WORLD TRADE ORGANIZATION

WT/DS62/AB/R
WT/DS67/AB/R
WT/DS68/AB/R
5 June 1998
(98-2271)

Appellate Body

EUROPEAN COMMUNITIES - CUSTOMS CLASSIFICATION OF CERTAIN COMPUTER EQUIPMENT

AB-1998-2

Report of the Appellate Body

WORLD TRADE ORGANIZATION
APPELLATE BODY

European Communities - Customs Classification of Certain Computer Equipment

European Communities, *Appellant*
United States, *Appellee*
Japan, *Third Participant*

AB-1998-2

Present:

Beeby, Presiding Member
Ehlermann, Member
Lacarte-Muró, Member

I. Introduction

1. The European Communities appeals from certain issues of law covered in the Panel Report, *European Communities - Customs Classification of Certain Computer Equipment*[1] (the "Panel Report") and certain legal interpretations developed by the Panel in that Report. The Panel was established to consider complaints by the United States against the European Communities, Ireland and the United Kingdom concerning the tariff treatment of Local Area Network ("LAN") equipment and personal computers with multimedia capability ("PCs with multimedia capability").[2] The United States claimed that the European Communities, Ireland and the United Kingdom accorded to LAN equipment and/or PCs with multimedia capability treatment less favourable than that provided for in Schedule LXXX of the European Communities[3] ("Schedule LXXX") and, therefore, acted

[1]WT/DS62/R, WT/DS67/R and WT/DS68/R, 5 February 1998.

[2]The United States submitted three requests for the establishment of a panel: *European Communities - Customs Classification of Certain Computer Equipment*, WT/DS62/4, 13 February 1997; *United Kingdom - Customs Classification of Certain Computer Equipment*, WT/DS67/3, 10 March 1997; and *Ireland - Customs Classification of Certain Computer Equipment*, WT/DS68/2, 10 March 1997. At its meeting of 20 March 1997, the Dispute Settlement Body (the "DSB") agreed to modify, at the request of the parties to the dispute, the terms of reference of the Panel established against the European Communities, so that the panel requests by the United States contained in documents WT/DS67/3 and WT/DS68/2 might be incorporated into the mandate of the Panel established pursuant to document WT/DS62/4. See WT/DS62/5, 25 April 1997.

[3]Schedule LXXX of the European Communities, *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, done at Marrakesh, 15 April 1994.

inconsistently with their obligations under Article II:1 of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994").

2. The Panel Report was circulated to the Members of the World Trade Organization (the "WTO") on 5 February 1998. The Panel reached the conclusion 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.[4]

The Panel made the following recommendation:

> 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.[5]

3. On 24 March 1998, the European Communities notified the DSB[6] of its intention to appeal certain issues of law covered in the Panel Report and legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed a Notice of Appeal with the Appellate Body, pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*"). On 3 April 1998, the European Communities filed an appellant's submission.[7] On 20 April 1998, the United States filed an appellee's submission[8] and on the same day, Japan filed a third participant's submission.[9] The oral hearing, provided for in Rule 27 of the *Working Procedures*, was held on 27 April 1998. At the oral hearing, the participants and the third participant presented their arguments and answered questions from the Division of the Appellate Body hearing the appeal.

[4]Panel Report, para. 9.1.
[5]Panel Report, para. 9.2.
[6]WT/DS62/8, WT/DS67/6 and WT/DS68/5, 24 March 1998.
[7]Pursuant to Rule 21(1) of the *Working Procedures.*
[8]Pursuant to Rule 22 of the *Working Procedures*.
[9]Pursuant to Rule 24 of the *Working Procedures*.

II. Arguments of the Participants

A. *Appellant - European Communities*

4. The European Communities requests the Appellate Body to review a number of errors of law and certain legal interpretations developed by the Panel. The European Communities submits that the Panel erred in law when it rejected the procedural objections of the European Communities concerning the lack of specificity of the request for the establishment of a panel of the United States, thus hampering the rights of defence of the responding Member and violating Article 6.2 of the DSU. The European Communities asserts that the Panel also erred in considering that the meaning of a particular heading of the Schedule of a WTO Member should be read in the light of the "legitimate expectations" of an exporting Member outside the context of a non-violation complaint under Article XXIII:1(b) of the GATT 1994. The European Communities also asserts that the Panel erred in finding that Article II:5 of the GATT 1994 confirms this view. Subordinately, the European Communities argues that even if the notion of "legitimate expectations" was relevant in the context of a violation complaint under Article XXIII:1(a) of the GATT 1994, those legitimate expectations should not be based on the classification practices for individual importers and individual consignments, or on the subjective perception of a number of exporting companies of an exporting Member. The European Communities submits that the Panel also erred in considering that, in any case, the onus of clarifying the scope of a tariff concession during a multilateral tariff negotiation under the auspices of the GATT/WTO shall necessarily be on the importing Member. The European Communities asserts that by so doing, the Panel has created new rules on the burden of proof which are inconsistent with the ones applicable to WTO dispute settlement procedures.

1. Request for the Establishment of a Panel

5. The European Communities submits that the Panel erred in finding that the measures under dispute and the products affected by such measures were sufficiently identified by the United States to include measures other than Commission Regulation (EC) No. 1165/95 as far as it concerns LAN adapter cards.[10] The European Communities asserts that the findings of the Panel are based on several legal errors. First, the Panel disregarded the requirement under Article 6.2 of the DSU providing that the request for the establishment of a panel shall "identify the specific measures at issue". Second, the Panel misapplied the established procedural requirement according to which the product coverage of a claim has to be specified prior to the commencement of the Panel's examination. Third, neglecting

[10]Commission Regulation (EC) No. 1165/95 of 23 May 1995 concerning the classification of certain goods in the combined nomenclature, Official Journal No. L 117, 24 May 1995, p. 15.

these procedural requirements which the European Communities invoked before the Panel results in a serious violation of the rights of defence of the European Communities and, as such, constitutes a breach of the demands of due process that are implicit in the DSU.

6. With respect to the identification of the specific measures at issue, the European Communities submits that the request of the United States for the establishment of a panel does not meet the minimum standards contained in Article 6.2 of the DSU. The European Communities asserts that in *European Communities - Regime for the Importation, Sale and Distribution of Bananas*[11] ("*European Communities - Bananas*"), the Appellate Body confirmed that the measures at issue in that dispute were adequately identified under Article 6.2 of the DSU by referring to the basic EC regulation at issue, by place and date of publication, in the request for the establishment of a panel. The European Communities states that this reading of Article 6.2 of the DSU, pursuant to which the request must at least specify one basic legal measure, is fully in line with the general rules of interpretation of public international law. In the view of the European Communities, the request of the United States for the establishment of a panel only identifies one specific measure, namely Commission Regulation (EC) No. 1165/95, which is said to "reclassify" LAN adapter cards and which, unlike the regulation at issue in *European Communities - Bananas*, is not a basic measure on which all the other actions complained about are founded. In response to a question asked at the oral hearing, the European Communities expressly accepted that the application of a tariff in an individual case on a consignment is a measure within the meaning of Article 6.2 of the DSU. However, in the view of the European Communities, the measures in question are only vaguely described in the request of the United States for the establishment of a panel. The type of measure, the responsible authority, the date of issue or the reference are not clearly defined. Furthermore, the European Communities argues that it is even unclear how many of these alleged measures are under dispute.

7. The European Communities also submits that under the minimum standard laid down in Article 6.2 of the DSU, relating to the identification of specific measures, it is also necessary to clearly define the product coverage of a claim raised in the framework of a dispute settlement procedure. The European Communities asserts that the Panel erroneously distinguished the present case from *EEC - Quantitative Restrictions Against Imports of Certain Products from Hong Kong*[12] ("*EEC - Quantitative Restrictions Against Hong Kong*") when holding that no new product was added by the United States in the course of the proceedings, and that the definition of LAN equipment provided by the United States, in responding to a question by the Panel, was an elucidation of the product coverage already specified in the request of the United States for the establishment of a panel.

[11]Adopted 25 September 1997, WT/DS27/AB/R.
[12]Adopted 12 July 1983, BISD 30S/129.

According to the European Communities, this reasoning is based on at least two flawed assumptions: first, that LAN equipment and PCs with multimedia capability could each be considered as a single product; and, second, that the explanations of the United States before the Panel concerning product coverage were an "elucidation" rather than an unlawful "curing" of the defective product description in the request for the establishment of a panel.

8. With respect to the first assumption, the European Communities submits that LAN equipment is not a single product but a wide variety of different products used in a local area network. Furthermore, the United States has not been consistent regarding the definition of LAN equipment in the course of the panel proceedings. The European Communities also asserts that, like LAN equipment, PCs with multimedia capability are not a single product category. It is further argued by the European Communities that using such broad product categories when defining the scope of a claim is equivalent to adding the convenient phrase "including but not necessarily limited to" in the request for the establishment of a panel. In the view of the European Communities, the Appellate Body in *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*[13] ("*India - Patents*") vigorously rejected the use of this kind of loose language when holding that "the convenient phrase, 'including but not necessarily limited to', is simply not adequate to 'identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly' as required by Article 6.2 of the DSU".[14]

9. The European Communities submits that the second assumption on which the Panel based its reasoning was that the United States elucidated the product coverage of its panel request. The European Communities argues that the Panel appeared to agree that the United States had left the precise scope of the dispute in the dark and, after the first meeting of the Panel with the parties, allowed the United States to provide a definitive list of products with respect to which it alleged there had been a violation. The European Communities asserts that the Panel accepted this list as an "elucidation" and sufficient specification of the product coverage, thus regarding the vague product definition of the United States as cured. In the view of the European Communities, this finding of the Panel amounts to an error in law.

10. The European Communities asserts that in any judicial or quasi-judicial procedure, it is an essential procedural right of the responding party to be aware of the case held against it, and that the WTO dispute settlement system can only produce acceptable solutions to conflicts between WTO Members if this fundamental rule of due process is adequately observed. The European Communities

[13]Adopted 16 January 1998, WT/DS50/AB/R.
[14]*Ibid*., para. 90.

submits that the Appellate Body should, therefore, guarantee this essential procedural right by continuing to interpret Article 6.2 of the DSU strictly.

2. "Legitimate Expectations" in the Interpretation of a Schedule

11. According to the European Communities, the existence of a *common* intention forms the basis for the mutual consent of the signatories to be bound by an international agreement. This common intention finds its authentic expression in the text of the treaty, not in the subjective expectations of one or other of the parties to the agreement. The European Communities states that the rules of the *Vienna Convention on the Law of Treaties*[15] (the "*Vienna Convention*") on the interpretation of international agreements are based on this fundamental consideration. Furthermore, the European Communities asserts that the report in *Panel on Newsprint*[16] is based on the correct assumption that a Schedule is an agreed commitment between the contracting parties and is not just the unilateral perception of one of the Members involved in the multilateral negotiations. The European Communities also submits that "protocols and certifications relating to tariff concessions" are an integral part of the GATT 1994[17] and, therefore, are part of an international multilateral agreement which is the result of a "meeting of the minds" and not the sum of subjective perceptions or expectations.

12. The European Communities asserts that the complaint of the United States was founded *only* on the allegation that the European Communities had violated its obligations under Article II:1 of the GATT 1994, which indicates that the claim was based *only* on Article XXIII:1(a) of the GATT 1994. The European Communities also submits that it appears that, when presenting its legal position, the United States used the notion of "reasonable expectations" and "legitimate expectations" as synonymous. The European Communities states that the Panel has not drawn any particular conclusion from the varied definitions of this notion and has apparently, albeit implicitly, decided to consider that the two definitions can be used indifferently to describe the same concept. In the view of the European Communities, the same approach was used by the Appellate Body, in paragraphs 41-42 of its Report in *India - Patents* and, therefore, the European Communities suggests that for the sake of this appeal, the Appellate Body continues to consider the notion of "legitimate expectations" used by the Panel and the parties to this dispute as equivalent to that of "reasonable expectations".

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[15]Done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679.

[16]Adopted 20 November 1984, BISD 31S/114.

[17]See paragraph 1(b)(i) of the language of Annex 1 A incorporating the GATT 1994 into the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*"), done at Marrakesh, Morocco, 15 April 1994.

13. The European Communities submits that the Panel erred in law by *not* considering the object and purpose of the tariff concession in Schedule LXXX with respect to the products concerned but rather a supposed and erroneous object and purpose of Article II of the GATT 1994, i.e., the protection of "legitimate expectations". In the view of the European Communities, the Panel should have proceeded, pursuant to Article 31 of the *Vienna Convention*, with the interpretation of the *words* used in Schedule LXXX in the light of *their* object and purpose and within *their* context. The European Communities asserts that the context of the Schedule must include the negotiations, the legal situation in both the exporting and importing Members (including the classification practice of the United States during the entire period of the negotiations), the EC internal legislation applicable to such tariff treatment, the EC customs nomenclature existing at the time of the drafting of the Schedule and so on. Responding to a question asked by the Appellate Body during the oral hearing, the European Communities stated that on the basis of Article 31(3)(c) of the *Vienna Convention*, the *International Convention on the Harmonized Commodity Description and Coding System*[18] (the "*Harmonized System*") and its *Explanatory Notes*[19] would be relevant in interpreting the obligations of the European Communities under Schedule LXXX *vis-à-vis* WTO Members which are also Members of the World Customs Organization (the "WCO").

14. The European Communities argues that the Panel limited itself to an unmotivated affirmation that the context to be considered pursuant to Article 31 of the *Vienna Convention* was *only* Article II of the GATT 1994, and has proceeded to the totally separate and not directly relevant interpretation of the object and purpose of Article II and *not* of the Schedule. The European Communities asserts that "even more erroneously, [the Panel's] interpretation of Article II has been achieved through the reference to previous case law in a non-violation case, notwithstanding the fact that the present procedure is only concerned with a violation complaint".[20] Therefore, the context that the present Panel considered to be relevant for the interpretation of Schedule LXXX in a violation complaint has been deduced from the interpretation of Article II in a non-violation complaint. The European Communities further asserts that in paragraph 36 of the Appellate Body Report in *India - Patents*, the Appellate Body clearly indicates that the concept of the protection of reasonable expectations of contracting parties relating to market access was developed in the context of non-violation complaints under Article XXIII:1(b) of the GATT. Thus, according to the European Communities, the Panel's finding in paragraph 8.23 contradicts this interpretation and "melds the legally-distinct bases for

[18]Done at Brussels on 14 June 1983.

[19]*Explanatory Notes to the Harmonized Commodity Description and Coding System*, Customs Cooperation Council, Brussels, 1986.

[20]Appellant's submission of the European Communities, para. 50.

'violation' and 'non-violation' complaints under Article XXIII of the GATT 1994 into a uniform cause of action"[21] which is not consistent with Article XXIII.

15. It is further argued by the European Communities that, independently of the legal issues that were at stake in the two dispute settlement procedures, there is an extraordinary resemblance in the legal approach followed by the panel in *India - Patents* and that followed by the present Panel. The European Communities submits that as in *India - Patents*, this Panel: (i) was not about an Article XXIII:1(b) "non-violation" complaint but only about an Article XXIII:1(a) "violation" complaint; (ii) was not about a violation complaint concerning Articles III or XI of the GATT; (iii) was not concerned with the affectation of competitive relationship between imported and domestic products, but rather with the tariff treatment of certain products compared to the concessions scheduled by the European Communities in the WTO; and (iv) has considered the "legitimate expectations" of the parties not by examining whether they were reflected in the words of the treaty -- Schedule LXXX in this case -- but rather by "imputing" into the treaty considerations and subjective "understandings" which the Panel has considered to be the expectations of a Member and of private companies involved in the trade of the covered products and which were never reflected in the wording of the Schedule.

16. The European Communities also submits that the Panel's findings lead to "absurd practical consequences".[22] The European Communities questions how it is possible to determine the content of MFN tariff treatment on the basis of the "legitimate expectations" of *one* Member among all WTO Members. If the "legitimate expectations" of that Member diverges from the "legitimate expectations" of other Members, the consequence would be that a Member, in order to know exactly what is the tariff treatment to grant a given product, would have to verify the potentially divergent "legitimate expectations" of all other WTO Members. This is at odds with the aim affirmed by the Panel to protect the predictability and stability of the tariff treatment of that particular product. Moreover, in the view of the European Communities, the *balance* of mutual concessions among Members, which is the result of the successive rounds of tariff negotiations in the framework of the GATT/WTO, would be severely upset: the "legitimate expectations" of one Member would, through the MFN provision, apply to all other Members whose balance of reciprocal concessions was based on substantially different and variable "legitimate expectations". The European Communities further claims that, if the Panel's findings on this point were upheld, the whole purpose of Article II of the GATT 1994 and of the Members' Schedules would be altered. In the view of the European Communities, a tariff concession bound by a Member in its Schedule would no longer define a limit

[21]Appellate Body Report, *India - Patents*, adopted 16 January 1998, WT/DS50/AB/R, para. 42.
[22]Appellant's submission of the European Communities, para. 54.

to the duty applicable upon importation of a given product, but would rather be determined by a unilateral perception of the advantages expected by the exporting Member.

17. The European Communities submits that the Panel violated the rules of interpretation of Articles 31 and 32 of the *Vienna Convention* and Articles 3.2 and 19.2 of the DSU by affirming that "[although] 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 ... [i]t must remain possible, at least in principle, that parties have legitimately formed expectations based on other particular supplementary factors".[23] According to the European Communities, what the Panel appears to pronounce here is the power to add elements which are not present in the text of the Schedules whereas, under Articles 3.2 and 19.2 of the DSU, a panel is required simply to clarify the provisions of the covered agreements. The European Communities submits that this would inevitably alter the very nature of the panel procedure which would be seen as replacing, or attempting to replace, the signatories of the *WTO Agreement.*

18. It is further claimed by the European Communities that the Panel erred by stating that the importance of "legitimate expectations" in interpreting tariff commitments can be confirmed by the text of Article II:5 of the GATT 1994. The European Communities submits that the Panel made two contradictory statements. On the one hand, the Panel stated that Article II:5 confirms the existence of the "legitimate expectations" in Article II:1. One the other hand, however, it stated that Article II:5 is a provision for the special bilateral procedure regarding tariff classification, which is not directly at issue in this case. In the view of the European Communities, there is a clear *non-sequitur* between the affirmation of the inapplicability of Article II:5 to the present case and its use for the interpretation of a different provision which is declared applicable to this case. According to the European Communities, either Article II:5 is relevant and applicable to the present case, in particular for the interpretation of Schedule LXXX, or it is not. It cannot be both at the same time. It is further argued by the European Communities that the only relevance of Article II:5 of the GATT 1994 could have been in the context of a procedure aimed at requesting a compensatory adjustment, which was never pursued by the United States. Thus, according to the European Communities, if the Panel was of the opinion that Article II:5 was relevant, it should have come to the conclusion that it was only relevant in establishing that the United States had never correctly followed it. Alternatively, the European Communities argues that Article II:5 is simply irrelevant.

19. The European Communities also submits that Article II:5 does not prove the existence of a notion of "legitimate expectations" in Article II of the GATT 1994 or, more generally, in the tariff

[23]Panel Report, para. 8.26.

treatment of a given product under the Schedule of a Member. The European Communities notes that the words "believes to have been contemplated" and "contemplated" in the first and second sentence of this provision are highlighted in the Panel Report and, therefore, argues that the Panel attached a special value to them in order to support its findings. The European Communities cannot see how these words, read in their context, could in any way be assimilated to the notion of "legitimate expectations" that was developed in the context of non-violation cases. In the view of the European Communities, there is nothing in the words "believes" or "contemplated" that indicates any reference to an objective entitlement to a tariff treatment that would be different from the one that derives from the *objective* interpretation of the content of the Schedule of the importing Member.

20. In the event that the Appellate Body considers that the notion of "legitimate/reasonable expectations" is relevant in the context of a violation dispute under Article XXIII:1(a) of the GATT 1994, the European Communities submits the following arguments for its consideration. According to the European Communities, the core of the Panel's argument regarding the notion of "legitimate expectations" can be summarized as follows: during a multilateral trade negotiation, the tariff treatment of a given product subject to negotiation is considered with respect to the "actual normal" tariff treatment at the time of the negotiation, unless there is a "manifestly anomalous" treatment that would indicate "the contrary". Therefore, the meaning of the tariff treatment which is bound in the importing Member's Schedule must correspond to the "actual normal" tariff treatment at the time of the negotiation. Otherwise, there will be a breach of the "legitimate expectations" of the exporting Member and, therefore, a violation of Article II:1 of the GATT 1994.

21. The European Communities submits that the Panel's reasoning is affected by errors in law and in logic in at least three respects. First, the European Communities argues that a duty imposed at a level which is currently lower than the duty bound in a Schedule does not constitute a right for the Members which temporarily benefit from the reduction. Second, the European Communities submits that it is not correct to assert, as the Panel does, that the current duty treatment is taken as the basis for the negotiations and, therefore, that treatment will be continued unless such treatment is manifestly anomalous or there is information readily available to the exporting Member that clearly indicates the contrary. Third, the European Communities argues that elements of subjective judgement such as "normally based", "manifestly anomalous", "information readily available" and "clearly indicates" are not legal elements that must, or even can, be taken into account when interpreting a Member's Schedule and/or Article II of the GATT 1994. These subjective appreciations are not included in Articles 31 and 32 of the *Vienna Convention*. Thus, in the view of the European Communities, irrespective of the existence of any normality or abnormality, or of information readily or not readily

available, the actual or current tariff treatment of a certain product could not be considered as an obligation under Article II if it cannot be demonstrated that it is reflected in the Schedule.

22. The European Communities also submits that the Panel should not have dealt with classification issues as the WTO system does deal with these issues in the covered agreements. According to the European Communities, there is no obligation under the GATT to follow any particular system for classifying goods, and a Member has the right to introduce in its customs tariff new positions or sub-positions as appropriate. The European Communities also argues that "[w]hat the Panel has *de facto* done here is weighing the number of *individual* EC *classification* decisions presented as evidence by the US against the opposite EC *individual classification* decisions presented as evidence by the EC in order to achieve the result that the former are correct and the latter are not".[24] The European Communities asserts that this is nothing less than a classification decision by the Panel in spite of the fact that the Panel itself rightly considers classification issues to be outside its terms of reference.

3. Clarification of the Scope of Tariff Concessions

23. The European Communities submits that the Panel erred in considering that the onus of clarifying the scope of a tariff concession during a multilateral tariff negotiation under the auspices of the GATT/WTO shall necessarily be placed on the side of the importing Member. In the view of the European Communities, the issue at stake in this dispute is not whether a requirement of clarification was on the United States or on the European Communities, but rather whether the agreement, which the United States claims it reached with the European Communities and other WTO Members, on certain tariff treatment of LAN equipment, really existed and was reflected in Schedule LXXX.

24. The European Communities asserts that the Panel dedicated three pages to the totally irrelevant issue of the burden of "clarification", which is treated separately from the issue of whether the United States has proven its assertion that Schedule LXXX contains an obligation to provide tariff treatment lower than the one applied. It is further argued by the European Communities that the Panel cannot rely on two contradictory assertions at the same time. *Either* the burden of proof and the burden of clarification are different notions, in which case the Panel should have explained to the parties and to the Members of the WTO how this is relevant in the present dispute, *or* the burden of clarification is identical with the notion of burden of proof or has, in any case, a bearing on the burden of proof in such a way as to determine a different distribution of that burden between the party which asserts and the party which responds.

[24]Appellant's submission of the European Communities, para. 82.

25. The European Communities submits that in this second scenario, the Panel has in fact created a newly invented rule on the burden of proof. According to this burden of proof, "the exporting Member that could show the existence of *practices* on the current classification of individual shipments by some 'prevailing' customs authorities of a Member would have proved its assertion that a tariff treatment was *agreed* in the Schedule, ... irrespective of whether it has actually *proved* that the existence of the *agreement* on a certain tariff treatment was actually reflected in the text of the agreement (or of the agreed Schedule). The burden of clarifying the content of the Schedule is on the importing Member: as a result, that Member is to blame for any misunderstanding".[25]

26. The European Communities cannot agree with this newly invented rule. This rule would allow the Member who asserts that a certain agreement was passed on the tariff treatment of a given product to shift the burden of proof to the responding Member without any need to submit evidence related to the words of the agreement. In the view of the European Communities, the result of such an "easy" shift of the burden of proof on the responding Member would be that, failing any written document, it would find itself in the practical impossibility of rebutting that assumption. An assertion would amount to a proof, and an almost unrebuttable one, which is fundamentally at odds with the finding of the Appellate Body in *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India* [26] ("*United States - Shirts and Blouses*").

B. *Appellee - United States*

27. The United States endorses the findings and conclusions of the Panel. The United States submits that the Panel was correct in determining that the request of the United States for the establishment of a panel sufficiently identified the measures and products at issue. The United States also asserts that regardless of whether the Appellate Body accepts the Panel's reasoning and interpretation of "legitimate expectations", the findings of the Panel Report support its ultimate conclusion that the impairment of treatment resulting from actions of customs authorities in the European Communities is inconsistent with Article II:1 of the GATT 1994. The United States also submits that the Panel correctly followed the standard laid down by the Appellate Body in *United States - Shirts and Blouses* and that, contrary to the arguments of the European Communities, the Panel did not establish a new burden of proof rule.

[25]Appellant's submission of the European Communities, para. 88.
[26]Adopted 23 May 1997, WT/DS33/AB/R.

1. Request for the Establishment of a Panel

28. The United States asserts that the Panel correctly followed the guidance of the Appellate Body decision in *European Communities - Bananas* in determining that the United States sufficiently identified the measures and products at issue. According to the United States, the meaning of the term "specific measures", as used in Article 6.2 of the DSU, was addressed in *European Communities - Bananas* where the panel found that the panel request complied with the requirements of Article 6.2 of the DSU because the measures contested by the complainants were "adequately identified", even though they were not listed explicitly. In the view of the United States, the panel and Appellate Body decisions in *European Communities - Bananas* "teach that the specificity requirement of Article 6.2 will be met if the responding party is provided sufficient notice and identification of the measure(s) at issue, even if those measures are not specifically identified".[27]

29. It is further argued by the United States that its panel request identified both the timing and nature of the measures at issue which, in the application since June 1995 by the customs authorities in the European Communities, consist of tariffs to LAN equipment higher than those provided for in Schedule LXXX.[28] The United States also submits that as of March 1997, both the European Communities and the United States agreed that Member State customs authorities were applying the higher tariff rates, under heading 85.17, to imports of LAN equipment. Accordingly, in the view of the United States, the European Communities has never had any basis to claim that it lacked sufficient information about the measures the United States sought to have modified at the time of the establishment of the panel. In applying the "adequate" or "sufficient" notice test of *European Communities - Bananas*, the United States submits that the European Communities had clear notice from the explicit terms used in the panel requests of the United States that the complaint concerned the application of higher tariffs for LAN equipment by customs authorities of Member States. Since the panel request identified the same measures which the European Communities acknowledged its customs officials were applying, the European Communities suffered, in the view of the United States, no prejudice, let alone prejudice sufficient to rise to the level of a violation of due process.

30. The United States submits that there is no basis for the assertion of the European Communities that the description of the United States of "all types of LAN equipment" and the allegedly inappropriate "curing" of the request for the establishment of a panel have led to a "serious violation of the European Communities' rights of defence". According to the United States, these

[27]Appellee's submission of the United States, para. 33.

[28]We note that the United States also argued with regard to its two additional requests for the establishment of a panel (WT/DS67/3 and WT/DS68/2) that they also identified both the timing and nature of the measures at issue (appellee's submission of the United States, paras. 34 and 35).

arguments ignore the fact that the term, LAN equipment, is a recognized term of the trade and that, beginning as early as the pre-consultation stage of this dispute through the panel proceedings, the European Communities was made sufficiently aware of which products were the subject of the dispute. According to the United States, the argument of the European Communities also ignores the many contacts between officials of the European Communities and the United States prior to the submission of the panel request, in which the term, LAN equipment, was routinely used and understood. The United States disagrees with the European Communities regarding the need for parties to exhaustively detail every conceivable sub-grouping of more broader categories of products which are detailed in a request for the establishment of a panel. In the view of the United States, the appropriate standard to be applied to product coverage should be similar to that applied by the panel in *European Communities - Bananas* to the specificity of measures: whether the products are "sufficiently identified". According to the United States, applying the logic followed in *European Communities - Bananas*, such a test would be met if the complaining party identifies the general product grouping of the products concerned in terms of the ordinary meaning in a commercial context.

31. The United States submits that the Panel was correct when it stated that the more detailed definition of LAN equipment, provided by the United States to the Panel in response to a question, was an "elucidation" of the product coverage already specified in the requests of the United States for the establishment of a panel. According to the United States, the present case is quite different from the situation in *European Communities - Bananas* and *India - Patents* with respect to the addition of a new claim. In the request for the establishment of a panel against the European Communities[29], the United States first defined the parameters of the products at issue -- all LAN products -- and then provided examples of some types of LAN products. The United States submits that it need not have provided any such examples to have complied with Article 6.2 of the DSU because the term LAN products is a sufficiently precise term of the trade. Nor should the United States or any other WTO Member be required to exhaustively enumerate all product category sub-groups in its panel request. The United States also asserts that since its request for the establishment of a panel properly identified LAN equipment, the Panel was correct in distinguishing the present case from the panel decision in *EEC - Quantitative Restrictions Against Hong Kong*.

32. In the view of the United States, if the arguments of the European Communities on the specificity of product definition are accepted, there inevitably will be long, drawn-out procedural battles at the early stage of the panel process in every proceeding. The United States submits that

[29]See footnote 2 of this Report.

according to the theory of the European Communities, a complaining party would be required to list each and every product in detail in its panel request.

2. "Legitimate Expectations" in the Interpretation of a Schedule

33. The United States submits that the attack of the European Communities on the Panel's reasoning places form over substance. In the view of the United States, the substance of the findings of the Panel is its fact-finding which supports the conclusion that the ordinary meaning of "automatic data-processing machines and units thereof" includes LAN equipment. The Panel found that the meaning of the text of the concession in heading 84.71 can include LAN equipment and that, as a matter of fact, Member State customs authorities treated LAN equipment as automatic data-processing machines ("ADP machines") during the Uruguay Round and that the European Communities had given the United States and other trading partners reason to believe that this treatment would be continued. It is further argued by the United States that during the panel proceeding, the European Communities did not produce or prove facts demonstrating that LAN equipment was intended to be included in the binding in heading 85.17 of Schedule LXXX.[30]

34. Thus, in the view of the United States, regardless of whether the Appellate Body accepts the Panel's reasoning and interpretation of "legitimate expectations", the findings of the Panel Report support its ultimate conclusion that the European Communities, by failing to accord to imports of LAN equipment treatment no less favourable than that provided for in headings 84.71 or 84.73 of Schedule LXXX[31], has acted inconsistently with its obligations under Article II:1 of the GATT 1994. The United States argues that the Panel's reasoning was correct but that, even if the Appellate Body should reverse certain aspects of this reasoning, the Appellate Body should affirm the Panel's ultimate conclusion.

35. The United States submits that the Panel has properly interpreted the obligations of the European Communities under Schedule LXXX and Article II of the GATT 1994 in accordance with Articles 31 and 32 of the *Vienna Convention*. The text of the concession in heading 84.71 of Schedule LXXX provides that this concession applies to "automatic data processing machines and units thereof". According to the United States, the ordinary meaning of "automatic data processing machines and units thereof" includes computers and computer systems, as well as units of computers

[30]Heading 85.17 relates to "electrical apparatus for line telephony or line telegraphy, including such apparatus for carrier-current line systems" (hereinafter referred to as "telecommunications equipment").

[31]Heading 84.71 relates to "automatic data-processing machines and units thereof ..." and heading 84.73 relates to "parts and accessories (other than covers, carrying cases and the like) suitable for use solely or principally with machines of heading Nos. 84.69 to 84.72" (hereinafter referred to together as "ADP machines").

such as computer networking equipment, i.e., LAN equipment. The United States submits that the function of LAN equipment is not "line telephony or line telegraphy" but that of facilitation of shared processing and storage of data within a computer network or an extended computer system. The Panel found that the text of this concession *can* include LAN equipment and that to the extent the ordinary meaning of the concession is ambiguous, that ordinary meaning can be clarified by the practice of the importing Member. In the view of the United States, these findings are eminently reasonable and are consistent with prior GATT and WTO practice. They can and should be affirmed.

36. The United States asserts that an important factor in determining the "ordinary meaning" of a term used in a Schedule is how the negotiating Members treated the particular product at issue -- in this case, how the European Communities, the United States and interested third parties treated LAN equipment. According to the United States, while the Panel's analysis in paragraphs 8.23-8.28 labels such treatment as an element of "legitimate expectations", this label is not essential to the Panel's conclusion. The United States submits that regardless of the label, what is important is that the factual findings of the Panel, concerning the actual treatment of LAN equipment during the Uruguay Round, amount to a determination that the parties assumed and intended that the concession under heading 84.71 in Schedule LXXX would cover LAN equipment.

37. The United States argues that "factual indicia" of "legitimate expectations" which the Panel actually considered can also be regarded as the factual context of the concessions in Schedule LXXX as facts indicating the object and purpose of the concessions in Schedule LXXX, or as a "supplementary means of interpretation" admissible under Article 32 of the *Vienna Convention*. According to the United States, whether the Panel's analysis was phrased as an interpretation of "legitimate expectations", or whether it was an interpretation of the intentions and understandings of the negotiating parties, the conclusion is the same. The United States submits that the important point here is that the intentions of the United States, as well as the third parties in this dispute, were a relevant factor for the Panel to consider in interpreting the ordinary meaning of the terms used in Schedule LXXX.

38. Responding to a question asked by the Appellate Body during the oral hearing, the United States asserted that the *Harmonized System* and its *Explanatory Notes* could be deemed as part of the "circumstances of the conclusion" of the *WTO Agreement* within the meaning of Article 32 of the *Vienna Convention* and, therefore, could be used as a "supplementary means of interpretation" of Schedule LXXX. However, the United States also submitted that the *Explanatory Notes* are not generally treated as binding because they contain certain contradictions and are occasionally outdated.

Thus, the United States considered that although the *Explanatory Notes* are relevant under Article 32 of the *Vienna Convention*, they should be treated with caution.

39. The United States submits that the European Communities argues that the text is the *only* permissible input for interpreting a Schedule. According to the United States, such a position leads to the conclusion that whenever a treaty interpreter cannot determine whether a given product falls within the exact product composition of a concession on the basis of the text of that concession, the importing Member can make this determination unilaterally. If this is the case, then the tariff obligations provided for under Articles II:1(a) and (b) of the GATT 1994, and the tariff concessions in the Schedules, would be reduced to inutility.

40. The United States further argues that the Panel properly considered the concept of "legitimate expectations" of WTO Members in analysing whether LAN equipment is included within the scope of the EC's concession in heading 84.71. The United States believes that the Panel properly relied on the concept of "legitimate expectations" and that the decision in *India - Patents* does not require the rejection of the Panel's use of "legitimate expectations" as a factor in its analysis of whether the European Communities is in violation of its obligations under Article II of the GATT 1994.

41. The issue, as the United States sees it, is really whether the "legitimate expectations" of an exporting Member are a relevant factor in determining the intentions of the negotiators and thus in determining the ordinary meaning of the terms used in the concession in heading 84.71 of Schedule LXXX. The United States submits that the Panel properly used the concept of "legitimate expectations" in determining and clarifying the intentions of the parties in this case. According to the United States, such an interpretation is supported by the text and context of Article II, as well as its object and purpose. In the view of the United States, the concept of "legitimate expectations" is entirely relevant in the context of any dispute concerning the application of actual tariff concessions. Contrary to the argument of the European Communities, the United States submits that the Panel's analysis has nothing to do with a "melding" of a basis for complaint under Articles III or XI of the GATT and a basis for a "non-violation nullification or impairment" complaint.

42. The United States argues that the argument of the European Communities confuses and distorts the Appellate Body's reasoning in *India - Patents*, and that it twists this reasoning into an instrument for undermining the enforcement of bargained-for tariff concessions. In the view of the United States, the conclusions argued by the European Communities are by no means ordained by the Appellate Body's findings and conclusions in *India - Patents*. The United States asserts that the European Communities has attempted to conflate the concept of "legitimate expectations", as used by

the Panel, with the concept of "reasonable expectations" in the context of Article XXIII:1(b) of the GATT. The United States submits that these concepts are not the same thing. The phrases may exhibit accidental linguistic convergence, but are legally and historically distinct and deal with different situations. In the view of the United States, it is both possible and necessary to distinguish between the concepts employed in enforcing obligations under Articles III or XI of the GATT, the concepts involved in a "non-violation nullification or impairment complaint" and the concept of "legitimate expectations" employed by the Panel in the present dispute. According to the United States, all three concepts are intellectually and historically distinct and independent. They need not be distorted and conflated in the manner advocated by the European Communities.

43. The United States submits that as the Appellate Body pointed out in *India - Patents*, panels considering violation complaints concerning Articles III and XI of the GATT have developed the concept of protecting the expectations of contracting parties concerning the competitive relationship between their products and the products of other contracting parties. According to the United States, Article II of the GATT 1994 is different in nature from Article III. The obligations of Article II only apply to the extent that a Member has made tariff bindings in a Schedule. The United States asserts that Article II also has nothing to do with guaranteeing the equality of opportunity with regard to competitive conditions. The provisions of Article II permit and recognize the existence of tariffs and "other duties and charges" imposed at the border which imply an intentional competitive *inequality* between imports and like domestic products.

44. According to the United States, as the Appellate Body has noted in *India - Patents*, the non-violation provision of Article XXIII:1(b) was aimed at preventing contracting parties from using non-tariff barriers, or other policy measures, to negate the benefits of negotiated tariff concessions. Like Article II of the GATT 1994, the non-violation remedy under Article XXIII:1(b) recognizes the existence of tariff barriers at the border, as well as the terms, conditions or qualifications of tariff concessions, which create intentional competitive *inequality* between imports and like domestic products. Thus, the United States submits that Article II and the non-violation remedy are broadly alike in that they both protect bargained-for market access and the integrity of Schedules. However, Article II protects and enforces the tariff concession itself. According to the United States, tariff concessions safeguard the right to a particular tariff rate, and a Member's responsibility to charge a duty no higher than the level bound in its Schedule, on products covered by the tariff binding in question.

45. The United States submits that the Panel, in the present dispute, used "legitimate expectations" as an interpretative aid to determine what the concession in heading 84.71 means, as

well as whether LAN equipment was meant to be within the product composition of heading 84.71. If it is further argued by the United States that, on the other hand, the concept of "actions that could not reasonably have been anticipated" or "reasonable expectations" has been used in non-violation cases to answer the question that Article XXIII:1(b) raises, namely what GATT-legal impediments to market access an importing Member may impose without taking away the value of the concession (as opposed to violating the obligation to maintain the concession itself). Therefore, in the view of the United States, "legitimate expectations" are relevant in the interpretation of obligations under Article II of the GATT 1994, and actions which "could not reasonably have been anticipated" are relevant in the application of the non-violation remedy under Article XXIII:1(b). However, these two concepts apply under different conditions and for different purposes. The United States argues that the concept of "legitimate expectations" is entirely relevant in the context of any dispute concerning the violation of tariff concessions; the Panel's analysis has nothing to do with a "melding" of a basis for complaint under Articles III or XI of the GATT and a basis for a "non-violation nullification or impairment" complaint.

46. It is further argued by the United States that the context of the Uruguay Round Schedules, as defined by Article 31(2) of the *Vienna Convention*, clearly includes the GATT 1994 and, in particular, Article II thereof. The United States submits that the text of Article II:5 of the GATT 1994 is, therefore, a relevant part of this context and the Panel properly interpreted the meaning of tariff obligations in the light of Article II:5. According to the United States, in the text of Article II:5 the "treatment provided for" is to be understood as the "treatment contemplated by a concession". The United States asserts that the term used in Article II:5 is "contemplated" and that such a provision does not require that treatment has been "discussed" or "expressly agreed". In the view of the United States, the ordinary meaning of "contemplate" in this context is "to expect"; the "treatment" in question must be the treatment by the importing Member which was contemplated at the time. Thus, the United States concludes that the "treatment" provided by a concession is the treatment legitimately expected by the trading partners of the Member making the concession. According to the United States, in the present case, that treatment is the treatment these products were known to be receiving in the European Communities, openly and legally, at the time the binding was negotiated.

47. The United States asserts that it properly invoked Article II:5 of the GATT 1994 and complied with all its procedural requirements. However, discussions under Article II:5 stopped short when, as the European Communities itself recognizes, the European Communities refused to agree that the treatment contemplated was that claimed by the United States. According to the United States, it was this refusal that prevented any negotiations under Article II:5 with regard to a compensatory adjustment. Therefore, in the view of the United States, having frustrated the

procedures of Article II:5, the European Communities may not claim them as a defence to its own violation of Article II:1.

48. The United States disagrees with the alternative argument of the European Communities that the Panel erred in relying on particular types of evidence, namely Binding Tariff Information ("BTIs") and actual trade data, as a factual basis for its findings of fact concerning actual tariff treatment during the Uruguay Round and the "legitimate expectations" based on that treatment. According to the United States, the European Communities distorts the Panel Report by arguing that the Panel found that the tariff treatment bound in Schedules must correspond to the actual tariff treatment, or else there is a breach of the "legitimate expectations" of the exporting Member and therefore a violation of Article II:1 of the GATT 1994. The United States submits that the substance of the Panel's findings amounted to an interpretation of the ordinary meaning of the concession in heading 84.71, on the basis of its text, context, object and purpose. Thus, in the view of the United States, the Panel has, in essence, interpreted the intentions of the parties and has determined what, in fact, the actual tariff treatment of LAN equipment was as a factor in evaluating those intentions.

49. The United States asserts that the European Communities is arguing that, when interpreting a Schedule, the only evidence that may be taken into account is the text of the Schedule itself. The United States submits that this "text only" approach not only contradicts the guidance of the *Vienna Convention* and the Appellate Body, with regard to the interpretation of treaties, but also leads to establishing the right of an importing Member to arbitrarily change the duty treatment of products whenever the text of the relevant concession is ambiguous.

50. According to the United States, the Panel did not use BTIs in order to determine how LAN equipment should be classified. Rather, it used BTIs as a form of factual evidence concerning the actual tariff treatment of certain products during a particular historical period. Therefore, the United States submits that the Panel properly relied on the evidence before it, including BTIs, affidavits by exporters and actual trade data, as a basis for its findings of fact concerning the actual tariff treatment of LAN equipment during the Uruguay Round and the legitimate expectations based on that treatment. In the view of the United States, the Panel's fact-finding was within the scope of its discretion under Article 11 of the DSU and, because these findings are factual, they do not fall within the permissible scope of an appeal under Article 17.6 of the DSU.

3. Clarification of the Scope of Tariff Concessions

51. According to the United States, when the Panel rejected the assertion of the European Communities that the exporting Member bears the burden of clarifying the product composition of concessions during tariff negotiations, the Panel did not, as the European Communities suggests, create a new rule on the burden of proof in dispute settlement proceedings. Rather, the Panel correctly followed the standard laid down by the Appellate Body in *United States - Shirts and Blouses*. The United States submits that the Panel examined first, whether the United States had presented factual information sufficient to raise the presumption that its claim concerning the actual treatment of LAN equipment during the Uruguay Round was true and, second, whether the European Communities had presented evidence sufficient to rebut that presumption once raised. In the view of the United States, the Panel correctly found that the United States had raised such a presumption as a matter of fact and that the European Communities had failed to rebut that presumption.

52. Regarding the argument of the European Communities that the Panel Report dedicates three pages to the totally irrelevant issue of the burden of clarification, the United States submits that it finds this claim curious because it is in this section of the Panel Report[32] that the Panel addressed the purported defence of the European Communities that the United States should have clarified, during the negotiations, where LAN equipment would be classified. If the Panel had accepted this defence from the European Communities, the Panel would have imposed, according to the United States, a new rule limiting the scope of proof that could be brought forward by an exporting Member, in this situation, by restricting the exporting Member to textual arguments concerning the meaning of the terms in Schedule LXXX. Thus, the United States argues that if any change in the burden of proof is suggested, that suggestion comes from the European Communities and not the Panel or the United States.

53. The United States submits that the European Communities is wrong in asserting that the Panel's findings permitting exporting Members to present evidence of tariff treatment of individual shipments, practices of current classification and other such evidence, would permit the exporting Member to shift the burden of proof to the responding Member without any need to submit evidence related to the words of the agreement. The United States asserts that it submitted to the Panel evidence concerning the meaning of the term ADP machines in Schedule LXXX and the various products falling within that definition based on treatment by the WCO, the European Communities and industry. According to the United States, it never argued to the Panel -- and does not assert now -- that it could sustain its burden of proof in this case without setting out the meaning of the

[32]Panel Report, paras. 8.48-8.55.

terms of the agreement. The United States sustained its burden of demonstrating that the term ADP machines included all types of LAN equipment.

C. *Third Participant - Japan*

54. Japan submits that the Panel's legal reasoning regarding "legitimate expectations" and the requirement of clarification was correct and, therefore, requests that the European Communities respect the conclusion of the Panel and bring its tariff treatment of LAN equipment into conformity with its obligations under the GATT 1994.

55. Japan asserts that "[g]enerally, ... the importing Member is obliged to identify products and relevant duties in its tariff schedules ... if the importing Member requests to limit or determine a scope of the tariff concession and relevant duties for the products, which are not classified under the heading of the Harmonized System Committee (HSC) of the CCC and therefore classified differently in several countries".[33] It is further argued by Japan that, "[i]n particular, the classification of the LAN equipment among the Members of the EC was not identical before the Uruguay Round. In other words, the common classification of the LAN equipment within the Members of the EC had not been established before the Uruguay Round, and the responsibility, the EC was required to discharge in this context, was inevitable".[34]

56. Japan submits that it agrees with the Panel that a tariff commitment is an instrument in the hands of an importing Member, in the light of its function to protect its own industry. Therefore, in the view of Japan, "[i]f the importing Member wishes to prove the expectations of the exporting Member, that a certain practice of its tariff classification will continue, are not legitimate, the importing Member as the effective bearer of its rights and responsibilities, will be in a position to correctly identify products and relevant duties in its tariff schedules, including such limitations or modifications as it intends to apply. Otherwise, no proof will be required to deny the legitimate expectations of the exporting Member that the tariff classification will continue and the predictability of protection through the imposition of tariffs would not be maintained".[35]

[33]Japan's third participant's submission, para. 8.
[34]*Ibid.*
[35]Japan's third participant's submission, para. 9.

III. Issues Raised in this Appeal

57. The appellant, the European Communities, raises the following issues in this appeal:

(a) Whether the measures in dispute, and the products affected by such measures, were identified with sufficient specificity by the United States in its request for the establishment of a panel under Article 6.2 of the DSU;

(b) Whether the Panel erred in interpreting Schedule LXXX, in particular, by reading Schedule LXXX in the light of the "legitimate expectations" of an exporting Member, and by considering that Article II:5 of the GATT 1994 confirms the interpretative value of "legitimate expectations"; and

(c) Whether the Panel erred in putting the onus of clarifying the scope of a tariff concession during a multilateral tariff negotiation conducted under the auspices of the GATT/WTO, solely on the importing Member.

IV. Request for the Establishment of a Panel

58. The first issue that we have to address is whether the measures in dispute, and the products affected by such measures, were identified with sufficient specificity by the United States in its request for the establishment of a panel under Article 6.2 of the DSU.

59. Article 6.2 of the DSU provides, in part, that the request for the establishment of a panel shall:

> ... identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. ...

60. The Panel considered that:

> ... the substance of the present case is the actual tariff treatment by customs authorities in the European Communities and the evaluation of that treatment in the light of the tariff commitments in Schedule LXXX.[36]

The Panel found that:

> Viewed from this perspective, ... 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.[37]

61. The Panel found that the definitions given by the United States of the terms, LAN equipment and PCs with multimedia capability, are "sufficiently specific for the purposes of our consideration of this dispute".[38]

62. The European Communities appeals these findings and submits that:

> The Panel erred where it found that the measures under dispute and the products affected by such measures were identified sufficiently specifically by the United States to include measures other than Commission Regulation (EC) No. 1165/95 as far as it concerns Local Area Network (LAN) adapter cards.[39]

63. According to the European Communities, the request of the United States for the establishment of a panel:

> ... identifies one specific measure, namely Commission Regulation (EC) No. 1165/95 ... [relating to] LAN adapter cards. The other alleged measures are only vaguely described, without clearly identifying the type of measure, the responsible authority, the date of issue and the reference.[40]

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[36]Panel Report, para. 8.12.
[37]*Ibid*.
[38]Panel Report, paras. 8.9-8.10.
[39]Notice of Appeal of the European Communities, para. 1.
[40]Appellant's submission of the European Communities, para. 19.

64. We note that the request of the United States for the establishment of a panel reads in relevant part:

> Since June 1995, customs authorities in the European Communities, including but not limited to those in the United Kingdom and Ireland, have been applying tariffs to imports of all types of LAN equipment - including hubs, in-line repeaters, converters, concentrators, bridges and routers - in excess of those provided for in the EC Schedules. Those products were previously dutiable as automatic data-processing equipment under category 8471, but, as a result of the customs authorities' action, are now subject to the higher tariff rates applicable to category 8517, "telecommunications apparatus". In addition, since 1995, customs authorities in the European Communities, particularly those in the United Kingdom, have increased tariffs on imports of certain personal computers ("PCs") from 3.5 per cent to 14 per cent, which is above the rate provided for in the EC Schedules. These increases have resulted from the reclassification of PCs with multimedia capability from category 8471 to other categories with higher duty rates.[41]

65. We consider that "measures" within the meaning of Article 6.2 of the DSU are not only measures of general application, i.e., normative rules, but also can be the application of tariffs by customs authorities.[42] Since the request for the establishment of a panel explicitly refers to the application of tariffs on LAN equipment and PCs with multimedia capability by customs authorities in the European Communities, we agree with the Panel that the measures in dispute were properly identified in accordance with the requirements of Article 6.2 of the DSU.

66. With respect to the products affected by such measures, we note that the European Communities and the United States disagree on the scope of the terms, LAN equipment and PCs with multimedia capability. Regarding LAN equipment, the disagreement concerns, in particular, whether multiplexers and modems are covered by this term.

67. We note that Article 6.2 of the DSU does *not* explicitly require that the products to which the "specific measures at issue" apply be identified. However, with respect to certain WTO obligations, in order to identify "the specific measures at issue", it may also be necessary to identify the products subject to the measures in dispute.

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[41]WT/DS62/4, 13 February 1997.

[42]In an answer to a question at the oral hearing, the European Communities expressly accepted that "the application of a tariff in an individual case on a consignment is a measure" within the meaning of Article 6.2 of the DSU.

68. LAN equipment and PCs with multimedia capacity are both generic terms. Whether these terms are sufficiently precise to "identify the specific measure at issue" under Article 6.2 of the DSU depends, in our view, upon whether they satisfy the purposes of the requirements of that provision.

69. In *European Communities - Bananas*, we stated that:

> It is important that a panel request be sufficiently precise for two reasons: first, it often forms the basis for the terms of reference of the panel pursuant to Article 7 of the DSU; and, second, it informs the defending party and the third parties of the legal basis of the complaint.[43]

70. The European Communities argues that the lack of precision of the term, LAN equipment, resulted in a violation of its right to due process which is implicit in the DSU. We note, however, that the European Communities does not contest that the term, LAN equipment, is a commercial term which is readily understandable in the trade. The disagreement between the European Communities and the United States concerns its exact definition and its precise product coverage.[44] We also note that the term, LAN equipment, was used in the consultations between the European Communities and the United States prior to the submission of the request for the establishment of a panel[45] and, in particular, in an "Information Fiche" provided by the European Communities to the United States during informal consultations in Geneva in March 1997.[46] We do not see how the alleged lack of precision of the terms, LAN equipment and PCs with multimedia capability, in the request for the establishment of a panel affected the rights of defence of the European Communities *in the course* of the panel proceedings. As the ability of the European Communities to defend itself was not prejudiced by a lack of knowing the measures at issue, we do not believe that the fundamental rule of due process was violated by the Panel.

71. The United States has stressed that "if the EC arguments on specificity of product definition are accepted, there will inevitably be long, drawn-out procedural battles at the early stage of the panel

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[43]Appellate Body Report, adopted 25 September 1997, WT/DS27/AB/R, para. 142.

[44]Answer of the European Communities to a question at the oral hearing.

[45]See, for example, the letter from the Vice-President of the Commission of the European Communities, Sir Leon Brittan, to the United States Trade Representative, Ambassador Michael Kantor, dated 7 December 1995 (first submission of the United States to the Panel, Attachment 26); and the letter from the United States Trade Representative, Ambassador Michael Kantor, to the Vice-President of the Commission of the European Communities, Sir Leon Brittan, dated 8 March 1996 (first submission of the United States to the Panel, Attachment 28).

[46]"Information Fiche" attached to letter from the Head of Permanent Delegation of the European Commission to the International Organizations in Geneva, Ambassador R.E. Abbott, to the Chargé d'Affaires of the United States to the WTO, Mr. A.L. Stoler, 13 March 1997 (first submission of United States to the Panel, Attachment 23).

process in every proceeding. The parties will contest every product definition, and the defending party in each case will seek to exclude all products that the complaining parties may have identified by broader grouping, but not spelled out in 'sufficient' detail".[47] We share this concern.

72. We agree with the Panel that the present case should be distinguished from *EEC - Quantitative Restrictions Against Hong Kong*. The request of the United States for the establishment of a panel refers to "all types of LAN equipment". Individual types of LAN equipment were only mentioned as examples. Therefore, unlike the panel in *EEC - Quantitative Restrictions Against Hong Kong*, we are not confronted with a situation in which an additional product item was added in the course of the panel proceedings.[48] This is not a case in which an attempt was made to "cure" a faulty panel request by a complaining party.[49]

73. In conclusion, we agree with the Panel that the request of the United States for the establishment of a panel fulfilled the requirements of Article 6.2 of the DSU.

V. "Legitimate Expectations" in the Interpretation of a Schedule

74. The European Communities also submits that the Panel erred in interpreting Schedule LXXX, in particular, by:

(a) reading Schedule LXXX in the light of the "legitimate expectations" of an exporting Member; and

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[47]Appellee's submission of the United States, para. 50.

[48]In paragraph 30 of the panel report in *EEC - Quantitative Restrictions against Hong Kong*, the panel stated:

> 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.

We have already noted that Article 6.2 of the DSU does *not* require that the products at issue be specified in a request for the establishment of a panel. Also, Article 7 of the DSU provides that panels shall have standard terms of reference, unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel.

[49]We recall that in our report in *European Communities - Bananas*, para. 143, we found that:

> If a *claim* is not specified in the request for the establishment of a panel, then a faulty request cannot be subsequently 'cured' by a complaining party's argumentation in its first written submission to the panel or in any other submission or statement made later in the panel proceeding.

(b) considering that Article II:5 of the GATT 1994 confirms the interpretative value of "legitimate expectations".

Subordinately, the European Communities submits that the Panel erred in considering that the "legitimate expectations" of an exporting Member with regard to the interpretation of tariff concessions should be based on the classification practices for individual importers and individual consignments, or on the subjective perception of a number of exporting companies of that exporting Member.

75. Schedule LXXX provides tariff concessions for ADP machines under headings 84.71 and 84.73 and for telecommunications equipment under heading 85.17. The customs duties set forth in Schedule LXXX on telecommunications equipment are generally higher than those on ADP machines.[50] We note that Schedule LXXX does not contain any explicit reference to "LAN equipment" and that the European Communities currently treats LAN equipment as telecommunications equipment. The United States, however, considers that the EC tariff concessions on ADP machines, and not its tariff concessions on telecommunications equipment, apply to LAN equipment. The United States claimed before the Panel, therefore, that the European Communities accords to imports of LAN equipment treatment less favourable than that provided for in its Schedule, and thus has acted inconsistently with Article II:1 of the GATT 1994. The United States argued that the treatment provided for by a concession is the treatment reasonably expected by the trading partners of the Member which made the concession.[51] On the basis of the negotiating history of the Uruguay Round tariff negotiations and the actual tariff treatment accorded to LAN equipment by customs authorities in the European Communities during these negotiations, the United States argued that it reasonably expected the European Communities to treat LAN equipment as ADP machines, not as telecommunications equipment.

76. The Panel found that:

> ... 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.[52]

[50]See Panel Report, paras. 2.10 and 8.1.
[51]See Panel Report, para. 5.15.
[52]Panel Report, para. 8.31.

77. In support of this finding, the Panel explained that:

> 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 ... 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.[53]

The Panel justified this latter statement by relying on the panel report in *European Economic Community - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*[54] ("*EEC - Oilseeds*"), and stated that:

> 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.[55]

78. The Panel also relied on Article II:5 of the GATT 1994, and stated that:

> 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.[56]

79. Finally, the Panel observed that its proposition that the terms of a Member's Schedule may be determined in the light of the "legitimate expectations" of an exporting Member:

> ... 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.[57]

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[53]Panel Report, para. 8.23.
[54]Adopted 25 January 1990, BISD 37S/86, para. 148.
[55]Panel Report, para. 8.23.
[56]Panel Report, para. 8.24.
[57]Panel Report, para. 8.25.

80. We disagree with the Panel's conclusion that the meaning of a tariff concession in a Member's Schedule may be determined in the light of the "legitimate expectations" of an exporting Member. First, we fail to see the relevance of the *EEC - Oilseeds* panel report with respect to the interpretation of a Member's Schedule in the context of a violation complaint made under Article XXIII:1(a) of the GATT 1994. The *EEC - Oilseeds* panel report dealt with a non-violation complaint under Article XXIII:1(b) of the GATT 1994, and is not legally relevant to the case before us. Article XXIII:1 of the GATT 1994 provides for three legally-distinct causes of action on which a Member may base a complaint; it distinguishes between so-called *violation* complaints, *non-violation* complaints and *situation* complaints under paragraphs (a), (b) and (c). The concept of "reasonable expectations", which the Panel refers to as "legitimate expectations", is a concept that was developed in the context of *non-violation* complaints.[58] As we stated in *India - Patents*, for the Panel to use this concept in the context of a violation complaint "melds the legally-distinct bases for 'violation' and 'non-violation' complaints under Article XXIII of the GATT 1994 into one uniform cause of action"[59], and is not in accordance with established GATT practice.

81. Second, we reject the Panel's view that Article II:5 of the GATT 1994 confirms that "legitimate expectations are a vital element in the interpretation" of Article II:1 of the GATT 1994 and of Members' Schedules.[60] It is clear from the wording of Article II:5 that it does not support the Panel's view. This paragraph recognizes the possibility that the treatment *contemplated* in a concession, provided for in a Member's Schedule, on a particular product, may differ from the treatment *accorded* to that product and provides for a compensatory mechanism to rebalance the concessions between the two Members concerned in such a situation. However, nothing in Article II:5 suggests that the expectations of *only* the exporting Member can be the basis for interpreting a concession in a Member's Schedule for the purposes of determining whether that Member has acted consistently with its obligations under Article II:1. In discussing Article II:5, the Panel overlooked the second sentence of that provision, which clarifies that the "contemplated treatment" referred to in that provision is the treatment contemplated by *both* Members.

82. Third, we agree with the Panel that the security and predictability of "the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade" is an object and purpose of the *WTO Agreement*, generally, as well as of the GATT 1994.[61] However, we disagree with the Panel that the maintenance of the security and predictability of tariff

[58]See Appellate Body Report, *India - Patents*, adopted 16 January 1998, WT/DS50/AB/R, paras. 36 and 41.
[59]Adopted 16 January 1998, WT/DS50/AB/R, para. 42.
[60]See Panel Report, para. 8.24.
[61]See Panel Report, para. 8.25.

concessions allows the interpretation of a concession in the light of the "legitimate expectations" of exporting Members, i.e., their *subjective* views as to what the agreement reached during tariff negotiations was. The security and predictability of tariff concessions would be seriously undermined if the concessions in Members' Schedules were to be interpreted on the basis of the subjective views of certain exporting Members alone. Article II:1 of the GATT 1994 ensures the maintenance of the security and predictability of tariff concessions by requiring that Members not accord treatment less favourable to the commerce of *other* Members than that provided for in their Schedules.

83. Furthermore, we do not agree with the Panel that interpreting the meaning of a concession in a Member's Schedule in the light of the "legitimate expectations" of exporting Members is consistent with the principle of good faith interpretation under Article 31 of the *Vienna Convention*. Recently, in *India - Patents*, the panel stated that good faith interpretation under Article 31 required "the protection of legitimate expectations".[62] We found that the panel had misapplied Article 31 of the *Vienna Convention* and stated that:

> The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the *Vienna Convention*. But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended.[63]

84. The purpose of treaty interpretation under Article 31 of the *Vienna Convention* is to ascertain the *common* intentions of the parties. These *common* intentions cannot be ascertained on the basis of the subjective and unilaterally determined "expectations" of *one* of the parties to a treaty. Tariff concessions provided for in a Member's Schedule -- the interpretation of which is at issue here -- are reciprocal and result from a mutually-advantageous negotiation between importing and exporting Members. A Schedule is made an integral part of the GATT 1994 by Article II:7 of the GATT 1994. Therefore, the concessions provided for in that Schedule are part of the terms of the treaty. As such, the only rules which may be applied in interpreting the meaning of a concession are the general rules of treaty interpretation set out in the *Vienna Convention*.

[62]Panel Report, *India - Patents*, adopted 16 January 1998, WT/DS50/R, para. 7.18.
[63]Appellate Body Report, *India - Patents*, adopted 16 January 1998, WT/DS50/AB/R, para. 45.

85. Pursuant to Article 31(1) of the *Vienna Convention*, the meaning of a term of a treaty is to be determined in accordance with the ordinary meaning to be given to this term in its context and in the light of the object and purpose of the treaty. Article 31(2) of the *Vienna Convention* stipulates that:

> 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.

Furthermore, Article 31(3) provides that:

> 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.

Finally, Article 31(4) of the *Vienna Convention* stipulates that:

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

86. The application of these rules in Article 31 of the *Vienna Convention* will usually allow a treaty interpreter to establish the meaning of a term.[64] However, if after applying Article 31 the meaning of the term remains ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable, Article 32 allows a treaty interpreter to have recourse to:

> ... supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.

[64]R. Jennings and A. Watts (eds.), *Oppenheim's International Law*, 9th ed., Vol. I (Longman, 1992), p. 1275.

With regard to "the circumstances of [the] conclusion" of a treaty, this permits, in appropriate cases, the examination of the historical background against which the treaty was negotiated.[65]

87. In paragraphs 8.20 and 8.21 of the Panel Report, the Panel quoted Articles 31 and 32 of the *Vienna Convention* and explicitly recognized that these fundamental rules of treaty interpretation applied "in determining whether the tariff treatment of LAN equipment ... is in conformity with the tariff commitments contained in Schedule LXXX".[66] As we have already noted above, the Panel, after a textual analysis [67], came to the conclusion that:

> ... 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.[68]

Subsequently, the Panel abandoned its effort to interpret the terms of Schedule LXXX in accordance with Articles 31 and 32 of the *Vienna Convention* .[69] In doing this, the Panel erred.

88. As already discussed above, the Panel referred to the *context* of Schedule LXXX[70] as well as to the *object and purpose* of the *WTO Agreement* and the GATT 1994, of which Schedule LXXX is an integral part.[71] However, it did so to support its proposition that the terms of a Schedule may be interpreted in the light of the "legitimate expectations" of an exporting Member. The Panel failed to examine the context of Schedule LXXX and the object and purpose of the *WTO Agreement* and the GATT 1994 in accordance with the rules of treaty interpretation set out in the *Vienna Convention.*

89. We are puzzled by the fact that the Panel, in its effort to interpret the terms of Schedule LXXX, did not consider the *Harmonized System* and its *Explanatory Notes*. We note that during the Uruguay Round negotiations, both the European Communities and the United States were parties to the *Harmonized System*. Furthermore, it appears to be undisputed that the Uruguay Round

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[65]I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed., (Manchester University Press, 1984), p. 141:

> ... the reference in Article 32 of the Convention to the circumstances of the conclusion of a treaty may have some value in emphasising the need for the interpreter to bear constantly in mind the historical background against which the treaty has been negotiated.

[66]Panel Report, para. 8.22.

[67]See Panel Report, para. 8.30.

[68]Panel Report, para. 8.31.

[69]As discussed above in paragraphs 76-84, the Panel relied instead on the concept of "legitimate expectations" as a means of treaty interpretation.

[70]See Panel Report, paras. 8.23-8.24.

[71]See Panel Report, para. 8.25.

tariff negotiations were held on the basis of the *Harmonized System's* nomenclature and that requests for, and offers of, concessions were normally made in terms of this nomenclature. Neither the European Communities nor the United States argued before the Panel[72] that the *Harmonized System* and its *Explanatory Notes* were relevant in the interpretation of the terms of Schedule LXXX. We believe, however, that a proper interpretation of Schedule LXXX should have included an examination of the *Harmonized System* and its *Explanatory Notes*.

90. A proper interpretation also would have included an examination of the existence and relevance of subsequent practice. We note that the United States referred, before the Panel, to the decisions taken by the Harmonized System Committee of the WCO in April 1997 on the classification of certain LAN equipment as ADP machines.[73] Singapore, a third party in the panel proceedings, also referred to these decisions.[74] The European Communities observed that it had introduced reservations with regard to these decisions and that, even if they were to become final as they stood, they would not affect the outcome of the present dispute for two reasons: first, because these decisions could not confirm that LAN equipment was classified as ADP machines in 1993 and 1994; and, second, because this dispute "was about duty treatment and not about product classification".[75] We note that the United States agrees with the European Communities that this dispute is not a dispute on the *correct* classification of LAN equipment, but a dispute on whether the tariff treatment accorded to LAN equipment was less favourable than that provided for in Schedule LXXX.[76] However, we consider that in interpreting the tariff concessions in Schedule LXXX, decisions of the WCO may be relevant; and, therefore, they should have been examined by the Panel.

91. We note that the European Communities stated that the question whether LAN equipment was bound as ADP machines, under headings 84.71 and 84.73, or as telecommunications equipment,

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[72]We recall, however, that in reply to our questions at the oral hearing, both the European Communities and the United States accepted the relevance of the *Harmonized System* and its *Explanatory Notes* in interpreting the tariff concessions of Schedule LXXX. See paras. 13 and 38 of this Report.

[73]See Panel Report, para. 5.12.

[74]As noted in para. 6.34 of the Panel Report, Singapore pointed out, before the Panel, that:

> ... the WCO's HS Committee had recently decided that LAN equipment was properly classifiable in heading 84.71 of the HS. The HS Committee had specifically declined to adopt the position advanced that heading 85.17 was the appropriate category ... The EC had suggested that the HS Committee decision was intended solely to establish the appropriate HS classification for future imports. It ignored that the language interpreted by the HS Committee was the same language appearing in the EC's HS nomenclature and in the EC's concession schedule at the time of the negotiations and afterwards.

[75]Panel Report, para. 5.13.

[76]See Panel Report, para. 5.3.

under heading 85.17, was *not* addressed during the Uruguay Round tariff negotiations with the United States.[77] We also note that the United States asserted that:

> In many, perhaps most, cases, the detailed product composition of tariff commitments was *never* discussed in detail during the tariff negotiations of the Uruguay Round ...[78] (emphasis added)

and that:

> The US-EC negotiation on Chapter 84 provided an example of how two groups of busy negotiators dealing with billions of dollars of trade and hundreds of tariff lines relied on *a continuation of the status quo*.[79] (emphasis added)

This may well be correct and, in any case, seems central to the position of the United States. Therefore, we are surprised that the Panel did not examine whether, during the Tokyo Round tariff negotiations, the European Communities bound LAN equipment as ADP machines or as telecommunications equipment.[80]

92. Albeit, with the mistaken aim of establishing whether the United States "was entitled to legitimate expectations"[81] regarding the tariff treatment of LAN equipment by the European Communities, the Panel examined, in paragraphs 8.35 to 8.44 of the Panel Report, the classification practice regarding LAN equipment in the European Communities during the Uruguay Round tariff negotiations. The Panel did this on the basis of certain BTIs and other decisions relating to the customs classification of LAN equipment, issued by customs authorities in the European Communities during the Uruguay Round.[82] In the light of our observations on "the circumstances of [the] conclusion" of a treaty as a supplementary means of interpretation under Article 32 of the *Vienna Convention*[83], we consider that the classification practice in the European Communities during the Uruguay Round is part of "the circumstances of [the] conclusion" of the *WTO Agreement* and may be used as a supplementary means of interpretation within the meaning of Article 32 of the *Vienna Convention*. However, two important observations must be made: first, the Panel did *not* examine the

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[77]See Panel Report, para. 5.28.

[78]Appellee's submission of the United States, para. 26.

[79]Panel Report, para. 5.31.

[80]We note that in paragraph 8 of its third participant's submission, Japan stated that: "[i]n particular, the classification of the LAN equipment among the Members of the EC was not identical before the Uruguay Round".

[81]Panel Report, para. 8.60.

[82]The lists of the BTIs and classification decisions in the form of a letter, submitted by the parties and considered by the Panel, were attached to the Panel Report as Annex 4 and Annex 6 thereof.

[83]See para. 86 of this Report.

classification practice in the European Communities during the Uruguay Round negotiations *as a supplementary means of interpretation* within the meaning of Article 32 of the *Vienna Convention*[84]; and, second, the value of the classification practice as a supplementary means of interpretation is subject to certain qualifications discussed below.

93. We note that the Panel examined the classification practice of only the European Communities[85], and found that the classification of LAN equipment by the United States during the Uruguay Round tariff negotiations was not relevant.[86] The purpose of treaty interpretation is to establish the *common* intention of the parties to the treaty. To establish this intention, the prior practice of only *one* of the parties may be relevant, but it is clearly of more limited value than the practice of all parties. In the specific case of the interpretation of a tariff concession in a Schedule, the classification practice of the importing Member, in fact, may be of great importance. However, the Panel was mistaken in finding that the classification practice of the United States was *not* relevant.

94. In this context, we also note that while the Panel examined the classification practice during the Uruguay Round negotiations, it did not consider the EC legislation on customs classification of goods that was applicable at that time. In particular, it did not consider the "General Rules for the Interpretation of the Combined Nomenclature" as set out in Council Regulation 2658/87 on the Common Customs Tariff.[87] If the classification practice of the importing Member at the time of the tariff negotiations is relevant in interpreting tariff concessions in a Member's Schedule, surely that Member's legislation on customs classification at that time is also relevant.

95. Then there is the question of the *consistency* of prior practice. Consistent prior classification practice may often be significant. Inconsistent classification practice, however, *cannot* be relevant in interpreting the meaning of a tariff concession. We note that the Panel, on the basis of evidence relating to *only* five out of the then 12 Member States[88], made the following factual findings with regard to the classification practice in the European Communities:

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[84]It examined the actual classification practice to determine whether the United States could have "legitimate expectations" with regard to the tariff treatment of LAN equipment.

[85]See Panel Report, paras. 8.36-8.44.

[86]See Panel Report, para. 8.60. We note that in paragraph 8.58 of the Panel Report, the Panel stated that the classification of LAN equipment by other WTO Members was not relevant either.

[87]Title I, Part I of Annex I of Council Regulation (EEC) No. 2658/87 of 23 July 1987, Official Journal No. L 256, 7 September 1987, p. 1.

[88]With regard to the manner in which the Panel evaluated the evidence regarding classification practice during the Uruguay Round tariff negotiations, we note that in paragraph 8.37 of the Panel Report, the Panel accepted certain BTIs submitted by the United States as relevant evidence, while in footnote 152 of the Panel Report, it considered similar BTIs submitted by the European Communities to be irrelevant.

> 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.[89] (emphasis added)
>
> ... it would be reasonable to conclude at least that the practice [regarding classification of LAN equipment] was not uniform in France during the Uruguay Round.[90]
>
> Germany appears to have consistently treated LAN equipment as telecommunication apparatus.[91]
>
> ... LAN equipment was *generally* treated as ADP machines in Ireland and the United Kingdom during the Uruguay Round.[92] (emphasis added)

As a matter of logic, these factual findings of the Panel lead to the conclusion that, during the Uruguay Round tariff negotiations, the practice regarding the classification of LAN equipment by customs authorities throughout the European Communities was *not* consistent.

96. We also note that in paragraphs 8.44 and 8.60 of the Panel Report, the Panel identified Ireland and the United Kingdom as the "largest" and "major" market for LAN equipment exported from the United States. On the basis of this assumption, the Panel gave special importance to the classification practice by customs authorities in these two Member States. However, the European Communities constitutes a customs union, and as such, once goods are imported into any Member State, they circulate freely within the territory of the entire customs union. The export market, therefore, is the European Communities, not an individual Member State.

97. For the reasons set out above, we conclude that the Panel erred in finding that the "legitimate expectations" of an exporting Member are relevant for the purposes of interpreting the terms of

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[89]Panel Report, para. 8.40.
[90]Panel Report, para. 8.42.
[91]Panel Report, para. 8.43.
[92]Panel Report, para. 8.41. In this paragraph, the Panel stated that the only direct counter-evidence against the claim of the United States that customs authorities in Ireland and the United Kingdom consistently classified LAN equipment as ADP machines during the Uruguay Round negotiations is a BTI issued by the UK customs authority to CISCO, classifying one type of LAN equipment (routers) as telecommunications apparatus. The Panel dismisses the value of this BTI as evidence on the basis that it "became effective only a week or so before the conclusion of the Uruguay Round negotiations [15 December 1993]". Similarly, in footnote 152 of the Panel Report, the Panel did not consider other BTIs issued by the UK customs authorities to be relevant because they became valid after the conclusion of the Uruguay Round negotiations. We note, however, that all of these BTIs became valid in December 1993 or February 1994, i.e., before the end of the verification process, to which all Schedules were submitted and which took place between 15 February 1994 and 25 March 1994 (MTN.TNC/W/131, 21 January 1994). Therefore, in our view, the Panel should have considered these BTIs.

Schedule LXXX and of determining whether the European Communities violated Article II:1 of the GATT 1994. We also conclude that the Panel misinterpreted Article II:5 of the GATT 1994.

98. On the basis of the erroneous legal reasoning developed and the selective evidence considered, the Panel was not justified in coming to the conclusion that the United States was entitled to "legitimate expectations" that LAN equipment would be accorded tariff treatment as ADP machines in the European Communities[93] and, therefore, that the European Communities acted inconsistently with the requirements of Article II:1 of the GATT 1994 by failing to accord imports of LAN equipment from the United States treatment no less favourable than that provided for in Schedule LXXX.[94]

99. In the light of our conclusion that the "legitimate expectations" of an exporting Member are not relevant in determining whether the European Communities violated Article II:1 of the GATT 1994, we see no reason to examine the subordinate claim of error of the European Communities relating to the evidence on which the "legitimate expectations" of exporting Members were based.

VI. Clarification of the Scope of Tariff Concessions

100. The last issue raised by the European Communities in this appeal is whether the Panel erred in placing the onus of clarifying the scope of a tariff concession during a multilateral tariff negotiation, held under the auspices of the GATT/WTO, solely on the importing Member.

101. In paragraph 8.60 of the Panel Report, the Panel concluded that:

> 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 ... We further find that the United States was not required to *clarify the scope* of the European Communities' *tariff concessions* on LAN equipment ... (emphasis added)

[93]See Panel Report, para. 8.60.
[94]See Panel Report, para. 9.1.

Prior to this conclusion, the Panel stated the following:

> ... 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.[95]

102. The European Communities appeals these findings, and argues that:

> ... the Panel erred where it considered that, in any case, the onus of clarifying the scope of a tariff concession during a multilateral tariff negotiation ... shall necessarily be put on the side of the importing Member. By doing so, the Panel has created and applied a new rule on the burden of proof in the dispute settlement procedure which is outside its terms of reference and is beyond the powers of a panel.[96]

103. We do not agree that the Panel has created and applied a new rule on the burden of proof. The rules on the burden of proof are those which we clarified in *United States - Shirts and Blouses*.[97]

104. The Panel's findings in paragraphs 8.55 and 8.60 on the "requirement of clarification" are linked to the Panel's reliance on "legitimate expectations" as a means of interpretation of the tariff concessions in Schedule LXXX. They serve to complete and buttress the Panel's conclusion 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".[98]

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[95]Panel Report, para. 8.55.

[96]Notice of Appeal of the European Communities, para. 4.

[97]Adopted 23 May 1997, WT/DS33/AB/R, p. 14. See also, Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, adopted 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, paras. 97-109.

[98]Panel Report, para. 8.60.

105. We note that the Panel's findings in paragraphs 8.55 and 8.60 on the "requirement of clarification" were, in fact, the Panel's response to the question 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.[99]

106. We also note the Panel's references[100] to the panel report in *Panel on Newsprint* and the report by the Group of Experts in *Greek Increase in Bound Duty*.[101] In both of these reports, the conclusions on the obligations of the importing contracting party under Article II:1 of the GATT 1994 were reached on the basis of the ordinary meaning of the wording of the respective Schedules. These reports also assume that the tariff concessions made by the importing contracting party would have had to be limited by "conditions or qualifications" if they were to be interpreted restrictively. That the Panel reads these two reports in this way is evident from the Panel's concluding remark that "these cases ... confirm that the onus of clarifying tariff *commitment* is generally placed on the importing Member" (emphasis added).[102]

107. However, the case before us raises a different problem. The question here is whether the European Communities has committed itself to treat LAN equipment as ADP machines under headings 84.71 or 84.73, rather than as telecommunications equipment under heading 85.17 of Schedule LXXX. We do not believe that the "requirement of clarification", as discussed by the Panel, is relevant to this question.

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[99]Panel Report, para. 8.48.

[100]See Panel Report, paras. 8.51-8.54.

[101]L/580, 9 November 1956. We note that while the panel report in *Panel on Newsprint* was adopted by the CONTRACTING PARTIES, the report by the Group of Experts in *Greek Increase in Bound Duty* was not.

[102]Panel Report, para. 8.54.

108. The Panel also based its conclusions on the "requirement of clarification" on a certain perception of the nature of tariff commitments. The Panel stated:

> ... 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". ... 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.[103]

109. We do not share this perception of the nature of tariff commitments. Tariff negotiations are a process of reciprocal demands and concessions, of "give and take". It is only normal that importing Members define their offers (and their ensuing obligations) in terms which suit their needs. On the other hand, exporting Members have to ensure that their corresponding rights are described in such a manner in the Schedules of importing Members that their export interests, as agreed in the negotiations, are guaranteed. There was a special arrangement made for this in the Uruguay Round. For this purpose, a process of verification of tariff schedules took place from 15 February through 25 March 1994, which allowed Uruguay Round participants to check and control, through consultations with their negotiating partners, the scope and definition of tariff concessions.[104] Indeed, the fact that Members' Schedules are an integral part of the GATT 1994 indicates that, while each Schedule represents the tariff commitments made by *one* Member, they represent a common agreement among *all* Members.

110. For the reasons stated above, we conclude that the Panel erred in finding that "the United States was not required to clarify the scope of the European Communities' tariff concessions on LAN equipment".[105] We consider that any clarification of the scope of tariff concessions that may be required during the negotiations is a task for *all* interested parties.

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[103]Panel Report, para. 8.50.

[104]MTN.TNC/W/131, 21 January 1994. See also *Marrakesh Protocol to the General Agreement on Tariffs and Trade 1994*, para. 3.

[105]Panel Report, para. 8.60.

VII. Conclusions

111. For the reasons set out in this Report, the Appellate Body:

(a) upholds the finding of the Panel that the request of the United States for the establishment of a panel met the requirements of Article 6.2 of the DSU;

(b) reverses the findings of the Panel that the United States was entitled to "legitimate expectations" that LAN equipment would be accorded tariff treatment as ADP machines in the European Communities and, therefore, that the European Communities acted inconsistently with the requirements of Article II:1 of the GATT 1994 by failing to accord imports of LAN equipment from the United States treatment no less favourable than that provided for in Schedule LXXX; and

(c) reverses the ancillary finding of the Panel that the United States was not required to clarify the scope of the European Communities' tariff concessions on LAN equipment.

Signed in the original at Geneva this 19th day of May 1998 by:

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Christopher Beeby

Presiding Member

_____ _____

Claus-Dieter Ehlermann
Member

Julio Lacarte-Muró
Member