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

Request for the Establishment of a Panel by the United States, Japan and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu

The following communication, dated 18 August 2008, from the delegations of the United States, Japan and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu to the Chairman of the Dispute Settlement Body, is circulated pursuant to Articles 4.7 and 6.2 of the DSU.

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), the United States, Japan, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu requested consultations with the European Communities (EC) and its member States regarding the tariff treatment the EC and its member States accord to certain information technology products. The United States requested consultations with the EC and its member States on 28 May 2008, and the request was circulated on 2 June 2008 as document WT/DS375/1, G/L/851. Japan requested consultations with the EC and its member States on the same matter on 28 May 2008, and the request was circulated on 2 June 2008 as document WT/DS376/1, G/L/852. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu requested consultations with the EC and its member States on the same matter on 12 June 2008, and the request was circulated on 18 June 2008 as document WT/DS377/1, G/L/853.

The United States and the EC and its member States held consultations on 25-26 June 2008 and 14-15 July 2008 in Geneva. Japan and the EC and its member States held consultations on 26 June 2008 and 16-17 July 2008 in Geneva. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the EC and its member States held consultations on 3 July 2008, 18 July 2008, and 25 July 2008 in Geneva. Those consultations were held with a view to reaching a mutually satisfactory solution. Unfortunately, those consultations failed to find such a solution.

Therefore, the United States, Japan, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, acting jointly and severally, each in the exercise of the rights accruing to it as a member of the WTO, hereby request that a panel be established pursuant to Article 6 of the DSU and Article XXIII of the GATT 1994 regarding the measures specified below and any amendments or extensions thereto as well as any related or implementing measures.

As participants in the *Ministerial Declaration on Trade in Information Technology Products*, or "ITA" (Information Technology Agreement),¹ the EC and its member States modified their Schedules of Concessions to the GATT 1994 (EC Schedules) to reflect the commitments made under the ITA.² Such modifications became effective 2 July 1997.³ Accordingly, the EC and its member States shall grant duty-free treatment for flat panel displays, set-top boxes (STBs) with a communication function, and "input or output units" of "automatic data processing machines" and facsimile machines. However, as a result of the application of certain EC measures, the EC and its member States impose duties on these products.

Flat panel displays

Customs authorities of EC member States impose duties on flat panel displays. The measures at issue through which they do so include:

1. Council Regulation (EC) No. 493/2005 of 16 March 2005;
2. Commission Regulation (EC) No. 634/2005 of 26 April 2005;
3. Commission Regulation (EC) No. 2171/2005 of 23 December 2005;
4. 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;⁴ and
5. Explanatory Notes to the Combined Nomenclature of the European Communities, 2008/C 133/01 (May 30 2008), alone or in combination with Council Regulation (EEC) No. 2658/87 of 23 July 1987,

as well as any amendments or extensions and any related or implementing measures.⁵

On 2 July 1997, the EC modified Schedule LXXX – European Communities to the *Marrakesh Agreement Establishing the World Trade Organization* (the Marrakesh Agreement). Those concessions include the concession for "[i]nput or output units...Other" as in HS item 8471 60 90. This subcategory carries a zero duty rate. The Schedule also provides in a headnote that "[w]ith respect to any product described in or for Attachment B to the Annex to the Ministerial Declaration on Trade in Information Technology Products, to the extent not specifically provided for in this Schedule, the customs duties on such product, as well as any other duties and charges of any kind ... shall be bound and eliminated, as set forth in paragraph 2(a) of the Annex to the Declaration, wherever the product is classified." Attachment B includes "[f]lat panel display devices (including LCD, Electro Luminescence, Plasma, Vacuum-Fluorescence and other technologies) for products falling within this agreement and parts thereof." The bound duty rate for this product, as set forth in HS items 8471 60 90, 8473 30 10, 8473 30 90, 8531 20 30, 8531 20 51, 8531 20 59, 8531 20 80, 8531

¹ *Ministerial Declaration on Trade in Information Technology Products*, 13 December 1996 (WT/MIN(96)/16), see also *Implementation of the Ministerial Declaration on Trade in Information Technology Products*, 2 April 1997 (G/L/160).

² G/MA/TAR/RS/16 (2 April 1997).

³ WT/Let/156 (15 August 1997).

⁴ Including amendments adopted pursuant to Commission Regulation No. 1214/2007 of 20 September 2007.

⁵ Including the actual application by customs authorities of EC member States of a 14% customs duty on imports of certain flat panel displays.

80 30, 8531 90 10, 8531 90 30, 9013 80 11, 9013 80 19, 9013 80 30 and 9013 90 10, and as specified in the headnote, is zero.

As a result of these concessions, the EC and its member States are obliged to grant duty-free treatment to flat panel displays. Nevertheless, the EC and its member States impose duties on these products, as explained below.

On 31 March 2005, the EC published Council Regulation (EC) No 493/2005 which provides 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 the Communication on its implementation (Council Decision 97/359/EC of 24 March 1997).⁶

On 26 April 2005, the EC published Commission Regulation (EC) No 634/2005, which provides that flat panel displays with certain attributes, including digital visual interface (DVI), would be classified as dutiable.⁷

Also, on 29 December 2005, the EC published Commission Regulation (EC) No 2171/2005, which also provides that flat panel displays with certain attributes, including DVI, would be classified as dutiable.⁸

On 20 September 2007, the EC published Commission Regulation 1214/2007, amending Council Regulation (EEC) No. 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, and establishing Combined Nomenclature (CN) 8528 59 10 and 8528 59 90, which provided a duty rate of 14% on certain flat panel displays.

Furthermore, on 30 May 2008, the EC published an amendment to the Explanatory Notes to the Combined Nomenclature of the European Communities (2008/C 133/01) providing that flat panel displays with certain attributes, such as DVI, would be classified as dutiable.⁹

As a result, customs authorities of EC member States have been applying a 14% duty to certain flat panel displays, instead of providing duty-free treatment as required by the EC Schedules. The United States, Japan, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu consider that their commerce has been accorded treatment less favourable than that provided in the EC Schedules, and that ordinary customs duties, or other duties and charges, in excess of those set forth in the EC Schedules have been applied to certain flat panel displays, inconsistent with the obligations of the EC and its member States under Articles II:1(a) and II:1(b) of the GATT 1994. While the EC has temporarily suspended the collection of duties on some flat panel displays pursuant to Council Regulation (EC) No 493/2005 of 31 March 2005 and Council Regulation (EC) No 301/2007 of 22 March 2007, it fails to accord tariff treatment that is no less favourable than that provided for in the EC Schedules. The measures at issue nullify or impair, within the meaning of GATT Article XXIII, benefits accruing directly or indirectly to the United States, Japan, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu under the GATT 1994.

⁶ Council Regulation (EC) 493/2005 of 16 March 2005, O.J. L 82 (31 March 2005), pp. 1-2.

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

⁸ Commission Regulation (EC) No 2171/2005 of 23 December 2005, O.J. L 346 (29 December 2005), pp. 7-9.

⁹ Explanatory Notes to the Combined Nomenclature of the European Communities, 2008/C 133/01, O.J. C 133 (30 May 2008), pp. 352-3.

STBs with a communication function

Customs authorities of EC member States impose duties on STBs with a communication function. The measures at issue through which they do so include:

1. 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;¹⁰ and
2. Explanatory Notes to the Combined Nomenclature of the European Communities, 2008/C 112/03, (7 May 2008), alone or in combination with Council Regulation (EEC) No. 2658/87 of 23 July 1987,¹¹

as well as any amendments or extensions and any related or implementing measures.¹²

On 2 July 1997, the EC modified Schedule LXXX – European Communities to the Marrakesh Agreement. The Schedule provides in a headnote that "[w]ith respect to any product described in or for Attachment B to the Annex to the Ministerial Declaration on Trade in Information Technology Products, to the extent not specifically provided for in this Schedule, the customs duties on such product, as well as any other duties and charges of any kind...shall be bound and eliminated, as set forth in paragraph 2(a) of the Annex to the Declaration, wherever the product is classified." Attachment B includes "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." The bound duty rate for this product, as set forth in HS items 8517 50 90, 8517 80 90, 8525 20 99, and 8528 12 91, and as specified in the headnote, is zero.

As a result of these concessions, the EC and its member States are obliged to grant duty free treatment to STBs with a communication function. Nevertheless, the EC and its member States impose duties on these products, as explained below.

On 7 May 2008, the EC published an amendment to the Explanatory Notes to the EC's CN, which provides that the duty-free heading CN 8528 71 13 ("set-top boxes with a communication function") does not include STBs with modems of certain types (e.g., Ethernet modems) or STBs which incorporate a device performing a recording or reproducing function (e.g., a hard disk or DVD drive).¹³ Moreover, in the same amendment, the EC added an explanatory note to accompany CN 8521 90 00 indicating that this subheading includes STBs which incorporate a device performing a recording or reproducing function (e.g., a hard disk or DVD drive).¹⁴ The duty rate for CN 8521 90 00 is 13.9%.

As a result, customs authorities of EC member States have been applying duties on STBs with a communication function, instead of providing duty-free treatment as required by the EC Schedules. The United States, Japan, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu

¹⁰ Including amendments adopted pursuant to Commission Regulation No. 1214/2007 of 20 September 2007.

¹¹ See also the decisions of the Customs Code Committee discussed on page 5, *infra*.

¹² Including the actual application by customs authorities of EC member States of customs duties on imports of STBs with a communication function.

¹³ Explanatory Notes to the Combined Nomenclature of the European Communities, 2008/C 112/03, O.J. C 112 (7 May 2008), pp. 8-9.

¹⁴ Explanatory Notes to the Combined Nomenclature of the European Communities, 2008/C 112/03, O.J. C 112 (7 May 2008), pp. 8-9.

consider that their commerce has been accorded treatment less favourable than that provided in the EC Schedules, and that ordinary customs duties, or other duties and charges, in excess of those set forth in the EC Schedules have been applied to STBs with a communication function, inconsistent with the obligations of the EC and its member States under Articles II:1(a) and II:1(b) of the GATT 1994. The measures at issue nullify or impair, within the meaning of GATT Article XXIII, benefits accruing, directly or indirectly, to the United States, Japan, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu under the GATT 1994.

In addition, with respect to STBs with a communication function, 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, EC member States were applying duties to STBs using the approach specified in 2008/C 112/03 prior to 7 May 2008. We consider that these actions are inconsistent with the EC's obligations under Articles X:1 and X:2 of the GATT 1994.

MFMs ("multifunctional digital machines")¹⁵

Customs authorities of EC member States impose duties on MFMs. The measures at issue through which they do so include:

1. Commission Regulation (EC) No. 517/1999 of 9 March 1999;
2. Report of the Conclusions of the 360th meeting of the Customs Code Committee, Tariff and Statistical Nomenclature Section, TAXUD/555/2005-EN (March 2005);
3. Commission Regulation (EC) No. 400/2006 of 8 March 2006; and
4. 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,¹⁶

as well as any amendments or extensions and any related or implementing measures.¹⁷

On 2 July 1997, the EC modified Schedule LXXX – European Communities to the Marrakesh Agreement, including the concessions for "[f]acsimile machines", as contained in HS 8517 21 00 and "input or output units" of "automatic data processing machines", as in HS category 8471 60. The bound duty rate for both products is zero.

As a result of these concessions, the EC and its member States are obliged to grant duty free treatment to MFMs. Nevertheless, the EC and its member States impose duties on these products, as explained below.

¹⁵ In this panel request, the United States, Japan and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu use the term "MFMs" to refer to 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 (including devices commercially known as MFPs (multifunctional printers), other "input or output units" of "automatic data processing machines", and facsimile machines).

¹⁶ Including amendments adopted pursuant to Commission Regulation No. 1214/2007 of 20 September 2007.

¹⁷ Including the actual application by customs authorities of EC member States of a 6% duty on imports of certain MFMs.

On 9 March 1999, the EC published Commission Regulation (EC) No 517/1999, which provides that certain MFMs would be classified as indirect process electrostatic photocopiers under CN 9009 12 00 with a duty rate of 6%.¹⁸

In January of 2005, the 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 9009 as photocopying apparatus.¹⁹ Photocopying apparatus classified in heading 9009 was subject to a 6% duty.

On 9 March 2006, the EC published Commission Regulation (EC) No 400/2006, which provides that certain MFMs would be classified as photocopying apparatus, and would be subject to a 6% duty.²⁰

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 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 more than 12 monochrome pages per minute and with an electrostatic engine are classified under CN 8443 31 91. The duty rate for CN 8443 31 91 is 6%.²¹

As a result, customs authorities of EC member States have been applying a 6% duty on imports of certain MFMs, instead of providing duty-free treatment as required by the EC Schedules. The United States, Japan, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu consider that their commerce has been accorded treatment less favourable than that provided in the EC Schedules, and that ordinary customs duties, or other duties and charges, in excess of those set forth in the EC Schedules have been applied to certain "input or output units" of "automatic data processing machines" and facsimile machines, inconsistent with the obligations of the EC and its member States under Articles II:1(a) and II:1(b) of the GATT 1994. The measures at issue nullify or impair, within the meaning of GATT Article XXIII, benefits accruing directly or indirectly to the United States, Japan, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu under the GATT 1994.

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The United States, Japan, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu request, pursuant to Articles 4.7 and 6 of the DSU, that a panel be established with standard terms of reference as set out in Article 7.1 of the DSU, in order to examine the matter described above.

¹⁸ Commission Regulation (EC) No 517/1999 of 9 March 1999, O.J. L 61 (10 March 1999), pp. 23-24.

¹⁹ 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).

²⁰ Commission Regulation (EC) No 400/2006 of 8 March 2006, O.J. L 70 (9 March 2006), pp. 9-11.

²¹ 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.