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ORGANIZATION

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***European Communities - Customs Classification  
of Certain Computer Equipment***

***Report of the Panel***

The report of the Panel on European Communities - Customs Classification of Certain Computer Equipment is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 5 February 1998 pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/160/Rev.1). Members are reminded that in accordance with the DSU only parties to the dispute may appeal a panel report, an appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel, and that there shall be no *ex parte* communications with the panel or Appellate Body concerning matters under consideration by the panel or Appellate Body.

Note by the Secretariat: This Panel Report shall be adopted by the Dispute Settlement Body (DSB) within 60 days after the date of its circulation unless a party to the dispute decides to appeal or the DSB decides by consensus not to adopt the report. If the Panel Report is appealed to the Appellate Body, it shall not be considered for adoption by the DSB until after the completion of the appeal. Information on the current status of the Panel Report is available from the WTO Secretariat.

## I. INTRODUCTION

1.1 On 8 November 1996, the United States requested consultations with the European Communities (EC) 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 tariff reclassification by the customs authorities of the EC and their member States of Local Area Network (LAN) equipment and personal computers (PCs) with multimedia capability (WT/DS62/1).

1.2 Korea and Canada requested, in communications dated 22 and 25 November 1996, respectively (WT/DS62/2 and WT/DS62/3), to be joined in the consultations, pursuant to paragraph 11 of Article 4 of the DSU.

1.3 Consultations were held between the United States and the EC on 23 January 1997, with Korea and Canada participating. The consultations did not result in a resolution of the dispute. As a result, in a communication dated 11 February 1997 (WT/DS62/4), the United States requested the establishment of a Panel. Accordingly, the Dispute Settlement Body (DSB) at its meeting of 25 February 1997 established a panel with the following terms of reference:

"To examine, in the light of the relevant provisions of the covered agreements cited by the United States in document WT/DS62/4, the matter referred to the DSB by the United States in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements".

1.4 The United States, in communications dated 14 February 1997 (WT/DS67/1 and WT/DS68/1), requested consultations with the United Kingdom and Ireland. These requests were made pursuant to Article 4 of the DSU and Article XXII:1 of the GATT 1994 and concerned the tariff reclassification by the customs authorities of the United Kingdom of LAN equipment and PCs with multimedia capability, and the tariff reclassification by the customs authorities of Ireland of LAN equipment.

1.5 Korea requested in a communication dated 28 February 1997 (WT/DS67/2) to join in the consultations requested by the United States with the United Kingdom.

1.6 On 24 February 1997, the United Kingdom and Ireland responded by referring the United States to a letter of the same date, in which the European Communities officially informed the United States that the requested consultations would not be entered into. As the United Kingdom as well as Ireland had declined to enter into consultations, the United States, in communications dated 7 March 1997, proceeded directly to request the establishment of two Panels; one to examine the measures taken by the United Kingdom (WT/DS67/3), and the other to examine the measures taken by Ireland (WT/DS68/2).

1.7 At its meeting of 20 March 1997, the DSB agreed to modify, at the request of the parties to the dispute, the terms of reference of the Panel established at its meeting on 25 February 1997 so that the panel requests by the United States contained in documents WT/DS67/3 and WT/DS68/2 would be incorporated into the mandate of the already existing Panel.

1.8 The modified terms of reference of the Panel are as follows:

"To examine, in light of the relevant provisions in the GATT 1994, the matters referred to the DSB by the United States in documents WT/DS62/4, WT/DS67/3 and WT/DS68/2, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings

provided for in that agreement".

1.9 In light of this decision, the DSB agreed not to establish separate panels pursuant to the requests submitted by the United States and circulated as documents WT/DS67/3 and WT/DS68/2.

1.10 The DSB also took note that the parties had agreed that the "panel established on 25 February 1997, with the terms of reference as modified at the present meeting, will be able to consider, and rule upon, any matter that might have been considered if separate panels had been established in response to those panel requests".

1.11 Furthermore, the DSB took note "that the modification of the terms of reference of the panel established on 25 February 1997 is without prejudice to the interpretation of the European Communities and its member States of the provisions of Article 4, paragraph 3 of the DSU, with regard to the 30-day period referred to in the second sentence of that paragraph".

1.12 The parties to the dispute agreed on 18 April 1997 to the following composition of the Panel:

Chairman: Mr. Crawford Falconer

Members: Mr. Ernesto de La Guardia  
Mr. Carlos Antonio da Rocha Paranhos

India, Japan, Korea and Singapore reserved their rights as third parties to the dispute.

## II. FACTUAL ASPECTS

### A. Product Description

#### 1. Local Area Network equipment<sup>119</sup>

2.1 A LAN is an interconnection of a number of computers and computer peripherals (for example, printers, input units, memory units, etc.) using a cabling system. These cables physically interconnect all the individual devices to enable them to communicate through the transmission of data. The principal types of LANs are **Ethernet**, **Token Ring** and **Fibre Distributed Data Interface (FDDI)**. A LAN is distinguished from other types of data networks in that the communication is usually limited to a discrete area such as a single office building, a warehouse or a campus.

2.2 In order for PCs to participate in a LAN, they must be connected to each other. This connection has traditionally been made via an adapter, which is inserted in the PC. An **adapter card** or **network card** is a small electronic card generally incorporated into the PC within a network. It converts, processes and formats data for transmission within the computing environment or outside of the network thereby acting as the interface between multiple systems that may employ different technologies.

2.3 If the LAN becomes bigger (for example, larger number of PCs are concerned or larger distances to be covered), more components are needed to connect the different elements of the LAN. Examples of such components are a **hub** (or concentrator). With a hub all the PCs in the LAN have a

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<sup>119</sup>This description of certain LAN equipment has been given using information provided by the EC and the United States. It is understood that the products described do not present an exhaustive list of all LAN components.

wire or cable leading from the LAN adapter card to a shared hub. The computers connected to the hub "see" all the packets<sup>120</sup> sent over the network. However, only the intended recipient PC "recognizes" the destination address, which triggers it to process the incoming packet. In this arrangement, only one computer in the LAN can transmit data at a time. Hubs may also act as network managers, by collecting information about the status of each network port and activating or shutting down a port where necessary.

2.4 Computers sharing a single hub are referred to as a **LAN segment**. Segments can be connected to other segments by means of a device called a **bridge**. A **bridge** hands data from one segment to the next, and affords security within a network as segments are partitioned from one another, thereby permitting restricted access to individual segments where necessary. In a typical LAN bridge architecture, a number of networks or segments will be bridged to each other creating a circle of bridges, one of which acts as an inactive back-up which will activate or "boot" on failure of an existing active bridge.

2.5 A **router** is another device used to link segments within a local area network or to link more than one local area network. Unlike the bridge, it is aware of exact destination addresses within a network and can optimize the route by which the data is to be delivered within the network. It segments a network in the same manner as a bridge, filters data, offers security, and protects data from "traffic jams".

2.6 Another way to organize a LAN is to use **LAN switches**. As noted above, the limitation of using a hub is that only one computer can transmit data at a time. With a switch, packets are directed only to their intended destination and therefore the system can direct packets from several sources to several destinations at one time.

2.7 A **repeater** is a device that regenerates data which is being routed from one part of the computer network to another. The repeater receives, builds and passes on the signal within a LAN, so that it can still be "heard" by the time it reaches its destination.

2.8 A network may use a variety of media to link up the various units operating on the LAN, for example **optical fibre converter, thick or thin coaxial cable, shielded or unshielded twisted pair cable**. **Media interface modules (MIMs)** are used to allow these different media to be connected into one network. A **multistation access unit** or **multi media access center** is a unit combining a repeater module and a number of media interface modules.

## 2. Personal computers with multimedia capabilities<sup>121</sup>

2.9 From their inception, computers have had the ability to process data in the form of digital, video and audio media. However, factors such as cost, memory capacity and speed rendered it impractical to incorporate these types of functions into most early PC models. In the late 1980s and early 1990s, continuing technological developments enabled PCs to process digital data streams more effectively and efficiently, resulting in the appearance of personal computers with multimedia capabilities. Such equipment, which may include a large capacity data storage unit such as a CD-ROM drive, is able to use computing technology to produce sounds, images or video, and may have specialized circuitry (i.e. a TV

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<sup>120</sup>Specialized software formats data into "packets", which can then be sent from one PC to another. The formatted data will include a source address, a destination address and control information which is used by the network to direct packet through the network.

<sup>121</sup>The description has been given using information provided by the EC and the United States.

tuner card) which allows the computer to convert a television reception signal into a digital data stream for display on the computer's monitor.

B. Tariff concessions contained in EC Schedule - LXXX relating to items under tariff headings 84.71, 84.73, 85.17, 85.21 and 85.28

2.10 Schedule LXXX provides that the base rate on "automatic data processing machines and units" under HS heading 84.71 will be reduced from 4.9 per cent to a final bound rate of either 2.5 per cent or duty free depending on the product. For "parts and accessories of machines under 84.71" covered by HS heading 84.73, and more particularly electronic assemblies, the base rate of 4 per cent is to be reduced to 2 per cent. In the case of parts and accessories of such machines other than electronic assemblies, the base rate of 4 per cent will be reduced to duty free. In the case of "electrical apparatus for line telephony or telegraphy" under HS heading 85.17, the base rate of 7.5 per cent is to be reduced to 3.6 per cent or duty free, and the base rate of 4.6 per cent to 3.6 per cent or 3 per cent. For products under HS heading 85.21 concerning video recording or reproducing apparatus, no reduction is envisaged and the bound rates are either duty free, 8 per cent or 14 per cent. Heading 85.28 pertaining to television receivers have bound rates of 8 per cent and 14 per cent with no reduction envisaged on any item with the exception of black and white or other monochrome television receivers which will have their base rate of 14 per cent reduced to 2 per cent. Regarding the staging of these tariff reductions, according to the Marrakesh Protocol to the GATT 1994, "... The tariff reductions agreed upon by each Member shall be implemented in five equal rate reductions, except as may be otherwise specified in a Member's Schedule." The first such reduction was to be made effective upon the entry into force of the WTO Agreement and each successive reduction is to be made effective on 1 January of each following year.<sup>122</sup>

C. Classification determinations in the EC, Ireland and the United Kingdom

1. Commission Regulations

(a) Classification procedure in the EC

2.11 The European Communities form a customs union.<sup>123</sup> Accordingly, on imports from third countries, a Common Customs Tariff (CCT) is applied.<sup>124</sup> While the CCT is adopted centrally by the EC, the member States' customs authorities are involved for the purpose of administration. When goods arrive at the Community frontier for customs clearance, the customs authorities of the member State through which the goods are imported in the EC territory apply the CCT determined for that year.<sup>125</sup> The

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<sup>122</sup>See Annex 1. Additionally, a note on "Implementation of Concessions" in Section II (Other Products) of Part I (Most-Favoured-Nation Tariff) of Schedule LXXX reads as follows: "Should the US not implement its concessions under the conditions set out in Note 2 to Chapter 84 and Note 12 to Chapter 85 in its schedule, the EC reserves the right to do the same with respect to the concessions indicated in this schedule for the following headings: ... Chapter 85; 85.17.10.00; 85.17.20.00; 85.17.30.00; 85.17.40.00; 85.17.81.10; 85.17.81.90; 85.17.82.00; 85.17.90.90; Ex1 New, Ex2 New; 85.17.90.91; Ex1 New, Ex2 New; 85.17.90.90, Ex1 New, Ex2 New; ...". Consequently, the applied duty rate in the European Communities for these products under heading 85.17 has been 7.5 per cent since 1995.

<sup>123</sup>Articles 12 to 17 of the Treaty Establishing the European Communities.

<sup>124</sup>Articles 18 to 29 of the Treaty Establishing the European Communities.

<sup>125</sup>"The Commission shall adopt each year by means of a Regulation a complete version of the combined nomenclature together with the corresponding autonomous and conventional rates of duty of the Common Customs Tariff, as it results from measures adopted by the Council or by the Commission. The said Regulation shall be published not later than 31 October in the *Official Journal of the European Communities* and it shall apply from 1

customs authorities check which heading of the CN the importer has mentioned on the declaration forms and apply the corresponding duty of the CCT. It is possible that, as may occur in any customs administration, customs authorities in different member States classify a product differently, which could lead to different duties being applied. It was indicated that, for this reason, the EC has put into place mechanisms in order to detect and remedy any such divergent practices.<sup>126</sup>

2.12 When divergences on a classification matter have been detected, the Tariff and Statistical Nomenclature Section (TSNS) of the Customs Code Committee which is composed of representatives of the member States and chaired by representatives of the Commission<sup>127</sup>, examines the issue and advises on what it views the correct classification to be. The Committee may examine a matter referred to it by its Chairman either on the Chairman's initiative or at the request of a representative of a member State. Following the opinion of the Committee, the Commission may adopt a Regulation concerning the classification of goods. Where the Commission does not agree with the Committee's opinion, or where no opinion is delivered within the time-limit set out by its Chairman, the Commission presents its proposal to the Council, which takes a decision through a qualified majority. A classification Regulation, adopted either by the Commission or the Council is binding in its entirety and directly applicable in all member States of the European Communities.

2.13 It is also possible that where an individual believes that a customs decision is based on an incorrect classification of goods, the customs decision may be attacked before the national tribunals and courts of the member State in question. If the national tribunal or court considers it unclear how the product should be classified, it may refer the case to the European Court of Justice (ECJ).<sup>128</sup> As such the ECJ can clarify classification issues in its case law.

(..continued)

January of the following year." (Article 12 of Council Regulation (EEC) No. 2658/87, OJ 1987 L 256/1).

<sup>126</sup>In particular, the EC has created a data base containing all Binding Tariff Information (BTI - see section 2(a) for "Definition and Evolution of BTIs within the EC") issued within the EC. Customs authorities must consult this data base before issuing a new BTI in order to make sure that they are aware of the classification practices as contained in the BTIs of all other customs authorities in the EC. If they discover in the data base that their own classification practice differs from that of any other customs authority in the EC for a similar product, they must consult with such other customs authority. If the customs authorities directly concerned cannot agree on a common approach, the internal co-ordination process of the EC is set in motion.

<sup>127</sup>Article 7 of Council Regulation 2658/87, OJ 1987 L 256/1.

<sup>128</sup>Article 177 of the Treaty Establishing the European Communities.

(b) Commission Regulation (EC) No 1165/95<sup>129</sup> on LAN Adapter Cards

2.14 On 23 May 1995, the Commission of the EC adopted Regulation (EC) No. 1165/95 which classified LAN adapter cards under the Combined Nomenclature (CN) Code<sup>130</sup> 8517.8290 which covers:

"Electrical apparatus for line telephony or line telegraphy, including such apparatus for carrier-current line systems:

- Other apparatus
  - Telegraphic
  - other"

2.15 The stated intention of this Regulation was to ensure that henceforth LAN adapter cards were classified in HS heading 8517.8290 in face of the fact that certain member States had issued Binding Tariff Information<sup>131</sup> under a heading other than the one considered appropriate for this product. The Regulation states that an adapter card is for "incorporation in cable linked digital automatic data-processing (ADP) machines enabling the exchange of data over a local area network (LAN) without using a modem. With such a card, an ADP-machine can be used as an input-output device for another machine or a central processing unit. The card constitutes a printed circuit of a size of about 10x21 cm incorporating integrated circuits and active and passive components. It is fitted with a row of pin contacts corresponding to an expansion slot in the ADP-machine with an attachment to the connection cable of the LAN and light emitting diodes (LEDs)".

2. Binding Tariff Information (BTI)

(a) Definition and evolution within the EC

2.16 A natural or legal person wishing to know how goods planned for export or import are classified by the national customs authorities of the member State through which the goods will enter the EC market, may request a BTI. A BTI constitutes a commitment of the relevant customs authorities vis-à-vis the individual applicant on how they will read the nomenclature and classify the goods described in the request for customs purposes.

2.17 Prior to 1991, BTIs only existed, on the basis of national law, in Germany and could only be obtained and used for customs clearance there. This practice was extended Community-wide with the stated rationale of encouraging import and export trade by facilitating the conclusion of medium-and long-term contracts for identical goods on the basis of reliable customs information. This was introduced in the EC by Council Regulation No. 1715/90 with rules for implementation contained in Commission Regulations Nos. 3796/90 and 2674/92. The first two of these Regulations entered into force on 1 January 1991, and on the basis of these provisions, BTIs could be obtained from a customs office in a particular member State, but could not be used for customs clearance in the customs offices of

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<sup>129</sup>See Annex 2.

<sup>130</sup>The EC's Combined Nomenclature (CN) Code provided for in Council Regulation (EEC) 2658/87 of 23 July 1987, is based on the Harmonized Commodity Description and Coding System. The Harmonized System (HS) was established by the International Convention on the Harmonized Commodity Description and Coding System on 14 June 1983, and the EC adhered to this Convention on 7 April 1987, by means of a Council Decision 87/369. It entered into force in the EC on 1 January 1988.

<sup>131</sup>See section 2(a) of this text for "Definition and Evolution of BTIs within the EC".

a member State other than the one whose customs authorities had issued the BTI. On 1 January 1993, Commission Regulation No. 2674/92 which stipulated for the first time that BTIs issued by the customs authorities of one EC member State were binding on customs authorities of all other EC member States, came into force. These rules have now been consolidated in Council Regulation No. 2913/92 containing the Community Customs Code and by Commission Regulation No. 2454/93 containing implementing provisions for the Community Customs Code. These implementing provisions entered into force on 1 January 1994 as provided in Article 915 of Commission Regulation 2454/93.

(b) Withdrawal and re-issuance of BTIs by the Ireland Revenue Commission concerning LAN equipment

2.18 By letter of 28 April 1995, the Ireland Revenue Commission withdrew BTIs it had issued on 11 August 1993 to a company Cabletron Systems LTD, in which it had classified units of bridges, routers, hubs, repeaters, media interface module and multi media access centre in CN heading 8471.99.10000, dutiable at 4.9 per cent. Simultaneously, it issued new BTIs classifying these products under 8517.8290, dutiable at 7.5 per cent. In their letter to Cabletron, the Irish authorities had stated that this action had been taken following discussions by the Tariff and Statistical Nomenclature Section (mechanical sector) of the Customs Code Committee (Nomenclature Committee) of the European Union on the classification of networking equipment and the issuance of Commission Regulation (EC) 1638/94 which classified adapters and transceivers in CN heading 85.17. The letter also indicated that discussion had been taking place at the Nomenclature Committee on the classification of network cards, that agreement had been reached that these products should be classified at CN heading 85.17, that a classification regulation was being drafted and that the Irish authorities would be amending Cabletron's BTIs for network cards as soon as the classification regulation was published. After the publication of Regulation 1165/95, the Irish authorities withdrew Cabletron's BTIs for LAN adapter cards that had been classified at CN heading 84.71. The Irish authorities simultaneously issued BTIs for these products in CN heading 85.17.

3. Customs determination by the UK HM Customs and Excise concerning LAN equipment

2.19 On 23 March 1992, the UK HM Customs and Excise issued a letter stating that LAN adapter cards would be classified under heading 8471.9910.900.<sup>132</sup> It further specified that "This decision does not constitute Binding Tariff Information (BTI) within the meaning of Regulation (EEC) 1715/90. On 28 July 1993, UK HM Customs and Excise issued another letter specifying that LAN boards and repeaters imported in board form were dutiable at 4 per cent under CN code 84.73 ("Parts and accessories of the machines of heading 84.71"); repeaters imported in complete units were to be dutiable at 4.9 per cent, under classification 8471.9910.900.

2.20 On 5 April 1994, the UK HM Customs and Excise issued a letter which reversed the decision contained in its letter of March 1992. It indicated that a review had been undertaken of the classification of networking equipment and on the basis of this review, it had concluded that all networking equipment including Local Area, Wide Area, Token Ring, Ethernet networks were "appropriately classified as data transmission apparatus in heading 8517". The reason provided was that apparatus which accepted data and transmitted it to a local or remote site was performing a data transmission function, which met the terms of heading 85.17, covering electrical apparatus for line telephony or line telegraphy which included apparatus for carrier current line systems. It considered heading 85.17 to be more specific than heading 84.71, which covered units of an automatic data processing machine. Additionally, the final

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<sup>132</sup>Although not indicated in the letter, the product was dutiable at 4.9 per cent.

paragraph of Chapter 84, note 5<sup>133</sup> of the Harmonized System<sup>134</sup> directed that heading 84.71 did not cover machines incorporating or working in conjunction with an automatic data processing machine and performing a specific function. The UK HM Customs and Excise further stated that in its letter dated 23 March 1992, it had classified LAN adapter cards under heading 8471.9910.900, but to " ... note that all future importations/exportations of these products will be under heading 8517.82900, duty rate 7.5 per cent".

2.21 In another letter also dated 5 April 1994, the UK HM Customs and Excise provided the same aforementioned explanations before referring to its letter dated 28 July 1993, in which it had classified LAN Boards, Repeaters, Token Ring and Ethernet Products under headings 84.71/84.73 and noting "...that all future importations/exportations of these products will be under heading 8517.8290, duty rate 7.5 per cent...".

#### 4. UK VAT and Duties Tribunal ruling on PCTVs<sup>135</sup>

2.22 On 17 April 1996, the UK VAT and Duties Tribunal upheld a customs administration determination classifying as a "television receiver" under heading 85.28 a multimedia PC.

2.23 The appeal was taken by International Computer LTD (ICL) against a decision of the UK Customs and Excise Commissioners as to the tariff classification for import customs duty of a Fujitsu ICL "PCTV". The tribunal stated that this PCTV "is both a multimedia personal computer and a full function colour television set, integrated within the same unit and using the same screen". ICL contended that the machine should be classified under heading 84.71 entitled "Automatic data processing machines", which carried a duty rate on importation of 4.4 per cent. The Commissioners had decided that it fell under heading 85.28 - "Television receivers", which carried a rate of duty on importation of 14 per cent. ICL contended that the PCTV's principal function and/or its essential character was that of a personal computer. The Commissioners maintained that it was not possible to determine a principal function; so, when presented with two tariff headings which equally deserved consideration, they would classify the PCTV under that heading which occurred last in numerical order, namely 85.28 "Television receivers".

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<sup>133</sup>Note 5 of Chapter 84 of the HS: "(A) For the purposes of heading No. 84.71, the expression "automatic data processing machines" means: (a) Digital machines, capable of (1) storing the processing program or programs and at least the data immediately necessary for the execution of the program; (2) being freely programmed in accordance with the requirements of the user; (3) performing arithmetical computations specified by the user; and (4) executing, without human intervention, a processing program which requires them to modify their execution, by logical decision during the processing run; (b) Analogue machines capable of simulating mathematical models and comprising at least; analogue elements, control elements and programming elements; (c) Hybrid machines consisting of either a digital machine with analogue elements or an analogue machine with digital elements. (B) Automatic data processing machines may be in the form of systems consisting of a variable number of separately-housed units. A unit is to be regarded as being a part of the complete system if it meets all the following conditions: (a) it is connectable to the central processing unit either directly or through one or more units; (b) it is specifically designed as part of such a system (it must, in particular, unless it is a power supply unit, be able to accept or deliver data in a form (code or signals) which can be used by the system). Such units presented separately are also to be classified in heading No. 84.71. Heading No. 84.71 does not cover machines incorporating or working in conjunction with an automatic data processing machine and performing a specific function. Such machines are classified in the headings appropriate to their respective functions or, failing that, in residual headings".

<sup>134</sup>See footnote 12.

<sup>135</sup>See Annex 3.

2.24 The tribunal dismissed the appeal. It did not find it possible to determine the principal function of the PCTV. The tribunal also found it doubtful that the "essential character" criterion was applicable in classifying a machine such as the PCTV. Even if that criterion was applicable, the tribunal was not persuaded that the automatic data processing machine was the component which gave the PCTV its essential character. According to the tribunal, the PCTV was "a new kind of hybrid machine which was both a PC and a TV," and neither of which gave it its essential character.

### III. CLAIMS OF THE PARTIES

3.1 The **United States** requested the Panel to find that:

- the EC's reclassification of LAN adapter cards under Regulation (EC) 1165/95 resulted in treatment of those products less favourable than that provided for in Part I of Schedule LXXX and therefore was inconsistent with obligations under GATT Article II;
- the EC's reclassification of other types of LAN equipment resulted in treatment of those products less favourable than that provided for in Part I of Schedule LXXX and therefore was inconsistent with obligations under GATT Article II;
- the EC's reclassification of multimedia personal computers resulted in treatment of those products less favourable than that provided for in Part I of Schedule LXXX and therefore was inconsistent with obligations under GATT Article II;
- the United Kingdom's reclassification of LAN equipment resulted in treatment of those products less favourable than that provided for in Part I of EC's Schedule of concessions and therefore was inconsistent with obligations under GATT Article II;
- the United Kingdom's reclassification of multimedia personal computers resulted in treatment of those products less favourable than that provided for in Part I of EC's Schedule of concessions and therefore was inconsistent with obligations under GATT Article II;
- Ireland's reclassification of LAN equipment resulted in treatment of those products less favourable than that provided for in Part I of EC's Schedule of concessions and therefore was inconsistent with obligations under GATT Article II;
- the above measures nullified or impaired the value of concessions accruing to the United States under the GATT 1994.

3.2 The United States also requested that the Panel specify which of these parties was responsible to the United States for this nullification or impairment and that the Panel recommend that the EC, Ireland and the United Kingdom bring the treatment of these products into conformity with obligations under GATT 1994.

3.3 The **European Communities** requested the Panel to reject the US claims in their entirety.

More specifically:

- the EC requested the Panel to reject the US claims against Ireland and the United Kingdom. As these member States had not engaged in any tariff bindings vis-à-vis the United States or any other country, they could not be considered to have violated any obligations under GATT

Article II, nor had they nullified or impaired the value of concessions accruing to the United States under the GATT 1994;

- moreover, the EC requested the Panel to reject the US claims against the EC, as the EC had for none of the products concerned committed itself to apply the duty rate bound for computers during the Uruguay Round. The EC had not reclassified the products concerned, resulting in treatment of those products less favourable than that provided for in its Schedule. The EC had consequently not violated any obligations under GATT Article II, nor had it nullified or impaired the value of concessions accruing to the United States under the GATT 1994.

**[Parties' arguments in Sections IV through VI deleted from this version]**

## VII. INTERIM REVIEW

7.1 On 21 October 1997, the European Communities and the United States requested the Panel to review, in accordance with Article 15.2 of the DSU, the interim report that had been issued to the parties on 7 October 1997. The European Communities also requested the Panel to hold a further meeting with the parties to discuss the points raised in its written comments. The Panel met with the parties on 12 November 1997, reviewed the entire range of arguments presented by the European Communities and the United States, and finalized its report, taking into account the specific aspects of these arguments it considered to be relevant.

7.2 Regarding paragraph 7.8 of the interim report (now paragraph 8.8 of the final report), the European Communities recalled that it had argued that a wide definition of LAN equipment necessarily included certain modems and multiplexers (see paragraph 5.59) and that Singapore had also argued before the Panel that multiplexers were LAN equipment (see paragraphs 5.26 and 6.30). The European Communities questioned how the Panel could justify the exclusion of multiplexers, since the Panel had made findings that applied to "all LAN equipment". The European Communities submitted that multiplexers should be considered LAN equipment. For the same reason, the European Communities requested that the Panel reconsider the relevance of the BTIs issued by the Netherlands (see paragraph 8.40). Given the large number of BTIs issued by the Netherlands (Annex 6, Table 1, Nos 5 to 34), the European Communities argued, this reconsideration of the Dutch BTIs should lead the Panel to the conclusion that there was enough evidence on the EC side to rebut the evidence submitted by the United States in this dispute.

7.3 The Panel noted that footnote 124 made it clear that multiplexers were outside the scope of the Panel's examination. The Panel recalled that the United States -- the complainant in this dispute -- stated that tariff treatment of multiplexers was not part of its claims. The Panel had found the United States' technical explanation in paragraph 5.54 to provide reasonable grounds to conclude that multiplexers should not be considered to be LAN equipment. The European Communities asserted otherwise (see paragraph 5.59), but provided no rationale for its position except the United States' own classification practice, which was not relevant in this case in the Panel's view (see paragraph 7.5 below). Accordingly, the Panel did not accept the European Communities' request on this point, and decided to retain paragraph 8.8 as it originally appeared as paragraph 7.8 of the interim report. Correspondingly, there was no reason, in the Panel's view, to reconsider the relevance of the Dutch BTIs.

7.4 The European Communities noted that in paragraph 7.23 of the interim report (now paragraph 8.23 of the final report) the Panel found that "the meaning of a particular expression in a tariff schedule cannot be determined in isolation from its context". It further noted that in paragraph 7.26 of the interim report (now paragraph 8.26 of the final report) the Panel stated that "it is clearly the case that most descriptions are to be treated with the utmost care to maintain their integrity precisely because, on its face, they normally constitute the most concrete, tangible and reliable evidence of commitments made". The European Communities argued that the Panel failed to explain how it could interpret the importing country's tariff schedule in context while omitting any reference to the relevant customs legislation of the importing country with regard to the interpretation of the tariff nomenclature, which is derived from the Harmonized System. The European Communities further pointed out that it had submitted to the Panel all the relevant interpretative notes (see footnote 15) as well as the EC legislation referring to the issuance and the legal value of the BTIs. The Panel, according to the European Communities, should have taken into account these legal elements in interpreting Schedule LXXX and in doing so should have come to the conclusion that Schedule LXXX does not require the European Communities to grant LAN equipment a tariff treatment that is below the bound duty rate for telecommunication apparatus.

7.5 After carefully examining this argument by the European Communities, the Panel remained of the view that the European Communities failed to accord imports of LAN equipment treatment no less favourable than that provided for under Schedule LXXX. First, the Panel noted that the both parties considered this dispute as a case about duty treatment, not about product classification. Indeed, the European Communities itself (see paragraph 5.13) stated that "this Panel should abstain from pronouncing itself on customs classification issues". In this respect, the European Communities was in agreement with the United States, which stated "this case was not about classification" (see paragraph 5.12, see also paragraph 5.3). The Panel adopted its interpretative approach accordingly. Furthermore, in making its finding, the Panel considered that BTIs were relevant to the formation of legitimate expectations to the extent that they indicate *actual tariff treatment* of the products concerned. In dealing with the matter, the legal status of BTIs within the European Communities was fully taken into account by the Panel, but whether or not BTIs were legally binding under the EC law, in the Panel's view, did not materially affect the conclusion that they constituted evidence of actual tariff treatment. Consequently, the Panel decided to reject the European Communities' request on this point.

7.6 The European Communities argued that the Panel's findings in paragraphs 7.36, 7.41 and 7.55 of the interim report (now paragraphs 8.36, 8.41 and 8.55, respectively) regarding the tariff treatment of LAN equipment in the European Communities were not reconcilable with the fact that "The American Electronics Association (AEA), which represented the computer industry, had scheduled a meeting with Commission officials on 25 February 1994 in order to discuss a number of issues including classification difference in member States with respect to a number of products including LAN interface" (paragraph 5.29). According to the European Communities, the existence of the scheduled meeting clearly indicated that the US industry was fully aware of the difficulties in classification of LAN equipment and that some imports of LAN products were classified as telecommunication apparatus by some EC customs authorities, including those located in the United Kingdom. The European Communities further argued that tariff commitments were negotiated by government officials, not by the industry. It therefore failed to understand how it could be held responsible for the alleged failure by the US industry to properly brief the US Government during the Uruguay Round about the differences in classification within the European Communities.

7.7 The Panel was not persuaded by this argument. The AEA meeting with EC officials might have been scheduled, but it was not clear whether or when it actually took place (see paragraph 5.30). The European Communities did not put forward more detailed explanation regarding that meeting than is contained in paragraph 5.29. In the Panel's view, it was impossible to infer from this information alone that the US industry which exported LAN equipment to Ireland and the United Kingdom was fully aware of the difficulties in classification of LAN equipment and that some imports of LAN products were classified as telecommunication apparatus in Ireland or the United Kingdom during the Uruguay Round. Moreover, in the Panel's view, the Panel had not attributed to the European Communities any failure by the US industry to brief the US Government. Rather, it was the matter of whether the European Communities bore the responsibility for creating the expectations that LAN equipment would be treated as ADP machines, or whether there was sufficient evidence to indicate "a manifest anomaly" (see paragraph 8.44) which the United States should have been aware of. Consequently, the Panel did not find it necessary to change its findings in paragraphs 8.41 and 8.55. However, in order to clarify its position further, the Panel decided to expand footnote 152.

7.8 The European Communities further argued that, in view of the agreement between the parties that the relevant period for this dispute was from January 1990 to March 1994 (see paragraph 5.24), it failed to understand how the finding in paragraph 7.41 of the interim report (now paragraph 8.41 of the final report) could be based on an objective appreciation of facts as they appeared from the file.

According to the European Communities, apart from the classification carried out by other EC customs authorities (e.g. Germany) the BTI issued by the UK customs authorities to CISCO showed that it had not been possible for the US industry to have a genuine understanding during the relevant period that all LAN equipment would be classified as ADP machines. Moreover, the European Communities argued, this evidence showed that CISCO, when submitting its letter referred to in Annex 4, Table 3, No. 8 was not telling the truth (see paragraph 5.49).

7.9 The Panel noted that when it made the finding in paragraph 8.41, it was fully aware that the BTI issued to CISCO had become effective within the relevant period, but in its view, the fact that the event occurred at the very end of the period as a single incidence also had to be given due weight (see also footnote 152). It also took into account the apparent contradiction between the BTI and the CISCO letter to the US Government. However, bearing in mind the plausibility of the explanation given by the United States (see paragraph 5.57), this did not itself constitute a sufficient basis to cast doubt on the veracity of other aspects of the CISCO letter. Nor had the European Communities provided any other evidence to do so. These elements did not affect the Panel's conclusion that the counter-evidence was not sufficient to rebut the presumption that US claim was true.

7.10 Regarding paragraph 7.44 of the interim report (now paragraph 8.44 of the final report), the European Communities returned to its argument in paragraph 5.48 regarding the relevance of Danish and Dutch BTIs due to the dates of their issuance and stated that these BTIs could not serve as sufficient evidence to support that the customs authorities of Denmark and the Netherlands were classifying LAN equipment as ADP machines during the relevant period.

7.11 The Panel noted that paragraph 7.37 of the interim report (now paragraph 8.37 of the final report) had been drafted with this issue directly in mind, and did not find it necessary to change its findings on this point: i.e. regarding its view that those BTIs provided supplementary support to the US claim. However, in order to clarify its position further, the Panel modified the language as used in paragraph 8.44 of the final report.

7.12 Regarding paragraph 7.56 of the interim report (now paragraph 8.56 of the final report), the European Communities pointed out that the United States itself had reclassified during the course of the Uruguay Round, namely in 1992, LAN equipment from telecommunication apparatus to ADP machines and that this reclassification had happened after the United States had made its "zero-for-zero" request/offer of 15 March 1990, which included electronic articles in HS chapters 84, 85 and 90 (see paragraph 5.26). The European Communities also noted that during the negotiations of the North American Free Trade Agreement, the parties to that agreement had admitted that it was difficult to classify LAN equipment and they had agreed to consult on this issue and to endeavour to agree no later than 1 January 1994 on the classification of such goods in each party's tariff schedule (see paragraph 5.33). The European Communities further recalled that after the conclusion of the Uruguay Round, the HS Committee of the World Customs Organization had to examine the proper classification of certain LAN equipment (see paragraph 5.12). Finally, the European Communities stated that even some third parties to this dispute, namely Japan and Korea, were currently classifying some or all LAN equipment as telecommunication apparatus (see paragraph 5.35).

7.13 Referring to paragraph 7.49 of the interim report (now paragraph 8.49 of the final report), the European Communities maintained that the facts mentioned in the previous paragraph clearly showed that there had been, and to a certain extent still was "a manifest anomaly" because of the extraordinary difficulty concerning the correct classification of LAN equipment. It also showed, according to the European Communities, the question of precise classification of LAN equipment in the EC schedule could not possibly have influenced the way in which the United States conducted the Uruguay Round

tariff negotiations since the United States' "zero-for-zero" request/offer was submitted before its own reclassification of LAN equipment, i.e. without prejudice to classification details. The European Communities asked the Panel to take these elements into account and therefore come to a different conclusion.

7.14 The Panel agreed with the European Communities that these elements had indeed been presented before the Panel, and accordingly modified and expanded the relevant paragraphs in its findings. However, for reasons explained in paragraphs 8.58 and 8.59 of the final report, it did not agree with the European Communities that it should come to a different conclusion.

7.15 The United States requested that the first sentence of footnote 167 be deleted as unnecessary and potentially misleading. That sentence, according to the United States, could be misinterpreted to suggest that production of BTIs, customs rulings or actual invoices was essential to showing a violation of Article II:1 of GATT 1994. The United States argued that it could not predict what types of evidence of actual tariff treatment might exist in a future dispute between different parties, with different domestic legal systems, concerning different concessions. According to the United States, it would be unwise for this Panel to imply that these three types of evidence were inherently superior to all other types of evidence or were the only types of evidence relevant in any case. The European Communities objected to the deletion of the sentence.

7.16 In the Panel's view, there would be no danger of misinterpretation as suggested by the United States. However, in order to clarify its views on evidence in this regard, the Panel introduced certain modifications to the sentence.

7.17 The United States also made other drafting suggestions concerning the description of its arguments, some of which the Panel accepted and introduced in its final report. These changes are reflected in paragraphs 2.9, 5.52, 8.2, 8.13, 8.14 and 8.65, and footnotes 4 and 83 of the final report.

## VIII. FINDINGS

### A. Claims of the Parties

8.1 The facts leading to this dispute can be summarized as follows. At the conclusion of the Uruguay Round, the European Communities bound its tariff rate on products described as "automatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included" (hereinafter referred to as "ADP machines") under heading 84.71 at 2.5 per cent -- or zero per cent on some products -- (to be reduced from the base rate of 4.9 per cent) in its Schedule of Concessions and Commitments annexed to the Marrakesh Protocol to the General Agreement on Tariffs and Trade 1994 (Schedule LXXX). The bound rates of duty on "parts and accessories of the machines of heading No 8471" under heading 84.73 was 2.0 per cent. The bound rates of duty on "electrical apparatus for line telephony or line telegraphy, including such apparatus for carrier current line systems" (hereinafter referred to as "telecommunication apparatus") under heading 85.17 were varied, but generally higher than those on ADP machines (3.0 to 3.6 per cent, to be reduced from the base rate of 4.6 to 7.5 per cent). The bound rate of duty on "television receivers (including video monitors and video projectors)" under heading 85.28 was 14.0 per cent.<sup>238</sup>

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<sup>238</sup>For a more detailed description of these products and their bound rates, see Annex 1. Regarding products under heading 85.17, see also footnote 4.

8.2 According to the United States, the customs authorities in the European Communities, particularly those of Ireland and the United Kingdom, generally treated LAN equipment as ADP machines during the Uruguay Round and for some time after its conclusion. In May 1995, the Commission adopted Regulation (EC) 1165/95 classifying LAN adapter cards as telecommunication apparatus under heading 85.17.<sup>239</sup> Following the adoption of this regulation, according to the United States, the customs authorities in the European Communities including those of Ireland and the United Kingdom started treating LAN adapter cards as telecommunication apparatus as mandated by the regulation, and also started classifying other LAN equipment as telecommunication apparatus.

8.3 In April 1996, a tribunal in the United Kingdom upheld a customs administration determination classifying a product known as PCTV (a combination of personal computer and colour television set, integrated in the same unit) as a television receiver under heading 85.28.<sup>240</sup>

8.4 In June 1997, the Commission adopted Regulation (EC) 1153/97, classifying all personal computers (hereinafter "PCs") as ADP machines, but applying higher rates of duty (as much as 14 per cent) on those with multimedia capability.

8.5 The United States claims as follows:

- (a) The European Communities' reclassification of LAN adapter cards under Regulation (EC) 1165/95 has resulted in treatment of those products less favourable than that provided for in Part I of Schedule LXXX and therefore is inconsistent with the European Communities' obligations under Article II:1 of the General Agreement on Tariffs and Trade 1994 (hereinafter "GATT 1994");
- (b) The European Communities' reclassification of other types of LAN equipment has resulted in treatment of those products less favourable than that provided for in Part I of Schedule LXXX and therefore is inconsistent with the European Communities' obligations under Article II:1 of GATT 1994;
- (c) The European Communities' reclassification of multimedia PCs has resulted in treatment of those products less favourable than that provided for in Part I of Schedule LXXX and therefore is inconsistent with the European Communities' obligations under Article II:1 of GATT 1994;
- (d) The United Kingdom's reclassification of LAN equipment has resulted in treatment of those products less favourable than that provided for in Part I of Schedule LXXX and therefore is inconsistent with the United Kingdom's obligations under Article II:1 of GATT 1994;
- (e) The United Kingdom's reclassification of multimedia PCs has resulted in treatment of those products less favourable than that provided for in Part I of Schedule LXXX and therefore is inconsistent with the United Kingdom's obligations under Article II:1 of GATT 1994;

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<sup>239</sup> Annex 2.

<sup>240</sup> Annex 3.

- (f) Ireland's reclassification of LAN equipment has resulted in treatment of those products less favourable than that provided for in Part I of Schedule LXXX and therefore is inconsistent with Ireland's obligations under Article II:1 of GATT 1994; and
- (g) The above measures have nullified or impaired the value of concessions accruing to the United States under GATT 1994.

8.6 The European Communities rejects these claims for the following reasons:

- (h) The United States' claims against Ireland and the United Kingdom (i.e., (d), (e) and (f) above) should be rejected because these member States did not engage in any tariff bindings vis-à-vis the United States or any other country and could not be considered to have violated any obligations under Article II of GATT 1994; and
- (i) The United States' claims against the European Communities (i.e., (a), (b) and (c) above) should be rejected because the European Communities did not reclassify the products concerned, resulting in treatment of those products less favourable than that provided for in its tariff schedule. The European Communities has not violated any of its obligations under Article II of GATT 1994, nor has it nullified or impaired the value of concessions accruing to the United States under GATT 1994.

## B. Issues Regarding the Scope of the Claim

8.7 Before examining the substantive aspects of the case, we need to rule on three preliminary issues raised by the European Communities regarding the scope of the United States' claim. These are the issues relating to product coverage, scope of the measures and the status of Ireland and the United Kingdom in this dispute.

### 1. Product Coverage

8.8 The European Communities argues that the United States has failed to define clearly "LAN equipment" subject to the dispute with the exception of LAN adapter cards, and suggests that all the claims on LAN equipment other than LAN adapter cards should be dismissed.<sup>241</sup> The United States argues that its definition of LAN equipment is clear.<sup>242</sup> In response to a question from the Panel, the United States has submitted that the term "LAN equipment" means all LAN equipment including LAN adapter cards, LAN controllers, LAN repeaters, LAN interface units and bridges, LAN extenders, LAN concentrators, LAN switches, LAN hubs and LAN routers.<sup>243</sup>

8.9 We note that the European Communities cites, in support of its position, the panel report on "EEC - Quantitative Restrictions against Imports of Certain Products from Hong Kong", which made the following observation:

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<sup>241</sup>See paragraph 4.1.

<sup>242</sup>See paragraph 4.2.

<sup>243</sup>See footnote 19 or a more precise description of these products. According to the United States, modems and multiplexers are not included in this definition. See paragraph 5.54. Evidence on these products is not accepted by the Panel as proof regarding the tariff treatment of LAN equipment.

"The Panel considered that just as the terms of reference must be agreed between the parties prior to the commencement of the Panel's examination, similarly the product coverage must be clearly understood and agreed between the parties to the dispute. The Panel considered that to allow the inclusion of an additional product item about which one party had not been formally advised prior to the commencement of proceedings would be to introduce an element of inequity."<sup>244</sup>

In our view, however, the present case should be distinguished from the *Quantitative Restrictions* case cited by the European Communities in that no new product was added by the United States in the course of the proceedings. The definition by the United States in the previous paragraph is an elucidation of the product coverage already specified in the United States' requests for the establishment of a panel on this matter (WT/DS62/4, WT/DS67/3 and WT/DS68/2). Consequently, we find that the definition is sufficiently specific for the purposes of our consideration of this dispute and reject the European Communities' suggestion.

8.10 The European Communities also argues that the scope of the United States' claim on multimedia PCs is unclear. According to the European Communities, the only item which can be considered to be the subject of this dispute settlement proceeding is the PCTV implicated in the 1996 judgement of a United Kingdom tribunal, and the European Communities suggests that the rest of the United States' claim on multimedia PCs should be dismissed.<sup>245</sup> In response to a question by the Panel, the United States has submitted that its claim includes a broad range of personal computers with multimedia capability such as those which utilize storage devices based on laser-reading technology (i.e., CD-ROMs) and those which have attendant audio and video capabilities.<sup>246</sup> Again, noting that the United States' reference to "PCs with multimedia capability" in its panel requests (WT/DS62/4, WT/DS67/3 and WT/DS68/2) covers all these products, we find that this definition is sufficiently specific for the purposes of our consideration of this dispute and reject the European Communities' suggestion.

8.11 For the reasons stated above, we reject the European Communities' argument and find that all LAN equipment and personal computers with multimedia capability, as specified by the United States, are the subject of this dispute.

## 2. Scope of the Measures

8.12 The European Communities argues that the United States has failed to identify measures where tariff commitments have allegedly been violated, except Regulation (EC) 1165/95 regarding LAN adapter cards and the above-mentioned UK tribunal judgement regarding PCTVs. The United States argues that in addition to these two measures, practices of the customs authorities in Ireland, the United Kingdom and other member States regarding LAN equipment, as well as the UK customs authorities' practice regarding multimedia PCs, are included within the scope of this dispute.<sup>247</sup> Although the United States' formulation of its claims appears to emphasize the "reclassification" aspect of the dispute, the

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<sup>244</sup>Panel Report on *EEC- Quantitative Restrictions against Imports of Certain Products from Hong Kong*, op cit., para. 30.

<sup>245</sup>See paragraph 4.3.

<sup>246</sup>See paragraph 4.4.

<sup>247</sup>See paragraph 4.8. See also paragraph 8.5.

substance of the present case is the actual tariff treatment by customs authorities in the European Communities and the evaluation of that treatment in light of the tariff commitments in Schedule LXXX. Both parties have presented their arguments on this basis.<sup>248</sup> Viewed from this perspective, we find that the United States has sufficiently identified the measures subject to the dispute, which concerns tariff treatment of LAN equipment and multimedia PCs by customs authorities in the European Communities.

8.13 Separately, the United States refers to Regulation (EC) 1153/97, which entered into force on 1 July 1997, as itself imposing tariffs at higher-than-concession rates under heading 84.71.<sup>249</sup> The European Communities objects to its inclusion for consideration by the Panel.<sup>250</sup>

8.14 Regarding Regulation (EC) 1153/97, we note that the regulation was issued on 24 June 1997, almost four months after the establishment of this Panel on 25 February 1997. It has been the consistent practice of previous panels not to examine measures introduced after the establishment of the panels.<sup>251</sup> We see no reasons to depart from this practice in the present case. The United States argues that Regulation (EC) 1153/97 "confirms" the existing measures. It does not however explain how and why this amounts to "confirmation".<sup>252</sup> Accordingly, we do not examine the conformity of Regulation (EC) 1153/97 with GATT 1994 in this report.

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<sup>248</sup>See paragraphs 5.3 (arguments by the United States) and 5.13 (arguments by the European Communities).

<sup>249</sup>See paragraph 5.74.

<sup>250</sup>See paragraph 4.6.

<sup>251</sup>Panel Report on *Uruguayan Recourse to Article XXIII*, adopted on 16 November 1962, BISD 11S/95, para. 18; Panel Report on *United States - Section 337 of the Tariff Act of 1930*, adopted on 7 November 1989, BISD 36S/345, para. 5.2.

<sup>252</sup>See paragraph 4.8.

3. Status of Ireland and the United Kingdom

8.15 The United States has requested that the Panel specify which of the defending parties (the European Communities, Ireland and the United Kingdom) are responsible for the alleged nullification or impairment of its benefits under GATT 1994.<sup>253</sup> The European Communities claims that Ireland and the United Kingdom are not parties to this dispute.

8.16 The terms of reference of this Panel clearly mandates us to examine "the matters referred to the DSB by the United States in documents WT/DS62/4, WT/DS67/3 and WT/DS68/2". The respondents in these documents are the European Communities, the United Kingdom and Ireland, respectively. However, as we stated earlier, what is at issue in this dispute is tariff treatment of LAN equipment and multimedia PCs by customs authorities in the European Communities.<sup>254</sup> Since the European Communities, Ireland and the United Kingdom are all bound by their tariff commitments under Schedule LXXX, our examination will focus, in the first instance, on whether customs authorities in the European Communities, including those located in Ireland and the United Kingdom, have or have not deviated from the obligations assumed under that Schedule. Accordingly, we will revert to this issue in light of the conclusions of that examination.

8.17 As a related matter, the United States has requested that the title of the report of this Panel be changed to read "European Communities, Ireland and the United Kingdom - Increases in Tariffs on Certain Computer Equipment".<sup>255</sup> The European Communities does not agree to this change.<sup>256</sup> Given that the report is a consolidated response to the United States' requests contained in documents WT/DS62/4, WT/DS67/3 and WT/DS68/2, the change in the title might have been acceptable if it had been agreed upon by the parties to the dispute when they reached an agreement on the terms of reference of this Panel. However, the United States requested this change at the very end of the second substantive meeting, which in our view was rather late in the process. Considering that the current title of this report, read together with the three document symbols (WT/DS62/R, WT/DS67/R and WT/DS68/R) it carries, does not lead to any confusion or misunderstanding regarding the substance of this dispute and that, more generally, it is desirable for the title of a dispute to remain unchanged throughout the process (from consultations to implementation), we reject the request by the United States. In so doing, we also note that the title of a particular dispute is given for the sake of convenience in reference and in no way affects the substantive rights and obligations of the parties to the dispute.

C. General Interpretative Issue

8.18 As indicated earlier, the substance of this dispute is whether the tariff treatment of LAN equipment and multimedia PCs by the customs authorities in the European Communities has been in compliance with the tariff concessions contained in Schedule LXXX. The pertinent provision in GATT 1994 is Article II:1, which reads in relevant parts as follows:

"(a) Each Member shall accord to the commerce of the other Members treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to

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<sup>253</sup>See paragraph 3.2.

<sup>254</sup>See paragraph 8.12.

<sup>255</sup>See paragraph 5.3.

<sup>256</sup>See paragraph 5.4.

this Agreement.

"(b) The products described in Part I of the Schedule relating to any Member, which are the products of territories of other Members, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date."

The specific question facing this Panel is whether customs authorities in the European Communities accorded tariff treatment to certain products less favourable than what is described in Part I of its tariff schedule -- Schedule LXXX. Whether LAN equipment or multimedia PCs are properly classified under a certain tariff heading is not an issue before this Panel because the question of their classification *per se* has not been raised by the United States. It should also be emphasized that the object of our examination is limited to Schedule LXXX. We have no intention of passing a judgement regarding in which tariff category a certain product must be classified. Such a question is outside the terms of reference of this Panel.

8.19 Thus, it is necessary to interpret Schedule LXXX in its relation to Article II:1 of GATT 1994. As noted earlier, Schedule LXXX is annexed to the Marrakesh Protocol, which in turn forms part of GATT 1994. As such, it is an integral part of the WTO Agreement, subject to "customary rules of interpretation of public international law" (Article 3.2 of the DSU).

8.20 Article 31 of the 1969 Vienna Convention on the Law of Treaties (hereinafter referred to as "Vienna Convention") sets out the general rules of treaty interpretation as follows:

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

"2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

"3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended."

8.21 Article 32 of the Vienna Convention further provides:

"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable."

8.22 We will follow these rules of interpretation in determining whether the tariff treatment of LAN equipment and multimedia PCs is in conformity with the tariff commitments contained in Schedule LXXX. The purpose of interpretation is, as is the case with any treaty text, to ascertain what a particular expression in the Schedule means.

8.23 The meaning of a particular expression in a tariff schedule cannot be determined in isolation from its context. It has to be interpreted in the context of Article II of GATT 1994 -- a provision that gives the rationale for the specification of products and duty rates in tariff schedules in the first place: i.e., they constitute a binding commitment arising out of a negotiation. It should be noted in this regard that the protection of legitimate expectations in respect of tariff treatment of a bound item is one of the most important functions of Article II. The panel on *Oilseeds* stated as follows:

"... The Panel considered that the main value of a tariff concession is that it provides an assurance of better market access through improved price competition. Contracting parties negotiate tariff concessions primarily to obtain that advantage. They must therefore be assumed to base their tariff negotiations on the expectation that the price effect of the tariff concessions will not be systematically offset. If no right of redress were given to them in such a case they would be reluctant to make tariff concessions and the General Agreement would no longer be useful as a legal framework for incorporating the results of trade negotiations..."<sup>257</sup>

The fact that the *Oilseeds* panel report concerns a non-violation complaint does not affect the validity of this reasoning in cases where an actual violation of tariff commitments is alleged. If anything, such a direct violation would involve a situation where expectations concerning tariff concessions were even more firmly grounded.

8.24 The importance of legitimate expectations in interpretation of tariff commitments can be confirmed by the text of Article II itself. Article II:5 provides as follows (emphasis added):

"If any Member considers that a product is not receiving from another Member the treatment which the first Member *believes to have been contemplated* by a concession provided for in the appropriate Schedule annexed to this Agreement, it shall bring the matter directly to the attention of the other Member. If the latter agrees that the treatment *contemplated* was that

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<sup>257</sup>Panel Report on *European Economic Community - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, adopted on 25 January 1990, BISD 37S/86, para. 148.

claimed by the first Member, but declares that such treatment cannot be accorded because a court or other proper authority has ruled to the effect that the product involved cannot be classified under the tariff laws of such Member so as to permit the treatment contemplated in this Agreement, the two Members, together with any other Members substantially interested, shall enter promptly into further negotiations with a view to a compensatory adjustment of the matter."

Although Article II:5 is a provision for the special bilateral procedure regarding tariff classification, not directly at issue in this case, the existence of this provision confirms that legitimate expectations are a vital element in the interpretation of Article II and tariff schedules.

8.25 This conclusion is also supported by the object and purpose of the WTO Agreement and those of GATT 1994. The security and predictability of "the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade" (expression common in the preambles to the two agreements) cannot be maintained without protection of such legitimate expectations. This is consistent with the principle of good faith interpretation under Article 31 of the Vienna Convention. It should be recalled that the panel report on *Underwear* stated as follows:

"[T]he relevant provisions [of the Agreement on Textiles and Clothing] have to be interpreted in good faith. Based upon the wording, the context and the overall purpose of the Agreement, exporting Members can ... legitimately expect that market access and investments made would not be frustrated by importing Members taking improper recourse to such action."<sup>258</sup>

8.26 In our view, it may, as a matter of fact, be the case that in nearly all instances, the ordinary meaning of the terms of the actual description in a tariff schedule accurately reflects and exhausts the content of the legitimate expectations. It is clearly the case that most descriptions are to be treated with the utmost care to maintain their integrity precisely because, on their face, they normally constitute the most concrete, tangible and reliable evidence of commitments made. In our view, however, this cannot be the case *a priori* for all tariff commitments. It must remain possible, at least in principle, that parties have legitimately formed expectations based on other particular supplementary factors.

8.27 To deny this *a priori* would be to reduce the nature and meaning of commitments under Article II to a purely formal and mechanical task of noting descriptions in schedules. This would be to rob such commitments of the reality of the context in which they clearly occur in Article II.

8.28 In interpreting Schedule LXXX, we will accordingly undertake *inter alia* an evaluation of what, as a matter of fact, the United States was entitled to expect legitimately regarding the actual tariff treatment of LAN equipment and multimedia PCs in the European Communities.

#### D. LAN Equipment

8.29 The United States claims that LAN equipment should have been accorded the tariff treatment of ADP machines or parts thereof under heading 84.71 or heading 84.73 in Schedule LXXX. The European Communities claims that its treatment of LAN equipment as telecommunication apparatus under heading 85.17 of Schedule LXXX is justified and that it is entitled to levy the rate of duty under that heading accordingly. Thus, we need to determine the proper interpretation of Schedule LXXX

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<sup>258</sup>Panel Report on *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear*, adopted on 25 February 1997, WT/DS24/R, para. 7.20. See also Panel Report on *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*", WT/DS50/R, para. 7.18.

regarding LAN equipment. As noted earlier, the general question of where LAN equipment should be classified in a tariff nomenclature is beyond our mandate. Our finding is specific to obligations under Schedule LXXX, and should not be taken as anything going beyond that.

## 1. Textual Analysis

8.30 Following the rules of the Vienna Convention<sup>259</sup>, we start from the textual analysis. Schedule LXXX does not specifically refer to LAN equipment. It generally refers to "automatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included" under heading 84.71 and "parts and accessories of machines of heading No 8471" under heading 84.73. In view of the data processing capacities of LAN equipment, one might conclude that any type of LAN equipment is an ADP machine or part thereof. However, if one emphasizes the fact that LAN equipment is used for communication among various computer devices and the expression "not elsewhere specified", one could also argue that LAN equipment is an "electrical apparatus for line telephony or line telegraphy, including such apparatus for carrier current line systems" under heading 85.17.

8.31 Thus, for the purposes of Article II:1, it is impossible to determine whether LAN equipment should be regarded as an ADP machine purely on the basis of the ordinary meaning of the terms used in Schedule LXXX taken in isolation. However, as noted above, the meaning of the term "ADP machines" in this context may be determined in light of the legitimate expectations of an exporting Member.<sup>260</sup>

## 2. Actual Tariff Treatment and Legitimate Expectations

8.32 The United States claims that it is entitled to tariff treatment of LAN equipment as ADP machines or parts thereof because customs authorities in the European Communities, particularly those in Ireland and the United Kingdom, actually treated LAN equipment that way when the tariff concession was being negotiated, thereby effectively creating legitimate expectations on the part of the United States that such tariff treatment would continue. The European Communities claims that the EC member States did not in fact treat these products uniformly during the Uruguay Round and therefore that the United States was not entitled to such expectations.

8.33 In addressing this issue, we consider it necessary (a) to weigh the evidence submitted by both parties regarding the actual tariff treatment of LAN equipment in the European Communities and, if the result supports the US claim, (b) to determine whether the actual tariff treatment entitles the United States to legitimate expectations in this regard.

### (a) Evaluation of the Evidence of Actual Tariff Treatment

8.34 In the *Shirts and Blouses* case, the Appellate Body made the following observation:

"[W]e find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof. It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact,

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<sup>259</sup>See paragraph 8.20.

<sup>260</sup>See paragraphs 8.23-8.28.

whether the claimant or the respondent, is responsible for providing proof thereof. Also, it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption."<sup>261</sup>

8.35 Accordingly, we first examine evidence produced by the United States to determine whether it has successfully raised a presumption that its claim on the actual tariff treatment of LAN equipment in the European Communities is true.

8.36 To support its claim, the United States has submitted Binding Tariff Information (BTI) issued by Ireland<sup>262</sup> and letters from the UK Customs and Excise<sup>263</sup>, which treated certain LAN equipment as ADP machines during the Uruguay Round. It has also produced letters from four of the leading US exporters of LAN equipment to Europe attesting to the fact that all of their LAN equipment exported to Ireland and the United Kingdom -- which were their major market -- between 1991 and 1994 had been treated as ADP machines.<sup>264</sup> The US industry appears to have been satisfied with this tariff treatment at that time, and did not voice any concerns in this regard to the US Government during the Uruguay Round.

8.37 Moreover, the BTIs submitted by the United States regarding other member States further support its position.<sup>265</sup> They indicate that even after the conclusion of the Uruguay Round tariff negotiations, customs authorities in Denmark, France and the Netherlands treated LAN equipment as ADP machines. In the case of France, a statement by a French customs official at a meeting of the European Commission's Customs Code Committee is also cited as support of this claim.<sup>266</sup> Although the United States cannot -- and does not -- claim that these BTIs formed the basis of its expectations because of the timing of their issuance, they lend supplementary support to the US claim on how LAN equipment was treated in the European Communities during the Uruguay Round in as much as there is no evidence to suggest that these BTIs were a particular departure from the prevailing practice in these member States.

8.38 We also note US export data showing that US exports of LAN equipment (classified under USX 847199 and 847330) to the European Communities continued to rise after the Uruguay Round, while EC import statistics, which formerly moved in the same direction as US export statistics, indicate a decline in the imports of "other ADP machines" (under CN 847199) from the United States and a simultaneous increase in the imports of telecommunication apparatus (under CN 851782) in 1995.<sup>267</sup> These statistics

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<sup>261</sup>Appellate Body Report on *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, adopted on 23 May 1997, WT/DS33/AB/R, p. 14 (footnotes omitted).

<sup>262</sup>Annex 4, Table 1.

<sup>263</sup>Annex 4, Table 2.

<sup>264</sup>Annex 4, Table 3. See also paragraph 5.44.

<sup>265</sup>Annex 4, Table 1.

<sup>266</sup>See paragraph 5.44.

<sup>267</sup>Annex 7.

are aggregated at a level that makes it difficult to draw specific conclusions in respect of the tariff treatment of LAN equipment. This evidence does, however, indirectly support the US argument in as much as it is consistent with the effects that would be anticipated if there was a change in tariff treatment in the European Communities after the Uruguay Round.

8.39 In light of the evidence described in the preceding paragraphs, we conclude that the United States has adduced evidence sufficient to raise a presumption that its claim that LAN equipment was treated as ADP machines in the European Communities during the Uruguay Round is true.

8.40 Following the Appellate Body report on *Shirts and Blouses*<sup>268</sup>, the burden now shifts to the European Communities. To rebut the presumption raised by the United States, the European Communities has produced documents which indicate that LAN equipment had been treated as telecommunication apparatus by other customs authorities in the European Communities. In Germany, the customs authorities treated certain LAN equipment as telecommunication apparatus already in 1989, a practice upheld by the German Federal Tax Court (Bundesfinanzhof) in 1991.<sup>269</sup> The European Communities has also produced BTIs issued by the Dutch, French, German and UK customs authorities treating certain LAN equipment as telecommunication apparatus<sup>270</sup>, although a close examination of these BTIs reveals that those from the Netherlands pertain to either multiplexers, which are outside the scope of our examination, or more generic networking equipment, which may or may not fall under the definition of LAN equipment used in this report.

8.41 The only direct counter-evidence against the US claim on practices in Ireland and the United Kingdom is a December 1993 BTI issued by the UK customs authority (HM Customs and Excise) to one of the US companies (CISCO), classifying one type of LAN equipment (routers) as telecommunication apparatus.<sup>271</sup> Since it became effective only a week or so before the conclusion of the Uruguay Round negotiations, it is not in our view sufficient to rebut the above presumption, which was raised by more extensive and general evidence, that LAN equipment was generally treated as ADP machines in Ireland and the United Kingdom during the Uruguay Round.

8.42 Regarding France, the European Communities has submitted conflicting BTIs (i.e., ones that classify LAN equipment as telecommunication apparatus) issued after the conclusion of the Uruguay Round. Thus, in light of our reasoning in paragraph 8.37, it would be reasonable to conclude at least that the practice was not uniform in France during the Uruguay Round.

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<sup>268</sup>See paragraph 8.34.

<sup>269</sup>See paragraph 5.46.

<sup>270</sup>Annex 6, Table 1.

<sup>271</sup>See paragraph 8.32. We do not consider other BTIs issued by the HM Customs and Excise submitted by the European Communities (Annex 6, Table 1) to be relevant because they became valid after the conclusion of substantive tariff negotiations of the Uruguay Round. In this connection, we find it noteworthy that the European Communities did not produce any British or Irish BTIs issued prior to December 1993 to support its case on this important issue. The European Communities suggests that the fact that American Electronics Association had scheduled a meeting with Commission officials on 25 February 1994 in order to discuss a number of issues including classification difference in member States with respect to a number of products including LAN interface is another indication of the non-uniform treatment of LAN equipment within the European Communities. See paragraph 5.29. However, in our view, the information was too vague and indirect to rebut the presumption mentioned above, even to the extent that it was unclear that the meeting had actually taken place.

8.43 Germany appears to have consistently treated LAN equipment as telecommunication apparatus. As noted above, a 1991 Bundesfinanzhof ruling affirmed BTIs treating LAN equipment as telecommunication apparatus, although the BTIs involved in that case were issued to a non-US firm and could not have formed any basis for US expectations. In addition, the European Communities has submitted one German BTI, issued in 1992, treating LAN equipment as telecommunication apparatus.

8.44 In our view, the evidence produced by the European Communities does not rebut the presumption raised by the United States concerning the accuracy of its claim regarding the actual tariff treatment of LAN equipment during the Uruguay Round. The evidence concerning Ireland and the United Kingdom, which are the largest export market in the European Communities for the US industry, as well as the supplementary evidence concerning Denmark and the Netherlands, supports the US position, leaving Germany as the only member State with practices to the contrary.

(b) Legitimate Expectations

8.45 We now turn to the examination of whether the actual tariff treatment of LAN equipment entitles the United States to legitimate expectations in this regard sufficient to establish its claim of a violation of Article II of GATT 1994 by the European Communities. In our view, an exporting Member's legitimate expectations regarding tariff commitments are normally based, at a minimum, on the assumption that the actual tariff treatment accorded to a particular product at the time of the negotiation will be continued unless such treatment is manifestly anomalous or there is information readily available to the exporting Member that clearly indicates the contrary. The existence of such expectations in tariff negotiations can be seen in the fact that negotiators normally use actual trade data to calculate the effect of "requests" and "offers", and to evaluate the resulting tariff reductions in terms of trade-weighted average.<sup>272</sup> In other words, they work on the general assumption that the actual tariff treatment accorded to a particular product as traded is the relevant item for the purposes of negotiations.

8.46 In the present case, in view of the prevailing practice in the European Communities during the Uruguay Round, the United States would appear to have a legitimate expectation that LAN equipment would continue to be accorded tariff treatment as ADP machines in the European Communities. Certainly, such treatment could not be characterized as manifestly anomalous.<sup>273</sup> Was there information readily available to the United States that indicated that the actual tariff treatment of LAN equipment would not be continued?

8.47 In this regard, the European Communities challenges the legitimacy of the United States' expectations by saying: "The US negotiators may find it difficult to admit now that their understanding of the tariff classification in the EC of the products they talk about now was erroneous; however, they only have themselves to blame. They should have come forward and requested clarification from the EC negotiators if they were not sure where these products should be classified in the EC especially since

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<sup>272</sup>For instance, when the Ministers agreed in Montreal in 1988 on a "substantial reduction ... with a target amount for overall reductions at least as ambitious as that achieved by the formula participants in the Tokyo Round" (MTN.TNC/11), it was generally understood to mean more than 33 per cent reduction in trade-weighted average for industrial products. For how this figure was calculated, see General Agreement on Tariffs and Trade, The Tokyo Round of Multilateral Trade Negotiations: Report by the Director-General of GATT (Geneva, April 1979), p. 120.

<sup>273</sup>See paragraphs 8.30-8.31.

they themselves had reclassified these products only shortly beforehand".<sup>274</sup> There are two distinct issues in this argument: (i) Were the US negotiators required to clarify where LAN equipment was to be classified in the draft Schedule LXXX during the negotiations?; and (ii) Does the United States' own reclassification of LAN equipment from telecommunication apparatus to ADP machines affect the legitimacy of the United States' expectations? We examine these issues in turn.

(i) Requirement of Clarification

8.48 The European Communities argues that the United States should have clarified, during the negotiations, where LAN equipment would be classified. The question here is whether the exporting Member has any inherent obligation to seek clarification when it has been otherwise given a basis to expect that actual tariff treatment by the importing Member will be maintained.

8.49 In our view, to require exporting parties in negotiations to effectively work on the assumption that, absent a manifest anomaly, explicit and particular clarification should be sought at an item-by-item level would run fundamentally counter to the object and purpose of tariff negotiations (which in turn form the context for Article II and tariff schedules). On one level, it would both risk an erosion of the confidence upon which it is necessary for parties to rely in the conduct of tariff negotiations, as well as raising logistic difficulties which would make the actual management of them particularly onerous. More fundamentally, such a requirement would risk presumptively raising systemic doubt and uncertainty about the exact nature and scope of the actual tariff concessions themselves. Such an inherent tendency cannot be reconciled with one of the major objectives of the WTO, from which tariff negotiations pursuant to, *inter alia*, Articles XXVIII and XXVIII *bis* of GATT 1994 draw their purpose, viz: "reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs" (an expression common to the preambles of the WTO Agreement and GATT 1994). Any interpretation of Article II which would be prone to have the practical effect of more generally facilitating the occasions upon which Members may apply a higher rate of duty and/or undermine the stability of concessions made (other than, of course, circumstances under which such action is explicitly provided for pursuant to relevant provisions of the WTO Agreement would run counter to this objective).

8.50 We also note in this context that a tariff commitment is an instrument in the hands of an importing Member which inherently serves the importing Member's "protection needs and its requirements for the purposes of tariff and trade negotiations".<sup>275</sup> The exporting party is well aware of that fact, and may therefore reasonably expect -- absent something explicit to the contrary -- that the importing party, in making a particular commitment has taken those needs and requirements already into account as matters over which it has competence and control. It is for this reason that it behooves the importing party, as the effective bearer of its rights and responsibilities, to correctly identify products and relevant duties in its tariff schedules, including such limitations or modifications as it intends to apply.

8.51 We consider that this reasoning is supported by past cases. In 1956, Germany complained that the Greek Government had increased the duty on gramophone records, which had been bound at the

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<sup>274</sup>See paragraph 5.33.

<sup>275</sup>Panel Report on *Japan - Tariff on Imports of Spruce, Pine, Fir (SPF) Dimension Lumber*, op cit., para. 5.9. Although this report affirms Japan's classification of particular items as a practice meeting these needs and requirements, the Panel Report on *Spain - Tariff Treatment of Unroasted Coffee*, op cit., -- which found Spain's classification practice to be inconsistent with GATT 1947 on other grounds -- states that such a practice is subject to the condition "that a reclassification subsequent to the making of a concession under the GATT would not be a violation of the basic commitment regarding that concession" (para. 4.4, footnote 1).

Annecy and Torquay rounds of tariff negotiations. The Group of Experts that examined the case stated as follows:

"The Greek representative said that his Government had left unaltered the specific duty as bound in Schedule XXV on item 137, e, 3. What they had done was to impose a duty which, with surtax, amounted to 70 per cent *ad valorem* on 'long-playing' records (33 1/3 and 45 revolutions per minute). His Government explained this action on the grounds that such records did not exist at the time the Greek Government granted the above concession, that they contained a volume of recordings up to five times that of the old records, that they were lighter than conventional records, that they were made of different material, and that, therefore, as a new product, they were not covered by the item bound at Annecy and Torquay. The Greek representative further pointed out that countries which impose *ad valorem* duties on gramophone records were, because of the higher value of long-playing records, collecting substantially higher duties in monetary terms.

...

"The Group agreed that the practice generally followed in classifying new products was to apply the tariff item, if one existed, that specified the products by name, or, if no such item existed, to assimilate the new products to existing items in accordance with the principles established by the national tariff legislation. It was noted that when this item was negotiated the parties concerned did not place any qualification upon the words 'gramophone record'.

"The Group consequently reports to the CONTRACTING PARTIES its finding that 'long-playing' records (under 78 revolutions per minute) are covered by the description of item 137, e, 3 bound in Schedule XXV (Annecy and Torquay) and, therefore, the rate of duty to be applied to long-playing records is that bound in the schedules under that item. As the action taken by the Greek Government involves a modification in a bound rate, it is the opinion of the Group that the Greek Government should have resorted to the procedures provided in the Agreement for such modification."<sup>276</sup>

Despite the fact that "long-playing" records did not exist at the time of the Annecy or Torquay rounds, the group concluded that Greece was bound by its commitment on gramophone records because it did not place any qualification on the term "gramophone records" during the negotiations. The onus of clarifying (in this case "limiting") the scope of the tariff concession was put on the side of the importing Member.

8.52 The European Communities claims that the *Gramophone Records* case is not relevant to the present dispute because the case dealt with new products, while the US complaint in the present dispute is limited to products which already existed during the Uruguay Round.<sup>277</sup> We disagree. If the product had existed at the time of the negotiation, it would, if anything, have been easier for the importing Member to qualify the scope of its tariff commitments regarding that product, as it would not even have recourse to the argument that subsequent novelty was involved. Consequently, the reasoning regarding the requirement to respect the integrity of the commitment without qualification would seem to have even more force.

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<sup>276</sup>*Greek Increase in Bound Duty*, complaint, op cit.

<sup>277</sup>See paragraph 5.9.

8.53 Similarly, in response to a Canadian claim that the European Communities had for the year 1984 opened an import quota for newsprint of only 500,000 tonnes instead of the bound quota of 1,500,000 tonnes as described in its tariff schedule and that this action was inconsistent with the European Communities' obligations under Article II of GATT 1947, the panel on *Newsprint* stated as follows:

"The Panel could not share the argument advanced by the European Communities that their action did not constitute a change in their GATT tariff commitment. It noted that under long-standing GATT practice, even purely formal changes in the tariff schedule of a contracting party, which may not affect the GATT rights of other countries, such as the conversion of a specific to an *ad valorem* duty without an increase in the protective effect of the tariff rate in question, have been considered to require renegotiations. By the same token, the European Communities action would, in the Panel's view, have required the European Communities to conduct such negotiations. The Panel also noted that in granting the concession in 1973, the European Communities had not made it subject to any qualification or reservation in the sense of Article II:1(b) although at the time the concession was made, it was known that agreement had already been reached that the EFTA countries would obtain full duty-free access to the Community market for newsprint from 1 January 1984 onward. The Panel therefore found that although in the formal sense the European Communities had not modified its GATT concession, it had *in fact* changed its GATT commitment unilaterally, by limiting its duty-free tariff quota for m.f.n. suppliers for 1984 to 500,000 tonnes."<sup>278</sup>

8.54 In our view, the reasoning applied in these cases is consistent with that set forth in paragraphs 8.49 and 8.50 above. They confirm that the onus of clarifying tariff commitment is generally placed on the importing Member. In the absence of any such limitation by the importing Member, the benefits of the concession accrue to the exporting Member(s).

8.55 In light of the above, we find that the European Communities cannot place the burden of clarification on the United States in cases where it has created, through its own practice, the expectations regarding the continuation of the actual tariff treatment prevailing at the time of the tariff negotiations. It would not be reasonable to expect the US Government to seek clarification when it had not heard any complaints from its exporters, who were apparently satisfied with the current tariff treatment of LAN equipment in their major export market -- Ireland and the United Kingdom. We have found no evidence to suggest that such treatment was manifestly anomalous or that there was information readily available that clearly indicated that the treatment would not be continued.

(ii) The United States' Own Reclassification

8.56 The European Communities further argues that since the United States itself had classified LAN equipment as telecommunication apparatus in its tariff schedule until 1992, it could not have legitimately expected that the European Communities would treat LAN equipment as ADP machines.<sup>279</sup> It also argues that the difficulty of classifying LAN equipment was recognized in the negotiations of the North American Free Trade Agreement and that it was not until 1995 that Canada reclassified LAN equipment as ADP machines.<sup>280</sup> It further argues that Japan and Korea, which are third parties to this dispute, still

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<sup>278</sup>Panel Report on *Newsprint*, op cit., para.50.

<sup>279</sup>See paragraph 5.26.

<sup>280</sup>See paragraph 5.33.

classify some or all LAN equipment as telecommunication apparatus.<sup>281</sup>

8.57 Furthermore, the European Communities points out that it was not until April 1997 that the Harmonized System (HS) Committee of the World Customs Organization (WCO) decided on the classification of LAN equipment, indicating the difficulty of tariff classification of this product.<sup>282</sup>

8.58 We are not persuaded by these arguments. The subject matter of this dispute is the EC tariff schedule (Schedule LXXX). How the like or similar product is treated in the US tariff schedule (Schedule XX) or in any other Member's schedule is not relevant to the US expectations regarding the tariff treatment in its export market. Regarding the European Communities' argument on the difficulty of classification, we would recall that both parties are of the view that this is not a dispute about customs classification itself; rather it concerns the actual tariff treatment by customs authorities in the European Communities.

8.59 That being said, to the extent that the evolution of US classification practice has relevance at all, it fails, in our view, to support the European Communities' argument. Insofar as the United States and the US industry had been satisfied with the treatment of LAN equipment as ADP machines in the European Communities, the classification change by the United States in 1992 (from telecommunication apparatus to ADP machines) would have been perceived as a move in the right direction. Rather than giving any reasons for occasioning US uncertainty about the nature of actual tariff treatment of LAN equipment in the European Communities, it would, if anything, have signified that the United States had more reason than ever to believe that such actual tariff treatment would continue. Certainly, neither the US Government nor the US industry would have had any reason to be alarmed. Thus, we find that the United States' own reclassification of LAN equipment does not affect the legitimacy of the US expectations.

### 3. Conclusion

8.60 We find that the United States was entitled to legitimate expectations that LAN equipment would continue to be accorded tariff treatment as ADP machines in the European Communities, based on the actual tariff treatment during the Uruguay Round, particularly in Ireland and the United Kingdom (which were the major export market for US products). We further find that the United States was not required to clarify the scope of the European Communities' tariff concessions on LAN equipment and that the United States' own reclassification of LAN equipment in 1992 was not relevant to the formation of its legitimate expectations regarding the European Communities' tariff treatment of the like or similar product.

8.61 It is clear from evidence that these legitimate expectations were frustrated by the subsequent change in the classification practice in the European Communities, including through the reclassification of LAN adapter cards under Regulation (EC) 1165/95.

8.62 We thus find that LAN equipment should have obtained the tariff treatment afforded to ADP machines in Schedule LXXX and that the European Communities has violated Article II:1 of GATT 1994 by failing to accord imports of LAN equipment from the United States treatment no less favourable than that provided for under heading 84.71 or heading 84.73, as the case may be, in Part I of

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<sup>281</sup>See paragraph 5.35.

<sup>282</sup>See paragraph 5.12.

Schedule LXXX.

E. Multimedia PCs

8.63 The United States claims that personal computers with multimedia capability should have been accorded the tariff treatment as ADP machines within the meaning of Schedule LXXX. The European Communities claims that the United States could not have had legitimate expectations that the European Communities would classify PCTVs or other multimedia equipment under tariff heading 84.71 and apply the corresponding duty rate.

1. Textual Analysis

8.64 Our starting point again is the textual analysis. We need not reproduce the definition of ADP machines under heading 84.71 in Schedule LXXX. We simply note that, as in the case of LAN equipment, certain types of multimedia PCs can be regarded, based on the ordinary meaning of the terms used in that Schedule, either as ADP machines under heading 84.71 or as television receivers under heading 85.28 depending on whether they are seen as "computers that can receive television signals" or as "television receivers that can also function as computers".<sup>283</sup> The textual analysis of Schedule LXXX alone does not lead to a clear solution of the problem.

2. Legitimate Expectations

8.65 The United States claims that it is entitled to the legitimate expectations that multimedia PCs would be accorded the tariff treatment as ADP machines within the meaning of Schedule LXXX. We recall in this context the Appellate Body's observation regarding what amounts to proof.<sup>284</sup> We also note that the United States' assertion that "PCs with multimedia capability were treated as products under Chapter 84 during the Uruguay Round"<sup>285</sup> is not substantiated by any evidence as regards actual tariff treatment.<sup>286</sup> The only evidence produced by the United States in this regard is a judgement by a UK court on PCTVs, ruling that they are properly classified under heading 85.28 as television receivers.<sup>287</sup> We fail to see how this judgement supports the US position without any showing of the previous practices in the European Communities or in the United Kingdom. It is true that Regulation (EC) 1153/97 classifies all computers "capable of receiving and processing television, telecommunication, audio and video signals" under heading 84.71, but this regulation became effective in July 1997. Since the regulation was adopted in part to reflect a 1996 decision by the HS Committee of the WCO, it cannot be viewed as evidence of the EC practice during the Uruguay Round.

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<sup>283</sup>It should be emphasized once again that it is not our task to determine where multimedia PCs should be classified in a tariff nomenclature.

<sup>284</sup>See paragraph 8.34.

<sup>285</sup>See paragraph 5.66.

<sup>286</sup>Unlike the case of LAN equipment, the United States has not produced any evidence of record on actual tariff treatment, e.g., BTIs, customs rulings or actual invoices. Paragraphs 5.69 to 5.71 are the US replies to the following question by the Panel: "How do you respond to the EC argument that 'the United States did not produce any document showing that the EC did indeed classify all computers with multimedia capabilities under heading 84.71 during the Uruguay Round'? Do you have any specific documentation regarding the actual tariff treatment of computers with multimedia capabilities on importation during the period covered by the Uruguay Round?"

<sup>287</sup>Annex 3.

8.66 In summary, regarding multimedia PCs, the United States has failed to adduce evidence sufficient to raise a presumption that these products were in fact treated as ADP machines in the European Communities during the Uruguay Round. Thus, we are unable to decide the case on the basis of legitimate expectations as we did with respect to LAN equipment.

### 3. Other Means of Interpretation

8.67 The analysis of the context, object or purpose of Schedule LXXX, GATT 1994 or the WTO Agreement -- apart from those relating to legitimate expectations -- does not clarify the situation. Nor do we find any clear guidance in subsequent agreements or practices. Moreover, recourse to the supplementary means of treaty interpretation<sup>288</sup> is not helpful because neither party has produced sufficient evidence thereof. We are therefore unable to reach a positive conclusion that multimedia PCs should have been treated as ADP machines within the meaning of Schedule LXXX.

8.68 In conclusion, based on the evidence submitted by the parties that is admissible under the terms of reference of this Panel, we do not find that the European Communities has violated Article II:1 of GATT 1994 regarding the tariff treatment of multimedia PCs.

### F. Nullification or Impairment

8.69 We note the claim by the United States that the value of concessions accruing to the United States has been nullified or impaired by the application of the measures identified under item (a) through (f) of paragraph 8.5.

8.70 In view of our finding that the tariff treatment of LAN equipment by customs authorities in the European Communities violated Article II:1 of GATT 1994 (US claims under item (a) and (b) of paragraph 8.5), we find that it is not necessary to examine this additional claim with respect to LAN equipment, except to note that the infringement of GATT rules is considered *prima facie* to constitute a case of nullification or impairment under Article 3.8 of the DSU.

8.71 Regarding the tariff treatment of multimedia PCs, we note that we have not found a violation of GATT rules on the part of the European Communities. We also note that the United States has not attempted to establish nullification or impairment of the value of concessions accruing to it in respect of multimedia PCs, except through its claim on the violation of tariff bindings by the European Communities.

8.72 Finally, with respect to LAN equipment, since we find a violation of Article II:1 by the European Communities, it is unnecessary to rule on the US claims under item (d) and (f) of paragraph 8.5. With respect to multimedia PCs, we did not find any evidence of a violation (US claims under (c) and (e) of paragraph 8.5). Therefore, we do not find it necessary to make a specific finding on the request by the United States referred to in paragraph 8.15 regarding either product category.

## IX. CONCLUSIONS

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<sup>288</sup>See paragraph 8.21.

9.1 In light of the findings above, the Panel finds that the European Communities, by failing to accord imports of LAN equipment from the United States treatment no less favourable than that provided for under heading 84.71 or heading 84.73, as the case may be, in Part I of Schedule LXXX, acted inconsistently with the requirements of Article II:1 of GATT 1994.

9.2 The Panel recommends that the Dispute Settlement Body request the European Communities to bring its tariff treatment of LAN equipment into conformity with its obligations under GATT 1994.