drum, magnified or reduced to the desired size of the final output.”).

<sup>220</sup>Abramsohn – Photocopying, p. 2-3 (“The critical differences between digital printing from hardcopy process and the photocopying process...are this intermediate storage of the data and the method of creating a latent image.”)

<sup>221</sup>Abramsohn – Photocopying, p. 2 (“The first stage is called scanning. Information carried by light reflected from an original is sensed by a charge-coupled device...The second stage, data accumulation, is the transfer and storage of the information generated as the buckets are measured.”)

<sup>222</sup>During a review of a similar issue between 1998 and 2003, the WCO Secretariat concluded in 2001 that “these composite digital machines do not incorporate a photocopying machines nor are they capable of functioning as a photocopying machine” and that “heading

should be noted that optical readers – unlike the technology used in photocopiers – are specifically referenced in heading 8471.<sup>223</sup>

159. The MFM reproduces images of objects by converting individual points of light, reflected from the object into electrical signals and then into digital data. This data may either be stored in that form or converted into a printed image and then deleted. As noted, both scanners and printers are covered by heading 8471 as input or output units of ADP machines if they meet the characteristics outlined above.

160. Other relevant headings in Chapter 90 are consistent with this interpretation of the term “photocopying” – all of which refer to optical and photographic technologies. These include: heading 9001 (“Optical fibers”), heading 9002 (“Lenses, prisms, mirrors and other optical elements...”), heading 9003 (“Frames and mountings for spectacles”), heading 9004 (“spectacles, goggles...”), heading 9005 (“Binoculars, monoculars...”), heading 9006 (“photographic...cameras”), heading 9007 (“cinematographic cameras and projectors...”), heading 9008 (“image projectors...; photographic...enlargers and reducers”); and heading 9010 (“apparatus and equipment for photographic...laboratories...not specified or included elsewhere in this Chapter”). Each of these headings, like heading 9009, pertains to optical technologies – not digital devices such as an MFM.

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90.09 does not merit consideration in the classification of these multifunctional digital machines.” Classification of Multifunctional Digital Copiers, HSC, 26th session, NC0335E1, para 29 (Exhibit US-91). On the basis of this analysis, WCO Members held three separate votes on whether 90.09 includes digital copying, resulting in a tie 33-33 vote in 2003. Ultimately, the WCO resolved the classification issue as part of HS2007, by creating heading 84.43, but did not resolve the underlying tariff concession issue – the core issue in dispute in this case.

<sup>223</sup>EC ITA Schedule Modifications, Section 1, p. 9.

**(c) Other evidence confirms that MFMs are entitled to duty-free treatment as “input or output units”**

**(i) Harmonized System**

161. In previous reports, for the purpose of interpreting the text of a particular tariff line in a Member’s Schedule of Commitments, the Appellate Body has stated that Harmonized System nomenclature may provide additional relevant context.<sup>224</sup> As also noted above, insofar as it may be considered relevant context, the HS provides additional support for the above interpretation of heading 8471. First, note 5 to Chapter 84 of the HS states that:

(B)...[S]ubject to paragraph(E) below, a unit is to be regarded as being part of a complete [automatic data processing] system if it meets all of the following conditions:

(a) It is of a kind solely or principally used in an automatic data processing system

(b) It is connectable to the central processing unit either directly or through one or more other units; and

(c) It is able to accept or deliver data in a form (codes or signals) which can be used by the system.

(C) Separately presented units of an automatic data processing machine are to be classified in heading 8471.<sup>225</sup>

162. As with the monitors described in Part II.B, the multifunction digital machines in question are of a kind solely or principally used in an automatic data processing system, are connectable to the central processing unit (CPU) of an automatic data processing machine, and are able to accept or deliver data in a form (codes or signals) which can be used by the system.

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<sup>224</sup>E.g., *EC – Computer Equipment (AB)*, para. 90; *EC– Chicken Cuts (AB)*, para. 199; *China – Auto Parts (AB)*, para. 149.

<sup>225</sup>HS96 Note 5. Note 5(E) provides that “Machines performing a specific function other than data processing and incorporating or working in conjunction with an automatic data processing machine are to be classified in the headings appropriate to their respective functions or, failing that, in residual headings.” None of the devices in question perform a “specific function other than data processing” within the meaning of note 5(E).

163. Second, the Harmonized System Explanatory Note (“HSEN”) to heading 90.09 (HS96) is also consistent with the interpretation of the term “photocopying” advanced above. It provides that:

These apparatus incorporate an optical system (comprising mainly a light source, a condenser, lenses, mirrors, prisms or an array of optical fibers) which projects the optical image of an original document on to a light-sensitive surface, and components for developing and printing of the image.<sup>226</sup>

As explained above, an MFM is not a “photocopier” as this term is defined in the HSEN — an optical image of the original document is not projected onto a photosensitive surface to produce a copy. Therefore, these devices do not fall within heading 90.09 (HS96).

**(ii) ITA**

164. As has been noted with respect to the other ITA products of concern in this dispute, the ITA provides relevant context for interpreting the obligations at issue. As such, it equally supports the conclusion that the obligation in the EC Schedule with respect to heading 8471, and subheading 8471.60 in particular, includes MFMs. In particular, Article 1 of the ITA provides that Members’ tariff regimes should “evolve” in a manner that “enhances market access for information technology products.”<sup>227</sup> Given this language, it is appropriate to interpret the ITA tariff concessions reflected in the EC Schedule broadly, including the concessions for heading 8471. In view of this and the clear language of the commitments described above, MFMs which are connectable to computers fall within the EC concession for “input or output units.”

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<sup>226</sup>Harmonized Commodity Description and Coding System, Explanatory Notes (2d ed., 1996), p. 2 (Exhibit US-57).

<sup>227</sup>ITA, art. 1.

**3. EC and Member State Measures Result in the Application of Ordinary Customs Duties “In Excess of” the Bound Duty Rate Provided in the EC Schedule for Facsimile Machines Described by 8517 21**

165. As discussed earlier,<sup>228</sup> this dispute involves two categories of MFMs – those that are input/output units of computers under heading 84.71 and those that are facsimile machines under heading 85.17. As part of its tariff concessions following conclusion of the ITA, the EC provided for duty-free treatment for all products in heading 85.17, including “facsimile machines” of tariff line 8517 21 00. As a result of the measures described in Part II.C.1, certain facsimile machines – in particular devices that do not have the ability to connect to a computer or computer network, but have a scanner device and are able to reproduce more than 12 pages per minute with that device – have been subjected to duties of 6%.

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

167. The ordinary meaning of “facsimile machine” is a device in which “a transmitter scans a photograph, map, or other fixed graphic material and converts the information into signal waves for transmission by wire or radio to a facsimile receiver at a remote point.”<sup>229</sup> The facsimile machines in question have scanners, which are used to convert an original document into digital

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<sup>228</sup>See paragraphs 69-72, *supra*.

<sup>229</sup>Definition of “facsimile” in McGraw Hill Scientific and Technical Dictionary (5th ed. 1994), p. 728 (Exhibit US-92).

data that can be sent as a facsimile. As explained previously, while these devices may be able to digitally reproduce files, none of them perform a *photocopying* function. Thus, devices combining a printer, scanner, and facsimile machine, which are not covered by heading 8471, are otherwise covered by the terms of heading 8517, as “facsimile machines”.

**4. EC and Member State Measures Also Result in Duty Treatment Less Favorable than that Provided in the EC Schedule for MFMs that are Input or Output Units Described by Subheading 8471 60 or Facsimile Machines Described by Subheading 8517 21, Contrary to Article II:1(a)**

168. As explained above, the EC and its member States have acted inconsistently with Article II:1(b) by imposing ordinary customs duties on MFMs meeting the description of “input or output units” and “facsimile machines” in excess of the bound rate established in their Schedule. Consequently, consistent with the approach adopted by the Appellate Body in, for example, *Argentina – Footwear*, the measures also result in duty treatment less favorable than that provided in the EC Schedule, contrary to Article II:1(a) of GATT 1994.

## **V. CONCLUSION**

169. For the reasons set out above, the United States respectfully requests the Panel to find that:

- (1) the EC and its member States have applied and continue to apply duties to STBs with a communication function, flat panel display devices, and MFMs at rates in excess of those set forth in their Schedules, inconsistent with Articles II:1(a) and (b) of the GATT 1994;
- (2) the application and continued application of these duties by the EC or any member State is inconsistent with Articles II:1(a) and (b) of the GATT 1994;
- (3) the Amended STB CNEN, individually and in conjunction with the CN, as such and as applied by EC and member State customs authorities is
  - (a) inconsistent with GATT 1994 Article II:1(b) as they subject imports of set top boxes with a communication function to ordinary customs duties in excess of those set forth in the EC's Schedule; and
  - (b) inconsistent with GATT 1994 Article II:1(a) as it affords imports of set top boxes with a communication function less favorable treatment than that provided for in the EC's Schedule;
- (4) the March 2005 FPD Regulation, April 2005 FPD Regulation, December 2005 FPD Regulation, and Amended FPD CNEN, individually and in conjunction with the CN, as such and as applied by EC member State customs authorities are:



- (a) inconsistent with GATT 1994 Article II:1(b) as they subject imports of flat panel display devices to ordinary customs duties in excess of those set forth in the EC's Schedule; and
  - (b) inconsistent with GATT 1994 Article II:1(a) as they afford imports of flat panel display devices less favorable treatment than that provided for in the EC's Schedule;
- (5) the 1999 MFM Regulation, 2005 MFM Decision, 2006 MFM Regulation, and individually and in conjunction with the CN, as such and as applied by EC and member State customs authorities are:
- (a) inconsistent with GATT 1994 Article II:1(b) as they subject imports of MFMs to ordinary customs duties in excess of those set forth in the EC's Schedule; and
  - (b) inconsistent with GATT 1994 Article II:1(a) as they afford imports of MFMs less favorable treatment than that provided for in the EC's Schedule; and
- (6) the EC has failed to publish promptly measures pertaining to the classification of STBs, inconsistent with Article X:1 of the GATT 1994, and the EC and its member States have enforced measures increasing the duty on such product before the measures have been officially published, inconsistent with Article X:2 of the GATT 1994;
- (7) the Amended STB CNENs are inconsistent with GATT 1994 Article X:1 and 2 as it was not published promptly in such a manner as to enable governments and

traders to become acquainted with it and was enforced before it had been  
officially published.

170. Accordingly, the United States also respectfully requests that the Panel recommend, pursuant to Article 19.1 of the DSU, that the EC and its member States bring the measures into conformity with the covered agreements.