

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

WT/DS375, WT/DS376, WT/DS377

**ANSWERS OF THE UNITED STATES OF AMERICA
TO THE EC'S QUESTIONS TO THE CO-COMPLAINANTS
IN CONNECTION WITH THE FIRST SUBSTANTIVE PANEL MEETING**

June 3, 2009

Q1. Under which subheading of the 1996 version of the Harmonized System ("HS96") did your customs authorities classify imports of the following products prior to the conclusion of the ITA:

1. Before proceeding to each subquestion, the United States notes that none of the information below is relevant to determining whether the EC measures are inconsistent with the concessions at issue. As the United States explained in its First Opening Statement, the EC has failed to offer an interpretation of the ordinary meaning of the terms “input or output unit” or “facsimile machine”, in their context and in light of the agreement's object and purpose,¹ nor indicated how the interpretation offered by the complainants based on the ordinary meaning, context, and object and purpose leaves the meaning obscure or leads to a manifestly absurd or unreasonable result.

a) single-function digital copiers with an electrostatic print engine;

2. U.S. Customs and Border Protection (“CBP”) did not issue any rulings on the classification of single-function digital copiers under HS96 prior to the conclusion of the ITA.

b) single-function digital copiers with an ink jet print engine

3. See response to Question 1(a). The technology used by the print engine did not (and does not) affect CBP classification.

c) MFMs connectable to an ADP machine, which can both print and copy using an electrostatic print engine;

4. Under HS96, prior to the conclusion of the ITA, CBP classified MFMs connectable to an ADP machine with printing and copying functions in heading 84.71 (generally subheading 8471.60). *See e.g.*, NYA88887 (October 31, 1996) (Exhibit EC-74).

d) MFMs connectable to an ADP machine, which can both print and copy using an ink-jet print engine;

5. See response to Question 1(c). The technology used by the print engine did not (and does not) affect CBP classification.

e) MFMs not connectable to an ADP machine, which can both fax and copy using an electrostatic engine;

6. Under HS96, CBP classified MFMs with faxing, printing and copying functions that were not connectable to an ADP machine, by application of GRI 3(b), as a composite good, as if they consisted only of the material or component which gives them their essential character. In most cases, CBP determined that the fax component imparted the essential character and classified the

¹Opening Statement of the United States at the First Meeting of the Panel (May 12, 2009) (“U.S. First Opening Statement”), para. 36.

machines in heading 85.17. *See e.g.*, NY B87980 and NY B87981 dated August 5, 1997.

f) MFMs not connectable to an ADP machine, which can both fax and copy using an ink jet print engine?

7. See response to Question 1(e). The technology used by the print engine did not (and does not) affect CBP classification.

Please describe any changes in your classification practice of each of the above products between the conclusion of the ITA and the introduction of the 2007 version of the Harmonized System.

Please provide relevant supporting evidence (e.g. classification regulations and rulings, explanatory notes, BTIs, etc) for all your replies.

8. In its earlier decisions, CBP referred to GRI 3(b) in classifying goods. In all but one ruling, it classified MFMs not connectable to an ADP machine as facsimile machines, in heading 85.17. In all but two rulings, it classified MFMs connectable to an ADP machine in heading 8471. In 2002, after conducting a more careful review of these decisions, CBP headquarters revoked decisions relying on GIR 3(b) because digital copying is a process different from photocopying (as explained in the U.S. First Written Submission, paras. 157-160).

Q2. a) Is it your position that any MFM that is not connectable to an ADP machine and which can both copy and fax is to be classified always under HS96 subheading 8517 21, irrespective of the relative importance of the faxing function and the copying function?

9. No.

b) If not, under which other HS96 subheadings should such products be classified? Where exactly do you draw the boundaries between the different HS96 subheadings concerned? What is the basis in the HS96 for drawing such boundaries?

10. Under HS96, prior to the ITA, such MFMs would have been classified by application of GRI 3(b), as composite goods, as if they consisted of the material or component which gives them their essential character. CBP examined the physical characteristics of the product presented. In some cases, CBP determined that the fax component imparted the essential character, and classified the good in heading 85.17. In other cases, CBP determined that the print engine which was an ADP printer without the connector port, imparted the essential character and classified the device under heading 84.71. *See, e.g.*, NY E81729, dated May 12, 1999.

11. CBP did not establish “boundaries” among the competing headings. Rather, CBP examined the physical characteristics of the product presented, as described above.

c) If your reply to letter a) is affirmative, how do you reconcile that position with the headquarter rulings HQ 963680, HQ 965478, HQ 965527, HQ 965636, HQ 965679, HQ 965680, HQ 965681, HQ 965682, HQ 965697 (Exhibit EC -69), in all of which the US Customs authorities determined that a non ADP connectable MFMs with a digital copying and a faxing function had to be classified under HS96 8472 90 pursuant to Note 3 to Section XVI of the HS because, on the basis of an examination of the machine at issue, the copying function was found to be more "important" than the faxing function?

12. The answer to question (a) is not affirmative.

Q3. Are video monitors and televisions within the scope of the EC's tariff concessions taken pursuant to ITA irrespective of the technology used? If so, where precisely?

13. The issue is not whether “video monitors” and “televisions” fall within the scope of the EC’s ITA-related tariff concessions, but rather whether the EC measures identified by complainants result in the imposition of duties on “flat panel display devices for products falling within” the ITA. For an explanation of the EC concessions at issue, see response to Panel Question 52.

Q4. In its oral statement (paragraph 9), the US states that " 'set top boxes with a communication function' was a concession that the EC itself drafted and formally added to its Schedule in 2000." Could the United States please explain:

a) what legal value and effect, if any, had this "formal addition" on the scope of the EC concession with respect to the products at issue?

14. With regard to the EC concession for “set top boxes which have a communication function” under Attachment B, as explained in the U.S. First Opening Statement, the addition demonstrates that the EC’s claim that “set top boxes *with* a communication function” were excluded from that concession is belied by the fact that, in its formal notification, it listed the new line pertaining to “set top boxes *with* a communication function” as a line in which it classified “set top boxes *which have* a communication function.”² Thus, the only textual argument the EC has put forward in response to complainants’ interpretation of this concession is flatly contradicted by the EC’s position in document G/MA/TAR/RS/74.³ Furthermore, as a result of this addition, the EC bound at zero duty goods meeting the description in the new tariff line. As explained in the U.S. First Submission, as a result of the EC CNEN, the EC imposes duties on goods meeting the description and, in this respect as well, acts inconsistently with

²U.S. First Opening Statement, paras. 15-17; Exhibit US-26.

³U.S. First Opening Statement, paras. 15-17; Exhibit US-26.

Article II.⁴

b) whether, in its view, the EC was obliged to make this "formal addition" to its Schedule under the ITA rules?

15. The EC is obliged to grant duty-free treatment to set top boxes which have a communication function, "wherever...classified." Whether or not the EC made the addition to its Schedule, consistent with GATT 1994 Article II and the headnote in its Schedule, it would have been required to provide duty-free treatment to products covered by the Attachment B description "wherever...classified", including products that also fall within the description associated with the new tariff line.

c) whether this "formal addition" had any effect on the extent of the scope of the EC concession made with respect to "set top boxes which have a communication function".

16. See response to Question 4(a).

⁴First Written Submission of the United States (May 5, 2009), paras. 109-110.