

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

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

**EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION
OF THE UNITED STATES OF AMERICA**

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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.

Set-top Boxes with a Communication Function

2. “Set top boxes with a communication function” are included in both Attachment A and Attachment B of the ITA. 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*. 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. However, as a result of the STB CNEN Amendments approved in 2006 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.

3. 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. 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.

4. 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 on an electronic circuit (or chip) performing functions with assistance of internal memory). 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.

5. 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.

6. 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*. 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.

7. The amendments to the EN for 8528 71 13 additionally operate to exclude from duty-free treatment devices that have particular types of modems. 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. 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.

8. 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.” A “modem” is equipment that connects data terminal equipment to a communication line. 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.

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

10. 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.

11. 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. By treating the presence of an RJ 45 connector as 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. 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 – 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.

12. 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. 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.” 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. Indeed, under the headnote to the Schedule, these products are entitled 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.

13. 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. In order to implement its obligations under the ITA, the EC bound three subheadings at zero duty that the EC identified as including STBs with a communication function, within the meaning of Attachment B. Each of these tariff lines has a bound duty rate of zero in the EC Schedule. 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. 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.

14. 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. This delay is not consistent with GATT 1994 Article X:1. 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.

15. 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.*” 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.*”

16. The EC’s action is also inconsistent with GATT 1994 Article X:2. 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 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. 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.

Certain Flat Panel Display Devices

17. Flat panel display devices are included in both Attachment A and Attachment B of the ITA. Attachment B describes certain flat panel display devices as “Flat panel display devices (including LCD, Electro Luminescence, Plasma, Vacuum-Fluorescence and other technologies) for products falling within this agreement, and parts thereof.” 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.” In the ITA, the parenthetical following the terms “flat panel display devices” specifically identifies LCD flat panel display devices as one example of a flat panel display device. Computers (“automatic data processing machines”) are among the “products falling within” the ITA. LCD monitors “for” computers are therefore among the devices covered by the EC’s 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*.

18. 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 digital signals to a display device. Approximately half of all LCD monitors have a DVI connector. 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. Yet even these devices are subject to duties in the EC simply because they have DVI.

19. 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. The text, however, contains no such limitation. Rather, the commitment uses the general term “for” — “a function word to indicate purpose.” 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. 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 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. 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.

20. 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.

21. 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." 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. Flat panel display devices for ITA products are entitled to duty-free treatment "wherever classified" – even when 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.

22. 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. The mere fact that a device uses a DVI connector to transmit the information displayed does not render it something other than an input or output unit.

23. 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. 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. 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.

24. Note 5(B-C) to Chapter 84 of HS(1996) 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.

25. 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.

26. 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. 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.” The duty suspension, however, is temporary – as the regulation states, it is provided “for a limited period” only, 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.

27. 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 suspension draws near. After the duty suspension has terminated (as is currently the case), they are subject to duties. 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.

Certain Multifunction Digital Machines

28. 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”).

29. 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.

30. The EC and its member States impose duties on certain MFMs which are “input or output units.” 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.” 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.

31. 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.

32. 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, the ITA covered a wide range of computer peripherals, including printers and scanners, as well as facsimile machines and some photocopiers. 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. 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. Nothing in the language or structure of heading 84.71 (HS96) would support excluding MFMs – devices combining a scanner and 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).

33. 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. 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. Digital copiers do not perform the function of *photo* copying – they do not use light to reproduce an image. Other relevant headings in Chapter 90 are consistent with this interpretation of the term “*photocopying*” – all of which refer to optical and photographic technologies. Each of these headings, like heading 9009, pertains to optical technologies – not digital devices such as an MFM.

34. Insofar as it may be considered relevant context, the HS provides additional support for the above interpretation of heading 8471. Consistent with note 5 to Chapter 84 of the HS, 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. The Harmonized System Explanatory Note (“HSEN”) to heading 90.09 (HS96) is also consistent with the interpretation of the term “*photocopying*” advanced 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).

35. 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*.” 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*.”

36. 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. 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%. The facsimile machines in question have scanners, which are used to convert an original document into digital 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”.