

VIII. RULINGS AND RECOMMENDATIONS

8.1 The Panel recalls the complainants' request that the Panel issue its findings in the form of a single document containing three separate reports with common sections on the Panel's conclusions and recommendations for each complaining party.¹⁹³³ In accordance with the requests by the complaining parties, we therefore provide three separate sets of conclusions and recommendations.

8.2 We recall that the complainants have brought claims not only against the European Communities, but also its member States. We note that it is the member States' national customs authorities that implement the customs measures enacted by the European Communities. We also are mindful of the fact that EC member states are WTO Members in their own right and that, like all WTO Members, they are bound to act consistently with their WTO obligations. Thus, if one or more EC member States were found to have applied WTO inconsistent measures, be they enacted by the States themselves or by the European Communities, it could be appropriate to find that the member States have acted inconsistently with their WTO obligations. However, we note that the complainants have framed their claims as challenging the European Communities measures "as such" and have confirmed to the Panel that they are not making claims with respect to specific applications of those measures by national customs authorities of any member States. Under the circumstances, the Panel considers that it is not required to make, and does not make, findings with respect to member States' application of the European Communities' measures that were challenged "as such" in this dispute. Moreover, we are of the view that findings with respect to the measures adopted by the European Communities will provide a positive solution to the dispute.¹⁹³⁴

¹⁹³³ See para.2.4 and its fn. 17.

¹⁹³⁴ We recall that the European Communities assured the Panel that to the extent the Panel were to find that any of the measures specified in the joint panel request breach WTO obligations, the European Communities stated it will bear full responsibility for such breach of its Schedule. See Letter from the Delegation of the Commission (4 February 2009).

A. COMPLAINT BY THE UNITED STATES (DS375): CONCLUSIONS OF THE PANEL

1. FPDs

8.3 The United States has made claims with respect to Council Regulation 2658/87, as amended, CNEN 2008/C 133/01, Commission Regulation Nos. 634/2005 and 2171/2005. The Panel analyzed how these measures worked in conjunction with and in the absence of the duty suspension under Council Regulation No. 179/2009.

8.4 With respect to the CNEN 2008/C 133/01, which operates in conjunction with the CN, the Panel finds that:

- (a) In the absence of the duty suspension under Council Regulation No. 179/2009, the measures direct national customs authorities to classify some flat panel display devices that are capable of receiving and reproducing video images both from an automatic data-processing machine and from a source other than an automatic data-processing machine, that fall within the scope of the FPDs narrative description and/or within the scope of the CN code 8471 60 90, under dutiable headings. Because the concessions call for duty-free treatment of products falling within their scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.
- (b) In the absence of the duty suspension under Council Regulation No. 179/2009, the measures direct national customs authorities to classify some flat panel display devices that have a DVI interface, whether or not they are capable of receiving signals from another source, that fall within the scope of the FPDs narrative description and/or within the scope of the CN code 8471 60 90, under dutiable headings. Because the concessions call for duty-free treatment of products falling within their scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.
- (c) Given the duty suspension currently in effect for certain products in dispute falling within the scope of the FPDs narrative description or within the scope of CN code 8471 60 90, the inconsistency with Article II:1(b) referred to in subparagraphs (a) and (b) above is eliminated because the duties are suspended and hence are not in excess of those provided for in the EC Schedule.
- (d) For those products in dispute falling within the scope of the FPDs narrative description or within the scope of CN code 8471 60 90 and that are not covered by the duty suspension with the result that they are subject to dutiable treatment, the duty suspension does not eliminate the inconsistency with Article II:1(b) for these products and therefore this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.
- (e) The European Communities fails to accord treatment no less favourable than that set forth in its Schedule to the commerce of the other WTO Members, in particular certain flat panel display devices that are capable of receiving and reproducing video images both from an automatic data-processing machine and from a source other than an automatic data-processing machine, or that have a DVI interface, whether or not they are capable of receiving signals from another source. Thus, the European Communities is inconsistent with Article II:1(a) of the GATT 1994. This inconsistency is not eliminated by the duty suspension with respect to certain products in dispute falling within the scope of the FPDs narrative description or within the scope of CN code 8471 60 90 because the duty suspension measure does

not eliminate the failure to accord treatment no less favourable to the commerce of the other WTO Members.

8.5 With respect to item 4 in the Annex to Commission Regulation No. 634/2005 and items 2, 3 and 4 in the Annex to Commission Regulation No. 2171/2005:

- (a) In the absence of the duty suspension under Council Regulation No. 179/2009, the measures direct national customs authorities to classify some flat panel display devices that are capable of receiving and reproducing video images both from an automatic data-processing machine and from a source other than an automatic data-processing machine, that fall within the scope of the FPDs narrative description and/or within the scope of the CN code 8471 60 90, under dutiable headings. Because the concessions call for duty-free treatment of products falling within their scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.
- (b) In the absence of the duty suspension under Council Regulation No. 179/2009, the measures direct national customs authorities to classify some flat panel display devices that have a DVI interface, whether or not they are capable of receiving signals from another source, that fall within the scope of the FPDs narrative description and/or within the scope of the CN code 8471 60 90, under dutiable headings. Because the concessions call for duty-free treatment of products falling within their scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.
- (c) Given the duty suspension currently in effect for certain products in dispute falling within the scope of the FPDs narrative description or within the scope of CN code 8471 60 90, the inconsistency with Article II:1(b) referred to in subparagraphs (a) and (b) above is eliminated because the duties are suspended and hence are not in excess of those provided for in the EC Schedule.
- (d) For those products in dispute falling within the scope of the FPDs narrative description or within the scope of CN code 8471 60 90 and that are not covered by the duty suspension with the result that they are subject to dutiable treatment, the duty suspension does not eliminate the inconsistency with Article II:1(b) for these products and therefore this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.
- (e) The European Communities fails to accord treatment no less favourable than that set forth in its Schedule to the commerce of the other WTO Members, in particular certain flat panel display devices that are capable of receiving and reproducing video images both from an automatic data-processing machine and from a source other than an automatic data-processing machine, or that have a DVI interface, whether or not they are capable of receiving signals from another source. Thus, the European Communities is inconsistent with Article II:1(a) of the GATT 1994. This inconsistency is not eliminated by the duty suspension with respect to certain products in dispute falling within the scope of the FPDs narrative description or within the scope of CN code 8471 60 90 because the duty suspension measure does not eliminate the failure to accord treatment no less favourable to the commerce of the other WTO Members.

2. STBCs

8.6 With respect to the CNEN 2008/C 112/03 which operates in conjunction with the CN, the Panel finds that:

- (a) The measures direct national customs authorities to classify under dutiable headings some set top boxes which incorporate a device performing a recording or reproducing function and retain the essential character of a set top box and that fall within the scope of the STBCs narrative description in the Annex to the EC Schedule. Because the concession calls for duty-free treatment of products falling within its scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.
- (b) The measures direct national customs authorities to classify under dutiable headings some set top boxes which utilise ISDN, WLAN or Ethernet technology, and that fall within the scope of the STBCs narrative description in the Annex to the EC Schedule. Because the concession calls for duty-free treatment of products falling within its scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.
- (c) By virtue of the inconsistency with Article II:1(b) of the GATT 1994, the measures accord treatment less favourable to such set top boxes than that provided for under the STBCs narrative description in the Annex to the EC Schedule and thus the measures are also inconsistent with Article II:1(a) of the GATT 1994.
- (d) The United States has failed to meet its burden to establish a *prima facie* case that the products at issue fall within the scope of concessions arising under CN codes 8517 50 90, 8517 80 90, 8525 20 99 and/or 8528 12 91 of the EC Schedule. Therefore, the United States has failed to establish that the measures are inconsistent with Articles II:1(a) and II:1(b) of the GATT 1994 because the concessions require duty-free treatment for the products falling within their scope.

8.7 With respect to claims regarding the consistency of the CNEN 2008/C 112/03 with Article X, the Panel finds that:

- (a) The European Communities failed to publish promptly CNEN 2008/C 112/03, such as to enable governments and traders to become acquainted with them, and has thus acted inconsistently with Article X:1 of the GATT 1994.
- (b) The European Communities has *not* acted inconsistently with Article X:2 of the GATT 1994 with respect to the October 2006 CNEN amendment because the complainants did not establish that the European Communities enforced the October 2006 CNEN amendment before its official publication as CNEN 2008/C 112/03 in the EU Official Journal on 7 May 2008.
- (c) The European Communities has acted inconsistently with Article X:2 of the GATT 1994 with respect to the April 2007 CNEN amendment by enforcing the April 2007 CNEN amendment before its official publication as CNEN 2008/C 112/03 in the EU Official Journal on 7 May 2008.

3. MFMs

8.8 With respect to item 1of the Annex to Commission Regulation No. 517/1999, the Panel finds that:

- (a) The regulation requires dutiable treatment of certain ADP MFMs that fall within the scope of the concession for "input or output units" in HS1996 subheading 8471 60 of the EC Schedule. Because the concession calls for duty-free treatment of products falling within its scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.
- (b) By virtue of the inconsistency with Article II:1(b) of the GATT 1994, the measures accord treatment less favourable to certain ADP MFMs than that provided for under the EC Schedule and thus the measures are also inconsistent with Article II:1(a) of the GATT 1994.
- (c) The regulation requires dutiable treatment of certain non-ADP MFMs that fall within the scope of the concession for "facsimile machines" in HS1996 subheading 8517 21 of the EC Schedule. Because the concession calls for duty-free treatment of products falling within its scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.
- (d) By virtue of the inconsistency with Article II:1(b) of the GATT 1994, the measures accord treatment less favourable to certain non-ADP MFMs than that provided for under the EC Schedule and thus the measures are also inconsistent with Article II:1(a) of the GATT 1994.

8.9 With respect to the 2005 Statement, the Panel finds that:

- (a) Because the measure has guided and serves to guide the European Communities uniform application of the common customs tariff in a way that results in the application of duties to those ADP MFMs that fall within the duty-free concession, the measure is inconsistent with Article II:1(b) of the GATT 1994.
- (b) By virtue of the inconsistency with Article II:1(b) of the GATT 1994, the measures accord treatment less favourable to certain ADP MFMs than that provided for under the EC Schedule and thus the measures are also inconsistent with Article II:1(a) of the GATT 1994.
- (c) Because the measure has guided and serves to guide the European Communities uniform application of the common customs tariff in a way that results in the application of duties to those non-ADP MFMs that fall within the duty-free concession, the measure is inconsistent with Article II:1(b) of the GATT 1994.
- (d) By virtue of the inconsistency with Article II:1(b) of the GATT 1994, the measures accord treatment less favourable to certain non-ADP MFMs than that provided for under the EC Schedule and thus the measures are also inconsistent with Article II:1(a) of the GATT 1994.

8.10 With respect to item 4 of the Annex to Commission Regulation No. 400/2006, the Panel finds that:

- (a) The regulation requires dutiable treatment of certain ADP MFMs that fall within the scope of the concession for "input or output units" in HS1996 subheading 8471 60 of the EC Schedule. Because the concession calls for duty-free treatment of products falling within its scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.

- (b) By virtue of the inconsistency with Article II:1(b) of the GATT 1994, the regulation accords treatment less favourable to certain ADP MFMs than that provided for under the EC Schedule and thus the measures are also inconsistent with Article II:1(a) of the GATT 1994.
- (c) The regulation does not require the dutiable treatment of non-ADP MFMs with a facsimile function. Therefore, the European Communities has not acted inconsistently with Article II:1(b) of the GATT 1994 with respect to non-ADP MFMs with a facsimile function as the measure does not impose duties in excess of those provided for in the EC Schedule.

8.11 With respect to the CN2007, the Panel finds that:

- (a) The three relevant CN2007 codes require that certain ADP MFMs which fall within the scope of the duty-free concession for input or output units of an ADP in subheading 8471 60 of the EC Schedule be charged a duty of 6 per cent. Therefore, with respect to these products, the measure is inconsistent with Article II:1(b) of the GATT 1994.
- (b) By virtue of the inconsistency with Article II:1(b) of the GATT 1994, the CN2007 accords treatment less favourable to certain ADP MFMs than that provided for under the EC Schedule and thus the measures are also inconsistent with Article II:1(a) of the GATT 1994.
- (c) The three relevant CN2007 codes require that certain non-ADP MFMs which fall within the scope of the duty-free concession for "facsimile machines" in subheading 8517 21 of the EC Schedule be charged a duty of 6 per cent. Therefore, with respect to these products, the measure is inconsistent with Article II:1(b) of the GATT 1994.
- (d) By virtue of the inconsistency with Article II:1(b) of the GATT 1994, the CN2007 accords treatment less favourable to certain non-ADP MFMs than that provided for under the EC Schedule and thus the measures are also inconsistent with Article II:1(a) of the GATT 1994.

4. Nullification and impairment

8.12 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent that the European Communities has acted inconsistently with Articles II:1(a), II:1(b), X:1 and X:2 of the GATT 1994, it has nullified or impaired benefits accruing to the United States under that agreement.

5. Recommendations

8.13 Pursuant to Article 19.1 of the DSU, having found that the European Communities has acted inconsistently with Articles II:1(a), II:1(b), X:1, and X:2 of the GATT 1994, we recommend that the Dispute Settlement Body request the European Communities to bring the relevant measures into conformity with its obligations under the GATT 1994.

8.14 We recall that the European Communities has indicated that the Commission Regulation Nos. 634/2005 and 2171/2005 would be repealed.¹⁹³⁵ In addition, the European Communities has indicated that Commission Regulation Nos. 517/1999 and 400/2006 would be repealed as of October 2009.¹⁹³⁶ However, there is no evidence properly before the Panel confirming such repeal. Therefore, the Panel has proceeded on the basis that the said measures are in force.

¹⁹³⁵ European Communities' first written submission, para. 95; European Communities' second written submission, para. 63.

¹⁹³⁶ European Communities' response to Panel question No. 110.

B. COMPLAINT BY THE JAPAN (DS376): CONCLUSIONS OF THE PANEL

1. FPDs

8.15 Japan has made claims with respect to Council Regulation 2658/87, as amended, CNEN 2008/C 133/01, Commission Regulation Nos. 634/2005 and 2171/2005. The Panel analyzed how these measures worked in conjunction with and in the absence of the duty suspension under Council Regulation No. 179/2009.

8.16 With respect to the CNEN 2008/C 133/01, which operates in conjunction with the CN, the Panel finds that:

- (a) In the absence of the duty suspension under Council Regulation No. 179/2009, the measures direct national customs authorities to classify some flat panel display devices that are capable of receiving and reproducing video images both from an automatic data-processing machine and from a source other than an automatic data-processing machine, that fall within the scope of the FPDs narrative description and/or within the scope of the CN code 8471 60 90, under dutiable headings. Because the concessions call for duty-free treatment of products falling within their scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.
- (b) In the absence of the duty suspension under Council Regulation No. 179/2009, the measures direct national customs authorities to classify some flat panel display devices that have a DVI interface, whether or not they are capable of receiving signals from another source, that fall within the scope of the FPDs narrative description and/or within the scope of the CN code 8471 60 90, under dutiable headings. Because the concessions call for duty-free treatment of products falling within their scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.
- (c) Given the duty suspension currently in effect for certain products in dispute falling within the scope of the FPDs narrative description or within the scope of CN code 8471 60 90, the inconsistency with Article II:1(b) referred to in subparagraphs (a) and (b) above is eliminated because the duties are suspended and hence are not in excess of those provided for in the EC Schedule.
- (d) For those products in dispute falling within the scope of the FPDs narrative description or within the scope of CN code 8471 60 90 and that are not covered by the duty suspension with the result that they are subject to dutiable treatment, the duty suspension does not eliminate the inconsistency with Article II:1(b) for these products and therefore this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.
- (e) The European Communities fails to accord treatment no less favourable than that set forth in its Schedule to the commerce of the other WTO Members, in particular certain flat panel display devices that are capable of receiving and reproducing video images both from an automatic data-processing machine and from a source other than an automatic data-processing machine, or that have a DVI interface, whether or not they are capable of receiving signals from another source. Thus, the European Communities is inconsistent with Article II:1(a) of the GATT 1994. This inconsistency is not eliminated by the duty suspension with respect to certain products in dispute falling within the scope of the FPDs narrative description or within the scope of CN code 8471 60 90 because the duty suspension measure does

not eliminate the failure to accord treatment no less favourable to the commerce of the other WTO Members.

8.17 With respect to item 4 in the Annex to Commission Regulation No. 634/2005 and items 2, 3 and 4 in the Annex to Commission Regulation No. 2171/2005:

- (a) In the absence of the duty suspension under Council Regulation No. 179/2009, the measures direct national customs authorities to classify some flat panel display devices that are capable of receiving and reproducing video images both from an automatic data-processing machine and from a source other than an automatic data-processing machine, that fall within the scope of the FPDs narrative description and/or within the scope of the CN code 8471 60 90, under dutiable headings. Because the concessions call for duty-free treatment of products falling within their scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.
- (b) In the absence of the duty suspension under Council Regulation No. 179/2009, the measures direct national customs authorities to classify some flat panel display devices that have a DVI interface, whether or not they are capable of receiving signals from another source, that fall within the scope of the FPDs narrative description and/or within the scope of the CN code 8471 60 90, under dutiable headings. Because the concessions call for duty-free treatment of products falling within their scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.
- (c) Given the duty suspension currently in effect for certain products in dispute falling within the scope of the FPDs narrative description or within the scope of CN code 8471 60 90, the inconsistency with Article II:1(b) referred to in subparagraphs (a) and (b) above is eliminated because the duties are suspended and hence are not in excess of those provided for in the EC Schedule.
- (d) For those products in dispute falling within the scope of the FPDs narrative description or within the scope of CN code 8471 60 90 and that are not covered by the duty suspension with the result that they are subject to dutiable treatment, the duty suspension does not eliminate the inconsistency with Article II:1(b) for these products and therefore this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.
- (e) The European Communities fails to accord treatment no less favourable than that set forth in its Schedule to the commerce of the other WTO Members, in particular certain flat panel display devices that are capable of receiving and reproducing video images both from an automatic data-processing machine and from a source other than an automatic data-processing machine, or that have a DVI interface, whether or not they are capable of receiving signals from another source. Thus, the European Communities is inconsistent with Article II:1(a) of the GATT 1994. This inconsistency is not eliminated by the duty suspension with respect to certain products in dispute falling within the scope of the FPDs narrative description or within the scope of CN code 8471 60 90 because the duty suspension measure does not eliminate the failure to accord treatment no less favourable to the commerce of the other WTO Members.

2. STBCs

8.18 With respect to the CNEN 2008/C 112/03 which operates in conjunction with the CN, the Panel finds that:

- (a) The measures direct national customs authorities to classify under dutiable headings some set top boxes which incorporate a device performing a recording or reproducing function and retain the essential character of a set top box and that fall within the scope of the STBCs narrative description in the Annex to the EC Schedule. Because the concession calls for duty-free treatment of products falling within its scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.
- (b) The measures direct national customs authorities to classify under dutiable headings some set top boxes which utilise ISDN, WLAN or Ethernet technology, and that fall within the scope of the STBCs narrative description in the Annex to the EC Schedule. Because the concession calls for duty-free treatment of products falling within its scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.
- (c) By virtue of the inconsistency with Article II:1(b) of the GATT 1994, the measures accord treatment less favourable to such set top boxes than that provided for under the STBCs narrative description in the Annex to the EC Schedule and thus the measures are also inconsistent with Article II:1(a) of the GATT 1994.

3. MFMs

8.19 With respect to item 1of the Annex to Commission Regulation No. 517/1999, the Panel finds that:

- (a) The regulation requires dutiable treatment of certain ADP MFMs that fall within the scope of the concession for "input or output units" in HS1996 subheading 8471 60 of the EC Schedule. Because the concession calls for duty-free treatment of products falling within its scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.
- (b) By virtue of the inconsistency with Article II:1(b) of the GATT 1994, the measures accord treatment less favourable to certain ADP MFMs than that provided for under the EC Schedule and thus the measures are also inconsistent with Article II:1(a) of the GATT 1994.
- (c) The regulation requires dutiable treatment of certain non-ADP MFMs that fall within the scope of the concession for "facsimile machines" in HS1996 subheading 8517 21 of the EC Schedule. Because the concession calls for duty-free treatment of products falling within its scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.
- (d) By virtue of the inconsistency with Article II:1(b) of the GATT 1994, the measures accord treatment less favourable to certain non-ADP MFMs than that provided for under the EC Schedule and thus the measures are also inconsistent with Article II:1(a) of the GATT 1994.

8.20 With respect to the 2005 Statement, the Panel finds that:

- (a) Because the measure has guided and serves to guide the European Communities uniform application of the common customs tariff in a way that results in the application of duties to those ADP MFMs that fall within the duty-free concession, the measure is inconsistent with Article II:1(b) of the GATT 1994.
- (b) By virtue of the inconsistency with Article II:1(b) of the GATT 1994, the measures accord treatment less favourable to certain ADP MFMs than that provided for under the EC Schedule and thus the measures are also inconsistent with Article II:1(a) of the GATT 1994.
- (c) Because the measure has guided and serves to guide the European Communities uniform application of the common customs tariff in a way that results in the application of duties to those non-ADP MFMs that fall within the duty-free concession, the measure is inconsistent with Article II:1(b) of the GATT 1994.
- (d) By virtue of the inconsistency with Article II:1(b) of the GATT 1994, the measures accord treatment less favourable to certain non-ADP MFMs than that provided for under the EC Schedule and thus the measures are also inconsistent with Article II:1(a) of the GATT 1994.

8.21 With respect to item 4 of the Annex to Commission Regulation No. 400/2006, the Panel finds that:

- (a) The regulation requires dutiable treatment of certain ADP MFMs that fall within the scope of the concession for "input or output units" in HS1996 subheading 8471 60 of the EC Schedule. Because the concession calls for duty-free treatment of products falling within its scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.
- (b) By virtue of the inconsistency with Article II:1(b) of the GATT 1994, the regulation accords treatment less favourable to certain ADP MFMs than that provided for under the EC Schedule and thus the measures are also inconsistent with Article II:1(a) of the GATT 1994.
- (c) The regulation does not require the dutiable treatment of non-ADP MFMs with a facsimile function. Therefore, the European Communities has not acted inconsistently with Article II:1(b) of the GATT 1994 with respect to non-ADP MFMs with a facsimile function as the measure does not impose duties in excess of those provided for in the EC Schedule.

8.22 With respect to the CN2007, the Panel finds that:

- (a) The three relevant CN2007 codes require that certain ADP MFMs which fall within the scope of the duty-free concession for input or output units of an ADP in subheading 8471 60 of the EC Schedule be charged a duty of 6 per cent. Therefore, with respect to these products, the measure is inconsistent with Article II:1(b) of the GATT 1994.
- (b) By virtue of the inconsistency with Article II:1(b) of the GATT 1994, the CN2007 accords treatment less favourable to certain ADP MFMs than that provided for under the EC Schedule and thus the measures are also inconsistent with Article II:1(a) of the GATT 1994.

- (c) The three relevant CN2007 codes require that certain non-ADP MFMs which fall within the scope of the duty-free concession for "facsimile machines" in subheading 8517 21 of the EC Schedule be charged a duty of 6 per cent. Therefore, with respect to these products, the measure is inconsistent with Article II:1(b) of the GATT 1994.
- (d) By virtue of the inconsistency with Article II:1(b) of the GATT 1994, the CN2007 accords treatment less favourable to certain non-ADP MFMs than that provided for under the EC Schedule and thus the measures are also inconsistent with Article II:1(a) of the GATT 1994.

4. Nullification and impairment

8.23 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent that the European Communities has acted inconsistently with Articles II:1(a) and II:1(b) of the GATT 1994, it has nullified or impaired benefits accruing to Japan under that agreement.

5. Recommendations

8.24 Pursuant to Article 19.1 of the DSU, having found that the European Communities has acted inconsistently with Articles II:1(a) and II:1(b) of the GATT 1994, we recommend that the Dispute Settlement Body request the European Communities to bring the relevant measures into conformity with its obligations under the GATT 1994.

8.25 We recall that the European Communities has indicated that the Commission Regulation Nos. 634/2005 and 2171/2005 would be repealed.¹⁹³⁷ In addition, the European Communities has indicated that Commission Regulation Nos. 517/1999 and 400/2006 would be repealed as of October 2009.¹⁹³⁸ However, there is no evidence properly before the Panel confirming such repeal. Therefore, the Panel has proceeded on the basis that the said measures are in force.

¹⁹³⁷ European Communities' first written submission, para. 95; European Communities' second written submission, para. 63.

¹⁹³⁸ European Communities' response to Panel question No. 110.

C. COMPLAINT BY THE CHINESE TAIPEI (DS377): CONCLUSIONS OF THE PANEL

1. FPDs

8.26 Chinese Taipei has made claims with respect to Council Regulation 2658/87, as amended, CNEN 2008/C 133/01, Commission Regulation Nos. 634/2005 and 2171/2005. The Panel analyzed how these measures worked in conjunction with and in the absence of the duty suspension under Council Regulation No. 179/2009.

8.27 With respect to the CNEN 2008/C 133/01, which operates in conjunction with the CN, the Panel finds that:

- (a) In the absence of the duty suspension under Council Regulation No. 179/2009, the measures direct national customs authorities to classify some flat panel display devices that are capable of receiving and reproducing video images both from an automatic data-processing machine and from a source other than an automatic data-processing machine, that fall within the scope of the FPDs narrative description and/or within the scope of the CN code 8471 60 90, under dutiable headings. Because the concessions call for duty-free treatment of products falling within their scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.
- (b) In the absence of the duty suspension under Council Regulation No. 179/2009, the measures direct national customs authorities to classify some flat panel display devices that have a DVI interface, whether or not they are capable of receiving signals from another source, that fall within the scope of the FPDs narrative description and/or within the scope of the CN code 8471 60 90, under dutiable headings. Because the concessions call for duty-free treatment of products falling within their scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.
- (c) Given the duty suspension currently in effect for certain products in dispute falling within the scope of the FPDs narrative description or within the scope of CN code 8471 60 90, the inconsistency with Article II:1(b) referred to in subparagraphs (a) and (b) above is eliminated because the duties are suspended and hence are not in excess of those provided for in the EC Schedule.
- (d) For those products in dispute falling within the scope of the FPDs narrative description or within the scope of CN code 8471 60 90 and that are not covered by the duty suspension with the result that they are subject to dutiable treatment, the duty suspension does not eliminate the inconsistency with Article II:1(b) for these products and therefore this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.
- (e) The European Communities fails to accord treatment no less favourable than that set forth in its Schedule to the commerce of the other WTO Members, in particular certain flat panel display devices that are capable of receiving and reproducing video images both from an automatic data-processing machine and from a source other than an automatic data-processing machine, or that have a DVI interface, whether or not they are capable of receiving signals from another source. Thus, the European Communities is inconsistent with Article II:1(a) of the GATT 1994. This inconsistency is not eliminated by the duty suspension with respect to certain products in dispute falling within the scope of the FPDs narrative description or within the scope of CN code 8471 60 90 because the duty suspension measure does

not eliminate the failure to accord treatment no less favourable to the commerce of the other WTO Members.

8.28 With respect to item 4 in the Annex to Commission Regulation No. 634/2005 and items 2, 3 and 4 in the Annex to Commission Regulation No. 2171/2005:

- (a) In the absence of the duty suspension under Council Regulation No. 179/2009, the measures direct national customs authorities to classify some flat panel display devices that are capable of receiving and reproducing video images both from an automatic data-processing machine and from a source other than an automatic data-processing machine, that fall within the scope of the FPDs narrative description and/or within the scope of the CN code 8471 60 90, under dutiable headings. Because the concessions call for duty-free treatment of products falling within their scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.
- (b) In the absence of the duty suspension under Council Regulation No. 179/2009, the measures direct national customs authorities to classify some flat panel display devices that have a DVI interface, whether or not they are capable of receiving signals from another source, that fall within the scope of the FPDs narrative description and/or within the scope of the CN code 8471 60 90, under dutiable headings. Because the concessions call for duty-free treatment of products falling within their scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.
- (c) Given the duty suspension currently in effect for certain products in dispute falling within the scope of the FPDs narrative description or within the scope of CN code 8471 60 90, the inconsistency with Article II:1(b) referred to in subparagraphs (a) and (b) above is eliminated because the duties are suspended and hence are not in excess of those provided for in the EC Schedule.
- (d) For those products in dispute falling within the scope of the FPDs narrative description or within the scope of CN code 8471 60 90 and that are not covered by the duty suspension with the result that they are subject to dutiable treatment, the duty suspension does not eliminate the inconsistency with Article II:1(b) for these products and therefore this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.
- (e) The European Communities fails to accord treatment no less favourable than that set forth in its Schedule to the commerce of the other WTO Members, in particular certain flat panel display devices that are capable of receiving and reproducing video images both from an automatic data-processing machine and from a source other than an automatic data-processing machine, or that have a DVI interface, whether or not they are capable of receiving signals from another source. Thus, the European Communities is inconsistent with Article II:1(a) of the GATT 1994. This inconsistency is not eliminated by the duty suspension with respect to certain products in dispute falling within the scope of the FPDs narrative description or within the scope of CN code 8471 60 90 because the duty suspension measure does not eliminate the failure to accord treatment no less favourable to the commerce of the other WTO Members.

2. STBCs

8.29 With respect to the CNEN 2008/C 112/03 which operates in conjunction with the CN, the Panel finds that:

- (a) The measures direct national customs authorities to classify under dutiable headings some set top boxes which incorporate a device performing a recording or reproducing function and retain the essential character of a set top box and that fall within the scope of the STBCs narrative description in the Annex to the EC Schedule. Because the concession calls for duty-free treatment of products falling within its scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.
- (b) The measures direct national customs authorities to classify under dutiable headings some set top boxes which utilise ISDN, WLAN or Ethernet technology, and that fall within the scope of the STBCs narrative description in the Annex to the EC Schedule. Because the concession calls for duty-free treatment of products falling within its scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.
- (c) By virtue of the inconsistency with Article II:1(b) of the GATT 1994, the measures accord treatment less favourable to such set top boxes than that provided for under the STBCs narrative description in the Annex to the EC Schedule and thus the measures are also inconsistent with Article II:1(a) of the GATT 1994.

8.30 With respect to claims regarding the consistency of the CNEN 2008/C 112/03 with Article X, the Panel finds that:

- (a) The European Communities failed to publish promptly CNEN 2008/C 112/03, such as to enable governments and traders to become acquainted with them, and has thus acted inconsistently with Article X:1 of the GATT 1994.
- (b) The European Communities has *not* acted inconsistently with Article X:2 of the GATT 1994 with respect to the October 2006 CNEN amendment because the complainants did not establish that the European Communities enforced the October 2006 CNEN amendment before its official publication as CNEN 2008/C 112/03 in the EU Official Journal on 7 May 2008.
- (c) The European Communities has acted inconsistently with Article X:2 of the GATT 1994 with respect to the April 2007 CNEN amendment by enforcing the April 2007 CNEN amendment before its official publication as CNEN 2008/C 112/03 in the EU Official Journal on 7 May 2008.

3. MFMs

8.31 With respect to item 1 of the Annex to Commission Regulation No. 517/1999, the Panel finds that:

- (a) The regulation requires dutiable treatment of certain ADP MFMs that fall within the scope of the concession for "input or output units" in HS1996 subheading 8471 60 of the EC Schedule. Because the concession calls for duty-free treatment of products falling within its scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.
- (b) By virtue of the inconsistency with Article II:1(b) of the GATT 1994, the measures accord treatment less favourable to certain ADP MFMs than that provided for under the EC Schedule and thus the measures are also inconsistent with Article II:1(a) of the GATT 1994.

- (c) The regulation requires dutiable treatment of certain non-ADP MFMs that fall within the scope of the concession for "facsimile machines" in HS1996 subheading 8517 21 of the EC Schedule. Because the concession calls for duty-free treatment of products falling within its scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.
- (d) By virtue of the inconsistency with Article II:1(b) of the GATT 1994, the measures accord treatment less favourable to certain non-ADP MFMs than that provided for under the EC Schedule and thus the measures are also inconsistent with Article II:1(a) of the GATT 1994.

8.32 With respect to the 2005 Statement, the Panel finds that:

- (a) Because the measure has guided and serves to guide the European Communities uniform application of the common customs tariff in a way that results in the application of duties to those ADP MFMs that fall within the duty-free concession, the measure is inconsistent with Article II:1(b) of the GATT 1994.
- (b) By virtue of the inconsistency with Article II:1(b) of the GATT 1994, the measures accord treatment less favourable to certain ADP MFMs than that provided for under the EC Schedule and thus the measures are also inconsistent with Article II:1(a) of the GATT 1994.
- (c) Because the measure has guided and serves to guide the European Communities uniform application of the common customs tariff in a way that results in the application of duties to those non-ADP MFMs that fall within the duty-free concession, the measure is inconsistent with Article II:1(b) of the GATT 1994.
- (d) By virtue of the inconsistency with Article II:1(b) of the GATT 1994, the measures accord treatment less favourable to certain non-ADP MFMs than that provided for under the EC Schedule and thus the measures are also inconsistent with Article II:1(a) of the GATT 1994.

8.33 With respect to item 4 of the Annex to Commission Regulation No. 400/2006, the Panel finds that:

- (a) The regulation requires dutiable treatment of certain ADP MFMs that fall within the scope of the concession for "input or output units" in HS1996 subheading 8471 60 of the EC Schedule. Because the concession calls for duty-free treatment of products falling within its scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.
- (b) By virtue of the inconsistency with Article II:1(b) of the GATT 1994, the regulation accords treatment less favourable to certain ADP MFMs than that provided for under the EC Schedule and thus the measures are also inconsistent with Article II:1(a) of the GATT 1994.
- (c) The regulation does not require the dutiable treatment of non-ADP MFMs with a facsimile function. Therefore, the European Communities has not acted inconsistently with Article II:1(b) of the GATT 1994 with respect to non-ADP MFMs with a facsimile function as the measure does not impose duties in excess of those provided for in the EC Schedule.

8.34 With respect to the CN2007, the Panel finds that:

- (a) The three relevant CN2007 codes require that certain ADP MFMs which fall within the scope of the duty-free concession for input or output units of an ADP in subheading 8471 60 of the EC Schedule be charged a duty of 6 per cent. Therefore, with respect to these products, the measure is inconsistent with Article II:1(b) of the GATT 1994.
- (b) By virtue of the inconsistency with Article II:1(b) of the GATT 1994, the CN2007 accords treatment less favourable to certain ADP MFMs than that provided for under the EC Schedule and thus the measures are also inconsistent with Article II:1(a) of the GATT 1994.
- (c) The three relevant CN2007 codes require that certain non-ADP MFMs which fall within the scope of the duty-free concession for "facsimile machines" in subheading 8517 21 of the EC Schedule be charged a duty of 6 per cent. Therefore, with respect to these products, the measure is inconsistent with Article II:1(b) of the GATT 1994.
- (d) By virtue of the inconsistency with Article II:1(b) of the GATT 1994, the CN2007 accords treatment less favourable to certain non-ADP MFMs than that provided for under the EC Schedule and thus the measures are also inconsistent with Article II:1(a) of the GATT 1994.

4. Nullification and impairment

8.35 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent that the European Communities has acted inconsistently with Articles II:1(a), II:1(b), X:1 and X:2 of the GATT 1994, it has nullified or impaired benefits accruing to Chinese Taipei under that agreement.

5. Recommendations

8.36 Pursuant to Article 19.1 of the DSU, having found that the European Communities has acted inconsistently with Articles II:1(a), II:1(b), X:1, and X:2 of the GATT 1994, we recommend that the Dispute Settlement Body request the European Communities to bring the relevant measures into conformity with its obligations under the GATT 1994.

8.37 We recall that the European Communities has indicated that the Commission Regulation Nos. 634/2005 and 2171/2005 would be repealed.¹⁹³⁹ In addition, the European Communities has indicated that Commission Regulation Nos. 517/1999 and 400/2006 would be repealed as of October 2009.¹⁹⁴⁰ However, there is no evidence properly before the Panel confirming such repeal. Therefore, the Panel has proceeded on the basis that the said measures are in force.

¹⁹³⁹ European Communities' first written submission, para. 95; European Communities' second written submission, para. 63.

¹⁹⁴⁰ European Communities' response to Panel question No. 110.