

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

Request for Consultations by the United States

The following communication, dated 28 May 2008, from the delegation of the United States to the delegation of the European Communities and to the Chairman of the Dispute Settlement Body, is circulated in accordance with Article 4.4 of the DSU.

My authorities have instructed me to request consultations with the European Communities ("EC") and its member States pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Article XXII:1 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") regarding 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.

The EC, in its Schedule of Concessions to the GATT 1994 ("Schedule"), and its member States, in their Schedules of Concessions to the GATT 1994, committed to provide duty-free treatment for these products. The EC and its member States granted these tariff concessions as a result of the Information Technology Agreement ("ITA").

However, the EC and its member States impose duties on these products. The measures pursuant to which these duties are imposed include:

- Set-top boxes with a communication function. On 7 May 2008, the EC published an amendment to the Explanatory Notes to the EC's Combined Nomenclature (CN), which provides that the duty-free heading CN 8528 71 13 ("set-top boxes with a communication function") no longer includes set-top boxes with modems of certain types (e.g., Ethernet modems) or set-top boxes which "incorporate a device performing a recording or reproducing function (for example, a hard disk or DVD drive)."¹ As a result of this exclusion, the EC and its member States impose a duty on these set-top boxes. In addition, the EC added an explanatory note to CN 8521 90 00 indicating that the subheading includes set-top boxes "which incorporate a device performing a recording or reproducing function (for example, a hard disk or DVD drive)."² Products classified in CN 8521 90 00 are subject to an MFN duty of 13.9%.

¹ Explanatory Notes to the Combined Nomenclature of the European Communities, 2008/C 112/03, O.J. C 112 (7 May 2008), pp. 8-9.

² Explanatory Notes to the Combined Nomenclature of the European Communities, 2008/C 112/03, O.J. C 112 (7 May 2008), pp. 8-9.

EC member States assess duties on set-top boxes with a communication function.

- Flat panel displays (including LCD, electro luminescence, plasma and other technologies). On 31 March 2005, the EC published Council Regulation (EC) No 493/2005, stating that certain flat panel displays using LCD technology that are "capable of reproducing video images from a source other than an automatic data-processing machine" are not covered by the ITA or by the Communication on its implementation (Council Decision 97/359/EC of 24 March 1997).³ On 26 April 2005, the EC published Commission Regulation (EC) No 634/2005, stating that flat panel displays with certain attributes, including DVI, would be classified in a dutiable tariff line.⁴ On 29 December 2005, the EC published Commission Regulation (EC) No 2171/2005, which also provided that certain flat panel displays would be classified in a dutiable tariff line if they had certain attributes, including DVI.⁵ On 30 December 2006, the EC published amendments to the Explanatory Notes to accompany CN 8471 60 80 and 8528 21 90.⁶ Like the regulations, the Explanatory Notes provide that flat panel displays with certain attributes, such as DVI, may not be classified in the duty-free tariff line 8471 60 80 and would be classified in a dutiable tariff line.

EC member States assess duties on flat panel displays. Furthermore, while the EC has temporarily suspended the collection of duties on some flat panel displays, it appears to fail to accord tariff treatment that is no less favorable than that provided for in its Schedule.

- "Input or output units" and facsimile machines. In 1999, the EC published Commission Regulation (EC) No 517/99, which provided that certain "output units" would be classified in a tariff line with a 6% MFN duty.⁷ On 9 March 2006, the EC published Commission Regulation (EC) No 400/2006, which classified certain "output units" or facsimile machines, under CN subheading 9009 12 00, as indirect process electrostatic photocopiers.⁸ The EC Customs Code Committee also issued a statement 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."⁹ Consistent with that statement, on 31 October 2006, the EC published Commission Regulation (EC) No 1549/2006, which provides that certain "output units" or facsimile machines capable of copying more than 12 monochrome pages per minute are classified in a dutiable tariff line.¹⁰

EC member States assess duties on certain "input or output units" and facsimile machines.

³ Council Regulation (EC) No 493/2005 of 16 March 2005, O.J. L 82 (31 March 2005), pp. 1-2.

⁴ Commission Regulation (EC) No 634/2005 of 26 April 2005, O.J. L 106 (27 April 2005), pp. 7-9.

⁵ Commission Regulation (EC) No 2171/2005 of 23 December 2005, O.J. L 346 (29 December 2005), pp. 7-9.

⁶ 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, 2006/C 332/05, O.J. C 332 (30 December 2006), pp. 7-9.

⁷ Commission Regulation (EC) No 517/99 of 9 March 1999, O.J. L 61 (10 March 1999), pp. 23-24.

⁸ Commission Regulation (EC) No 400/2006 of 8 March 2006, O.J. L 70 (9 March 2006), pp. 9-11.

⁹ Customs Code Committee, Tariff and Statistical Nomenclature Section, *Report of conclusions of the 360th meeting of the Committee*, TAXUD/555/2005-EN, Annex VII (March 2005).

¹⁰ Commission Regulation (EC) No 1549/2006 of 17 October 2006, O.J. L 31.10.2006 (31 October 2006), pp. 1, 541.

The United States considers that these measures, alone or in combination with Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, including all annexes thereto, as amended, appear to be inconsistent with the EC's obligations under Articles II:1(a) and II:1(b) of the GATT 1994 and its Schedule and with the member States' obligations under Articles II:1(a) and II:1(b) of the GATT 1994 and their Schedules and to nullify or impair benefits accruing to the United States under the GATT 1994. In addition, with respect to set-top boxes, the Tariff and Statistical Nomenclature Section of the Customs Code Committee delivered favorable opinions with respect to the proposed amendments to the Explanatory Notes contained in 2008/C 112/03 in October 2006 and May 2007, respectively. It did not publish the amended explanatory notes in the EC Official Journal until 7 May 2008. Furthermore, member States were applying duties to set-top boxes using the approach specified in 2008/C 112/03 prior to 7 May 2008. The United States considers that these actions appear to be inconsistent with the EC's obligations under GATT 1994 Articles X:1 and X:2.

We look forward to receiving your reply to this request and to fixing a mutually acceptable date for consultations.
