

*European Communities - Customs Classification  
of Certain Computer Equipment*

*Report of the Panel*

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

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## I. INTRODUCTION

1.1 On 8 November 1996, the United States requested consultations with the European Communities (EC) pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994) regarding tariff reclassification by the customs authorities of the EC and their member States of Local Area Network (LAN) equipment and personal computers (PCs) with multimedia capability (WT/DS62/1).

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

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

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

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

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

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

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

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

"To examine, in light of the relevant provisions in the GATT 1994, the matters referred to the DSB by the United States in documents WT/DS62/4, WT/DS67/3 and WT/DS68/2, and

to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that agreement".

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

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

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

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

Chairman: Mr. Crawford Falconer

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

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

## II. FACTUAL ASPECTS

### A. Product Description

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

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

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

2.3 If the LAN becomes bigger (for example, larger number of PCs are concerned or larger distances to be covered), more components are needed to connect the different elements of the LAN. Examples

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<sup>1</sup>This description of certain LAN equipment has been given using information provided by the EC and the United States. It is understood that the products described do not present an exhaustive list of all LAN components.

of such components are a **hub** (or concentrator). With a hub all the PCs in the LAN have a wire or cable leading from the LAN adapter card to a shared hub. The computers connected to the hub "see" all the packets<sup>2</sup> sent over the network. However, only the intended recipient PC "recognizes" the destination address, which triggers it to process the incoming packet. In this arrangement, only one computer in the LAN can transmit data at a time. Hubs may also act as network managers, by collecting information about the status of each network port and activating or shutting down a port where necessary.

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

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

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

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

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

## 2. Personal computers with multimedia capabilities<sup>3</sup>

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

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<sup>2</sup>Specialized software formats data into "packets", which can then be sent from one PC to another. The formatted data will include a source address, a destination address and control information which is used by the network to direct packet through the network.

<sup>3</sup>The description has been given using information provided by the EC and the United States.

able to use computing technology to produce sounds, images or video, and may have specialized circuitry (i.e. a TV tuner card) which allows the computer to convert a television reception signal into a digital data stream for display on the computer's monitor.

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

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

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

1. Commission Regulations

(a) Classification procedure in the EC

2.11 The European Communities form a customs union.<sup>5</sup> Accordingly, on imports from third countries, a Common Customs Tariff (CCT) is applied.<sup>6</sup> While the CCT is adopted centrally by the EC, the member States' customs authorities are involved for the purpose of administration. When goods arrive at the Community frontier for customs clearance, the customs authorities of the member

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<sup>4</sup>See Annex 1. Additionally, a note on "Implementation of Concessions" in Section II (Other Products) of Part I (Most-Favoured-Nation Tariff) of Schedule LXXX reads as follows: "Should the US not implement its concessions under the conditions set out in Note 2 to Chapter 84 and Note 12 to Chapter 85 in its schedule, the EC reserves the right to do the same with respect to the concessions indicated in this schedule for the following headings: ... Chapter 85; 85.17.10.00; 85.17.20.00; 85.17.30.00; 85.17.40.00; 85.17.81.10; 85.17.81.90; 85.17.82.00; 85.17.90.90; Ex1 New, Ex2 New; 85.17.90.91; Ex1 New, Ex2 New; 85.17.90.90, Ex1 New, Ex2 New; ...". Consequently, the applied duty rate in the European Communities for these products under heading 85,17 has been 7.5 per cent since 1995.

<sup>5</sup>Articles 12 to 17 of the Treaty Establishing the European Communities.

<sup>6</sup>Articles 18 to 29 of the Treaty Establishing the European Communities.



State through which the goods are imported in the EC territory apply the CCT determined for that year.<sup>7</sup> The customs authorities check which heading of the CN the importer has mentioned on the declaration forms and apply the corresponding duty of the CCT. It is possible that, as may occur in any customs administration, customs authorities in different member States classify a product differently, which could lead to different duties being applied. It was indicated that, for this reason, the EC has put into place mechanisms in order to detect and remedy any such divergent practices.<sup>8</sup>

2.12 When divergences on a classification matter have been detected, the Tariff and Statistical Nomenclature Section (TSNS) of the Customs Code Committee which is composed of representatives of the member States and chaired by representatives of the Commission<sup>9</sup>, examines the issue and advises on what it views the correct classification to be. The Committee may examine a matter referred to it by its Chairman either on the Chairman's initiative or at the request of a representative of a member State. Following the opinion of the Committee, the Commission may adopt a Regulation concerning the classification of goods. Where the Commission does not agree with the Committee's opinion, or where no opinion is delivered within the time-limit set out by its Chairman, the Commission presents its proposal to the Council, which takes a decision through a qualified majority. A classification Regulation, adopted either by the Commission or the Council is binding in its entirety and directly applicable in all member States of the European Communities.

2.13 It is also possible that where an individual believes that a customs decision is based on an incorrect classification of goods, the customs decision may be attacked before the national tribunals and courts of the member State in question. If the national tribunal or court considers it unclear how the product should be classified, it may refer the case to the European Court of Justice (ECJ).<sup>10</sup> As such the ECJ can clarify classification issues in its case law.

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<sup>7</sup>"The Commission shall adopt each year by means of a Regulation a complete version of the combined nomenclature together with the corresponding autonomous and conventional rates of duty of the Common Customs Tariff, as it results from measures adopted by the Council or by the Commission. The said Regulation shall be published not later than 31 October in the *Official Journal of the European Communities* and it shall apply from 1 January of the following year." (Article 12 of Council Regulation (EEC) No. 2658/87, OJ 1987 L 256/1).

<sup>8</sup>In particular, the EC has created a data base containing all Binding Tariff Information (BTI - see section 2(a) for "Definition and Evolution of BTIs within the EC") issued within the EC. Customs authorities must consult this data base before issuing a new BTI in order to make sure that they are aware of the classification practices as contained in the BTIs of all other customs authorities in the EC. If they discover in the data base that their own classification practice differs from that of any other customs authority in the EC for a similar product, they must consult with such other customs authority. If the customs authorities directly concerned cannot agree on a common approach, the internal co-ordination process of the EC is set in motion.

<sup>9</sup>Article 7 of Council Regulation 2658/87, OJ 1987 L 256/1.

<sup>10</sup>Article 177 of the Treaty Establishing the European Communities.

(b) Commission Regulation (EC) No 1165/95<sup>11</sup> on LAN Adapter Cards

2.14 On 23 May 1995, the Commission of the EC adopted Regulation (EC) No. 1165/95 which classified LAN adapter cards under the Combined Nomenclature (CN) Code<sup>12</sup> 8517.8290 which covers:

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

- Other apparatus
  - Telegraphic
  - other"

2.15 The stated intention of this Regulation was to ensure that henceforth LAN adapter cards were classified in HS heading 8517.8290 in face of the fact that certain member States had issued Binding Tariff Information<sup>13</sup> under a heading other than the one considered appropriate for this product. The Regulation states that an adapter card is for "incorporation in cable linked digital automatic data-processing (ADP) machines enabling the exchange of data over a local area network (LAN) without using a modem. With such a card, an ADP-machine can be used as an input-output device for another machine or a central processing unit. The card constitutes a printed circuit of a size of about 10x21 cm incorporating integrated circuits and active and passive components. It is fitted with a row of pin contacts corresponding to an expansion slot in the ADP-machine with an attachment to the connection cable of the LAN and light emitting diodes (LEDs)".

2. Binding Tariff Information (BTI)

(a) Definition and evolution within the EC

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

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

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<sup>11</sup>See Annex 2.

<sup>12</sup>The EC's Combined Nomenclature (CN) Code provided for in Council Regulation (EEC) 2658/87 of 23 July 1987, is based on the Harmonized Commodity Description and Coding System. The Harmonized System (HS) was established by the International Convention on the Harmonized Commodity Description and Coding System on 14 June 1983, and the EC adhered to this Convention on 7 April 1987, by means of a Council Decision 87/369. It entered into force in the EC on 1 January 1988.

<sup>13</sup>See section 2(a) of this text for "Definition and Evolution of BTIs within the EC".

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

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

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

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

2.19 On 23 March 1992, the UK HM Customs and Excise issued a letter stating that LAN adapter cards would be classified under heading 8471.9910.900.<sup>14</sup> It further specified that "This decision does not constitute Binding Tariff Information (BTI) within the meaning of Regulation (EEC) 1715/90. On 28 July 1993, UK HM Customs and Excise issued another letter specifying that LAN boards and repeaters imported in board form were dutiable at 4 per cent under CN code 84.73 ("Parts and accessories of the machines of heading 84.71"); repeaters imported in complete units were to be dutiable at 4.9 per cent, under classification 8471.9910.900.

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

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<sup>14</sup>Although not indicated in the letter, the product was dutiable at 4.9 per cent.

the final paragraph of Chapter 84, note 5<sup>15</sup> of the Harmonized System<sup>16</sup> directed that heading 84.71 did not cover machines incorporating or working in conjunction with an automatic data processing machine and performing a specific function. The UK HM Customs and Excise further stated that in its letter dated 23 March 1992, it had classified LAN adapter cards under heading 8471.9910.900, but to "... note that all future importations/exportations of these products will be under heading 8517.82900, duty rate 7.5 per cent".

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

4. UK VAT and Duties Tribunal ruling on PCTVs<sup>17</sup>

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

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

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<sup>15</sup>Note 5 of Chapter 84 of the HS: "(A) For the purposes of heading No. 84.71, the expression "automatic data processing machines" means: (a) Digital machines, capable of (1) storing the processing program or programs and at least the data immediately necessary for the execution of the program; (2) being freely programmed in accordance with the requirements of the user; (3) performing arithmetical computations specified by the user; and (4) executing, without human intervention, a processing program which requires them to modify their execution, by logical decision during the processing run; (b) Analogue machines capable of simulating mathematical models and comprising at least; analogue elements, control elements and programming elements; (c) Hybrid machines consisting of either a digital machine with analogue elements or an analogue machine with digital elements. (B) Automatic data processing machines may be in the form of systems consisting of a variable number of separately-housed units. A unit is to be regarded as being a part of the complete system if it meets all the following conditions: (a) it is connectable to the central processing unit either directly or through one or more units; (b) it is specifically designed as part of such a system (it must, in particular, unless it is a power supply unit, be able to accept or deliver data in a form (code or signals) which can be used by the system). Such units presented separately are also to be classified in heading No. 84.71. Heading No. 84.71 does not cover machines incorporating or working in conjunction with an automatic data processing machine and performing a specific function. Such machines are classified in the headings appropriate to their respective functions or, failing that, in residual headings".

<sup>16</sup>See footnote 12.

<sup>17</sup>See Annex 3.

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

### III. CLAIMS OF THE PARTIES

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

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

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

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

More specifically:

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

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

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

#### IV. ISSUES REGARDING THE SCOPE OF THE CLAIM

##### A. Product Coverage

##### 1. LAN equipment

4.1 The **European Communities** noted that as established by an earlier panel "Prior to the commencement of the Panel's examination, ... the product coverage must be clearly understood and agreed between the parties to the dispute".<sup>18</sup> However, this was not the situation in the present case. The United States, as complainant had failed to define clearly LAN products subject to the dispute, with the exception of LAN adapter cards. In its first submission, the United States had indicated that products specifically involved in these tariff disputes were: repeaters, bridges, routers, hubs, adapters or network cards, optical fibre converters, media interface modules and multistation access units or multi media access centers. In its pleadings during the first substantive meeting of the Panel, the United States had stated in very general terms that one of the measures attacked was "the change in treatment and resulting increases in tariffs applied to other LAN equipment, including repeaters, bridges, routers, hubs, optical fibre converters, media interface modules, and multi station access units". In its responses to the questions by the Panel on this matter, the United States had presented an enumeration of LAN components, including this time LAN adapter cards, LAN controllers, LAN repeaters, LAN interface units and bridges, LAN concentrators, LAN switches, LAN hubs and LAN routers. With regard to controllers and switches the EC noted that these items were not included in the original US claim. Moreover, the United States appeared to have dropped equipment which it had originally designated as LAN equipment, notably optical fibre converters and multi media access centres. Therefore, in the EC's view, the only products relating to LAN equipment that were subject to dispute were LAN adapter cards. With regard to all other LAN equipment, the United States had failed to identify with sufficient precision and consistency which items were concerned by its original complaint.

4.2 The **United States** asserted that it had specified that the products at issue were LAN equipment, both LAN adapter cards and other LAN equipment. There was nothing vague about the consultation or panel requests by the United States in this respect: the term used in the trade was LAN equipment. Those products were classifiable as "automatic data processing equipment" in the Schedule maintained by the EC, Ireland and the United Kingdom. The United States had provided further detail when requested by the Panel<sup>19</sup>, but the answer could have been ten pages long or hundred pages long,

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<sup>18</sup>Panel Report on *EEC - Quantitative Restrictions against Imports of Certain Products from Hong Kong*, adopted on 12 July 1983, BISD 30S/129, para. 30.

<sup>19</sup>US response to the Panel's question: "... violation of tariff commitments under Schedule LXXX ... has taken place with respect to all LAN equipment. Sometimes referred to as "modules," "LAN boards," or "LAN (continued...)"

depending on the level of detail desired. But the answer would not have been more complete, because the terms "LAN equipment", "LAN adapter cards" and "other LAN equipment" were meaningful phrases in the trade.

2. Personal computers with multimedia capability

4.3 The **European Communities** stated that with regard to PCTVs, the scope of the US claim was even more confusing. The United States had stated on different occasions that the claim concerned "personal computers", "personal computers with multimedia capability" and "all personal computers the tariff treatment of which had been impaired relative to the treatment such products received during the relevant period". At the same time the United States had stated that its complaint was "provoked" by the UK tribunal decision of 1996 in the ICL case and had continued to suggest that its claim was limited to the specific type of PCTV dealt with in that case. As a result, the EC submitted that the only item subject to the dispute was the PCTV implicated in the 1996 judgement.

4.4 The **United States** argued that it sought restoration of the concession negotiated during the Uruguay Round for those personal computers for which tariff treatment had been impaired. This included multimedia PCs with television capability. It also included a broader range of personal computers, such as those which utilized storage devices based on laser-reading technology (i.e., CD-ROMs) and those which also had attendant audio or video capabilities. These were the products which had been subjected to duties in excess of the tariff commitments made by the EC and its member States under heading 84.71. The personal computers involved in this dispute were dealt with in EC Regulation No. 1153/97, issued on 24 June 1997 and which had entered into force on 1 July 1997. That regulation amended the EC tariff schedule to reflect a tariff rate of 3.8 per cent applicable to computers "capable of receiving and processing television, telecommunication, audio and video signals," and of 10.5 per cent applicable to computers "capable of receiving and processing television signals but having no other specific subsidiary functions".<sup>20</sup>

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<sup>19</sup>(...continued)

cards," this product area includes the following general categories: - LAN adapter cards, including but not limited to LAN adapter cards and LAN network cards of all types, including those for Token Ring, Ethernet and FDDI systems; - LAN controllers, including but not limited to disk controllers, memory controllers, cluster controllers (including remote control units), storage system controllers, device drivers, and similar controller units; - LAN repeaters, including but not limited to frame relay devices, multi station access units and media interface modules; - LAN interface units and bridges, including but not limited to access servers (analogous to computer network servers), LAN extenders (low end LAN access devices), media interface modules, multi station access units and network computers; LAN concentrators; LAN switches; LAN hubs, including hublets; and LAN routers, including terminal servers not otherwise described as routers".

<sup>20</sup>In its response to the questions posed by the Panel at the first substantive meeting, the United States had stated that, in March 1997, the EC had submitted to the WTO a document specifying how the appropriate duty treatment to carry out the information Technology Agreement ("ITA") would be provided in its WTO schedule of concessions, pursuant to paragraph 2 of the Ministerial Declaration on Trade in Information Technology Products. This notification concerning the EC's ITA implementation indicated that, as of the 1 July 1997 implementation date for the ITA, the EC and its member States would apply tariffs to these products in excess of the 1997 bound rate for computers provided in Schedule LXXX. However, as the details of ITA implementation by the EC and its member States were not known to the United States at the time of its response, it was not clear whether this implementation would eliminate the violation of tariff commitments by the EC, and its member States. In its second submission, the United States had indicated that the EC had on 24 June 1997 issued its regulation implementing its ITA commitments - Regulation No. 1153/97. As a result, the EC's Common Customs Tariff

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4.5 The **European Communities** asserted that the United States was trying to expand the scope of the dispute, by mentioning for the first time in its second written submission, EC Regulation No. 1153/97 issued on 24 June 1997, which was unacceptable.

B. Measures at issue

4.6 The **European Communities** stated that the United States had neglected to indicate for each of the items mentioned in its list, how the EC was supposed to have violated its tariff commitments. The only products for which the United States had identified violating measure were with respect to LAN adapter cards and the PCTV implicated in the 1996 UK judgement; so in its view, those were the only products subject to this dispute.

4.7 The **United States** asserted that (i) on 23 May 1995, EC Commission Regulation (EC) No. 1165/95 mandated reclassification of LAN adapter cards to heading 85.17. It became binding on all member States; (ii) In 1995 and 1996, following adoption of Regulation No. 1165/95, the Irish Revenue Commission withdrew earlier BTIs on various types of LAN equipment and issued a series of new rulings reclassifying them as telecommunications apparatus under heading 85.17. The UK likewise reversed previously issued written determinations confirming treatment of LAN equipment under headings 84.71 and 84.73. In the wake of Regulation No. 1165/95, customs authorities in several other member States, including France, Belgium and Luxembourg also reclassified other types of LAN equipment under heading 85.17<sup>21</sup>; (iii) since 1996 UK customs authorities had reclassified certain personal computers to heading 85.28. Specifically, the United Kingdom had reclassified and continued to classify, certain personal computers as "television receivers" under CN heading 85.28 as they were capable of receiving and processing television signals. The United States also argued that the amendment of Annex 1 to Council Regulation (EEC) 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff through the issuance of Regulation No. 1153/97, confirmed that the EC and its member States had increased the tariff rates applicable to computers with multimedia capability, and confirmed that these products were specifically provided for in heading 84.71.

4.8 In summary, the reclassification of LAN adapter cards and other LAN equipment as "telecommunications apparatus" had resulted in an increase in the applicable tariff to 7.5 per cent from the current applicable bound rate of 2 per cent under heading 84.71. Reclassification of personal computers as "television receivers" had resulted in an increase in the applicable tariff to 14 per cent, from the current bound rate of 3.5 per cent for personal computers under heading 84.71.

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<sup>20</sup>(...continued)

now explicitly reflected that tariffs were being applied to computers with multimedia capability provided for in heading 84.71 at rates higher than the concession rates agreed to by the EC and its member States during the Uruguay Round.

<sup>21</sup>The US also wished to point out that after the EC published the LAN adapter card regulation in May 1995, the United States had expressed its concerns to the EC. In a 7 December 1995 letter, the EC Commissioner Sir Leon Brittan had responded to Ambassador Kantor that "... The product in question is variously called a network or LAN card. These are the adapter cards permitting exchange of data over a local area network without using a modem. Some Member States in 1994 were classifying these items under heading 8473, as parts of automatic data-processing machines, while others (and indeed the majority) were classifying them under heading 8517, as electrical apparatus for line telephony or line telegraphy performing a specific function ...". Responding to a letter from Ambassador Kantor as to the classification of "additional LAN equipment including bridges, routers and other products", Sir Leon Brittan wrote in a letter dated 28 March 1996 that "there is no current decision or planned action to classify the products you mention as telecoms apparatus." He also noted that he intended "to follow classification proposals closely since they are not just a technical matter".



C. Status of defending parties

4.9 The **European Communities** argued that the United States had not always been clear about who the parties to the present dispute were. While the Panel was established on the understanding that the EC replies would address all the claims made by the United States against Ireland and the United Kingdom, there were indications that the United States considered these two member States to be somehow parties to the dispute, which was not the case, in the view of the EC.

4.10 Since the late 1950s and the early 1960s, with the inception of the EC there had been a transfer of sovereignty from the EC member States to the EC, in particular in the area of customs tariffs and associated measures. For this reason, EC member States' individual schedules of tariff concessions had been withdrawn in the GATT and replaced by a (single) EC Schedule of tariff concessions. This happened most recently at the occasion of the accession of Austria, Finland and Sweden at the beginning of 1995 under the aegis of the WTO. When compared to the Schedule of commitments in the area of services, which had as a heading "European Communities and their member States", it became clear that in the present EC Schedule of tariff concessions, which had as a heading "European Communities", such tariff concessions were bound in the GATT 1994 (like in the GATT 1947) exclusively at the level of the EC and not at the level of individual member States. This was entirely compatible with Article XI:1 of the WTO Agreement which was negotiated in full knowledge of the above and which did not require EC member States to submit individual schedules of tariff concessions. The EC was an original WTO Member, in its own right.

4.11 In addition, the EC recalled the understanding reached in the present dispute by the joint letter of 20 March 1997 addressed to the Chairman of the DSB, Ambassador Wade Armstrong, which stated that "... any argument that the United States may wish to put forward relating to the tariff treatment actually applied by the UK or Irish authorities, or related to classification decisions that lie behind such tariff treatment, can be put forward to the Panel established on 25 February 1997 (with terms of reference modified), and ... the European Communities will address any such point in their replies to the US submissions". Moreover, it was agreed in that letter that the Panel already established against the EC would also deal with the claims raised by the United States in documents WT/DS67/3 and WT/DS68/2 with regard to Ireland and the United Kingdom, respectively.

4.12 The **United States** claimed that the present dispute was directed against WTO Members in addition to the EC, as Ireland and the United Kingdom were defending parties in this dispute. Consultation requests had first been addressed to each Member pursuant to Article 4 of the DSU, and subsequently, requests for the establishment of a panel. Indeed, the United States was forced to ask for consultations and establishment of a panel with respect to Ireland and the United Kingdom because it was told during consultations with the EC that there was no centralized EC customs authority and that the Community could not control the classification practices of member State customs authorities.

4.13 The Panel's terms of reference were clear in that they incorporated three dispute settlement matters -- one with respect to the measures of the EC, another with respect to the measures of the United Kingdom, and the third with respect to the measures of Ireland. If there had been only one matter before the Panel (i.e., that with respect to the Communities), then the DSB would have adopted terms of reference concerning a single matter. The understanding enshrined in the joint letter of 20 March 1997 dealt with form rather than substance. The European Commission had wished to avoid the establishment of three separate panels. The United States had wished to pursue its rights pursuant to each of the three panel requests and wished to avoid certain procedural delays. The United States had, in fact, traded its right to request three separate panels for the certainty that the existing panel would address its claims in all three of the matters raised, based on the assurances of the Commission

that the United States would not be prejudiced in a single panel in its choice of arguments. The EC, Ireland and the United Kingdom were Members of the WTO. As independent Members, Ireland and the United Kingdom hid behind no other Member. Nothing in the text of the GATT 1994 or the DSU limited the scope of application of the provisions of these two agreements with respect to either Member as to its status in a dispute brought under these agreements.

4.14 Moreover, the Commission appeared to suggest that a transfer of sovereignty within the internal legal framework of the EC had resulted in fewer rights and obligations being allotted to the member States. That might be the case in the internal legal framework of the Communities, but that framework was not at issue in this dispute. What was at issue were the WTO rights of the United States and the WTO obligations of the EC, Ireland and the United Kingdom. As such, the obligations of Ireland and the United Kingdom under Article II:1 of GATT 1994 and the concessions reflected in the tariff schedule for the customs union of which Ireland and the United Kingdom were constituents, were in dispute. The United States sought nothing more or less than the benefit of the bargain it had struck in the Uruguay Round. That bargain was reflected in, *inter alia*, those tariff concessions. Whether the European Commission negotiated the tariff concessions on behalf of the member States was beside the point. The legally relevant fact was that a Schedule of Tariff Concessions had been annexed with respect to Ireland and the United Kingdom.

4.15 The **European Communities** disagreed with the US allegation that the transfer of sovereignty between EC member States and the EC was irrelevant on the external plane. The EC had bound a tariff schedule of its own in GATT 1994 and was an original Member of the WTO. This indicated that the transfer of sovereignty had been recognized by Members, and that the EC was more than a simple customs union. The EC was ready to assume its international obligations, but was not ready to allow an attack on its constitution in the WTO.

## V. MAIN ARGUMENTS

5.1 The **United States** claimed that the tariff concession granted on heading 84.71 in the EC-Schedule LXXX legally benefited and applied with respect to LAN equipment and multimedia PCs. The imposition of higher duties by the EC, Ireland and the United Kingdom on these products benefiting from this concession through reclassification actions was therefore inconsistent with their obligations under Article II:1 of GATT 1994.

5.2 The **European Communities** disagreed with the US assertion that these products had been reclassified. This was because the EC had never committed itself nor could it be construed to have given the impression that it would classify LAN equipment and PCs with multimedia capabilities under heading 84.71 and apply the corresponding duty.<sup>22</sup> Accordingly, the US complaint could not be

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<sup>22</sup>The EC argued that it had always considered LAN equipment to be classified under heading 85.17, due to its data transmission function. When considering PCs with "multimedia capabilities", one had to look at the overall situation. When applying the classification rules to individual cases, the EC had determined that these products essentially fell into four categories. One type would be the product classified in heading 85.21 due to its capability of reproducing video images (this product was no longer produced). Another type would be classifiable under heading 85.28 because of its television capabilities. Yet another category would be for products with a full range of multimedia functions (i.e. TV, telecommunications, audio and video) which fell within heading 85.43. All other PCs either without or with more limited multimedia functions fell under heading 84.71. Additionally, the particular equipment implicated in the 1996 ICL case was never classified as a computer; therefore it could not have been "reclassified" by the UK customs authorities. In this case the importer had visibly given  
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interpreted in any other way than as an attempt to revise the negotiating record of the Uruguay Round. However, the result of the Uruguay Round could not be put into question now before the Panel. Indeed, Article 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) provided that: "....Recommendations and rulings by the DSB cannot add to or diminish the rights and obligations provided in the covered agreement". India, Japan, Korea and Singapore, who intervened as third parties, seemed to have blindly adopted the allegations of the US, in particular the statement that the EC during the Uruguay Round, uniformly classified the products concerned as computers. However, they did not bring any proof to this claim either.<sup>23</sup>

5.3 The **United States** wished to note that this dispute did not concern reclassification as such, and that the WTO Agreement included no legal provisions concerning where products should be classified for customs purposes. Rather, this dispute concerned tariff treatment, and in particular the duty increases on LAN equipment and certain personal computers in the EC, Ireland and the United Kingdom. For this reason, the United States was of the view that the original title assigned to this dispute was incorrect. The United States had requested that the title of the Panel's report on these disputes be corrected to read "European Communities, Ireland and the United Kingdom - Increases in Tariffs on Certain Computer Equipment".

5.4 The **European Communities** stated that the US wish to change the title of the dispute, as reflected in its second submission, indicated that it had changed its mind on what the dispute was all about. The EC disagreed with this attempt to redirect the dispute against new parties at the present stage of the procedure as the United States now seemed to insinuate that the EC, Ireland and the United Kingdom were somehow collectively responsible for the situation complained about, as was apparent from the use of the word "and" in the suggested redrafting of the title of the dispute. It would, anyhow, be extraordinary if the title of the dispute was amended in the course of the procedure, and there was not justification whatsoever for that in the present case.

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<sup>22</sup>(...continued)

up any hope for a more favourable judgement upon appeal, because the importer had allowed the judgement of the UK court to become final by not appealing it domestically within the relevant time limit. It appeared instead, that the Panel was now being requested to act as a sort of an appellate body on a domestic court ruling handed down in an individual case. To the knowledge of the EC, challenging a domestic court ruling as a "measure" under the WTO was a novel way of attempting to obtain a more favourable ruling in an individual case. Even if it were true that the domestic court had failed to classify the imported product in a manner allowing proper tariff treatment, which the EC submitted it had not, the EC considered that Article II:5 which would be applicable in such circumstances would pre-empt the Panel from simply overturning the domestic court ruling by a *de novo* examination of the case. Rather, Article II:5 provided for the need to compensate for the loss in tariff concessions that might ensue. Additionally, as the United States itself had recognized, the equipment implicated in this case was a Taiwanese manufacture involving a Japanese company. The classification of this particular product by definition did not concern the United States, and did not prejudge the classification of other US products which might have different characteristics.

The United States noted that the EC was admitting that it was treating some multimedia computers as dutiable under headings other than 84.71 (and at higher duty rates). As for Article II:5, the United States had duly brought the reclassification-related impairment of tariff concessions on the products at issue directly to the attention of the EC, and had requested informal consultations by letter on 2 May 1996. On 4 June and 23 July 1996, the United States and the EC had held bilateral consultations, which did not resolve the matter. The United States had subsequently brought its concerns directly to the attention of the United Kingdom and Ireland, both of which had declined to discuss the matter with the United States.

<sup>23</sup>See also Section VI on "Third Parties Submissions."

A. Scope of the concession

1. Duty treatment of new products or products affected by Harmonized System (HS)<sup>24</sup> changes

5.5 The **United States** claimed that the practice of the GATT with regard to the treatment of new products or products affected by HS changes was instructive in interpreting the scope of a concession that was described generally, but for which there was no record of any discussion or agreement describing the product scope in exhaustive detail. In both instances, there would not necessarily have been any discussion of whether a particular product or variation of a product should be included in the scope of a concession. As established by the *Gramophone Records* case, the practice in such instances was to resolve silence in favour of deeming the new or undiscussed product to be covered by the existing concession. This case concerned Germany's complaint<sup>25</sup> that Greece had raised the tariff on long-playing gramophone records to levels above its bound rates for gramophone records. Greece considered that "long playing" records were a new item and therefore not covered by the "records" binding because they contained a higher volume of recordings, were lighter than conventional records, and were made of a different material. The Group of Experts which examined Germany's complaint reported that the "Group agreed that the practice generally followed in classifying new products was to apply the tariff item, if one existed, that specified the products by name, or, if no such item existed, to assimilate the new products to existing items in accordance with the principles established by the national tariff legislation." The Group also observed that when Greece granted the concession on records, it had not attached any qualification to the description of the product. The Group was of the opinion that "long-playing" records were covered by the description of "gramophone records" in the concession and therefore the rate of duty to be applied to those records was that bound under that item in the Greek schedule.<sup>26</sup>

5.6 Another case worth noting in this context was when the EC proposed to modify its binding on item 9211.A.II, "sound reproducers," in order to raise the duty on digital audio disc players (DADS) in 1983.<sup>27</sup> The withdrawal was to be made on a preemptive basis when trade in this product was still at low levels. The EC proposal was controversial and triggered a series of discussions in the GATT Council and the Committee on Tariff Concessions. During these discussions, even the EC did not argue that the lack of any reference to DADS in the EC tariff schedule, since they were new products, meant that DADs were unbound. Eventually, this issue was taken up in the Negotiating Group on GATT Articles and resulted in the provisions of paragraph 4 of the Understanding on the Interpretation of Article XXVIII of the GATT 1994.

5.7 The United States pointed out that while there was no obligation under the GATT to follow any particular system for classifying goods, a reclassification subsequent to the making of a concession

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<sup>24</sup>See footnote 12.

<sup>25</sup>*Greek Increase in Bound Duties*, complaint L/575, S.R. 11/12, pages 115 and 116.

<sup>26</sup>Report by the Group of Experts on *Greek Increase in Bound Duty*, 9 November 1956, L/580.

<sup>27</sup>Notification in SECRET/296 and Add.1 with respect to "sound reproducers with laser optical reading system", dated 24 February 1983.

under GATT must not violate the basic commitment regarding that concession.<sup>28</sup> Tariff changes resulting from reclassification and their GATT legal implications were also thoroughly discussed in the early 1980s, during preparations for the introduction of the HS nomenclature. It was clear then, as it is now, that changes in nomenclature or classification which altered the bound treatment of a product were inconsistent with a Member's obligations under Article II:1 of GATT 1994. Implementation of the HS became a massive Article XXVIII exercise in negotiating compensation for the impairment of tariffs consequential to changes in nomenclature. These considerations have applied on a continual basis with respect to the implementation of HS revisions adopted by the WCO. The GATT 1947 CONTRACTING PARTIES decided that implementation of such changes "shall not involve any alteration in the scope of concessions nor any increase in bound rates of duty unless their maintenance results in undue complexity in the national tariffs. In such cases the contracting parties concerned shall inform the other contracting parties of the technical difficulties in question, e.g. why it has not been possible to create a new subheading to maintain the existing concession on a product or products transferred from within one HS 6-digit subheading to another".<sup>29</sup>

5.8 If a Member could raise duties at will on new or undiscussed product variations through reclassification, it would not need to invoke Article XXVIII. Nor would it need to provide any compensation if it wished to make a preemptive withdrawal of the sort proposed by the EC in 1983 for DADS. Paragraph 4 of the Understanding on the Interpretation of Article XXVIII would be reduced to inutility. The link between Article II and Article XXVIII was recognized by ten countries that made the compromise proposal for the Understanding, when they remarked that Article II:1(a) "is designed to provide security for the future and creates a presumption that the conditions governing access at the time of negotiations will be maintained".<sup>30</sup>

5.9 The **European Communities** responded that the above cited case of the *Gramophone Records* did not support the US complaint at all. This case was different from the present case in that it dealt with new products. The current US complaint was limited to products which already existed during the Uruguay Round. Thus, the question which needed to be addressed was which duty rate had been bound for the products concerned and not under which heading this equipment should be classified.

5.10 Nor was the EC alleging in any way that WTO Members could somehow undo tariff bindings by reclassifying products at will, without following the procedures of Article XXVIII of GATT 1994, and thereby unravelling the results of 50 years of tariff liberalization. On the contrary, even in cases of a reclassification as a consequence of an agreement in the WCO, the EC maintained the tariff treatment originally agreed upon in the tariff negotiations. For example, the EC used to classify power supply units for computers under the tariff classification heading for computers (8471.99). As such the bound duty rate for this product was 3.9 per cent in 1995<sup>31</sup> and would have been 2 per cent in 1996.<sup>32</sup> However,

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<sup>28</sup>Panel Report on *Spain - Tariff Treatment of Unroasted Coffee*, adopted on 11 June 1981, BISD 28S/102, para. 4.4 and n.1. See TAR/M/4, Committee on Tariff Concessions, Minutes of Meeting, 31 July 1981, at para. 7.14.

<sup>29</sup>Decision on *Gatt Concessions under the Harmonized Commodity Description and Coding System, Procedures to Implement Changes in the Harmonized System*, 8 October 1991, BISD 39S/300, para.1.

<sup>30</sup>MTN.GNG/NG7/W/59, proposal by Argentina, Canada, Colombia, Czechoslovakia Hong Kong, Hungary, Korea, Mexico, New Zealand and Singapore circulated on 3 November 1989, page 3.

<sup>31</sup>See the annex to EC Regulation 1395/95.

following a decision of the HS Committee, power supply units were reclassified under heading 8504.40. The tariff rate normally applying to this heading was 4.8 per cent in 1996. Yet the EC created a separate subheading, 8504.4030 with the rate of 2 per cent in order to maintain the concession it had negotiated in the WTO.

2. "products described"

5.11 The **United States** claimed that the products at issue were within the scope of the EC concession on item 84.71. Article II:1(b) required that the "products described" in a Member's Schedule which were the products of territories of other Members "shall...be exempt from ordinary customs duties in excess of those set forth and provided therein.". The ordinary meaning of "describe" was "to state the characteristics of...". The negotiating history of Article II confirmed that the drafters deliberately chose the general term "described" in preference to the narrower term "enumerated".<sup>33</sup> The EC-Schedule LXXX provided a concession on item 84.71 comprising automatic data processing machines and units thereof. The characteristics of LAN equipment and of personal computers with multimedia capability corresponded, in the United States' view, to those stated in this tariff concession on 84.71, and their parts within the scope of the concession on 84.73.

5.12 Moreover, this fact had been confirmed by the World Customs Organization (WCO). The WCO HS Committee at its eighteenth session in November 1996, had decided that a PC with television and audio capabilities was properly classified as an automatic data processing machine in HS Chapter 84 at sub-heading 8471.49. In accordance with Article 8 of the International Convention on the Harmonized Commodity Description and Coding System the classification decision was deemed accepted by the Council on 1 February 1997, as no reservation was entered on this decision during the two-month period allowed under the Convention. The Committee also decided at its eighteenth Session to draft an opinion which embodied this decision for inclusion in the Compendium of Classification Opinions. This text<sup>34</sup> was adopted by the Committee at its nineteenth Session in April 1997. Unless a WCO member made a reservation and sought to have the text of the opinion reconsidered by the Committee, this text would be deemed to be accepted by the Council as of 1 July 1997, and would be included in the next set of amendments to the Compendium of Classification Opinions. The WCO HS Committee also at its nineteenth Session in April 1997, voted on the proper classification of certain LAN equipment including routers, cluster controllers, hubs, multistation access units and optical fibre converters. The overwhelming majority of HS Committee members agreed that these products were properly classified under heading 84.71. While the United States was of the view that this case was not about classification, the WCO decisions confirmed that the United States was justified in expecting the products at issue to be classifiable under heading 84.71 and subject to the bound duty rate pertaining to that heading.

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<sup>32</sup>(...continued)

<sup>32</sup>See the annex to EC Regulation 3009/95.

<sup>33</sup>EPCT/TAC/PV/23, pages 18 and 19.

<sup>34</sup>"**8471.49 Multimedia personal computer** consisting of three separately housed units: a 14 inch (35 cm) colour television receiver (display) with a digital processing unit, a keyboard (input unit), and an infra-red remote control device. The unit comprises a processor (60486DX2), a memory (4 MB RAM), a diskette drive (1.44 MB), a hard disk (350 MB), a CD-ROM drive, a colour monitor television receiver, non-interlaced in PC mode and interlaced in TV mode, and stereophonic loudspeakers. The system plays audio and software CDs and records digital audio files. The different functions (PC, television or soundstack) are selected by using either a trackball incorporated in a keyboard, the keyboard itself or the infra-red remote control device. The system also plays audio and software CDs and records digital audio files." (Annex K/14 to Doc.41.100E (HSC/19/Apr.97).

5.13 The **European Communities** failed to see how these draft opinions dated 1996/97 could confirm that the products subject to the dispute were classified under 8471 in 1993/94. If anything, the recent draft amendment merely showed that until recently it had been disputed how the products concerned should be classified. Otherwise the HS would not need to be amended. In any case the EC, had introduced reservations in respect of both classification opinions (i.e. the PCTVs and certain LAN equipment) on 26 June 1997. But, even if the draft opinions as they stood now were to become final, the EC considered that it would not affect the present case, because the case was about duty treatment and not about product classification. A decision of the WCO could not affect the balance of concessions of the respective parties agreed upon during the Uruguay Round. Tariff negotiations were about tariffs, not about customs classification. Customs classification, thus, was only the background for such tariff negotiations, but not its subject matter. If it were different, tariff negotiations would be carried out in the framework of the WCO and not in the WTO. It was possible to have divergent views between participants in tariff negotiations concerning the classification of certain products, but that question should be addressed in the WCO. Furthermore, the EC noted that in the WTO Agreement on Rules of Origin reference was made to the future elaboration of arrangements concerning the "settlement of disputes relating to customs classification".<sup>35</sup> Such an arrangement had not yet been considered, which was another reason why this Panel should abstain from pronouncing itself on customs classification issues.

3. treatment accorded at the time the concession was negotiated

(a) "treatment ... provided for" and "treatment ... contemplated"

5.14 The **United States** argued that interpreting Article II:1 in its context, including Article II:5, the "treatment...provided for" in a tariff concession included the "treatment...contemplated" when the concession was made. Under GATT Article II:1(a), each WTO Member had to accord to the commerce of the other Members "treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement." The reference to "treatment...provided for" in Article II:1(a) did not mean "classification specifically provided for." Such an interpretation would mean that in all cases where a WTO Member had not specifically provided in a concession that a particular product would be given a specific tariff classification, that Member could reclassify the product at will to a higher-duty tariff position and apply higher tariffs. The reference to "treatment...provided for" had to be interpreted in the light of its context and the object and purpose of Article II. The context of Article II:1 included Article II:5.

5.15 Article II:5 provided that "If any contracting party considers that a product is not receiving from another contracting party the treatment which the first contracting party believes to have been contemplated by a concession provided for in the appropriate Schedule annexed to this Agreement, it shall bring the matter directly to the attention of the other contracting party. . . ." Thus, the "treatment...provided for" was to be understood as the "treatment...contemplated" by a concession. Article II:5 did not require the treatment to have been discussed or expressly agreed. The ordinary meaning of "contemplate" in this context was "to expect". The treatment in question had to be the treatment by the importing Member which was contemplated at the time. Thus, the treatment provided by a concession was the treatment reasonably expected by the trading partners of the Member making the concession.

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<sup>35</sup>Article 9.4 of the Agreement on Rules of Origin.

5.16 The **European Communities** noted that in referring to "reasonable expectations" with regard to the tariff treatment of certain computer equipment, the United States had used language that was borrowed from panel reports dealing with Article XXIII:1(b) of GATT 1994, the so-called non-violation cases. But the United States had never raised formally the matter of Article XXIII:1(b) in the procedure, nor during consultations. At the same time the United States appeared to allege that the EC had violated its obligations under Article II:1 of GATT 1994, which indicated by contrast that the claim appeared to be based on Article XXIII:1(a) of GATT 1994.

5.17 The United States had justified use of this language by referring to Article II:5 of GATT 1994, in particular by quoting the words "...the first contracting party believes to have been contemplated by a concession provided for in the appropriate schedule...". From the EC's point of view, this explanation was inconsistent with the claim that the EC had allegedly violated Article II:1 of GATT 1994. The consequence of the invocation of Article II:5 could only be that there should be negotiations on how to resolve the divergence of views depending on the subjective beliefs of the interested Members, rather than the relevant exporting industry. Nowhere in Article II:5 was there an indication that the belief, which the United States translated by "reasonable expectations", could replace the objective determination of an existing agreement on a tariff binding of a particular product.

5.18 The **United States** claimed that this dispute was about the violation of the obligations of the EC, Ireland and the United Kingdom under Article II:1 of the GATT 1994 and the nullification or impairment of benefits arising from those violations. However, it was worth recalling that one of the precepts developed under GATT 1947 was that rules and disciplines governing the multilateral trading system served to protect legitimate expectations of Members as to the competitive relationship between their products and those of the other Members. As the *Superfund* panel had pointed out, such rules and disciplines " ... are not only to protect current trade but also to create the predictability needed to plan future trade".<sup>36</sup> The protection of legitimate expectations was central to creating security and predictability in the multilateral trading system, for governments and for trade itself. Furthermore, the *Newsprint* case had made clear that "reasonable expectation" was enforceable under Article II:1. Reasonable was not based on certainty or absolute clarity. It was the treatment that a Member "believes to have been contemplated by a concession", as that phrase appeared in Article II:5. This 1984 *Newsprint* panel case concerned an EC regulation on the duty-free tariff rate quota for newsprint. The EC had agreed to give fully duty-free access to the EFTA countries for newsprint and had reduced the MFN tariff rate quota for newsprint (bound at 1.5 million tonnes) by subtracting an amount corresponding to EFTA access (1 million tonnes). The EC claimed that it was not impairing the binding on newsprint, but the Panel found that the EC was, for the following reasons: "...under long-standing GATT practice, even purely formal changes in the tariff schedule of a contracting party.... have been considered to require renegotiations. ... In granting the concession in 1973, the EC had not made it subject to any qualification or reservation in the sense of Article II:1(b) although at the time the concession was made, it was known that agreement had already been reached that the EFTA countries would obtain full duty-free access to the Community market for newsprint from 1 January 1984 onward. The Panel therefore found that although in the formal sense the EC had not modified its GATT concession, it had *in fact* changed its GATT commitment unilaterally, by limiting its duty-free tariff quota for m.f.n. suppliers for 1984 to 500,000 tonnes".<sup>37</sup> The Panel had concluded that "...the EC, in unilaterally establishing for 1984 a duty-free quota of 500,000 tonnes, had not acted in conformity with their obligations under Article II of the GATT. The Panel shared the view expressed before it relating to

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<sup>36</sup>Panel Report on *United States - Taxes on Petroleum and Certain Imported Substances*, adopted on 17 June 1987, BISD 34S/136, para. 5.2.2.

<sup>37</sup>Panel Report on *Newsprint*, adopted on 20 November 1984, BISD 31S/114, para. 50.



the fundamental importance of the security and predictability of GATT tariff bindings, a principle which constitutes a central obligation in the system of the General Agreement".<sup>38</sup>

(b) "treatment ... contemplated" and "treatment accorded "

5.19 The **United States** claimed that in the absence of explicit provision in a Schedule or specific discussions during negotiations, the "treatment ... contemplated" could be inferred from the "treatment accorded" at the time the concession was negotiated. In other words, the latter provided a basis for interpreting the product scope and the nature of the "treatment... provided for". Under Article II, Members were free to specify the terms of, and any conditions or qualifications on, the concessions they make. The Member making the concession might specify explicitly the treatment it intended or the exact product composition of the concession. Those who had made the concessions in Schedule LXXX did not do so. In fact, Schedule LXXX could have provided that the concessions therein would be subject to reclassification at will or could have provided explicitly that the trading partners of the EC, Ireland and the United Kingdom were not guaranteed a continuation of the treatment known to be provided during the negotiations. No such qualification or reservation appeared in Schedule LXXX. Nor were there any reservations for particular types of computer or computer equipment. Hence, the parties which were bound by Schedule LXXX had agreed to continue to provide the treatment contemplated by their trading partners at the time the bargain was struck.

5.20 The **European Communities** stated that the United States had created confusion by its statement that "the product scope of a concession", and thus the "treatment ... contemplated" could be determined from the treatment actually accorded at the time that the concession was negotiated. Such an approach, if followed, would mean that a decision by a local customs authority for a particular consignment would amount to a new tariff binding under Article II of the GATT which was absurd. Information by local customs offices or even by national customs authorities to individual importers on the classification of individual consignments or goods identified by name (brand and model) could not become the equivalent of a tariff binding since a tariff binding referred to a category of products identified in a generic way by the product description in the relevant tariff line of the customs tariff. Such tariff bindings needed to be agreed during tariff negotiations, as provided for under the relevant provisions of the GATT 1994 (particularly Article XXVIII bis). It might be possible to infer a tariff binding for a category of products corresponding to the product description in a given tariff line from circumstances that were not laid down in written records of the negotiations, but the party invoking such special circumstances would have to bear the burden of proof for the existence of such circumstances. It would certainly be necessary, in order to meet this burden of proof, to show that negotiators had knowledge of the circumstances and that they were relevant to a category of products coming under a particular tariff line and not for individual imports alone.

5.21 The **United States** said that the EC had conceded that a tariff binding could be inferred for a group of products corresponding to the product description in a given tariff line, on the basis of circumstances outside the written negotiating record. However, the EC argument that negotiators must have had knowledge of these circumstances and the circumstances must have been relevant to a group of products under a particular tariff line, and not for individuals alone, was calculated to deprive BTIs and other member State classification actions of any significance. It was important to note, however, that an importer who had obtained a BTI for goods of a particular type could use the BTI to import the same goods throughout the EC. In addition, the importer would know that, no matter what the ultimate EC market for the product, it could be entered through the country that issued the BTI at the

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<sup>38</sup>Ibid., para. 52.

rate specified in the BTI. Other importers of identical or similar products might also expect those products to receive the same tariff treatment.<sup>39</sup>

(c) at the time the concession was negotiated

5.22 The **United States** said that the "time" or time period relevant to defining the rights and obligations with respect to the EC's tariff commitments on the products at issue began in March 1990 when the United States tabled the offer/request for the electronics sectoral proposal. The relevant time period closed in two stages, first and primarily with the Uruguay Round on 15 December 1993 (MTN.TNC/40). The more limited second stage closed at the end of verification of tariff schedules, which took place from February 1994 through 31 March 1994. As substantive tariff negotiations closed on 15 December 1993, changes in treatment during the verification of tariff schedules were only relevant to defining rights and obligations with respect to tariff concessions to the extent that the party making such changes brought them to the attention of its negotiating partners.

5.23 The **European Communities** were of the view that the starting base for the Uruguay Round was established in the "Procedures for the Negotiations".<sup>40</sup> The Uruguay Round tariff negotiations were held on the basis of the HS nomenclature and had lasted until the completion of the verification process that enabled participants to raise any problems they had with regard to the reflection of concessions negotiated in proposed schedules. This process ended in March 1994 with the finalization of the verification process.

5.24 The **United States** agreed with the EC that the starting point for the relevant period was established in the text agreed to on 30 January 1990 on "Procedures for the Negotiations". The Uruguay Round tariff negotiations were held on this basis, and ended in March 1994 with the finalization of the verification process. The US trading conditions were reflected not only in the tabling of the first "zero-for-zero" request/offer but in its preparation.

5.25 The United States recalled that, at the close of substantive tariff negotiations, the delegations had agreed that "no adjustments entailing a withdrawal of an offer or elements of offers would be permitted" from then forward (MTN.TNC/W/131). As also agreed, they had submitted their draft final schedules to the Secretariat by 14 February 1994. Between 14 February and 31 March 1994, the participants had engaged in the verification process, to ensure that the final schedules accurately reflected the negotiated concessions agreed upon by the participants. In adherence to the deadlines agreed upon, the United States, the EC and the other participants had completed verification by the end of March 1994. On 15 April 1994, the contracting parties had signed the Final Act of the Uruguay Round, at which time their schedules of concessions were annexed to the Marrakesh Protocol.

B. Tariff treatment of products

1. LAN equipment

(a) Negotiating History

5.26 The **United States** claimed that inclusion of LAN equipment within heading 84.71 was supported by negotiating history. If a party had made and maintained an offer of coverage for a specific item

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<sup>39</sup>Additional discussion on this matter is to be found in paragraphs 5.43 to 5.62.

<sup>40</sup>*Procedures for the Negotiations*, MTN.GNG/NG1/17 of 1 February 1990.

identified as within a particular tariff heading, then that party could be assumed to have induced reasonable reliance by its trading partners on that offer; the trading partners concerned could reasonably expect that the concession would include those items; and unless the final concession explicitly provided otherwise, it could be inferred that the final concession was intended to include that item at the rate applicable to the tariff heading in question. The same was true if a party had received a request for a specific item identified as within a particular tariff heading and had not objected that the request was wrongly targeted. In the present case, the US "zero-for-zero" request/offer of 15 March 1990 had proposed elimination of duties by the United States and its trading partners, including the EC, with respect to a long list of products, including electronic articles in HS chapters 84, 85 and 90. Singapore's June 1990 request made to the EC requested duty reductions on "microcomputers desk top type" and "microcomputers other" (both 8471.20), as well as "control units", "adaptor units", "gateways" and "concentrators or multiplexers" (all 8471.99), and "printed circuit boards assembled" (8473.30). In other words, Singapore had submitted a request to the EC for tariff reduction on LAN equipment within heading 84.71 and the EC had not objected to that classification of LAN equipment at that time. Thus, the EC's own conduct showed that it intended to include LAN equipment under the concession rate for heading 84.71.

5.27 Furthermore, representatives of the US computer industry had closely monitored the Uruguay Round negotiations, and had regularly raised their concerns with the United States Trade Representative (USTR) and members of the US Congress. During this time, they did not raise any concerns with respect to EC's classification and duty treatment of LAN equipment and personal computers with multimedia capability. They assumed, in light of the fact that this issue was not raised by the EC, that headings 84.71 and 84.73 would continue to cover LAN equipment products. The industry's only concern was that the EC's reduction in tariffs on those headings would be insufficient, as reflected in a letter on 10 November 1993 to Ambassador Kantor from the US Computer and Business Equipment Manufacturers Association (CBEMA). Reviewing the tariff headings of interest to CBEMA members, the letter noted that "there is ... enormous trade in the next level of value-added, the "stuffed circuit board" (small boards are sometimes called cards), or "electronic assembly" or sometimes called in Europe the "PCB" (for "printed circuit board"). There is a wide variety of PCB's or electronic assemblies, most of which are classified in [heading 8473] as computer parts: memory boards, graphics accelerator boards, LAN cards." In the letter, CBEMA went on to criticize a proposal floated by the EC to divide HS heading 8473 into two items, "electronic assemblies," with no duty reduction, and "other," subject to zero duties. The proposal would be inadequate, CBEMA said, because "other" computer parts consisted of plastic cases and metal chassis, which had low or nonexistent trade, and "electronic assemblies" consisted of "PCBs or stuffed circuit boards" with substantial trade. Essentially, the significance of this letter was that in the face of dramatic differences in tariff rates depending upon the classification of the products -- a difference of 3.5 per cent and 14 per cent in some cases -- the industry advisors were noticeably silent on the treatment of LAN equipment in reacting to the EC offer. Yet they commented specifically on the offers of other products. So the industry's understanding of tariff treatment was based, in turn on the treatment their exports had actually received, as evidenced in part by the BTIs and by their attestations that the United States submitted to support its claims.<sup>41</sup> The US government, in turn, during the Uruguay Round negotiations had reasonably relied on the experience of its exporters and traders in actually exporting these products to the EC under Chapter 84 and reasonably expected that these products would continue to receive treatment by the EC as computers, computer units or computer parts under Chapter 84.

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<sup>41</sup>See Annex 4.

5.28 The **European Communities** stated that during the Uruguay Round, both the EC and the United States had made numerous tariff concessions in various areas. However, none of the products at issue were discussed by name. No specific binding was made for any of the individual products at issue. Only the tariff headings in question were bound. Singapore's request on heading 84.71 in which it identified by name "gateways, "concentrators" and "multiplexer", did not constitute any evidence that the EC had accepted that its concessions on computers would cover these components. First Singapore's product listing under heading 84.71 was derived from Singapore's own tariff classification, and secondly subsequently to this preliminary tariff request, Singapore sent a revised tariff request to the EC on 10 October 1990.<sup>42</sup> Significantly in the revised list, "gateways", "concentrators" and "multiplexers" were not mentioned anymore under the tariff heading 84.71. Singapore had not submitted any evidence that the EC in the meantime, or afterwards, had accepted to grant the tariff treatment accorded to computers to these products. On the contrary, the EC had clearly classified multiplexers, for instance, as telecom equipment in a 1992 Regulation<sup>43</sup>, well before the end of the Uruguay Round. If Singapore had any expectations left, this Regulation certainly must have put an end to them. For these reasons, Singapore could not legitimately claim to have established that the EC indicated or raised expectations during the Uruguay Round, that LAN equipment would be covered by the tariff concession on computers. In any event, any expectations raised by this bilateral correspondence in the mind of Singapore could not be conferred on the United States.

5.29 The EC, additionally alleged, contrary to the United States, that American industry was aware of this problem. The American Electronics Association (AEA), which represented the computer industry, had scheduled a meeting with Commission officials on 25 February 1994 in order to discuss a number of issues including classification differences in member States with respect to a number of products including LAN interface. Tariff headings to be discussed in this context included 85.17, 84.71 and 84.73. So when asking for the meeting, the AEA (and certainly some of their members manufacturing LAN) were aware that LAN equipment was not classified in a uniform manner within the EC.

5.30 The **United States** responded that during negotiations it had not inquired specifically into the treatment of these products, as there was no reason to doubt that these products would continue to be treated as dutiable under heading 84.71. The EC on its part did not provide any notice to US negotiators during the negotiations of any doubts that the EC or member State authorities might have had concerning the proper classification or duty rate applicable to these products. And, of course, given the tariff treatment applied at the time, there would have been no logical reason for the EC to do so. Moreover, tariff negotiators dealing with thousands of tariff lines could not have discussed the precise product composition of each line without taking an additional ten years to complete the Uruguay Round. Thus, the EC's position would throw into uncertainty practically every tariff concession the EC or any of its trading partners made in the Uruguay Round. As for the AEA meeting, the

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<sup>42</sup>This letter contained the following:

"Dear Paul,

I am writing with reference to my letter of 22 June wherein I forwarded to you Singapore's preliminary request list for the tariff negotiations.

Following bilateral discussions with your market access negotiators, Singapore has revised its request list. I am enclosing the revised Singapore tariff request list to EEC. It would be appreciated if you could transmit it to the appropriate authorities. I hope that these requests would be considered favourably.

Yours sincerely, [signature]"

<sup>43</sup>EC Regulation 396/92 of 18 February 1992, OJ 1992 L44/9.

United States had made inquiries, and was unable to confirm whether a meeting had, in fact, taken place in February 1994 or before the end of the Uruguay Round.

5.31 The United States questioned whether the argument that no specific binding was made for any of the products at issue because they were not discussed by name during the Uruguay Round and only the tariff headings in question were bound meant that if there was no "specific binding" for these products under Chapter 84, then they were bound under Chapter 85, and if so, why there, given the evidence suggesting otherwise? And if not, were they then to be considered unbound? The implications of such an argument were disturbing when considered in relation to the Uruguay Round tariff concessions, and even more so for Tokyo Round and Kennedy Round concessions. Although the United States had negotiated in the Uruguay Round on a request/offer basis, some participants in the Round had negotiated by using a tariff reduction formula. 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. Discussion of specific product coverage was even less likely when all negotiators used a formula approach to tariff reduction, as was the case in the Tokyo Round and the Kennedy Round. Was the EC arguing that whenever the formula approach was utilized, the headings were bound but the products within the headings were not, and if so an importing country could reclassify such products at will into higher-duty headings with no duty to provide compensation? If so, not only was the balance established by all previous negotiating rounds upset, but all future negotiations would require a fundamentally different, and more time-consuming and complicated, approach.

5.32 The **European Communities** stated that the allegation raised by the United States, that the EC's position was that the products subject to the dispute were unbound under the EC-Schedule LXXX, was absurd. Its real position was that these products were not bound with computers under tariff heading 84.71, but were bound with electric machinery under the relevant tariff headings of chapter 85 of the EC schedule.

5.33 It was possible that the EC and the US negotiators did not have the same understanding on what precisely were the products to which their tariff negotiations related. In fact, no party to the negotiations raised the issue that customs duty treatment of LAN equipment differed from one country to another. This meant that different concessions were negotiated by various parties for the same products. The US negotiators might find it difficult to admit now that their understanding of the tariff classification in the EC of the products they talk about now was erroneous; however, they only had themselves to blame. They should have come forward and requested clarification from the EC negotiators if they were not sure where these products should be classified in the EC especially since they themselves had reclassified these products only shortly beforehand; a fact which was conveniently omitted by the United States. During the Uruguay Round, the United States had considered LAN equipment to be covered by category 85.17, but in 1992 on its own initiative the United States had reclassified LAN equipment under heading 84.71; so, in fact, the reclassifying party was the United States and not the EC. Moreover, the United States, after having reclassified LAN equipment itself, in 1992 from telecom equipment to computers, did not acknowledge or inform trading partners of this fact, nor did it amend its offer/request to the EC during the Uruguay Round. Canada was another example of a reclassifying Member. During the NAFTA negotiations, the parties to this agreement had admitted that it was difficult to classify LAN equipment, and they had agreed to consult on this issue and to endeavour to agree, no later than 1 January 1994, on the classification of such goods in each Party's tariff schedule.<sup>44</sup> Following this agreement and not earlier than May 1995, Canada modified its classification practice

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<sup>44</sup>Annex 308.3 to NAFTA.

and began to classify LAN equipment from then on under heading 84.71. In a Customs Notice of 24 May 1995, the Canadian Department of Revenue observed that: "Although valid statements can be made for classification under heading No. 85.17, the Department has decided to adopt a harmonized NAFTA classification position for LAN apparatus under heading No. 84.71"<sup>45</sup>

5.34 The **United States** argued that the first important point to note was that the classification by the United States of imported goods under the Tariff Schedules of the United States Annotated or the Harmonized Tariff Schedule of the United States did not affect the reasonable expectation of the United States that the EC, the United Kingdom and Ireland would provide the tariff treatment to LAN equipment according to the concessions in the EC Schedule for automatic data processing equipment or parts thereof. It was unaware of any assumptions about the classification decisions taken by EC, UK or Irish customs authorities based upon the decisions of the United States under its tariff schedule. Such assumptions would have been wholly speculative, at best. Furthermore, the impact of US classification of such goods on its GATT tariff bindings was not apparent, as the United States had negotiated during the relevant period in the context of the North American Free Trade Agreement an understanding to move to MFN duty-free treatment of imported automatic data processing equipment.

5.35 The **European Communities** stated that the change in classification or reclassification by the United States in 1992 and Canada in 1995 was important enough to be mentioned because it showed that classification of LAN equipment was unsettled during the Uruguay round. These examples illustrated that the United States had no particular reason to expect that the EC would classify LAN equipment as computers. They also helped to put the initially inconsistent classifications of some national customs authorities in the EC into better perspective. Classification of this equipment was indeed a difficult exercise for everybody. This should have forewarned EC trading partners not to draw hasty conclusions from tariff treatment in individual cases which they found favourable. Furthermore, the recent negotiations on the Information Technology Agreement showed again the many diversities between WTO trading partners in classifying LAN equipment. For instance, two of the third parties to this dispute, Japan and Korea, were still classifying some LAN equipment as telecom equipment.<sup>46</sup>

(b) Imports of products

5.36 The **United States** claimed that imports of the products at issue into the EC were treated under Chapter 84 during the Uruguay Round. This treatment could be determined through examining trade figures and other data such as invoices. In conjunction with actual treatment, classification rulings by the importing country provided particularly compelling evidence of the actual product scope of a particular tariff heading.

5.37 The **European Communities** noted that as indicated before, tariff treatment was different from custom classification. The fact of classifying a product under a certain tariff heading was separate from the agreement Members might have reached on the tariff treatment for particular items during multilateral tariff negotiations. A tariff binding could not be inferred from individual classification decisions by local customs authorities on individual consignments. If as a result of such individual classification decisions, an importer obtained more favourable tariff treatment than that foreseen in the tariff schedule, this represented a windfall benefit for that company and did not have an effect on the rights and obligations held by WTO Members.

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<sup>45</sup>Canadian Customs Notice No. 963 of 24 May 1995, page 4.

<sup>46</sup>See Annex 5.

5.38 The **United States** argued that the classification actions by the importing member States of the EC were clearly relevant in determining such treatment. Such actions demonstrated where trade was expected to and did, flow. They provided particularly compelling evidence that specific products fell within the product scope of a particular tariff heading, and that the authorities in the EC were aware of that product scope. In particular, the treatment accorded to LAN equipment under BTIs and other member State classification actions prior to 1993 was especially compelling given the absence of any EC-wide classification regulations on these products or even a mechanism to obtain BTIs with EC-wide applicability. No legitimate objection could be raised that the classification of goods imported consistent with such a ruling was fraudulent or mistaken.

5.39 The **European Communities** responded that it was clear that the EC was not bound vis-à-vis its trading partners by any actions of national authorities which were inconsistent with the EC's position, but which might have benefited certain individuals. Likewise the EC would not claim to derive any rights against the US government, for instance, if a local US customs office mistakenly levied duties on EC imports that were lower than those negotiated and bound by the United States in the WTO.

5.40 The **United States** argued that the analogy was misplaced on the ground that EC member States were themselves WTO Members, as already mentioned. Moreover, the situation in the present dispute had special features because the actual treatment of any product in the EC depended on actions by the customs authorities of each EC member State.

5.41 At the same time, the United States wished to note that sufficiency of evidence such as BTIs should not be the issue in this case. It just so happened that US exporters of the products subject to this dispute sought BTIs before exporting their products and those BTIs demonstrated treatment during the Uruguay Round as automatic data processing equipment. But what if they had not? What if there had been no document from UK and Irish customs officials articulating tariff treatment? In the normal course of trade US exporters sent products to Europe, claimed tariff treatment under headings 84.71 and 84.73 (for parts) and, in the absence of review by customs authorities, paid the duties owed. The paper trail there would not have involved a piece of paper from the customs authorities themselves. What then? Legally, it would have no effect on the strength of the US claim. Trade in the product, and the mere fact of customs treatment should be enough. That was not just the US view, but also the view of the European Commission, as set out in an "Aide-Mémoire" as far back as in 1981 when the EC had wished to draw the attention of the US authorities to the tariff reclassification by US customs service of tire protection chains. These products had been classified under TSUS no. 652.24 through 652.33, but in October 1979, the US Customs Service considered this classification as erroneous and proposed to classify these chains under TSU no. 652.35, resulting in an increase of the applied duty. The Commission had indicated that it was "...of the opinion that the reclassification under TSUS no. 652.35, bearing a much higher duty rate than the concessional rates (for TSUS nos. 652.24 through 652.33) is inconsistent with the obligations of the US under the GATT. Furthermore, the Commission considers that, even if it could be maintained that the articles in question had been erroneously classified under TSUS no. 652.24 through 652.33, the fact that over a period of many years (including the period during which the relevant tariff concession was negotiated) these articles were treated as belonging to these headings would be sufficient in itself to establish the concessional rights of the EC to a continuation of the tariff treatment promised in respect of the classification for these articles".<sup>47</sup>

5.42 The **European Communities** noted that the "Aide Mémoire" referred to by the United States was dated 22 May 1981, which was almost sixteen years ago. It was written in a completely different

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<sup>47</sup>European Commission Aide-Mémoire, 22 May 1981.

context and related to different products, and therefore could not be relevant to the present case. Moreover, the background to the situation was unknown. Additionally, in that "Aide-Mémoire" the EC had referred to an acknowledgement by the US State Department that "for some cases brought up, the Community might have some GATT rights". In the present dispute, this was not the case; the EC was not acknowledging that the United States had any WTO rights.

(i) BTIs and national classification

5.43 The **United States** claimed that classification actions by member States provided evidence that these products were treated uniformly under Chapter 84 during the Uruguay Round. In fact, prior to the conclusion of the Uruguay Round, and going back as far as 1988, many EC member States, including at least Ireland, the United Kingdom, France, Belgium and Luxembourg, treated imports from the United States of LAN adapter cards and other LAN equipment as computer equipment, dutiable at the rates applicable to products falling under heading 8471. Additionally, prior to the implementation of the European Commission's LAN adapter card Regulation, other member States, including the Netherlands and Denmark, also issued BTIs treating LAN equipment under Chapter 84. The existing treatment in these member States prior to 1994 formed the basis for the United States' expectations during the Uruguay Round negotiations.

5.44 To support this claim, in addition to the BTIs issued by Ireland<sup>48</sup>, and classification decisions by the UK<sup>49</sup> Customs and Excise, in which certain LAN equipment products subject to dispute were classified under 84.71, the United States had also produced letters from four of the leading US exporters of LAN equipment to Europe<sup>50</sup> attesting to the fact that all of their LAN equipment exported to Ireland and the United Kingdom between 1991 and 1994 was classified by customs authorities under 84.71 or 84.73. One of them distributed its products through its primary warehousing facility in Ireland. Another distributed through a subsidiary in the United Kingdom. The four companies which submitted the letters represented over 75 per cent of LAN equipment export from the United States to the EC. The United States had also submitted four BTIs issued by the Dutch<sup>51</sup> customs authorities, eight BTIs issued by the French<sup>52</sup> customs authorities and four BTIs by the Danish<sup>53</sup> authorities during the period from October 1993 to January 1995 in which LAN equipment was determined to be dutiable under heading 84.71 or 84.73. Furthermore, as late as June 1995, France had asserted at a meeting of the European Commission Customs Code Committee<sup>54</sup> that only "real telecommunication equipment" could be classified under 85.17. US exporters of LAN equipment had also verified that routers imported into Belgium<sup>55</sup> in 1995 were classified under 8471.9910, and at least one manufacturer of computer products had imported routers into Luxembourg under the heading 84.71 in 1993 and 1994.

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<sup>48</sup>See Annex 4, Table 1, Nos. 13-44.

<sup>49</sup>See Annex 4, Table 2, Nos. 1-3.

<sup>50</sup>See Annex 4, Table 3, Nos. 6-9.

<sup>51</sup>See Annex 4, Table 1, Nos. 45-48.

<sup>52</sup>See Annex 4, Table 1, Nos. 5-12.

<sup>53</sup>See Annex 4, Table 1, Nos. 1-4.

<sup>54</sup>See Annex 4, Table 3, No. 5.

<sup>55</sup>See Annex 4, Table 3, No. 1.



5.45 In addition to the EC-12, at least two of the three countries that acceded to the EC in 1995 provided tariff treatment for LAN equipment under heading 84.71 prior to accession. Both Finland and Sweden<sup>56</sup>, at the time had bound their tariffs under the Uruguay Round and prior to accession to the EC had treated LAN equipment as ADP equipment under heading 84.71. Under Finland's Uruguay Round Schedule of tariff concessions, LAN equipment under heading 84.71 was bound at a flat rate of 0.9 per cent. Under Sweden's Uruguay Round schedule of tariff concessions, LAN equipment, under heading 8471.9910, was staged from a base rate of 3.8 per cent in 1995 to a duty free bound rate in 1999 (other products under heading 84.71 were staged from 3.8 per cent to 1.9 per cent).

5.46 The **European Communities** noted that, contrary to what the United States alleged, the EC member States did not treat these products uniformly under Chapter 84 during the Uruguay Round. Significantly, in the EC there had been a tendency since the early 1990s to classify more and more components, which could be used in LAN and other kind of networks (e.g. telephone networks), as telecom equipment. The question of proper classification of LAN equipment was litigated early on, in Germany. There, the customs authorities issued, already in 1989, BTIs classifying LAN under heading 85.17. These rulings were upheld by the German Federal Tax Court in 1991.<sup>57</sup> Subsequently the German customs authorities duly continued to issue BTIs for LAN equipment under heading 85.17. For example, in 1992, the German customs authorities had issued a BTI for LAN adapter cards under 85.17<sup>58</sup>; the Dutch customs authorities had also issued BTIs classifying LAN equipment under heading 85.17<sup>59</sup>, as did the UK<sup>60</sup> and French<sup>61</sup> customs authorities.

5.47 It was also true that customs authorities in some member States had initially considered LAN equipment to fall under heading 84.71, for example Ireland had issued BTIs classifying some LAN equipment under heading 84.71. However, the EC wished to recall that the impact of a BTI was limited. It could only be invoked by the individual to whom it was addressed and was temporary and restricted to the specific type of product it covered; its validity was limited in time and a BTI did not guarantee that the classification of the goods was correct and could be relied upon by the individual in the future. BTIs did not represent classification decisions of the EC. As such, BTIs created no rights or legitimate expectations for governments in the context of WTO. Thus, the Community Customs Code provided explicitly that a BTI ceased to be valid where an EC regulation was adopted and the information no longer conformed to the law laid down thereby or where the BTI was incompatible with a judgement of the ECJ.

5.48 For these reasons, the BTIs issued by the Irish Customs authorities could not have created rights and expectations for the United States about future classifications or duty treatment by the EC. Especially, in that particular case, as these BTIs were all issued on the same day by one customs office to one single company. It was not as if these BTIs reflected a consistent practice of the Irish customs authorities. With respect to the United Kingdom, reference was made to a few letters from customs

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<sup>56</sup>See Annex 4, Table 3, Nos. 3 and 4.

<sup>57</sup>See Annex 6, Table 2, No. 1.

<sup>58</sup>See Annex 6, Table 1, No.4.

<sup>59</sup>See Annex 6, Table 1, Nos. 5-34.

<sup>60</sup>See Annex 6, Table 1, Nos. 35-44.

<sup>61</sup>See Annex 6, Table 1, Nos. 1-3.

authorities and it was even unclear to whom they were addressed. As far as France and Belgium were concerned the United States had produced initially importers invoices to support its allegation. However, these documents were dated 1995 and 1996 and were therefore beyond the relevant period. Also, there was no indication that these documents concerned LAN equipment; they only referred to "computer parts". Finally, as far as the EC could determine, these invoices reflected only self-certification by importers, and no decision by customs authorities. Regarding France, in particular, the unofficial report of the EC's Nomenclature Committee meeting produced by the United States, reflected an opinion which the French representative was supposed to have expressed during the meeting; it did not establish that the French customs authorities actually classified LAN equipment under heading 84.71. The French BTIs which had been submitted were also issued after 1993 which indicated that they could not have formed the basis of reasonable expectations by the United States that tariff treatment was going to be that covered by 84.71. With respect to the Netherlands, the United States had submitted merely one "original" BTI issued by the competent Dutch authorities. Moreover this original contained no stamp or other means of certification. In any event according to the English translation, the rulings date from 1995, which was after the conclusion of the Uruguay Round and could certainly not have created reasonable expectations for the United States during those negotiations. With regard to Denmark, the United States had produced five "original" BTIs which were unidentifiable. No date was mentioned in the English translations or identifiable in the "original rulings". With respect to Luxembourg, no document had even been submitted regarding the classification practice of its customs authorities. The United States had also claimed that Finland and Sweden at the time they had bound their tariffs under the Uruguay Round, which was prior to their accession to the EC, had treated LAN equipment under heading 84.71. This might well be true but was irrelevant. As already explained, when countries acceded to the EC, they withdrew their individual schedules. A new schedule of the enlarged Community was then negotiated with the EC trading partners. The EC and the United States had already agreed on the EC concessions under this new schedule, and therefore no reasonable expectations could be based on the withdrawn individual schedules of Finland and Sweden.

5.49 With reference to the letters which the United States had submitted from the four leading US companies exporting LAN equipment to the EC, the EC pointed out that in the evidence submitted to the Panel by the EC, the EC had included a BTI issued to one of those companies in 1993 by the UK HM Customs and Excise, which classified a router under tariff heading 85.17.<sup>62</sup> This seemed to contradict the claim by that company that all its export of LAN equipment to the United Kingdom was classified under 84.71 during the relevant period. This situation created serious doubt as to the reliability of the statement made by that company that all its export of LAN equipment to Ireland and the United Kingdom was classified under Chapter 84.

5.50 What had been demonstrated by the above information was the fact that there was no uniform classification<sup>63</sup> in the EC member States with respect to LAN equipment during the Uruguay Round

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<sup>62</sup>See Annex 4, Table 3, No. 8 and Annex 6, Table 1, No. 41.

<sup>63</sup>The aim and purpose of the relevant EC law in the context of the present case was to ensure that no conflicting BTIs be issued for the same product, nor even for similar products. That did not mean that such situations would never arise in practice. The EC had put in place a data base in order to avoid such situations as much as humanly possible. However, such undesirable things did happen occasionally in practice. In this context it was important to remember that the EC customs authorities were dealing daily with hundreds of applications in eleven different official languages. Misunderstandings or even fraudulent behaviour were a reality under such circumstances (Importers were required to indicate whether they have knowledge of the existence of a BTI for the product for which they are submitting a BTI application (cf. Article 6 para. 4 lit. j. of Commission Regulation No. 2454/93).

(continued...)

period. Although, the process of unifying the views on classification of LAN equipment had taken time, the EC applying the HS interpretation rules had consistently taken the view that components of data transmitting networks in general and LAN in particular should be classified under 85.17 on the basis that its principal function is the communication/transmission of data. This was reflected in a number of Regulations issued on this matter starting from 1992. In 1992, the EC had issued a Regulation which classified a multiplexer under heading 85.17, describing a multiplexer as "an electronic multiplexing appliance in its own housing which enables multiple link-ups to be made between the different connection points of a computer network."<sup>64</sup> In March 1994, the EC had issued another Classification Regulation in which it classified modems as telecom equipment under 85.17.<sup>65</sup> A few weeks later, it decided that heading 85.17 should equally apply to adapters and transceivers.<sup>66</sup> Finally, the Commission had adopted on 23 May 1995 a Regulation noting *inter alia* that the proper classification of LAN adapter cards was 85.17.<sup>67</sup>

5.51 In view of all of the above, the United States should not have formed any "reasonable expectations" as to the treatment accorded to the products subject to the dispute.

5.52 The **United States** disagreed with the EC argument that the BTIs issued by customs authorities from Netherlands, Denmark and France after 1993 were irrelevant. These BTIs were relevant because they reflected previous practice (i.e. during the Uruguay Round) by these countries. According to the experience of US exporters, these member States had continued to treat imports of the relevant LAN equipment as computer parts and units under headings 84.71 and 84.73 until 1995-1996. Following the EC's publication of the adapter card regulation, these and other member States began reclassifying LAN adapter cards and other LAN equipment. In some instances, customs authorities also began in 1995 to make the unwarranted demand that importers pay additional duties for past LAN equipment imports based on the difference between the 84.71 or 84.73 rate and the 85.17 rate. For example, in August 1995, the Luxembourg customs authorities sent invoices to importers seeking to reopen their duty liability and collect for shipments since January 1993 the difference between the 3.6 per cent actually charged under heading 84.71 and the 7.5 per cent applicable under 85.17. As another example, a company whose LAN equipment had entered the United Kingdom on 11 May 1995 as ADP machines under heading 84.71, received a demand note for the difference in duties on 7 June 1996, when the

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<sup>63</sup>(...continued)

There was a delicate balance to be drawn between a thorough and efficient implementation of EC customs law in individual cases and a smooth handling of ongoing trade operations by customs authorities. Customs formalities in the EC had to allow for the thorough implementation of all customs rules, but was not to become an obstacle for trade. The only alternative to the present decentralized organization of customs services would be to have a fully centralized customs service with specialized offices for particular products. The EC did not believe that such a change would be in the interest of the trading community. Also to be recalled was the fact that something which was not provided for in law or which was prohibited by law did not mean that it did not exist. Theft was presumably prohibited by law everywhere in the world. The promulgation and implementation of the relevant legal provisions did unfortunately not mean that theft had been eradicated and no longer existed, however, thoroughly the law was applied in individual countries.

<sup>64</sup>Regulation 396/92, *op cit*.

<sup>65</sup>Regulation 754/94 of 30 March 1994, OJ 1994 L 89/2.

<sup>66</sup>Regulation 1638/94 of 5 July 1994, OJ 1994 L 172/5.

<sup>67</sup>Commission Regulation 1165/95, OJ 1995 L 117/15.

United Kingdom reclassified these products. In this note, the UK customs authority asked the higher tariff rate on the imports of the products for the past year.

5.53 The EC had suggested that US expectations should instead have been formed based upon a 1991 decision by the German Bundesfinanzhof affirming BTIs issued by German customs authorities to a non-US firm (Transtec) in 1989. The reference to the Transtec ruling was irrelevant as this ruling had no authority outside of Germany and did not justify tariff treatment less favourable than or inconsistent with the EC Uruguay Round bindings negotiated for heading 8471. Under EC law, national court rulings concerning the classification of products were not binding on the customs authorities of other member States. In addition, the legal basis of the Transtec decision was reversed in a later decision by the ECJ. In the case of Siemens Nixdorf, ECJ Case C-11/93, the ECJ had ruled in favour of broad product coverage under heading 84.71.<sup>68</sup> In so doing, the ECJ had rejected the rationale relied on by the Transtec court. In the Transtec case, the Bundesfinanzhof had ruled that certain computer network equipment were classifiable as telecommunications equipment based upon the court's interpretation of the term "specific function" in Note 5 to Chapter 84 of the HS.<sup>69</sup> In the German court's view, classification under heading 84.71 was precluded where the equipment in question was viewed by customs authorities as having a "specific function" (data transmission) which was distinct from "data processing." In Siemens-Nixdorf, the ECJ had rejected this reasoning, and instead interpreted Note 5 to mean that "any unit which is connected to the central processing unit of a data-processing system and which is able to accept or deliver data in a form -- code or signals -- which can be used by the system is to be regarded as being a part of the complete system of an automatic data processing machine and classified under heading 8471".<sup>70</sup>

5.54 The EC had also claimed that products classified by the Regulations referred to by the EC signalled a tendency in the EC to classify LAN components under 85.17 which should have warned the United States; however, these products were outside the scope of this dispute. The EC had included multiplexers and modems in its description of LAN equipment, suggesting that these, too, were LAN products, which was not the case. Modems were combined modulators-demodulators, which operated to convert a signal in order to achieve compatibility in a telecommunications environment. Modems had been historically classified and accorded tariff treatment as telecommunications apparatus by the EC and other US trading partners. Likewise multiplexers were not LAN products. "Multiplexing" was a technique for interleaving point-to-point telecommunications calls coming from different sources and going to different destinations but passing through common telecommunications trunk lines. The most simple way to describe this was the method by which one "dials" a call on the telephone or facsimile machine. Without multiplexers, each destination (eg. a telephone) would have to be individually connected to each other's end point, rather than through common trunk lines. Such multiplexing did not operate in a LAN environment. In a LAN, all data and processing information was automatically

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<sup>68</sup>See Annex 4, Table 3, No. 10.

<sup>69</sup>See footnote 15.

<sup>70</sup>The reasoning of the ECJ in Siemens-Nixdorf was consistent with the Opinion of the Advocate General and the position of the European Commission. The ECJ issued its decision on May 19, 1994. However, the Advocate General and the European Commission provided their views, with which the ECJ concurred, well before that date. The Advocate General delivered his opinion on January 27, 1994, after receiving and reviewing the views of the parties. The Advocate General wrote that he was adopting the views expressed by the European Commission, that Note 5 to Chapter 84 of the Combined Nomenclature should be interpreted as meaning that "separately housed units which are integral parts of a data-processing system come under heading 8471, if by virtue of their design, they are not suitable for using except as part of a data-processing system."

passed to all active interfaces or stations that were connected. Only those interfaces or stations which recognized themselves as being intended destinations would copy the transmitted data from their physical interface to their processing engines.

5.55 Additionally, these Regulations were issued after the relevant negotiating period. Specifically the EC had cited its classification Regulation on LAN adapters issued in June 1994. The United States noted that given that the EC had issued the relevant Regulation several months after it had bound its tariff in the Uruguay Round, the EC had no legitimate basis to rely on the adapter regulation as evidence of the United States' expectations during the Uruguay Round regarding tariff treatment of those or other LAN products.

5.56 The BTIs submitted by the EC from 3 (France, Netherlands and the United Kingdom) of 15 member States over a four year time-period concerning a number of narrowly-defined products from specific producers did not, as claimed by the EC, constitute evidence that the EC had changed its collective opinion of the classification of all networking equipment. The UK BTI<sup>71</sup> effective December 1993 related to a "statistical time division multiplexer," which was a product outside the scope of this dispute. Six UK BTIs<sup>72</sup> were effective as from February 1994, i.e. only after the close of substantive tariff negotiations and their existence was not drawn to the attention of US tariff negotiators during the verification process. A Dutch BTI<sup>73</sup> appeared also to relate to a multiplexer. One French BTI<sup>74</sup> referring to a "multiprotocol terminal server for server/mainframe exchanges" which was related to a front-end controller for mainframe computers, was not relevant to the products at issue.

5.57 The question raised by the EC about the apparent contradiction between the BTI issued by the UK customs classifying a router under 85.17, and the exporting US company's claim in a letter that all its exports of LAN equipment had always been classified by UK customs under 84.71 did not cast any doubts about the reliability of the company's claim. The explanation was as follows: the company's UK office had used the 84.71 classification for its import entries until the UK customs had issued the BTI of 11 October 1993 for certain router products. The company had instructed its customs broker to initiate protest procedures, and had corresponded with the UK Customs on this matter until the company's protest about the classification of this product under 85.17 had been finally rejected on 5 May 1994. Moreover, because this company used the method of distribution<sup>75</sup>, whereby it was

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<sup>71</sup>UK 55700: See Annex 6, Table 1, No. 42.

<sup>72</sup>UK57112, UK57127, UK57128, UK57141, UK57142, UK 57110: See Annex 6, Table 1, Nos: 35, 36, 37, 38, 39 and 40.

<sup>73</sup>NL199109209450089-0: See Annex 6, Table 1, No. 10.

<sup>74</sup>FR 06190199102248: See Annex 6, Table 1, No. 3.

<sup>75</sup>Product distribution in the EC may take place in many ways, but two scenarios are the most frequent. First, if products are distributed on a Free-on-Board (FOB) Plant basis, the EC customer takes possession of the goods at the foreign manufacturer's plant and is responsible for all subsequent distribution activities, including transportation, customs clearance, and subsequent delivery to an end user in the EC; in this scenario there may be many entry points. In the second likely scenario, a foreign multinational retains title to the goods and undertakes these activities itself. To provide the customer with the lowest landed cost and maximum flexibility, distribution is often done through a centralized location. Redistribution to end customers may be done post customs clearance where the goods are in free circulation, or in bond using a T1 transit document which enables the goods to be transported to the final destination country where customs clearance will be made. A growing number of

not the importer, it had relied on information from its customers who were the importers that the common treatment of this equipment in the EC was under 84.71 during this same period.

5.58 The point worth noting was that the United States had produced as many BTIs from as many member States where networking equipment was classified under heading 84.71 or 84.73. It would appear that this consideration begged the question of what effect actions by one member State's customs authorities might have on expectations with regard to treatment under concessions for another member State. While actions at the Community level might affect expectations regarding market access with respect to trade into all member States, the treatment of a product by Greece, for instance, could not be deemed to affect the expectations of an exporter with respect to the treatment contemplated for its exports to the United Kingdom or for its exports to the entire Community. If so, then the concessions of the Community and of the member States were all fundamentally unreliable, and the Community, alone among WTO Members, was placed in the unique position in which the treatment accorded by the Community, and each of its member States, could be reduced to the least common denominator of the treatment by any of its member States. Such an interpretation should not be accorded to Article II or to these concessions. Moreover, since the EC's trading partners knew that exporters could enter goods in one member State and then ship them free of duty to any other member State, they should be able to rely on the most favourable treatment provided in any member State. The United States noted the parallel to the interpretation that had been given to GATT Article III in disputes concerning measures of provinces or states in the United States and Canada; past GATT panels had held that Article III required treatment of imported products no less favourable than the treatment accorded to the most-favoured domestic product.<sup>76</sup>

5.59 The **European Communities** stated that the EC considered the principal function of LAN equipment to be the transmission of data between computers. Thus the communication function was paramount. The purpose of processing data by the LAN equipment was to enable that data to be communicated. Some modems were peripheral devices that permitted a personal computer, minicomputer, or mainframe, to receive and transmit data in digital format across voice telecommunication lines. Thus, their function was not unlike that of a router. Some multiplexers also fell within the definition of LAN equipment. In a US ruling of 21 March 1989 (NY 837606), sixteen line intelligent multiplexers described as networking boards, which were to be installed in a mainframe computer chassis and which appeared to be dedicated to the transmission of signals representing symbols and data, were classified under HS heading 8517.82. Later, following the reclassification decision of LAN equipment by the United States in 1992, a product known as statistical multiplexers was classified in HS heading 8471.80 in a ruling of 13 February 1996 (NY A80132). The multiplexers in question were designed to provide interconnection between dumb terminals and/or desk-top processors with centrally located minicomputers in both LAN and WAN applications. Moreover, Singapore, in its submission, had identified a multiplexer as LAN equipment.<sup>77</sup> In conclusion, if this dispute was about

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companies, including a number of the exporters of LAN equipment, are transitioning to the latter distribution strategy (Information provided by the United States).

<sup>76</sup>Panel Report on *United States - Measures Affecting Alcoholic and Malt Beverages*, adopted on 19 June 1992, BISD 39S/206, para. 5.17; Panel Report on *Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, adopted on 18 February 1992, BISD 39S/27, note to para. 5.4; see Analytical Index/Guide to GATT Law and Practice (1995 ed.), page. 130.

<sup>77</sup>It stated the following: "Significantly, Singapore's request on 8471.99 identified by name examples of LAN equipment covered by the request namely: 'gateways', 'concentrators' and 'multiplexers'".

LAN equipment other than LAN adapter cards, which the EC contested, it necessarily also included certain modems and multiplexers.

5.60 In this connection, it was also important to note that the BTIs issued by France, the Netherlands and the United Kingdom submitted by the EC were relevant. They were not as asserted by the United States dealing with products outside the scope of this issue. They, in fact, dealt with those types of LAN equipment which were complete in that they were imported in their own housing and included routers, bridges, hubs, servers and multiplexers used in computer networks for data transmission. They were not limited to connecting computers within a local area network but were also used for communication between networks. For example, routers controlled the flow of information between the different LANs that made up the larger wide-area networks (WAN).

5.61 Furthermore, the ECJ ruling in the Siemens Nixdorf case had not undermined the ruling of the German Bundesfinanzhof of 1991. In the German case, the product at issue related to LAN components, including a LAN adapter device. In the Siemens-Nixdorf case, the product at issue was a video monitor that could only receive signals from a data processing machine. The two products were therefore completely different and their functions did not correspond in any way. The German court case still stood and was not only relevant for Germany, as the United States wrongly alleged, since products imported into Germany participated in the free circulation of goods in the entire EC.

5.62 Finally, the EC wished to emphasize that how many individual classifications had been made in one direction rather than in the other could certainly not be considered decisive since at best the classification practice could only be characterized as inconsistent. How under these circumstances the US negotiators could have derived certainty about an agreed tariff treatment or even simple expectations from individual classification decisions while they were negotiating tariff concessions with the EC as a whole was extremely unclear; the EC could not be held bound by such unjustified expectations.

(ii) Trade Flows

5.63 The **United States** claimed that trade data demonstrated that the EC and its member States treated imports of these products under Chapter 84. The data and documents containing trade statistics relied on during the negotiations demonstrated that there were large and increasing trade flows of the products at issue within tariff heading 84.71. The EC's trading partners had a right to rely on this well-known treatment in bargaining for tariff concessions and to assume that such treatment would continue in the absence of any statement to the contrary by the EC. The calculations submitted by the EC in the 1993 negotiations to justify the value of its Uruguay Round tariff offer confirmed the reasonableness of the US expectation in this regard. These data indicated that US-originating imports into the EC of products treated as automatic data processing products under Chapter 84 closely tracked US exports of computers, computer peripherals and computer parts. Trade flow trends confirmed the US claim that, in the aftermath of the Uruguay Round, the EC changed the tariff treatment of the products at issue from that which was negotiated. Thus, while US exports of LAN equipment, as reported on the Shipper's Export Declarations under expected heading 8471.99 continued to rise in 1994 and 1995, the EC's trade data indicated that the products as classified as dutiable under that heading sharply declined in 1995. At the same time, the EC's reported imports of products dutiable as telecommunications equipment under 8517.82 increased in an amount disproportionate to the US exporters reported exports of products they expected to be treated under that heading.<sup>78</sup>

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<sup>78</sup>See Annex 7.

5.64 Furthermore, interpretation of trade flows in relation to the headings in a particular schedule had to take into account the agreed context of the tariff negotiations in the Uruguay Round. The Mid-term Review decision of Ministers on Tariffs adopted at the Montreal Ministerial Meeting of December 1988 provided explicitly: "Participants have agreed that in the negotiation of tariff concessions, current nomenclatures should be employed... ." <sup>79</sup> Thus, the participants had agreed that the tariff negotiations would take place on the basis of the tariff treatment that was operative during the negotiations.

5.65 The **European Communities** stated that with regard to the arguments put forward by the United States on trade figures, EC import figures from the United States for 8471.99 did not show that they had "sharply declined in 1995". Indeed the volume of imports from the US trade under heading 8471.99 had remained fairly constant since 1990; this constancy was also reflected in EC imports from the United States for the products under 84.71. However, for all products falling under 85.17 there had been since 1990 growth in imports from the United States. This was due to the ever increasing use of telephone and telecommunications equipment. LAN equipment was involved in that growth but did not account for all of it. While exporters might have said that the products they had shipped to the EC under 84.71 were LAN equipment, the EC did not know whether, in all such cases, the products were declared as LAN equipment or just declared as computers or computer products. Apart from this, the following elements also had to be considered:

- It was possible that certain companies in certain cases had received windfall benefits through BTIs which enabled them to obtain a lower duty treatment for specific LAN products in another heading, e.g. 84.71/84.73.
- In other cases, as was already mentioned, importers might not have specifically mentioned LAN equipment when declaring products under 84.71/84.73. Indeed the evidence supplied to the Panel's questions by the United States showed that the products in question were declared as computer parts under HS heading 84.73 ("accessoires d'ordinateurs" and "onderdelen voor computers")<sup>80</sup> and not as LAN equipment.
- It was quite possible, not to say likely, that certain exporters were regarding all products they had shipped under 84.71 to be LAN equipment. Indeed, the statements submitted by the United States were ambiguous, if not incorrect. When products were shipped they were declared according to the exporting country's classification of a particular product, and in the period referred to, the United States had classified these products under tariff heading 84.71. However, when products were imported into a third country, they should be declared in accordance with the classification as determined by the importing country. When the United States and the EC disagreed on a particular classification of an EC product, the United States did not grant tariff treatment under the heading supported by the EC but under the heading they themselves found appropriate. One example of this, which had already been mentioned, was the US company which had claimed that all its LAN equipment exported during a certain time period to the United Kingdom had been classified by UK customs authorities under 84.71. But, in fact a BTI issued by the UK customs during that time-period to the same company had classified the product under tariff heading 85.17. Moreover, it should be remembered that in order

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<sup>79</sup>MTN.TNC/7(MIN); also referenced in the agreed text on *Procedures for the Negotiations*, op cit., para. 5: "Participants have agreed that in the negotiation on tariff concessions, current nomenclatures should be employed . . .".

<sup>80</sup>See Annex 4, Table 3, Nos. 1 and 2.



to facilitate trade, EC customs officials only verified a small proportion of imports and the accompanying declarations.

2. Personal Computers with multimedia capability

5.66 The **United States** claimed that PCs with multimedia capability were treated as products under Chapter 84 during the Uruguay Round. The EC had admitted that personal computers at issue in this dispute, including those capable of receiving and processing television signals, existed and were marketed prior to 1994. When the EC had bound its tariffs in early 1994, it had treated all PCs, including those with multimedia capability, as automatic data processing machines as provided for under heading 84.71. In negotiating its Uruguay Round concessions, the EC had not made any reservations under heading 84.71 for any particular type of personal computer.

5.67 The **European Communities** responded that as more and more functionalities had been added to PCs, it had become more common to refer to such PCs as PCs with multimedia capabilities. At the same time classification of such products had become much more difficult because it was necessary to determine whether the product was a PC with multimedia capabilities or a multimedia machine with computing facilities.

5.68 However, neither during nor at the end of the Uruguay Round, could the United States have had reasonable expectations that the EC would classify PCTVs or other multimedia equipment under tariff heading 84.71 and apply the corresponding duty rate. In fact, the United States had not produced any documentation showing that the EC had indeed classified all computers with multimedia capabilities under heading 84.71 during the Uruguay Round. Moreover, on 30 March 1994, EC Regulation 754/94<sup>81</sup> was issued which classified "Compact Disc Interactive System" (CDI System) made by the Dutch company Philips under tariff heading 85.21, "video apparatus." This Regulation put the trading community on notice concerning treatment of "multimedia equipment". As far as PCTVs were concerned, the United States should have had even fewer reasonable expectations that the EC would apply the tariff concession regarding heading 84.71. The mere fact that importers were able to clear certain shipments of these products under heading 84.71 was, by itself, irrelevant. As already mentioned, customs clearance in the EC depended on self-certification for over 90 per cent of imports in order to keep trade flowing, and importers derived no rights from their own misstatements. Neither should the US government.

5.69 The **United States** stated that the absence of rulings on treatment suggested (1) a consensus among importers that classification was obviously under tariff heading 84.71 and (2) a general acceptance of that view by customs officials who had ample opportunity to engage importers in discussion at local ports and through other means. Long-standing trading practices confirmed this conclusion. The process of customs entry and importation was in fact designed to work without written rulings: to be self-executing based on the plain text of the Harmonized System, the guidance of the Notes to Chapters in the Harmonized System, and the advice provided by the text of the Explanatory Notes. An importer with a new product normally began by undertaking a classification analysis based on these sources, as well as any pertinent available written rulings. Knowledgeable importers did this all the time, relying on their own expertise. If the analysis resulted in an obvious classification, the importer did not seek advance advice from customs authorities in the form of written rulings. Contrary to the EC's suggestions, such advance written advice was not required. Indeed, if it were, the normal course of international trade would be seriously disrupted by a requirement which no competent customs authority

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<sup>81</sup>Commission Regulation 754/94, OJ 1994 L 89/2, product 5.

was staffed to implement within commercially acceptable time limits. Instead, the importer started importing the merchandise, using the classification that its analysis indicated was correct. This was particularly the case where the change in a product was evolutionary.

5.70 The United States argued that one should not be misled by the EC's claim that only 10 per cent of shipments were physically inspected, which suggested that only 10 per cent of shipments were classified correctly. The EC and member States had their own classification experts in major product areas, such as ADP equipment. They read the trade press, kept up with technological change, and applied their knowledge of customs classification principles and the HS sources to new products. They were not hesitant to ask questions or even demand written presentations if they had questions. If customs authorities in the EC had indeed inspected 10 per cent of shipments, it was very unlikely that they would not have inspected multimedia-capable computers; if they had not accepted that the appropriate tariff treatment was that under heading 84.71, they would have treated them as subject to a different heading.

5.71 The system had to work this way, and was described in the Kyoto Convention to which the EC and the member States were parties. Importers had an affirmative obligation to classify products correctly, whether or not the products were physically inspected. The fact that there were no EC reclassification of multimedia-capable computers during the Uruguay Round in the face of substantial trade indicated that importers were doing their jobs, customs authorities were satisfied with their classifications, and customs authorities agreed that these products were properly dutiable under heading 84.71.

5.72 Furthermore, the CDI System to which the EC had referred was outside the product scope of the present dispute, as it was not a computer. The EC asserted that this product had "computing capabilities", however, this assertion was misleading. Although the user had an array of available choices, at its most basic level the CDI System could only be "programmed" to perform in a finite number of ways, like a microwave oven or a VCR. Those, too, had various computing functions, but were not computers. The EC's tariff treatment of microwave ovens and VCRs could not reasonably be relied upon as the measure of the EC's tariff treatment of personal computers. Nor could the EC's treatment of the CDI unit be reasonably relied upon by the United States and its exporters of computers as an indicator of the EC's future treatment of computers, including computers with multimedia capacity.

5.73 During consultations in this case, the EC had indicated that personal computers capable of receiving and processing television signals were treated by the United Kingdom alone among the EC member States as dutiable under heading 85.28, and that this was inconsistent with EC practice.<sup>82</sup> The EC had since stated that such statements were "erroneous." Subsequently, the EC stated that "PCTV's have always been classified in the EC in 85.28." This inconsistency in the EC position illustrated why the United States had found it necessary to seek clarification concerning the treatment by the United Kingdom and the EC of all types of multimedia computers.

5.74 With the issuance of EC Regulation 1153/97, the EC Commission had now admitted that such computers -- as well as all computers "capable of receiving and processing television, telecommunication, audio and video signals" -- were properly treated as "automatic data processing machines and units thereof" in heading 84.71. This Regulation which became effective on 1 July 1997 amended the EC Common Tariff Nomenclature and the Common Customs Tariff. It was a Regulation which was adopted

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<sup>82</sup>Information Fiche which in the US submission was attached to a 13 March 1997 letter from R.E. Abbott, Head of the Permanent Delegation of the European Commission to the International Organizations in Geneva, to A.L. Stoler, Chargé d'Affaires of the Permanent Mission of the United States to the WTO.

to implement EC commitments under the Information Technology Agreement (ITA) reached at the Singapore Ministerial Conference. The ITA was intended "to achieve maximum freedom of world trade in information technology products" through the reduction and ultimate elimination of customs duties on information technology products. However, the Regulation blatantly imposed tariffs at higher-than-concession rates on computers provided for in the concession on heading 84.71<sup>83</sup>.

5.75 The **European Communities** wished to point out that Regulation 754/94 which classified the CDI System under 85.21 had also classified the Commodore Dynamic Total Vision System<sup>84</sup>, which was a product referred to by the United States as a computer with multimedia capacity, under 85.21. Therefore, this Regulation should have put the trading community on notice concerning treatment of "multimedia equipment" in the EC.

5.76 With respect to the "erroneous statement", referred to by the United States, it was contained in an "information fiche", for a meeting. This was an informal document, which had no legal value and could not be considered a formal EC position statement. It was prepared within a short deadline and it had not been possible to consult with all the Commission services involved in the matter. In fact, the statement should have read "As regards the classification of PCTVs, the general practice in the EU is that these fall under heading 85.28" instead of "84.71". It was a mistake and did not represent inconsistencies on the part of the EC.

5.77 On the last point, Regulation 1153/97 which was adopted in order to implement the results of the ITA was, in the view of the EC and as already noted, at odds with the scope of what this dispute was about; it was a new Agreement negotiated after the Uruguay Round. Following the decision in the WCO on the classification of a multimedia personal computer, the EC had had to adapt its nomenclature in accordance with the substance of that ruling which effectively moved the PCTV from HS heading 85.28 to 84.71.<sup>85</sup> On the US assertion that the Regulation "blatantly imposed tariffs at higher-than-concession rates on computers provided for in the concession on heading 84.71", the EC had always held that PCTVs should receive tariff treatment which was originally provided for under 85.28. The idea being that even if there was a reclassification, for instance because of discussions at the WCO, it should not affect the tariff treatment. This approach had also been taken by the GATT with regard to the introduction of the HS, and was reflected in a decision taken by the GATT Council

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<sup>83</sup>Other information submitted by the United States concerning multimedia computers included: a chart and catalogues describing models of multimedia personal computers on the market in 1992 and 1993; report of the 57th meeting of the Tariff and Statistical Nomenclature Section of the EC Customs Code Committee, held on 29-30 June 1995; flash sheet dated February 1996 regarding multimedia PCs, and a letter regarding the same from the UK Department of Trade and Industry dated 27 March 1996; a European Commission document entitled "Information Note with regard to Classification of Multimedia and Related Products"; minutes of the 14 March 1996 meeting of the WTO Committee on Market Access (G/MA/M/5); and trade data on multimedia PCs submitted in response to the Panel's questions.

<sup>84</sup>The EC claimed that the Regulation classifying the Commodore Dynamic Total Vision (CDTV) product (item 4 in Regulation 754/94) established the principle that even though a piece of equipment was capable of computing, other functionalities might be added, thus bringing the equipment into another product category in the HS nomenclature. Also, at the time when Commission Regulation (EC) No. 754/94 was adopted, the CDTV was an exceptional product compared with the standard type of PCs imported under HS heading 8471 and presumably declared under that heading as computers.

<sup>85</sup>The EC, under the WCO process, made a reservation for the reason to seek clarity with regard to the term "multimedia", which was, as already noted, broad and imprecise.

which stated that: "The main principle to be observed in connexion with the introduction of the Harmonized System in national tariffs is that existing bindings should be maintained unchanged. The alteration of existing bindings should only be envisaged where their maintenance would result in undue complexity in the national tariffs and should not involve a significant or arbitrary increase in customs duties collected on a particular product".<sup>86</sup> In fact, Article II obliged Members to give tariff treatment not less favourable than that which derived from tariff negotiations.

C. Nullification and Impairment

5.78 The **United States** claimed that the EC-Schedule LXXX provided tariff concessions for HS heading 84.71, "automatic data-processing machines and units thereof". These concessions were negotiated and agreed to during the Uruguay Round, after intensive negotiations between the United States and the EC on behalf of the EC member States initially within the context of the US zero-for-zero initiative within the electronics sector. There was no discussion, during this time-period, between the EC and the United States of treating LAN equipment and PCs with multimedia capability as anything other than computers, computer units or computer parts subject to the tariffs applicable under tariff heading 8471 and 84.73. These products were, also during this period of time, already marketed, traded and legally imported into member States of the EC under headings 84.71 and 84.73, as demonstrated by BTIs and/or written classification determinations of member State customs authorities and by other evidence. As a result, the United States was justified in reasonably expecting the products at issue being provided the treatment foreseen under the relevant tariff headings of chapter 84 of the EC Schedule LXXX. By classifying these products to tariff headings carrying higher duty rates which were in excess of the rates provided for in Schedule LXXX under the relevant tariff headings of chapter 84, the EC, Ireland and the UK had violated their obligations under Article II:1, and as a result these measures had nullified or impaired the value of concessions accruing to the United States under the GATT 1994.

5.79 The **European Communities** argued that the United States did not have a legitimate basis to claim "reasonable expectations". On the contrary, all that had been revealed with the BTIs and classification actions of EC member states' customs authorities submitted to the Panel was that during the Uruguay Round there was no uniform treatment, within the EC member states for these products, and that if anyone re-classified LAN equipment during this period of time it was the United States and not the EC. This situation demonstrated the uncertainty that existed with respect to the classification of these products within the EC member states and EC's trading partners and therefore the claim of "reasonable expectations" could not be justified. Moreover, the United States had not been able to establish the existence of a meeting of the minds of the negotiators constituting an agreement at any moment in the course of the Uruguay Round tariff negotiations concerning the tariff treatment of these products. In view of the above, the classification actions of the EC, Ireland and the United Kingdom should be viewed as having been intended to rectify a situation of divergences within the EC member states regarding the treatment of these products, and not one of reclassification. Furthermore, it should be noted that while the customs authorities of EC member States might have classified these products differently, thereby according different duty treatment to the same products, the EC itself had always held the view that these products should be classified under the relevant tariff headings of chapter 85 as the primary function of these products was data transmission and not data processing. In view of all of the above, the actions by the EC, Ireland and the United Kingdom could not have nullified or impaired the value of concessions accruing to the United States under the GATT 1994.

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<sup>86</sup>GATT Concessions under the Harmonized Commodity Description and Coding System, adopted on 12 July 1983, BISD 30S/17, para. 2.1.

## VI. THIRD PARTIES SUBMISSIONS

### A. India

6.1 India requested the Panel to find that the EC's classification of LAN equipment under Regulation (EC) 1165/95, had resulted in the treatment of those products becoming less favourable than that provided for in Part I of Schedule LXXX and therefore was inconsistent with obligations under Article II of GATT 1994.

6.2 India exported approximately Rs.1 billion worth of LAN equipment to the EC in 1995-1996.<sup>87</sup> In addition to this substantial trade interest, India was interested in the systemic issues raised by this dispute. In particular, India was concerned with the possibility that a Member might avoid its specific obligations related to tariff rate concessions under Article II through the reclassification of bound items. In examining this matter, emphasis had to be placed on the "fundamental importance of the security and predictability of GATT tariff bindings", a principle which constituted a central obligation in the system of the General Agreement, as mentioned in 1984 Panel Report on *Newsprint*.<sup>88</sup>

6.3 On 27 April 1997, an overwhelming majority of the members of the WCO HS Committee voted to classify LAN equipment, under heading 84.71. Notwithstanding this decision, the EC had not adopted any measures bringing its member States into conformity with this decision. As was clear from this decision, it was India's understanding that the products subject to this dispute should be classified under heading 84.71.

6.4 One could conclude from these facts that in the Uruguay Round tariff negotiations, other Members including developing country Members like India, who were beginning to export such products to the EC, had reason to believe that the EC had agreed to bind LAN equipment as a product under the heading 84.71. Thus the EC and its member States were under obligation to provide the tariff treatment granted at the time of the Uruguay Round to LAN equipment based on the provisions under Article II of GATT 1994.

### B. Japan

6.5 Japan argued that on the technical side, as was clear from the decision of the WCO HS Committee and as had always been Japan's understanding, that the products subject to this dispute should be classified under tariff heading 84.71. At its eighteenth Session of the Harmonized System (HS) Committee of the WCO held in November 1996, the Committee had decided to classify "PCTV" multimedia PCs under tariff heading 84.71 as a result of a vote. At its nineteenth Session held in April 1997, the HS Committee had voted to classify LAN equipment, especially (1) communications controllers or router, (2) cluster controllers, (3) multistation access unit and (4) optical fibre converter under heading 84.71. Notwithstanding these decisions, the EC had not adopted any measure to bring its member States into conformity with these decisions. While, the WTO Agreement imposed no obligation on Members to follow any specific nomenclature including the HS, the scope of the concession for a tariff line in the EC's Schedule which was based on the HS nomenclature, had to be considered or interpreted, unless otherwise specified in the Schedule, in light of the related HS documents, including the text of the HS nomenclature and Notes to Chapters. However, there was no such specification

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<sup>87</sup>Statistics of Foreign Trade of India (1995-96).

<sup>88</sup>Panel Report on *Newsprint*, op cit., para. 52.

or qualification concerning the product coverage for the heading 84.71 or 85.28 in the EC's schedule. Moreover, in actual practice the EC had applied the same tariff rate as the bound rate on LAN equipment and PCTVs under the heading 84.71, before reclassification actions by the EC, Ireland and the United Kingdom.

6.6 From this factual background, it could be concluded that during the Uruguay Round tariff negotiations, other Members had reason to believe that the EC had agreed to bind LAN equipment and PCTVs as "automatic data processing machines" under the heading 84.71. Thus, the EC and its member States were under the obligation to provide the tariff treatment granted at the time of the Uruguay Round to LAN equipment and multimedia PCs based on the provisions of Article II of GATT 1994. Instead, the EC, Ireland and the United Kingdom had unilaterally, through reclassification, imposed higher tariff rates than those bound during Uruguay Round without initiating the procedures set forth in Article XXVIII of GATT 1994. Wherever these products were classified, the three defending parties should have maintained the value of tariff concessions at 3.9 per cent on LAN equipment and multimedia PCs, which the EC had committed to in the Uruguay Round. The three defending parties had therefore violated their obligations under Article II of GATT 1994.

6.7 The EC had argued that the EC had exclusive prerogative to decide on the classification of products under particular tariff headings, and that the application of particular tariff rates to certain products by the customs authorities of its member States should not be the basis for expectations regarding tariff concessions; therefore the Commission Regulation (EC) 1165/95 had not reclassified LAN adapter cards nor resulted in an increase in tariff rate. In fact, in Japan's view, in the absence of clear announcements or rules to show that the EC would classify those products under the heading 85.17 or 85.28, it would be natural for countries outside the EC when engaging in tariff negotiations to base themselves on the reality at that time. If the EC wished to argue otherwise, it should have been for the EC to bear the burden of proof. Japan had not found convincing evidence to that effect in the submission by the EC. In other words, the EC had not been able to produce sufficient evidence to show that the countries outside the EC should have anticipated such increases in tariff rates after the Uruguay Round.

6.8 This particular issue was systemic in that it could be a problem with regard to not only the products in dispute now but also to other products. As technology progressed, a number of new products would be coming into the market. Whenever new negotiations took place with regard to those products, the same issue would inevitably come out. It would then be difficult to negotiate tariff concessions on those items on which the EC did not have uniform classification on tariff headings. Moreover, if the EC was allowed to change the tariff rates after the tariff negotiations in the name of proper and uniform classification, it would disturb the delicate balance of interests formulated by the tariff negotiations.

6.9 It was in this context that Japan requested the Panel to find that the unilateral increase of tariff rates as a result of the EC reclassification, or classification, of LAN adapter cards and its member States' reclassification of other types of LAN equipment and PCTVs were inconsistent with their obligations under Article II of GATT 1994.

C. Korea<sup>89</sup>

6.10 Korea argued that as a WTO Member, Korea had reasonable expectation during the Uruguay Round that LAN adapter cards and other LAN equipment would continue to be treated as ADP machines and units thereof under tariff heading 84.71, and that they would not be reclassified under a customs heading with a higher import duty. In addition, Korea had reasonably expected that multimedia PCs would remain under tariff heading 84.71 and not be changed to tariff heading 85.28. Systemic problems which stemmed from the propensity to classify technologically innovative multi-purpose or hybrid products under tariff headings carrying higher duty rates should be resolved pursuant to the decisions rendered by international standard setting bodies such as the WCO.

6.11 During the Uruguay Round, Korea had every reason to expect that the EC would classify LAN adapter cards and other LAN equipment as ADP machines and units thereof, as per tariff heading 84.71, not as telecommunications apparatus under category 85.17. Moreover, Korea had reasonably expected that multimedia PCs would be classified under tariff heading 84.71, not under heading 85.28.

6.12 Korea noted that the EC had claimed in its first written submission that the fundamental point of the current dispute was the "scope of the bindings negotiated in the Uruguay Round". The EC had contended that because it did not negotiate specific concessions on the customs duties applicable to LAN or multimedia equipment, Korea and other WTO Members could not have derived reasonable expectation that these products would be classified under tariff heading 84.71. However, certain salient aspects of the EC's classification practices, notably the issuance of BTIs by the customs authorities of member States, had led to the conclusion that Korea and other WTO Members could have reasonably expected that the EC would treat LAN equipment and multimedia PCs as ADP machines and units thereof. These practices included the fact that:

- "The EC has no centralized administration of the Common Customs Tariff, but involved the member States' customs authorities for the purpose of administration";
- "It may occur, in particular when it is not obvious in which heading a given product should be classified, that customs authorities in different member States classify that product differently and consequently apply different duties."
- "Prior to December 1993, when substantive Uruguay Round negotiations were concluded, there was no classification regulation on LAN equipment with an EC-wide applicability that had been adopted and implemented by the EC Commission or by the Council. Nor had there been a ruling by the European Court of Justice on the classification decision of LAN equipment".

6.13 In short, the classification of LAN equipment was left to the customs authorities of the EC member States prior to the conclusion of the Uruguay Round negotiations. Based on the factual information provided in the first written submission of the EC, it could be inferred that the practices of the member States' customs authorities constituted the only source for identifying "classification rules and practices at the time of the Uruguay Round".

6.14 To show that the reasonable expectation derived by the United States and other WTO Members from BTIs was misplaced, the EC had alluded by way of examples to various contradictory BTIs issued

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<sup>89</sup>On the procedural background, Korea in its submission had also indicated that on 2 December 1996, the EC had requested the consulting parties to delay the proceedings until after the completion of the Information Technology Agreement, and it was so agreed.

by member States during the Uruguay Round negotiations. The customs authorities of Germany and the Netherlands had rendered BTIs which classified LAN equipment under tariff heading 85.17, whereas the BTIs issued by the customs authorities of the United Kingdom and Ireland had classified LAN equipment under 84.71. At the same time, the EC had attempted to mitigate the significance of BTIs as a source of reasonable expectation regarding the classification of a product by citing Article 12.5 of the Community Customs Code which provided that "a BTI ceases to be valid where an EC regulation is adopted and the information no longer conforms to the law laid down thereby, or where the BTI is incompatible with a judgement of the European Court of Justice." Contrary to the EC's assertion, that provision appeared to endorse the role of BTIs to supplement the absence of Community-wide rules governing the practical classification of a variety of products. The EC's first written submission failed to point out any alternative source of concrete reference, other than the BTIs, regarding the practices of some of its member States, such as the United Kingdom and Ireland, governing the classification of LAN equipment during the Uruguay Round negotiations. Because there were no EC regulations or judgments of the ECJ which specified the classification of LAN equipment, Korea was of the opinion that the BTIs provided the best available source for exporters to identify the practices of the relevant countries. No explicit reference appeared to have been made during the Uruguay Round tariff negotiations. The EC stated that "none of the products at issue were discussed by name." In the absence of any specific exceptions or explicit reservations on the part of the EC, participating countries to the Uruguay Round tariff negotiations had no choice but to expect that the then existing classification would continue to be applied.

6.15 More significantly, as was stated by the United States, the EC's Uruguay Round concessions were set forth in Schedule LXXX. Article II of the GATT 1994 obliged contracting parties to apply the established rates of duties which appeared in their respective schedules. The imposition of a duty higher than the rates appearing in the schedule would nullify or impair the value of the concessions accruing to other WTO Members. At the time of the Uruguay Round negotiations, and prior to its conclusion, the EC had treated LAN equipment as ADP machines and units thereof under tariff heading 84.71 and such products were indeed imported under that category. After the finalization of the Uruguay Round tariff concessions, the EC began to apply the higher rate of duty under tariff heading 85.17 as mandated by Regulation (EC) No. 1165/95.

6.16 A noteworthy point made by the United States was that between 14 February and 31 March 1994, participants had engaged in a verification process to confirm that negotiated concessions were accurately reflected in the final schedules. Despite the fact that the EC was aware that its trading partners relied on BTI rulings and communications in the negotiations which indicated that LAN equipment would be treated as ADP machines under heading 8471, the EC had not taken any steps to define ADP machines to exclude LAN equipment. It was only after the Uruguay Round negotiations that the EC and several of its member States had started to categorize LAN equipment under tariff heading 85.17.

6.17 In view of the treatment of LAN equipment under tariff heading 84.71 at the time of the Uruguay Round negotiations and the EC's commitment in Schedule LXXX, the EC could not refute the claim that it had committed itself to apply the duty rate bound for computer equipment to LAN equipment. Participating countries could reasonably expect that the EC would continue to classify LAN equipment under tariff heading 84.71 and apply the corresponding tariff set forth in Schedule LXXX. However, such reasonable expectation was nullified and impaired by the application of Regulation (EC) No. 1165/95 to LAN adapter cards and by the subsequent reclassification of other LAN equipment from tariff heading 84.71 to 85.17.

6.18 With respect to PCTVs, it was common in today's international marketplace for a number of technological new products to be developed by incorporating certain functions of other products into



an already existing product. Unless new headings were created and new tariff rates negotiated, there was no other way to classify the new, multi-functional products but to rely on the headings of existing products, whose functions were reflected closely or remotely in the new, multi-functional product. Given the different duty rates for the existing products to which a new product might be related, there was a possibility that the WTO Members might attempt to “shop around” to apply the highest possible duty rates to the new, multi-functional products.

6.19 Allowing WTO Members to classify new, multi-functional products under the heading of the related existing product with the highest possible duty rates without appropriate justification, would undermine the value of the concessions negotiated and committed to by WTO Members. If personal computers with television capabilities replaced conventional PCs and the new breed of PCs were dutiable under the high-duty heading of television receivers, the concessions made for personal computers would become substantially affected and reduced in value. When tariff negotiations were conducted, it was reasonable to assume that the existing product containing simple functions could be replaced by a new generation of multi-functional products. As science and technology progressed, such results were inevitable, especially in the field of goods involving high technology.

6.20 By definition, multi-functional products carried out multiple functions. Therefore, it was difficult, if not impossible, to determine the appropriate classification of multi-functional devices solely on the basis of functions, as was argued by the EC. It, therefore, became essential to scrutinize the end-use and determine which existing products were replaced by the new multi-functional goods in the largest quantity. It was unlikely that consumers purchased PCTVs for the exclusive purpose of using them as ordinary television receivers, without regard to their other applications. Furthermore, it was observed that this device worked solely in conjunction with a computer (automatic data processing machine).

6.21 One way of identifying an appropriate classification for new multi-functional products was through examination and decision by the WCO. As the EC had admitted, the HS Committee of the WCO had adopted a draft amendment to the Compendium of Classification Opinions with regard to PCTVs in favour of tariff heading 84.71. This meant that the EC had not come up with a justification, even in the form of an interim decision under the WCO, for its reclassification of PCTVs under a higher tariff heading. Apart from this, the EC had failed to suggest in its first submission any justification for the reclassification.

6.22 Based on the above stated observations, Korea challenged the EC’s classification of automatic data processing machines with television capabilities under tariff heading 85.28 as an act which undermined and devalued the concession on products under tariff heading 84.71 as contained in the EC Schedule. The EC had failed to justify its classification of these new multi-functional products under the heading of the related existing products with a higher tariff rate. Unless the EC was able to justify such classification, Korea was of the opinion that the EC’s classification of computers with television capabilities resulted in treatment of those products less favourable than that provided for in Part I of Schedule LXXX.

6.23 For the reasons described above, the Republic of Korea requested the Panel to find that the EC’s reclassification of LAN adapter cards under the Regulation (EC) No. 1165/95 and that of other LAN equipment and computers with television capabilities through measures taken by several of its member States were inconsistent with its obligations under Article II of GATT 1994.

D. Singapore

6.24 Singapore argued that during the Uruguay Round negotiations, and prior to finalization of these tariff concessions, certain EC member States classified LAN equipment under tariff heading 84.71, as evidenced by numerous BTIs and other written rulings. In addition, the EC had clear notice from the inception of the negotiations that its trading partners, including Singapore, had negotiated with the understanding that the EC offers on ADP units included LAN equipment. Through various procedures, the defending parties subsequently classified LAN equipment, including LAN adapter cards, into tariff heading 85.17 as telecommunication apparatus. This classification resulted in the imposition of customs duties on LAN equipment imports in excess of the bound rate commitments for ADP units under Schedule LXXX.

6.25 In terms of trade interest Singapore exported approximately S\$2 billion worth of LAN equipment, including LAN adapter cards, to the EC between May 1996, the effective date of the reclassification, and December 1996. In addition to this substantial trade interest, Singapore was interested in the systemic issues raised by this dispute. In particular, Singapore was concerned with the possibility that Members might avoid specific obligations related to tariff rate concessions under Article II through the reclassification of bound items. In examining this matter, emphasis had to be placed on the "fundamental importance of the security and predictability of GATT tariff bindings, a principle which constitutes a central obligation in the system of the General Agreement".<sup>90</sup>

6.26 The EC's reclassification of LAN computer equipment violated EC's tariff concessions under Article II of GATT 1994. GATT Article II:1(b) provided that "The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein." Under Article II:7 of GATT 1994, the annexed concession schedules were an integral part of the Agreement. The EC concessions on ADP units that were at issue in this matter appeared in Schedule LXXX of GATT 1994. Article II.1(b) was violated by tariff classifications, including reclassification, that resulted in increased duties on bound items. This was reflected in the Agreement itself under Article II.5, which contemplated compensatory adjustment in cases where internal classification decisions effectively prevented contracting parties from according agreed-to tariff concessions.<sup>91</sup> In short, it was settled that "[i]f ... there is a divergence between a national customs tariff of a contracting party to GATT and its schedule, the international obligations of that country are those described in its schedule of concessions".<sup>92</sup>

6.27 The dispute on *Greek Increase in Bound Duty* confirmed that contracting parties should not avoid their Article II obligations by reclassifying bound items. In that dispute, a GATT Group of Experts examined Germany's complaint that Greece had raised its tariff on long-playing gramophone records,

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<sup>90</sup>Panel Report on *Newsprint*, op cit., para. 52.

<sup>91</sup>As one GATT scholar has noted: "A reclassification subsequent to the making of a GATT concession could ... be a violation of the basic commitment regarding that concession. ... Paragraph 5 of Article II recognizes the possibility that reclassification of goods can violate a GATT concession and provides for consultation and renegotiation in such cases.", Jackson, John H., World Trade and the Law of GATT, 1969, p. 212.

<sup>92</sup> See Note by the Secretariat on *Tariff Reclassification* dated 27 April 1981, Committee on Tariff Concessions, TAR/W/19, para. 1.

despite the fact that "gramophone records" were bound in the Greek schedule.<sup>93</sup> Greece contended that the introduction of later-developed, long-playing records made of different material constituted a new item not subject to the earlier binding. The reviewing Group agreed with Germany that the disputed records were covered by the description of "gramophone records" in the bound item and found that Greece had violated its Article II obligations.<sup>94</sup>

6.28 As demonstrated below, the defending parties in this dispute had similarly used tariff classification authority in violation of their Article II.1(b) commitments. In reclassifying LAN equipment from the controlling categories covering ADP units, the defending parties applied customs duties in excess of the bound rates specified for such products in the EC's concession schedule. In the present matter, at the time the EC tariff bindings were negotiated, substantial volumes of LAN equipment were being imported into and classified by EC member States in the categories covering automatic data processors and units. As documented in the US submission dated 14 May 1997, such practice was widespread and highlighted by written BTIs and letter rulings by certain EC member States.<sup>95</sup> Accordingly, the EC had clear knowledge of the practice. The EC, however, contended that it "never committed itself nor could it be construed to have given the impression that it would classify LAN ... equipment with computer equipment under heading 84.71 and apply the corresponding duty to the products concerned".<sup>96</sup> Such an assertion was plainly incorrect. As pointed out in the US submission, the documents exchanged in the concession negotiations clearly indicated that the parties viewed the EC's ADP units/tariff heading 84.71 concession as encompassing LAN equipment.

6.29 The US assertion was confirmed by negotiating documents exchanged by Singapore and the EC. In particular, in its original concession request directed to the EC in June 1990, Singapore had requested the EC to reduce tariffs on subheading 8471.99 from 4.9 per cent to zero. Significantly, Singapore's request on 8471.99 identified by name examples of LAN equipment covered by the request, namely "gateways," "concentrators" and "multiplexers." Through such an exchange, the EC had received express notice of Singapore's expectation that any eventual EC tariff concessions on ADP units in tariff heading 84.71 would specifically include LAN equipment. The negotiations proceeded on this basis and the EC never expressed any reservations with including LAN equipment among the products subject to its concessions on ADP units/tariff heading 84.71. Consequently, Singapore had reasonably expected such treatment. Thus, contrary to the EC's assertions, its trading partners had relied not only on EC rulings classifying LAN equipment in ADP categories, but on communications in the negotiations indicating the understanding that LAN equipment would be covered by the EC's ADP concessions. With full knowledge of such an understanding, the EC had not made any reservations on LAN equipment or otherwise attempted to define its ADP concession in a manner that would not include LAN equipment. As demonstrated in the US submission, the EC had not given any indication of any contrary perception until after the agreement was finalized.

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<sup>93</sup>*Greek Increase in Bound Duties*, complaint op cit., pages 115 and 116.

<sup>94</sup>Report by the Group of Experts on *Greek Increase in Bound Duty*, op cit., pages 168 to 170.

<sup>95</sup>Pursuant to such rulings, certain EC member States applied the rates for ADP units and parts to imports of LAN equipment from numerous sources.

<sup>96</sup>EC's first submission, 4 June 1997, para.9.

6.30 The scope of a tariff concession had to be interpreted based on the circumstances known at the time the binding was negotiated. For example, in the Panel on *Newsprint*<sup>97</sup> the EC had made an Article II binding that provided duty-free access to 1.5 million tonnes of newsprint per year, and then afterwards had unilaterally reduced the quantity by 1 million tonnes, which corresponded to the amount of duty-free access granted to EFTA partners under a separate agreement. Finding that the EC had not acted in conformity with Article II commitments, the Panel had emphasized that the EC had made no reservation on its 1.5 million tonnes MFN commitment even though "it was known that agreement had already been reached that the EFTA countries would obtain full duty-free access to the Community market ...".<sup>98</sup> Similarly, in the present matter, the EC was aware of the understanding by its trading partners that LAN equipment was encompassed within the tariff negotiations on ADP equipment. In view of these circumstances, the EC's failure to apply to LAN equipment the bound rates for ADP units constituted a plain violation of its Article II.1(b) commitment.

6.31 The EC's violation of its Article II.1(b) commitment constituted a *prima facie* case of nullification and impairment under Article XXIII.1(a). In addition, even if the EC had not directly abrogated its Article II commitment, its failure to accord LAN equipment the bound rates for ADP units nullified or impaired the value of its commitment under Article XXIII.1(b). The EC had not rebutted the US contention that the EC's trade partners had good reason to believe, based on information exchanged in the negotiations, that the EC's concession on ADP units/tariff heading 84.71 would apply to LAN equipment. Any such rebuttal would not be tenable given the explicit references to LAN equipment in Singapore's concession request submitted to the EC. Such documentation demonstrated that the EC's trading partners had reasonably expected that the EC's heading 84.71 bindings covered LAN equipment.

6.32 The concept of nullification and impairment was inextricably linked to the expectations formed by parties during the negotiation process. It was well-established that Article XXIII.1(b) violations occurred where actions subsequent to undertaking a GATT commitment resulted in the frustration of reasonable expectations. For instance, in *Treatment by Germany of Imports of Sardines*<sup>99</sup>, the Panel had considered Norway's complaint that Germany had nullified benefits accruing to Norway when Germany had reduced tariffs on certain sardines imported from other countries to levels that were lower than tariff bindings that Germany had previously committed to on competitive sardines of a type principally imported from Norway. Although Germany had technically adhered to its bound rate on imports from Norway, the Panel had determined that Germany had impaired the intended benefits of the commitment by subsequently according more favourable duty treatment to imports of competitive sardines shipped by other countries. As stated by the Panel, Germany's actions "could not reasonably have been anticipated" at the time of the negotiations and Norway "had reason to assume during these negotiations" that its exports would not be less favourably treated than other countries' exports.<sup>100</sup>

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<sup>97</sup>Panel Report on *Newsprint*, op cit.

<sup>98</sup>Ibid., para. 50.

<sup>99</sup>Panel Report on *Treatment by Germany of Imports of Sardines*, adopted on 31 October 1952, BISD 1S/53.

<sup>100</sup>Ibid., para.16. See, also *Report on The Australian Subsidy on Ammonium Sulphate*, Report adopted on 3 April 1950, page 188, BISD Volume II, May 1952, (finding that although no violation occurred, contracting party "had reason to assume, during these negotiations that ..."); and *Reports Relating to the Review of the Agreement, Quantitative Restrictions*, adopted on 2,4 and 5 March 1955, BISD 3S/170, para. 63 (contracting parties could not resort to withdrawal of concessions or suspension of obligations, "unless the effects of the measure concurred in proved to be substantially different from what could have been foreseen at the time the measure

6.33 Similarly, Singapore had valid reasons for expecting that the ADP binding under negotiation would apply to LAN equipment. Having explicitly referred to various types of LAN equipment in its ADP concession request, which prompted no objection from the EC, Singapore had no reason to assume that the EC would resist applying its ADP binding to LAN equipment. The EC's subsequent unilateral action nullified the benefits Singapore had reasonably expected that it would derive from the concession.

6.34 Furthermore, the WCO's HS Committee had recently decided that LAN equipment was properly classifiable in heading 84.71 of the HS.<sup>101</sup> The HS Committee had specifically declined to adopt the position advanced that heading 85.17 was the appropriate category.<sup>102</sup> Given that the language interpreted by the HS Committee was identical to the EC's description in its concession schedule for heading 84.71, the decision confirmed that the EC had no valid basis for increasing the bound rates on ADP units on imports of LAN equipment.<sup>103</sup> The decision also provided additional corroboration of the reasonableness of EC trading partners' expectations that their LAN equipment exports would be covered by such bound rates. 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. The HS Committee decision did not purport to modify the language or alter prior HS Committee's interpretation. Instead, it interpreted longstanding HS provisions that were incorporated within the parties' nomenclature throughout the course of the GATT concession negotiations. As such, the decision demonstrated that the EC's trading partners had reasonably expected the ADP bindings to cover LAN equipment.

6.35 The EC submission emphasized that the HS Committee's decision was "not yet final" and noted that reservations could be made to the WCO by 1 July 1997. Significantly, the EC had not suggested that there was any chance that the HS Committee's decision would not be adopted on substantive grounds, nor could they have, given the overwhelming majority of members who were in favour of the decision. The EC instead appeared to be referring to the rules of HS Convention that permitted any member from lodging reservations to prevent the Council's adoption of the HS Committee's decisions as Classification Opinions. However, the current legal status of the decision did not negate the fact that the HS Committee had fully considered the matter and formally determined that LAN equipment was classifiable in tariff heading 84.71. Again, such determination had confirmed the sound foundation

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was considered ...").

<sup>101</sup>Decisions of the Harmonized System Committee, Annex H/1 to Doc.41.100E (HSC/19/Apr.97).

<sup>102</sup>The HS Committee's decision will be embodied in a Classification Opinion, which will be deemed to be approved by the WCO unless a party specifically requests that the matter be referred to the Council. See International Convention on the Harmonized Commodity and Coding System, Article 8.2.

<sup>103</sup>In interpreting the scope of a tariff concession, "the product description ... is the essential element for delimitating the coverage of the concession." The EC Schedule LXXX identified all products subject to bound rates by (1) tariff item numbers correlating with the Harmonized System; and (2) a narrative description based on the language of the corresponding HS headings. Due to the EC's election, the scope of its tariff concessions should be determined with reference to the scope of the matching descriptions contained in the HS nomenclature.

of expectations that LAN equipment would be treated by the EC as ADP units under its concession schedule.<sup>104</sup>

6.36 It should also be noted that one principal function of the HS Committee and predecessor bodies was to ensure uniform classification under common nomenclatures to protect tariff bindings under Article II. Many countries had adopted the HS specifically as a means to enhance protection of Article II tariff concessions through greater tariff classification uniformity.<sup>105</sup> This enthusiasm was shared by GATT: "[F]rom a GATT point of view adoption of the Harmonized System would ensure greater uniformity among countries in customs classification and thus a greater ability for countries to monitor and protect the value of tariff concessions ...".<sup>106</sup> These GATT expectations were seriously undermined by the EC's insistence on autonomously interpreting the scope of common product descriptions in concession schedules and harmonized tariff nomenclature. The prevailing views of the international organization that developed the uniform product descriptions, and in whom interpretative authority was entrusted, should not be so easily dismissed.

6.37 The reclassification by the defending parties could not be justified under the general rationale that GATT contracting parties were not obligated to follow any particular system for classifying goods. Member countries' authority over their own national customs tariffs had been noted by certain panels examining the Article I consistency of tariff differentiation through the addition of subcategories in tariff nomenclatures.<sup>107</sup> Each panel had plainly cautioned that classification authority must be exercised in conformity with GATT obligations. The Panel in the *Unroasted Coffee* dispute noted, in particular, that reclassification was appropriate "provided that a reclassification subsequent to the making of a

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<sup>104</sup>Under WCO's internal rules, any single member could have made a reservation that would have prevented the HSC from issuing its decision. The EC did not lodge any reservation and fully participated in the HS Committee proceedings, making a thorough presentation of its views. Further, the EC acknowledged (par. 97 of EC's first submission) that the intended effect of the HS Committee proceedings in which they participated was to ensure uniform classification of LAN equipment in Heading 84.71. Based on this acknowledgement and the EC's extensive participation, the EC's trading partners had been led to reasonably expect EC's compliance with the HS Committee's decision. Otherwise, individual members could abuse the HS Committee's procedures by having their positions fully considered, and then escape the consequences of the Committee's fully deliberated decisions by withholding reservations until the last minute after their positions had been rejected. To prevent such type of abuse, CCC members had agreed that compliance with HS Committee decisions was a "moral" obligation. See Report to the Customs Cooperation Council of the Fifth Session of the Harmonized System Committee, CCC Doc. No. 35.960, 12 April 1990.

<sup>105</sup>This was in fact one of the primary benefits envisioned by the complainant in this matter. "Adoption by the United States of the Harmonized System would, therefore, serve to protect the value of tariff concessions granted the United States." See Interim Report on the Harmonized Commodity Description and Coding System, USITC Pub. 1106 at 31-32, November 1980.

<sup>106</sup>Decision on *GATT Concessions under the Harmonized Commodity Description and Coding System*, op cit., para. 1.2. Consistent with this, the Article 7.1 (e) of the HS Convention indicates that one of the functions of the HS Committee is to furnish guidance on classification of specific goods under the HS system to "intergovernmental or other international organizations," including GATT. Thus, while GATT envisioned that nomenclature harmonization would protect tariff concessions, the WCO's role is to furnish advice on the HS classification of specific goods for use in GATT proceedings.

<sup>107</sup>Panel Report on *Spain - Tariff Treatment of Unroasted Coffee*, op cit., para 4.4; and Panel Report on *Canada/Japan: Tariff on Imports of Spruce, Pine, Fir (SPF) Dimension Lumber*, adopted on 19 July 1989, BISD 36S/167, para. 5.9. The goods in such disputes were not subject to bound tariffs under Article II.

tariff concession under the GATT would not be a violation of the basic commitment regarding that concession (Article II:V)".<sup>108</sup> Consequently, a party could not validly rely on the authority over national tariffs to reclassify goods to circumvent bound tariffs.<sup>109</sup>

6.38 In conclusion, the defending parties had circumvented the prescribed requirements and procedures for ensuring that tariff reclassification conformed to Article II concessions. The transition to the HS nomenclature was closely controlled and monitored by GATT to ensure that nomenclature conversions conformed with contracting parties' existing tariff concessions under GATT Article II and the requirements of Article XXVIII. In the conversion, the "main principle to be observed in connection with the introduction of the Harmonized System in national tariffs is that existing bindings should be maintained unchanged".<sup>110</sup> The contracting parties had agreed to detailed requirements and procedures designed to ensure orderly notification, challenge opportunities, determinations of whether any Article II concessions had been violated or impaired, and any necessary negotiations on compensation.<sup>111</sup> Additional procedures were adopted in 1991 to ensure adherence to Article II tariff concessions when countries implemented HS nomenclature amendments adopted by the CCC.<sup>112</sup> Such activity largely reaffirmed (and streamlined procedures for implementing) pre-existing obligations to formally revise concession schedules when adopting any nomenclature changes in national customs tariffs.<sup>113</sup>

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<sup>108</sup>*Spain - Tariff Treatment of Unroasted Coffee*, op cit., para. 4.4, n.1. The SPF Panel stated that it must be "borne in mind that [tariff] differentiations may lend themselves to abuse, insofar as they may serve to circumscribe tariff advantages ... ." op cit., para. 5.9.

<sup>109</sup>This was particularly true of parties, such as the EC, that have adopted the Harmonized System. While HS contracting parties have discretion to establish subdivisions beyond the six-digit HS Code, they were obligated to "use all the headings and subheadings of the Harmonized System without addition or modification, together with their related numerical codes". Articles 3.1(a)(i) and 3(3) of the HS Convention. Thus, the HS was purposely structured to leave no room for classifying goods outside the controlling 6-digit HS subheadings.

<sup>110</sup>Decision on *GATT Concessions Under the Harmonized Commodity Description and Coding System*, op cit., para. 2.1; see also the GATT Ministerial Decision on Tariffs, adopted 29 November 1982, referring to contracting parties' agreement that, if HS nomenclature is adopted, "... the general level of benefits provided by GATT concessions must be maintained ... ." BISD 29S/18, para. 2.

<sup>111</sup>To this end, the parties agreed to requirements specifying (1) information to be provided to the GATT Secretariat by each country adopting the HS; (2) rules to be used for conversion of duty rates when combining headings or parts of headings; and (3) procedures governing renegotiations under Article XXVIII. "GATT Concessions under the Harmonized Commodity Description and Coding System", BISD 30S/17, *supra*.

<sup>112</sup>See Decision on *Procedures to Implement Changes in the Harmonized System*, adopted on 8 October 1991, BISD 39S/300-301. Members who change their nomenclatures based on CCC HS amendments are required to formally submit proposed changes to their tariff concession schedules for all nomenclature revisions, whether or not such changes alter the scope of Article II concessions. *Ibid.*, paras. 2(a) and 2(b). Such proposals are subject to objections and challenges by other members, as well as negotiation or consultation requirements under Article XXVIII. *Ibid.*, paras. 4 to 6.

<sup>113</sup>See, e.g., Decision on *Procedures for Rectification and Modification of Schedules*, adopted 26 March 1980, BISD 27S/25, para. 2: Changes in the authentic texts of Schedules shall be made when amendments or rearrangements which do not alter the scope of a concession are introduced in national customs tariffs in respect of bound items. Such changes and other rectifications of a purely formal character shall be made by means of Certifications. If no objection is made to the Secretariat within three months, the proposed change to the tariff schedule is deemed to be approved. See 1985 Secretariat Note on "Loose-leaf Schedules Based on Harmonized

6.39 During this process, the GATT Committee on Tariff Concessions had confirmed that the described protections and safeguards applied to reclassification decisions, as well as nomenclature amendments.<sup>114</sup> The contracting parties had agreed, in particular, that these requirements applied where the reclassification was occasioned by efforts to correct a perceived erroneous classification practice<sup>115</sup>, the exact situation here. Notably, the EC itself was at the forefront of the successful initiative to extend Article II compliance procedures to reclassification decisions.<sup>116</sup> Such extension was a direct response to the EC and other parties' concerns that certain countries were avoiding Article II compliance requirements by reinterpreting existing tariff provisions in lieu of amending the tariff nomenclature.

6.40 In the present matter, the defending parties effected reclassification unilaterally without giving the requisite notice and without seeking the necessary GATT approval. The defending parties had also failed to comply with the mandatory requirement to submit for approval proposed amendments to concession schedules that reflected the altered tariff treatment accorded to the goods. Such non-compliance appeared contrary to the EC's historical positions which aggressively advocated that contracting parties effected product reclassification in full conformity with Article II and Article XXVIII requirements. For instance, the EC had defended its own tariff reclassification practices under these Articles, and had openly questioned adherence by other contracting parties.<sup>117</sup>

6.41 In its submission of 4 June 1997, the EC had not contended that it had complied with the procedural requirements or, for that matter, even acknowledged the existence of such requirements. Instead, the EC had argued that the United States should have raised the matter on its own initiative during the concession negotiations.<sup>118</sup> As demonstrated above, however, the party making Article II concessions had the affirmative obligation to give the requisite notice through formal GATT procedures when it altered effective duty rates through reclassification.<sup>119</sup> In any event, as discussed above, Singapore in fact had taken the initiative when the negotiations had commenced by specifically referring to various types of LAN equipment in its concession request for ADP units under tariff heading 84.71. Consequently, the EC was aware that trading partners such as Singapore had negotiated with the understanding that the EC offers on ADP units included LAN equipment. Accordingly, the Panel should

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System Nomenclature," TAR/W/55/Add. 1, p. 2-3, paras. 5-7. "[U]nder longstanding GATT practice, even purely formal changes in the tariff schedule of a contracting party, which may not affect the GATT rights of other countries, such as the conversion of a specific to an ad valorem duty without an increase in the protective effect of the tariff rate in question, have been considered to require renegotiations." Panel Report on *Newsprint*, op cit., para. 50.

<sup>114</sup>See Note by the Secretariat on *Tariff Reclassification*, op cit, paras. 6(iii), 8 and 14.

<sup>115</sup>*Ibid.*, para. 6(iii).

<sup>116</sup>See TAR/M/3 dated 10 March 1981, Minutes of Meeting, Committee on Tariff Concessions, pages 11 and 12, para. 5.2.

<sup>117</sup>*Ibid.*, para. 5.2 (the EC representative "was wondering whether, through the secretariat, it would not be possible to know what were the legal possibilities available in various countries in order to be able to maintain obligations under GATT in reclassification cases.")

<sup>118</sup>See, e.g., para. 92. Even if EC's partners anticipated future events and raised the issue during the negotiations, such consultations would not have relieved the EC from its obligation to follow the requisite GATT requirements when it later mandated that EC member states increase the effective duty rates on the disputed items.

<sup>119</sup>Any obligations of fellow contracting parties are triggered only upon the receipt of such formal notice.



reject the EC's attempt to shift its burden to other Members, and its attempt to alter its binding obligation that it had committed to during the course of the negotiations.

6.42 As a conclusion, during the tariff concession negotiations, Singapore and the EC's other trading partners had every reason to believe that the EC's concessions on ADP units included LAN equipment. Singapore's original request to the EC for heading 8471 concessions explicitly referred to various types of LAN equipment, and the EC had never indicated any reservations or opposition. The reasonableness of EC trading partners' expectations was subsequently corroborated by the HS Committee's determination that tariff heading 84.71 was the controlling HS category for LAN equipment. The language interpreted by the HS Committee was identical to the language appearing in tariff heading 84.71 of the EC's HS nomenclature and the language in the EC's ADP tariff concession. Consequently, the EC's reclassification of LAN equipment and resulting imposition of duties at rates that exceeded the bound rates for ADP units had violated Article II obligations, and nullified or impaired the value of the benefits EC trading partners had reasonably expected to receive.

## VII. INTERIM REVIEW

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

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

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

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

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

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

7.7 The Panel was not persuaded by this argument. The AEA meeting with EC officials might have been scheduled, but it was not clear whether or when it actually took place (see paragraph 5.30). The European Communities did not put forward more detailed explanation regarding that meeting than

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

7.8 The European Communities further argued that, in view of the agreement between the parties that the relevant period for this dispute was from January 1990 to March 1994 (see paragraph 5.24), it failed to understand how the finding in paragraph 7.41 of the interim report (now paragraph 8.41 of the final report) could be based on an objective appreciation of facts as they appeared from the file. According to the European Communities, apart from the classification carried out by other EC customs authorities (e.g. Germany) the BTI issued by the UK customs authorities to CISCO showed that it had not been possible for the US industry to have a genuine understanding during the relevant period that all LAN equipment would be classified as ADP machines. Moreover, the European Communities argued, this evidence showed that CISCO, when submitting its letter referred to in Annex 4, Table 3, No. 8 was not telling the truth (see paragraph 5.49).

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

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

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

7.12 Regarding paragraph 7.56 of the interim report (now paragraph 8.56 of the final report), the European Communities pointed out that the United States itself had reclassified during the course of the Uruguay Round, namely in 1992, LAN equipment from telecommunication apparatus to ADP machines and that this reclassification had happened after the United States had made its "zero-for-zero" request/offer of 15 March 1990, which included electronic articles in HS chapters 84, 85 and 90 (see

paragraph 5.26). The European Communities also noted that during the negotiations of the North American Free Trade Agreement, the parties to that agreement had admitted that it was difficult to classify LAN equipment and they had agreed to consult on this issue and to endeavour to agree no later than 1 January 1994 on the classification of such goods in each party's tariff schedule (see paragraph 5.33). The European Communities further recalled that after the conclusion of the Uruguay Round, the HS Committee of the World Customs Organization had to examine the proper classification of certain LAN equipment (see paragraph 5.12). Finally, the European Communities stated that even some third parties to this dispute, namely Japan and Korea, were currently classifying some or all LAN equipment as telecommunication apparatus (see paragraph 5.35).

7.13 Referring to paragraph 7.49 of the interim report (now paragraph 8.49 of the final report), the European Communities maintained that the facts mentioned in the previous paragraph clearly showed that there had been, and to a certain extent still was "a manifest anomaly" because of the extraordinary difficulty concerning the correct classification of LAN equipment. It also showed, according to the European Communities, the question of precise classification of LAN equipment in the EC schedule could not possibly have influenced the way in which the United States conducted the Uruguay Round tariff negotiations since the United States' "zero-for-zero" request/offer was submitted before its own reclassification of LAN equipment, i.e. without prejudice to classification details. The European Communities asked the Panel to take these elements into account and therefore come to a different conclusion.

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

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

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

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

## VIII. FINDINGS

### A. Claims of the Parties

8.1 The facts leading to this dispute can be summarized as follows. At the conclusion of the Uruguay Round, the European Communities bound its tariff rate on products described as "automatic data

processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included" (hereinafter referred to as "ADP machines") under heading 84.71 at 2.5 per cent -- or zero per cent on some products -- (to be reduced from the base rate of 4.9 per cent) in its Schedule of Concessions and Commitments annexed to the Marrakesh Protocol to the General Agreement on Tariffs and Trade 1994 (Schedule LXXX). The bound rates of duty on "parts and accessories of the machines of heading No 8471" under heading 84.73 was 2.0 per cent. The bound rates of duty on "electrical apparatus for line telephony or line telegraphy, including such apparatus for carrier current line systems" (hereinafter referred to as "telecommunication apparatus") under heading 85.17 were varied, but generally higher than those on ADP machines (3.0 to 3.6 per cent, to be reduced from the base rate of 4.6 to 7.5 per cent). The bound rate of duty on "television receivers (including video monitors and video projectors)" under heading 85.28 was 14.0 per cent.<sup>119</sup>

8.2 According to the United States, the customs authorities in the European Communities, particularly those of Ireland and the United Kingdom, generally treated LAN equipment as ADP machines during the Uruguay Round and for some time after its conclusion. In May 1995, the Commission adopted Regulation (EC) 1165/95 classifying LAN adapter cards as telecommunication apparatus under heading 85.17.<sup>120</sup> Following the adoption of this regulation, according to the United States, the customs authorities in the European Communities including those of Ireland and the United Kingdom started treating LAN adapter cards as telecommunication apparatus as mandated by the regulation, and also started classifying other LAN equipment as telecommunication apparatus.

8.3 In April 1996, a tribunal in the United Kingdom upheld a customs administration determination classifying a product known as PCTV (a combination of personal computer and colour television set, integrated in the same unit) as a television receiver under heading 85.28.<sup>121</sup>

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

8.5 The United States claims as follows:

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

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<sup>119</sup>For a more detailed description of these products and their bound rates, see Annex 1. Regarding products under heading 85.17, see also footnote 4.

<sup>120</sup>Annex 2.

<sup>121</sup>Annex 3.

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

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

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

B. Issues Regarding the Scope of the Claim

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

1. Product Coverage

8.8 The European Communities argues that the United States has failed to define clearly "LAN equipment" subject to the dispute with the exception of LAN adapter cards, and suggests that all the

claims on LAN equipment other than LAN adapter cards should be dismissed.<sup>122</sup> The United States argues that its definition of LAN equipment is clear.<sup>123</sup> In response to a question from the Panel, the United States has submitted that the term "LAN equipment" means all LAN equipment including LAN adapter cards, LAN controllers, LAN repeaters, LAN interface units and bridges, LAN extenders, LAN concentrators, LAN switches, LAN hubs and LAN routers.<sup>124</sup>

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

"The Panel considered that just as the terms of reference must be agreed between the parties prior to the commencement of the Panel's examination, similarly the product coverage must be clearly understood and agreed between the parties to the dispute. The Panel considered that to allow the inclusion of an additional product item about which one party had not been formally advised prior to the commencement of proceedings would be to introduce an element of inequity."<sup>125</sup>

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

8.10 The European Communities also argues that the scope of the United States' claim on multimedia PCs is unclear. According to the European Communities, the only item which can be considered to be the subject of this dispute settlement proceeding is the PCTV implicated in the 1996 judgement of a United Kingdom tribunal, and the European Communities suggests that the rest of the United States' claim on multimedia PCs should be dismissed.<sup>126</sup> In response to a question by the Panel, the United States has submitted that its claim includes a broad range of personal computers with multimedia capability such as those which utilize storage devices based on laser-reading technology (i.e., CD-ROMs) and those which have attendant audio and video capabilities.<sup>127</sup> Again, noting that the United States' reference to "PCs with multimedia capability" in its panel requests (WT/DS62/4, WT/DS67/3 and

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<sup>122</sup>See paragraph 4.1.

<sup>123</sup>See paragraph 4.2.

<sup>124</sup>See footnote 19 or a more precise description of these products. According to the United States, modems and multiplexers are not included in this definition. See paragraph 5.54. Evidence on these products is not accepted by the Panel as proof regarding the tariff treatment of LAN equipment.

<sup>125</sup>Panel Report on *EEC- Quantitative Restrictions against Imports of Certain Products from Hong Kong*, op cit., para. 30.

<sup>126</sup>See paragraph 4.3.

<sup>127</sup>See paragraph 4.4.

WT/DS68/2) covers all these products, we find that this definition is sufficiently specific for the purposes of our consideration of this dispute and reject the European Communities' suggestion.

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

## 2. Scope of the Measures

8.12 The European Communities argues that the United States has failed to identify measures where tariff commitments have allegedly been violated, except Regulation (EC) 1165/95 regarding LAN adapter cards and the above-mentioned UK tribunal judgement regarding PCTVs. The United States argues that in addition to these two measures, practices of the customs authorities in Ireland, the United Kingdom and other member States regarding LAN equipment, as well as the UK customs authorities' practice regarding multimedia PCs, are included within the scope of this dispute.<sup>128</sup> Although the United States' formulation of its claims appears to emphasize the "reclassification" aspect of the dispute, 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 light of the tariff commitments in Schedule LXXX. Both parties have presented their arguments on this basis.<sup>129</sup> Viewed from this perspective, we find that the United States has sufficiently identified the measures subject to the dispute, which concerns tariff treatment of LAN equipment and multimedia PCs by customs authorities in the European Communities.

8.13 Separately, the United States refers to Regulation (EC) 1153/97, which entered into force on 1 July 1997, as itself imposing tariffs at higher-than-concession rates under heading 84.71.<sup>130</sup> The European Communities objects to its inclusion for consideration by the Panel.<sup>131</sup>

8.14 Regarding Regulation (EC) 1153/97, we note that the regulation was issued on 24 June 1997, almost four months after the establishment of this Panel on 25 February 1997. It has been the consistent practice of previous panels not to examine measures introduced after the establishment of the panels.<sup>132</sup> We see no reasons to depart from this practice in the present case. The United States argues that Regulation (EC) 1153/97 "confirms" the existing measures. It does not however explain how and why this amounts to "confirmation".<sup>133</sup> Accordingly, we do not examine the conformity of Regulation (EC) 1153/97 with GATT 1994 in this report.

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<sup>128</sup>See paragraph 4.8. See also paragraph 8.5.

<sup>129</sup>See paragraphs 5.3 (arguments by the United States) and 5.13 (arguments by the European Communities).

<sup>130</sup>See paragraph 5.74.

<sup>131</sup>See paragraph 4.6.

<sup>132</sup>Panel Report on *Uruguayan Recourse to Article XXIII*, adopted on 16 November 1962, BISD 11S/95, para. 18; Panel Report on *United States - Section 337 of the Tariff Act of 1930*, adopted on 7 November 1989, BISD 36S/345, para. 5.2.

<sup>133</sup>See paragraph 4.8.



3. Status of Ireland and the United Kingdom

8.15 The United States has requested that the Panel specify which of the defending parties (the European Communities, Ireland and the United Kingdom) are responsible for the alleged nullification or impairment of its benefits under GATT 1994.<sup>134</sup> The European Communities claims that Ireland and the United Kingdom are not parties to this dispute.

8.16 The terms of reference of this Panel clearly mandates us to examine "the matters referred to the DSB by the United States in documents WT/DS62/4, WT/DS67/3 and WT/DS68/2". The respondents in these documents are the European Communities, the United Kingdom and Ireland, respectively. However, as we stated earlier, what is at issue in this dispute is tariff treatment of LAN equipment and multimedia PCs by customs authorities in the European Communities.<sup>135</sup> Since the European Communities, Ireland and the United Kingdom are all bound by their tariff commitments under Schedule LXXX, our examination will focus, in the first instance, on whether customs authorities in the European Communities, including those located in Ireland and the United Kingdom, have or have not deviated from the obligations assumed under that Schedule. Accordingly, we will revert to this issue in light of the conclusions of that examination.

8.17 As a related matter, the United States has requested that the title of the report of this Panel be changed to read "European Communities, Ireland and the United Kingdom - Increases in Tariffs on Certain Computer Equipment".<sup>136</sup> The European Communities does not agree to this change.<sup>137</sup> Given that the report is a consolidated response to the United States' requests contained in documents WT/DS62/4, WT/DS67/3 and WT/DS68/2, the change in the title might have been acceptable if it had been agreed upon by the parties to the dispute when they reached an agreement on the terms of reference of this Panel. However, the United States requested this change at the very end of the second substantive meeting, which in our view was rather late in the process. Considering that the current title of this report, read together with the three document symbols (WT/DS62/R, WT/DS67/R and WT/DS68/R) it carries, does not lead to any confusion or misunderstanding regarding the substance of this dispute and that, more generally, it is desirable for the title of a dispute to remain unchanged throughout the process (from consultations to implementation), we reject the request by the United States. In so doing, we also note that the title of a particular dispute is given for the sake of convenience in reference and in no way affects the substantive rights and obligations of the parties to the dispute.

C. General Interpretative Issue

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

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<sup>134</sup>See paragraph 3.2.

<sup>135</sup>See paragraph 8.12.

<sup>136</sup>See paragraph 5.3.

<sup>137</sup>See paragraph 5.4.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8.21 Article 32 of the Vienna Convention further provides:

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

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable."

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

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

"... The Panel considered that the main value of a tariff concession is that it provides an assurance of better market access through improved price competition. Contracting parties negotiate tariff concessions primarily to obtain that advantage. They must therefore be assumed to base their tariff negotiations on the expectation that the price effect of the tariff concessions will not be systematically offset. If no right of redress were given to them in such a case they would be reluctant to make tariff concessions and the General Agreement would no longer be useful as a legal framework for incorporating the results of trade negotiations..."<sup>138</sup>

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

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

"If any Member considers that a product is not receiving from another Member the treatment which the first Member *believes to have been contemplated* by a concession provided for in

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<sup>138</sup>Panel Report on *European Economic Community - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, adopted on 25 January 1990, BISD 37S/86, para. 148.

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

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

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

"[T]he relevant provisions [of the Agreement on Textiles and Clothing] have to be interpreted in good faith. Based upon the wording, the context and the overall purpose of the Agreement, exporting Members can ... legitimately expect that market access and investments made would not be frustrated by importing Members taking improper recourse to such action."<sup>139</sup>

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

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

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

#### D. LAN Equipment

8.29 The United States claims that LAN equipment should have been accorded the tariff treatment of ADP machines or parts thereof under heading 84.71 or heading 84.73 in Schedule LXXX. The European Communities claims that its treatment of LAN equipment as telecommunication apparatus

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<sup>139</sup>Panel Report on *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear*, adopted on 25 February 1997, WT/DS24/R, para. 7.20. See also Panel Report on *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*", WT/DS50/R, para. 7.18.

under heading 85.17 of Schedule LXXX is justified and that it is entitled to levy the rate of duty under that heading accordingly. Thus, we need to determine the proper interpretation of Schedule LXXX regarding LAN equipment. As noted earlier, the general question of where LAN equipment should be classified in a tariff nomenclature is beyond our mandate. Our finding is specific to obligations under Schedule LXXX, and should not be taken as anything going beyond that.

1. Textual Analysis

8.30 Following the rules of the Vienna Convention<sup>140</sup>, we start from the textual analysis. Schedule LXXX does not specifically refer to LAN equipment. It generally refers to "automatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included" under heading 84.71 and "parts and accessories of machines of heading No 8471" under heading 84.73. In view of the data processing capacities of LAN equipment, one might conclude that any type of LAN equipment is an ADP machine or part thereof. However, if one emphasizes the fact that LAN equipment is used for communication among various computer devices and the expression "not elsewhere specified", one could also argue that LAN equipment is an "electrical apparatus for line telephony or line telegraphy, including such apparatus for carrier current line systems" under heading 85.17.

8.31 Thus, for the purposes of Article II:1, it is impossible to determine whether LAN equipment should be regarded as an ADP machine purely on the basis of the ordinary meaning of the terms used in Schedule LXXX taken in isolation. However, as noted above, the meaning of the term "ADP machines" in this context may be determined in light of the legitimate expectations of an exporting Member.<sup>141</sup>

2. Actual Tariff Treatment and Legitimate Expectations

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

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

(a) Evaluation of the Evidence of Actual Tariff Treatment

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

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<sup>140</sup>See paragraph 8.20.

<sup>141</sup>See paragraphs 8.23-8.28.

"[W]e find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof. It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. Also, it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption."<sup>142</sup>

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

8.36 To support its claim, the United States has submitted Binding Tariff Information (BTI) issued by Ireland<sup>143</sup> and letters from the UK Customs and Excise<sup>144</sup>, which treated certain LAN equipment as ADP machines during the Uruguay Round. It has also produced letters from four of the leading US exporters of LAN equipment to Europe attesting to the fact that all of their LAN equipment exported to Ireland and the United Kingdom -- which were their major market -- between 1991 and 1994 had been treated as ADP machines.<sup>145</sup> The US industry appears to have been satisfied with this tariff treatment at that time, and did not voice any concerns in this regard to the US Government during the Uruguay Round.

8.37 Moreover, the BTIs submitted by the United States regarding other member States further support its position.<sup>146</sup> They indicate that even after the conclusion of the Uruguay Round tariff negotiations, customs authorities in Denmark, France and the Netherlands treated LAN equipment as ADP machines. In the case of France, a statement by a French customs official at a meeting of the European Commission's Customs Code Committee is also cited as support of this claim.<sup>147</sup> Although the United States cannot -- and does not -- claim that these BTIs formed the basis of its expectations because of the timing of their issuance, they lend supplementary support to the US claim on how LAN equipment was treated in the European Communities during the Uruguay Round in as much as there is no evidence to suggest that these BTIs were a particular departure from the prevailing practice in these member States.

8.38 We also note US export data showing that US exports of LAN equipment (classified under USX 847199 and 847330) to the European Communities continued to rise after the Uruguay Round,

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<sup>142</sup>Appellate Body Report on *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, adopted on 23 May 1997, WT/DS33/AB/R, p. 14 (footnotes omitted).

<sup>143</sup>Annex 4, Table 1.

<sup>144</sup>Annex 4, Table 2.

<sup>145</sup>Annex 4, Table 3. See also paragraph 5.44.

<sup>146</sup>Annex 4, Table 1.

<sup>147</sup>See paragraph 5.44.

while EC import statistics, which formerly moved in the same direction as US export statistics, indicate a decline in the imports of "other ADP machines" (under CN 847199) from the United States and a simultaneous increase in the imports of telecommunication apparatus (under CN 851782) in 1995.<sup>148</sup> These statistics are aggregated at a level that makes it difficult to draw specific conclusions in respect of the tariff treatment of LAN equipment. This evidence does, however, indirectly support the US argument in as much as it is consistent with the effects that would be anticipated if there was a change in tariff treatment in the European Communities after the Uruguay Round.

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

8.40 Following the Appellate Body report on *Shirts and Blouses*<sup>149</sup>, the burden now shifts to the European Communities. To rebut the presumption raised by the United States, the European Communities has produced documents which indicate that LAN equipment had been treated as telecommunication apparatus by other customs authorities in the European Communities. In Germany, the customs authorities treated certain LAN equipment as telecommunication apparatus already in 1989, a practice upheld by the German Federal Tax Court (Bundesfinanzhof) in 1991.<sup>150</sup> The European Communities has also produced BTIs issued by the Dutch, French, German and UK customs authorities treating certain LAN equipment as telecommunication apparatus<sup>151</sup>, although a close examination of these BTIs reveals that those from the Netherlands pertain to either multiplexers, which are outside the scope of our examination, or more generic networking equipment, which may or may not fall under the definition of LAN equipment used in this report.

8.41 The only direct counter-evidence against the US claim on practices in Ireland and the United Kingdom is a December 1993 BTI issued by the UK customs authority (HM Customs and Excise) to one of the US companies (CISCO), classifying one type of LAN equipment (routers) as telecommunication apparatus.<sup>152</sup> Since it became effective only a week or so before the conclusion of the Uruguay Round negotiations, it is not in our view sufficient to rebut the above presumption, which was raised by more extensive and general evidence, that LAN equipment was generally treated as ADP machines in Ireland and the United Kingdom during the Uruguay Round.

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<sup>148</sup>Annex 7.

<sup>149</sup>See paragraph 8.34.

<sup>150</sup>See paragraph 5.46.

<sup>151</sup>Annex 6, Table 1.

<sup>152</sup>See paragraph 8.32. We do not consider other BTIs issued by the HM Customs and Excise submitted by the European Communities (Annex 6, Table 1) to be relevant because they became valid after the conclusion of substantive tariff negotiations of the Uruguay Round. In this connection, we find it noteworthy that the European Communities did not produce any British or Irish BTIs issued prior to December 1993 to support its case on this important issue. The European Communities suggests that the fact that American Electronics Association had scheduled a meeting with Commission officials on 25 February 1994 in order to discuss a number of issues including classification difference in member States with respect to a number of products including LAN interface is another indication of the non-uniform treatment of LAN equipment within the European Communities. See paragraph 5.29. However, in our view, the information was too vague and indirect to rebut the presumption mentioned above, even to the extent that it was unclear that the meeting had actually taken place.

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

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

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

(b) Legitimate Expectations

8.45 We now turn to the examination of whether the actual tariff treatment of LAN equipment entitles the United States to legitimate expectations in this regard sufficient to establish its claim of a violation of Article II of GATT 1994 by the European Communities. In our view, an exporting Member's legitimate expectations regarding tariff commitments are normally based, at a minimum, on the assumption that the actual tariff treatment accorded to a particular product at the time of the negotiation will be continued unless such treatment is manifestly anomalous or there is information readily available to the exporting Member that clearly indicates the contrary. The existence of such expectations in tariff negotiations can be seen in the fact that negotiators normally use actual trade data to calculate the effect of "requests" and "offers", and to evaluate the resulting tariff reductions in terms of trade-weighted average.<sup>153</sup> In other words, they work on the general assumption that the actual tariff treatment accorded to a particular product as traded is the relevant item for the purposes of negotiations.

8.46 In the present case, in view of the prevailing practice in the European Communities during the Uruguay Round, the United States would appear to have a legitimate expectation that LAN equipment would continue to be accorded tariff treatment as ADP machines in the European Communities. Certainly, such treatment could not be characterized as manifestly anomalous.<sup>154</sup> Was there information readily available to the United States that indicated that the actual tariff treatment of LAN equipment would not be continued?

8.47 In this regard, the European Communities challenges the legitimacy of the United States' expectations by saying: "The US negotiators may find it difficult to admit now that their understanding

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<sup>153</sup>For instance, when the Ministers agreed in Montreal in 1988 on a "substantial reduction ... with a target amount for overall reductions at least as ambitious as that achieved by the formula participants in the Tokyo Round" (MTN.TNC/11), it was generally understood to mean more than 33 per cent reduction in trade-weighted average for industrial products. For how this figure was calculated, see General Agreement on Tariffs and Trade, The Tokyo Round of Multilateral Trade Negotiations: Report by the Director-General of GATT (Geneva, April 1979), p. 120.

<sup>154</sup>See paragraphs 8.30-8.31.



of the tariff classification in the EC of the products they talk about now was erroneous; however, they only have themselves to blame. They should have come forward and requested clarification from the EC negotiators if they were not sure where these products should be classified in the EC especially since they themselves had reclassified these products only shortly beforehand".<sup>155</sup> There are two distinct issues in this argument: (i) Were the US negotiators required to clarify where LAN equipment was to be classified in the draft Schedule LXXX during the negotiations?; and (ii) Does the United States' own reclassification of LAN equipment from telecommunication apparatus to ADP machines affect the legitimacy of the United States' expectations? We examine these issues in turn.

(i) Requirement of Clarification

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

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

8.50 We also note in this context that a tariff commitment is an instrument in the hands of an importing Member which inherently serves the importing Member's "protection needs and its requirements for the purposes of tariff and trade negotiations".<sup>156</sup> The exporting party is well aware of that fact, and may therefore reasonably expect -- absent something explicit to the contrary -- that the importing party, in making a particular commitment has taken those needs and requirements already into account as matters over which it has competence and control. It is for this reason that it behooves the importing party, as the effective bearer of its rights and responsibilities, to correctly identify products and relevant duties in its tariff schedules, including such limitations or modifications as it intends to apply.

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<sup>155</sup>See paragraph 5.33.

<sup>156</sup>Panel Report on *Japan - Tariff on Imports of Spruce, Pine, Fir (SPF) Dimension Lumber*, op cit., para. 5.9. Although this report affirms Japan's classification of particular items as a practice meeting these needs and requirements, the Panel Report on *Spain - Tariff Treatment of Unroasted Coffee*, op cit., -- which found Spain's classification practice to be inconsistent with GATT 1947 on other grounds -- states that such a practice is subject to the condition "that a reclassification subsequent to the making of a concession under the GATT would not be a violation of the basic commitment regarding that concession" (para. 4.4, footnote 1).

8.51 We consider that this reasoning is supported by past cases. In 1956, Germany complained that the Greek Government had increased the duty on gramophone records, which had been bound at the Annecy and Torquay rounds of tariff negotiations. The Group of Experts that examined the case stated as follows:

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

...

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

"The Group consequently reports to the CONTRACTING PARTIES its finding that 'long-playing' records (under 78 revolutions per minute) are covered by the description of item 137, e, 3 bound in Schedule XXV (Annecy and Torquay) and, therefore, the rate of duty to be applied to long-playing records is that bound in the schedules under that item. As the action taken by the Greek Government involves a modification in a bound rate, it is the opinion of the Group that the Greek Government should have resorted to the procedures provided in the Agreement for such modification."<sup>157</sup>

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

8.52 The European Communities claims that the *Gramophone Records* case is not relevant to the present dispute because the case dealt with new products, while the US complaint in the present dispute is limited to products which already existed during the Uruguay Round.<sup>158</sup> We disagree. If the product had existed at the time of the negotiation, it would, if anything, have been easier for the importing Member to qualify the scope of its tariff commitments regarding that product, as it would not even have recourse to the argument that subsequent novelty was involved. Consequently, the reasoning

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<sup>157</sup>*Greek Increase in Bound Duty*, complaint, op cit.

<sup>158</sup>See paragraph 5.9.

regarding the requirement to respect the integrity of the commitment without qualification would seem to have even more force.

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

"The Panel could not share the argument advanced by the European Communities that their action did not constitute a change in their GATT tariff commitment. It noted that under long-standing GATT practice, even purely formal changes in the tariff schedule of a contracting party, which may not affect the GATT rights of other countries, such as the conversion of a specific to an *ad valorem* duty without an increase in the protective effect of the tariff rate in question, have been considered to require renegotiations. By the same token, the European Communities action would, in the Panel's view, have required the European Communities to conduct such negotiations. The Panel also noted that in granting the concession in 1973, the European Communities had not made it subject to any qualification or reservation in the sense of Article II:1(b) although at the time the concession was made, it was known that agreement had already been reached that the EFTA countries would obtain full duty-free access to the Community market for newsprint from 1 January 1984 onward. The Panel therefore found that although in the formal sense the European Communities had not modified its GATT concession, it had *in fact* changed its GATT commitment unilaterally, by limiting its duty-free tariff quota for m.f.n. suppliers for 1984 to 500,000 tonnes."<sup>159</sup>

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

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

(ii) The United States' Own Reclassification

8.56 The European Communities further argues that since the United States itself had classified LAN equipment as telecommunication apparatus in its tariff schedule until 1992, it could not have legitimately expected that the European Communities would treat LAN equipment as ADP machines.<sup>160</sup> It also argues that the difficulty of classifying LAN equipment was recognized in the negotiations of the North American Free Trade Agreement and that it was not until 1995 that Canada reclassified LAN equipment

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<sup>159</sup>Panel Report on *Newsprint*, op cit., para.50.

<sup>160</sup>See paragraph 5.26.

as ADP machines.<sup>161</sup> It further argues that Japan and Korea, which are third parties to this dispute, still classify some or all LAN equipment as telecommunication apparatus.<sup>162</sup>

8.57 Furthermore, the European Communities points out that it was not until April 1997 that the Harmonized System (HS) Committee of the World Customs Organization (WCO) decided on the classification of LAN equipment, indicating the difficulty of tariff classification of this product.<sup>163</sup>

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

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

### 3. Conclusion

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

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

8.62 We thus find that LAN equipment should have obtained the tariff treatment afforded to ADP machines in Schedule LXXX and that the European Communities has violated Article II:1 of GATT 1994

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<sup>161</sup>See paragraph 5.33.

<sup>162</sup>See paragraph 5.35.

<sup>163</sup>See paragraph 5.12.

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.

E. Multimedia PCs

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

1. Textual Analysis

8.64 Our starting point again is the textual analysis. We need not reproduce the definition of ADP machines under heading 84.71 in Schedule LXXX. We simply note that, as in the case of LAN equipment, certain types of multimedia PCs can be regarded, based on the ordinary meaning of the terms used in that Schedule, either as ADP machines under heading 84.71 or as television receivers under heading 85.28 depending on whether they are seen as "computers that can receive television signals" or as "television receivers that can also function as computers".<sup>164</sup> The textual analysis of Schedule LXXX alone does not lead to a clear solution of the problem.

2. Legitimate Expectations

8.65 The United States claims that it is entitled to the legitimate expectations that multimedia PCs would be accorded the tariff treatment as ADP machines within the meaning of Schedule LXXX. We recall in this context the Appellate Body's observation regarding what amounts to proof.<sup>165</sup> We also note that the United States' assertion that "PCs with multimedia capability were treated as products under Chapter 84 during the Uruguay Round"<sup>166</sup> is not substantiated by any evidence as regards actual tariff treatment.<sup>167</sup> The only evidence produced by the United States in this regard is a judgement by a UK court on PCTVs, ruling that they are properly classified under heading 85.28 as television receivers.<sup>168</sup> We fail to see how this judgement supports the US position without any showing of the previous practices in the European Communities or in the United Kingdom. It is true that Regulation

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<sup>164</sup>It should be emphasized once again that it is not our task to determine where multimedia PCs should be classified in a tariff nomenclature.

<sup>165</sup>See paragraph 8.34.

<sup>166</sup>See paragraph 5.66.

<sup>167</sup>Unlike the case of LAN equipment, the United States has not produced any evidence of record on actual tariff treatment, e.g., BTIs, customs rulings or actual invoices. Paragraphs 5.69 to 5.71 are the US replies to the following question by the Panel: "How do you respond to the EC argument that 'the United States did not produce any document showing that the EC did indeed classify all computers with multimedia capabilities under heading 84.71 during the Uruguay Round'? Do you have any specific documentation regarding the actual tariff treatment of computers with multimedia capabilities on importation during the period covered by the Uruguay Round?".

<sup>168</sup>Annex 3.

(EC) 1153/97 classifies all computers "capable of receiving and processing television, telecommunication, audio and video signals" under heading 84.71, but this regulation became effective in July 1997. Since the regulation was adopted in part to reflect a 1996 decision by the HS Committee of the WCO, it cannot be viewed as evidence of the EC practice during the Uruguay Round.

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

### 3. Other Means of Interpretation

8.67 The analysis of the context, object or purpose of Schedule LXXX, GATT 1994 or the WTO Agreement -- apart from those relating to legitimate expectations -- does not clarify the situation. Nor do we find any clear guidance in subsequent agreements or practices. Moreover, recourse to the supplementary means of treaty interpretation<sup>169</sup> is not helpful because neither party has produced sufficient evidence thereof. We are therefore unable to reach a positive conclusion that multimedia PCs should have been treated as ADP machines within the meaning of Schedule LXXX.

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

### F. Nullification or Impairment

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

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

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

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

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<sup>169</sup>See paragraph 8.21.

## IX. CONCLUSIONS

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

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

ANNEX 1

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

Tariff item number	Description of products	Base rate of duty	Bound rate of duty	Initial negotiating right	Other duties and charges	Remarks
	2	3	4	5	6	7
8471	Automatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included:					
8471.10	-Analogue or hybrid automatic data processing machines:					
8471.10.10	--For use in civil aircraft	0.0	0.0			
8471.10.90	--Other	4.9	2.5			
8471.20	-Digital automatic data processing machines, containing in the same housing at least a central processing unit and an input and output unit, whether or not combined:					
8471.20.10	--For use in civil aircraft	0.0	0.0			
8471.20.40	--Other:					
	---With a random access memory (RAM) with a capacity not exceeding 64 kilobytes	4.9	2.5			
8471.20.50	---With a random access memory (RAM) with a capacity exceeding 64 kilobytes but not exceeding 256 kilobytes	4.9	2.5			
8471.20.60	---With a random access memory (RAM) with a capacity exceeding 256 kilobytes but not exceeding 512 kilobytes	4.9	2.5			
8471.20.90	---With a random access memory (RAM) with a capacity exceeding 512 kilobytes	4.9	2.5			
8471.91	-Other:					
	--Digital processing units, whether or not presented with the rest of a system, which may contain in the same housing one or two of the following types of unit : storage units, input units, output units:					
8471.91.10	---For use in civil aircraft	0.0	0.0			
8471.91.40	---Other					
	----With a random access memory (RAM) with a capacity not exceeding 64 kilobytes	4.9	2.5			



Tariff item number	Description of products	Base rate of duty	Bound rate of duty	Initial negotiating right	Other duties and charges	Remarks
1	2	3	4	5	6	7
8471.91.50	----With a random access memory (RAM) with a capacity exceeding 64 kilobytes but not exceeding 256 kilobytes	4.9	2.5			
8471.91.60	----With a random access memory (RAM) with a capacity exceeding 256 kilobytes but not exceeding 512 kilobytes	4.9	2.5			
8471.91.90	----With a random access memory (RAM) with a capacity exceeding 512 kilobytes	4.9	2.5			
8471.92	--Input or output units, whether or not presented with the rest of a system and whether or not containing storage units in the same housing:					
8471.92.10	---For use in civil aircraft	0.0	0.0			
8471.92.90	---Other	4.9	0.0			
8471.93	--Storage units, whether or not presented with the rest of a system:					
8471.93.10	---For use in civil aircraft	0.0	0.0			
8471.93.40	---Other:					
	----Central storage units	4.9	0.0			
	----Other:					
	-----Disk storage units	4.9	0.0			
	-----Magnetic tape storage units	4.9	0.0			
	-----Other	4.9	0.0			
	---Other:					
	----Peripheral units	4.9	0.0			
	----Punches, verifiers and calculators	4.9	0.0			
	----Other	4.9	0.0			
8473	Parts and accessories (other than covers, carrying cases and the like) suitable for use solely or principally with machines of headings Nos 8469 to 8472:					
	-Parts and accessories of the machines of heading No 8469:					
	--Electronic assemblies	4.0	3.0			
	--Other	4.0	0.0			
	-Parts and accessories of the machines of heading No 8470:					
	--Of the electronic calculating machines of subheading No 8470 10, 8470 21 or 8470 29:					
	----Electronic assemblies	6.3	3.0			
	----Other	6.3	0.0			
8473.10.00						
EX1-NEW						
EX2-NEW						
8473.21.00						
EX1-NEW						
EX2-NEW						

Tariff item number	Description of products	Base rate of duty	Bound rate of duty	Initial negotiating right	Other duties and charges	Remarks
1	2	3	4	5	6	7
8473.29.00	--Other:					
EX1-NEW	---Electronic assemblies	4.0	3.0			
EX2-NEW	---Other	4.0	0.0			
8473.30.00	-Parts and accessories of the machines of heading No 8471:					
EX1-NEW	--Electronic assemblies	4.0	2.0			Concession to be implemented over 8 years
EX2-NEW	--Other	4.0	0.0			
8473.40.00	-Parts and accessories of the machines of heading No 8472:					
EX1-NEW	--Electronic assemblies	4.0	3.0			
EX2-NEW	--Other	4.0	0.0			
8517	Electrical apparatus for line telephony or line telegraphy, including such apparatus for carrier-current line systems:					
8517.10.00	-Telephone sets	7.5	0.0			
8517.20.00	-Teleprinters	7.5	3.6			
8517.30.00	-Telephonic or telegraphic switching apparatus	7.5	3.6			
8517.40.00	-Other apparatus, for carrier-current line systems	4.6	3.6			
8517.81	-Other apparatus:					
8517.81	--Telephonic:					
8517.81.10	---Entry-phone systems	7.5	3.6			
8517.81.90	---Other	7.5	3.6			
8517.82.00	--Telegraphic	7.5	3.6			
8517.90	-Parts:					
8517.90.10	--Of apparatus of subheading 8517 40 00:					
EX1-NEW	---Electronics assemblies and sub-assemblies	4.6	3.0			
EX2-NEW	---Other	4.6	3.0			
8517.90.91	--Other:					
8517.90.91	---Of telephonic apparatus:					
EX1-NEW	----Electronics assemblies and sub-assemblies	7.5	3.0			
EX2-NEW	----Other	7.5	3.0			
8517.90.99	---Of telegraphic apparatus					
EX1-NEW	----Electronics assemblies and sub-assemblies	7.5	3.0			
EX2-NEW	----Other	7.5	3.0			
8521	Video recording or reproducing apparatus:					
8521.10	-Magnetic tape-type:					

Tariff item number	Description of products	Base rate of duty	Bound rate of duty	Initial negotiating right	Other duties and charges	Remarks
1	2	3	4	5	6	7
8521.10.10	--For use in civil aircraft --Other: ---Of a width not exceeding 1,3 cm and allowing recording or reproduction at a tape speed not exceeding 50 mm per second: ----Within the same housing a built-in television camera ----Other ---Other -Other Television receivers (including video monitors and video projectors), whether or incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus: -Colour: --Video recording or reproducing apparatus incorporating a video tuner: ---Using magnetic tape on reels or in cassettes: ----Of a width not exceeding 1,3 cm and allowing recording or reproduction at a tape speed not exceeding 50 mm per second ----Other ----Other --Television projection equipment --Apparatus incorporating a videophonic recorder or reproducer --Video monitors --Other: ----With integral tube, with a diagonal measurement of the screen: -----Not exceeding 42 cm -----Exceeding 42 cm but not exceeding 52 cm -----Exceeding 52 cm ----Other: ----Video tuners ----Other -Black and white or other monochrome: --With integral tube: ----Video monitors	0.0  14.0 14.0 8.0 14.0  14.0  8.0 14.0 14.0 14.0 14.0  14.0  14.0 14.0 14.0 14.0  14.0  14.0 14.0 14.0 14.0 14.0 14.0 14.0 14.0 14.0	0.0  14.0 14.0 8.0 14.0  14.0  8.0 14.0 14.0 14.0 14.0  14.0  14.0 14.0 14.0 14.0  14.0  14.0 14.0 14.0 14.0 14.0 14.0 14.0	5	6	7
8528.10.11		14.0	14.0			
8528.10.19		8.0	8.0			
8528.10.30		14.0	14.0			
8528.10.40		14.0	14.0			
8528.10.50		14.0	14.0			
8528.10.60		14.0	14.0			
8528.10.71		14.0	14.0			
8528.10.73		14.0	14.0			
8528.10.79		14.0	14.0			
8528.10.91		14.0	14.0			
8528.10.99		14.0	14.0			
8528.20						
8528.20.10		14.0	14.0			

Tariff item number	Description of products	Base rate of duty	Bound rate of duty	Initial negotiating right	Other duties and charges	Remarks
1	2	3	4	5	6	7
8528.20.71	---Other, with a diagonal measurement of the screen:	14.0	2.0			
8528.20.73	----Not exceeding 42 cm	14.0	2.0			
8528.20.79	----Exceeding 42 cm but not exceeding 52 cm	14.0	2.0			
8528.20.90	----Exceeding 52 cm	14.0	2.0			
	--Other	14.0	2.0			

Source: European Communities - Schedule LXXX.

Note: "The tariff reductions agreed upon by each Member shall be implemented in five equal rate reductions, except as may be otherwise specified in a Member's Schedule. The first such reduction shall be made effective on the date of entry into force of the WTO Agreement, each successive reduction shall be made effective on 1 January of each of the following years, and the final rate shall become effective no later than the date four years after the date of entry into force of the WTO Agreement, except as may be otherwise specified in the Member's Schedule." (Marrakesh Protocol to the General Agreement on Tariffs and Trade 1994, paragraph 2)

ANNEX 2

Commission Regulation (EC) No. 1165/95

of 23 May 1995

concerning the classification of certain goods in the combined nomenclature

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No. 2658/87<sup>170</sup> on the tariff and statistical nomenclature and on the Common Customs Tariff, as last amended by Commission Regulation (EC) No. 3115/94<sup>171</sup>, and in particular Article 9,

Whereas in order to ensure uniform application of the combined nomenclature annexed to the said Regulation, it is necessary to adopt measures concerning the classification of the goods referred to in the Annex to this Regulation;

Whereas Regulation (EEC) No. 2658/87 has set down the general rules for the interpretation of the combined nomenclature and those rules also apply to any other nomenclature which is wholly or partly based on it or which adds any additional subdivision to it and which is established by specific Community provisions, with a view to the application of tariff and other measures relating to trade in goods;

Whereas, pursuant to the said general rules, the goods described in column 1 of the table annexed to the present Regulation must be classified under the appropriate CN codes indicated in column 2, by virtue of the reasons set out in column 3;

Whereas it is acceptance that binding tariff information issued by the customs authorities of Member States in respect of the classification of goods in the combined nomenclature and which do not conform to the rights established by this Regulation, can continue to be invoked, under the provisions in Article 12(6) of Council Regulation (EEC) No. 2913/92 establishing the Community Customs Code<sup>172</sup>, for a period of three months by the holder;

Whereas the tariff and statistical nomenclature section of the Customs Code Committee has not delivered an opinion with the time limit set by its chairman as regards products Nos. 4 and 7 in the annexed table;

Whereas the measures provided for in this Regulation are in accordance with the opinion of the tariff and statistical nomenclature section of the Customs Code Committee as regards products Nos. 1, 3, 5 and 6 in the annexed table,

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<sup>170</sup>OJ No. L 256, 7/9/1987, p.1.

<sup>171</sup>OJ No. L 345, 31/12/94, p.1.

<sup>172</sup>OJ No. L 302, 19/10/92, p.1.

HAS ADOPTED THIS REGULATION:

*Article 1*

The goods described in column 1 of the annexed table are now classified within the combined nomenclature under the appropriate CN codes indicated in column 2 of the said table.

*Article 2*

Binding tariff information issued by the customs authorities of Member States which do not conform to the rights established by this Regulation can continue to be invoked under the provisions of Article 12(6) of Regulation (EEC) No. 2913/92 for a period of three months.

*Article 3*

This Regulation shall enter into force on the 21st day following its publication in the *Official Journal of the European Communities*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 23 May 1995.

*For the Commission*

Mario MONTI

*Member of the Commission*

ANNEX

Description of goods	Classification CN code	Reason
(1)	(2)	(3)
<p>1. An ornamental article (luminous fountain or "running tap"), put up unassembled in a packing for retail sale. Assembled, the various plastic components (a base about 15 cm. diameter, incorporating a lighting system and an electric motor with a power-supply cable, and equipped with a switch, three basins, various pipe connections, a tap, a small figure of a dancer, artificial flowers and foliage, etc.) form one or other of the articles depicted<sup>(*)</sup> (height between 30 cm. and 40 cm.)  <sup>(*)</sup>See photograph</p>	3926 40 00	Classification is determined by the provisions of General Rules 1 and 6 for the interpretation of the combined nomenclature and by the wording of CN codes 3926 and 3926 40 00
<p>2. Slippers consisting of a textile upper and an outer sole of plastic (approximately one centimetre thick), the outside of which is entirely covered by a very thin layer of textile material, with poor wearing properties, stuck along the edges</p>	6404 19 10	Classification is determined by the provisions of General Rules 1 and 6 for the interpretation of the combined nomenclature, note 4(b) to Chapter 64 and by the wording of CN codes 6404, 6404 19 and 6404 19 10
<p>3. An automated cartridge system in a casing consisting, essentially, of:  (a) one or more library storage modules (each containing cartridge storage cells and a microprocessor controlled robot and having one or more attached cartridge drive frames and control units); and  (b) a library management unit with integral software (which acts as the link between the library storage modules and one or more central processing units). This system is specifically designed for the automatic loading, processing, storage and unloading of magnetic tape cartridges for automatic data processing purposes</p>	8471 99 10	Classification is determined by the provisions of General Rules 1 and 6 for the interpretation of the combined nomenclature, by note 5B to Chapter 84 and by the wording of CN codes 8471, 8471 99 and 8471 99 10
<p>4. An adapter card for incorporation in cable linked digital automatic data-processing (ADP) machines enabling the exchange of data over a local area network (LAN) without using a modem. With such a card, an ADP-machine can be used as an input-output device for another machine or a central processing unit. The card constitutes a printed circuit of a size of about 10 x 21 cm. incorporating integrated circuits and active and passive components. It is fitted with a row of pin contacts corresponding to an expansion slot in the ADP-machine, with an attachment to the connection cable of the LAN and light emitting diodes (LEDs).</p>	8517 82 90	Classification is determined by the provisions of General Rules 1 and 6 for the interpretation of the combined nomenclature, by note 5 to Chapter 84 and by the wording of CN codes 8517, 8517 82 and 8517 82 90
<p>5. A miniature electro-acoustic receiver (earphone) in a housing whose exterior dimensions do not exceed 7 x 7 x 5 mm. The receiver comprises a magnet, a coil and a diaphragm to receive electrical signals which cause the diaphragm to vibrate thus producing audible sound. The receiver may be used together with an amplifier as a hearing aid.</p>	8518 30 90	Classification is determined by the provisions of General Rules 1 and 6 for the interpretation of the combined nomenclature, by note 2(a) to Chapter 90 and by the wording of CN codes 8518, 8518 30 and 8518 30 90

Description of goods	Classification CN code	Reason
(1)	(2)	(3)
<p>6. A laser copier comprising mainly a device for scanning (scanner), a digital image processing device and a printing device (laser printer), contained in a housing.</p> <p>The scanning device uses an optical system, consisting of a lamp, mirrors, lenses and photocells to scan the original image line by line.</p> <p>The copies are produced electrostatically via a drum on the laser printer using the indirect process. The laser copier has several additional features for altering the original image, e.g. reduction, enlargement, shading.</p>	9009 12 00	Classification is determined by the provisions of General Rules 1 and 6 for the interpretation of the combined nomenclature and by the wording of CN codes 9009 and 9009 12 00
<p>7. Little star and heart shapes in a variety of colours (red, green and shiny silver) and multicoloured granules, the size of pinheads, made from plastic film, and used to decorate e.g. a table on which food for a carnival celebration, children's party or Advent festivity is served. The decorative effect is achieved by sprinkling the products.</p>	9505 90 00	Classification is determined by the provisions of General Rules 1 and 6 for the interpretation of the combined nomenclature and by the wording of CN codes 9505 and 9505 90 00



ANNEX 3

CUSTOMS DUTIES - classification - combined nomenclature - rules of interpretation - "PCTV" whether a composite machine with a "principal function" as an Automatic Data Processing Machine or composite goods given its "essential character" by the ADPM components so classified under heading 84.71 "ADPMs" or whether it fails to be classified by default under heading 85.28 "Television Receivers" - Council Reg. 2658/87 Annex 1, GIRs1.3(b)&(c)

LONDON TRIBUNAL CENTRE

INTERNATIONAL COMPUTERS LIMITED

Appellant

- and -

THE COMMISSIONERS OF CUSTOMS AND EXCISE

Respondents

Tribunal: MR. R.K. MILLER CB (Chairman)  
MRS. S. SADEQUE M.Phil. MSc

Sitting in public at 15-19 Bedford Avenue, London WC1 on Thursday, 18 January and Friday, 19 January 1996

Mrs. P.A. Hamilton of Coopers and Lybrand for the Appellant

Mr. Hugh Davies, counsel instructed by the Solicitor for Customs and Excise for the respondents.

## DECISION

This appeal by International Computers Ltd. ("ICL") is against a decision of the Commissioners on review as to the tariff classification for import customs duty of a machine known as the "PCTV". The machine has a full title "the Fujitsu ICL PCTV", Fujitsu being the major shareholder in ICL. It is an innovative product. The machine is both a multimedia personal computer and a full function colour television set, integrated within the same unit and using the same screen.

It is common ground that the machine fails to be classified in one of two headings. ICL contends that it should be classified under heading 84.71 of the Community Customs Code - "Automatic data processing machines", which carry a rate of duty on importation of 4.4 per cent. The Commissioners decided that it falls under heading 85.28 - "Television receivers", which carry a rate of duty on importation of 14 per cent. The dispute turns upon the way in which the rules governing how goods are to be classified are to be applied. ICL contends that the PCTV's "principal function" and/or its "essential character" is that of a personal computer. The Commissioners maintain that it is not possible to determine a principal function; so, presented with two tariff headings which equally merit consideration, one must classify the PCTV under that heading which occurs last in numerical order, namely 85.28 "Television receivers".

We heard oral evidence from Mr. Sidney Burton, Development Manager for the Advanced Technology Group of ICL, who designed the machine: Mr. Justin Matthew Houghton Clarke, Market Development Manager for consumer products within ICL; and Professor Robert Spence, Professor of Information Engineering at Imperial College. These witnesses were all called by Mrs. Hamilton, who presented the case for ICL. No witnesses were called on behalf of the Commissioners, who were represented by Mr. Hugh Davies. Mr. Burton demonstrated the machine in court. We were not, however, able to see it in operation as a TV because of the lack of a proper aerial on the tribunal's premises. Mrs. Hamilton also put before the tribunal a bundle of documents. It was not an agreed bundle but was used as a working bundle for both sides.

The goods to which the disputed decision refers were imported between 1 May and 31 July 1995 by Design to Distribution Ltd., a wholly owned subsidiary of ICL from Taiwan where the machines are manufactured.

ICL has designed a range of multimedia personal computers ("PCs") known as the Fujitsu Indiana range. Multimedia PCs are computer systems which can incorporate a number of media functions, such as CD-ROM, CD audio, PC generated sound, Joystick for games etc., in addition to the normal personal computer functions. The PCTV is part of that range and is an integrated single unit designed for use in the home. The finish of the unit is charcoal-grey to be more in keeping with, for example, normal Hi-Fi equipment and is intended to be used in a study or teenager's bedroom. It integrates a multimedia personal computer with a remote controlled television facility. It is thus a fully functioning PC and a fully functioning full screen analogue TV. It is supplied packaged in one box, which contains a Main Pack, with the PCTV system unit as the first item, and an Accessories Pack, of which the first item is the keyboard with built-in trackball (the equivalent of a "mouse").

The Accessories Pack also contains the PCTV software and Microsoft software, with their documentation packs, and the remote control and power cable.

It has a single power cable and, although the machine contains two power supplies, there is a single on/off switch. The PCTV, the very first time it is switched on and provided the keyboard

is connected, turns on as a TV, the PC needing time to load. Thereafter the PC is fully capable from the time it is switched on.

The PCTV comes with a 66 MHz 486 DX2 processor 350 MB hard disk, 4 MB RAM, and double speed CD-ROM drive, integrated TV tuner with Teletext and Nicam Stereo, the integrated trackball on the keyboard, 14" SVGA display, 0.28mm dot pitch, Local bus graphics, 1 MB VRAM, 16-bit stereo sound; and software, MS DOS 6.22, Windows 3.11, MS Works CD, ICL The Den pre-installed and, on CD ROM, Wing Commander Privateer. MS Encarta, Putt Putt Joins Parade and PGA Tour Golf.

Both the PC and TV functions can be operated by the remote control unit. It is a normal remote control unit which can be used to change TV channels and to use Teletext. But it is unique in having an extra button which will operate the mouse using directional arrows and by being "clicked".

The ICL software applications can be accessed through "The Den" or by going instead direct to Windows. The Den is an ICL application consisting of a recognisable front end to Windows, to make it easier for novices to use the PCTV. Once the user is logged in he is presented with a graphic representation of a room full of familiar looking objects such as a CD player, games cupboard, clock, calendar and filing cabinet which act as "hotspots". By moving the cursor onto a hotspot a "prompt box" appears which explains the function. Clicking onto a "hotspot" activates the function.

The SoundStack is a comprehensive electronic CD player, recorder and mixer, for playing audio CDs, MIDI files and recording to hard disk.

The TV is automatically tuned in when the PCTV is switched on for the first time. Thereafter, it can be returned using the TV Channel controller. This software will automatically identify, name channels and place them in logical order. All cable and satellite channels can be picked up. Selected channels can be barred by parents so that access by unauthorised users is prevented until a password is entered.

The ICL application software also includes a "Live Mag" teletext "magazine" which stores selected teletext pages in an electronic file which are saved on the hard disk and updated automatically.

Since the pixels on a VGA screen are smaller and the degree of resolution required to display images generated by a PC even at the lowest VGA frequency is twice the frequency of 15,625 KHz fixed for all world wide TV standards, a television cathode ray tube is not physically capable of displaying the images generated by a PC nor is the television electronics capable of handling the PC display. But a PC cathode ray tube and electronics can have as a subset of its specification the necessary mode to allow the TV image to be displayed and with a picture quality which is sharper than on an equivalent portable TV.

Specifically, the PCTV has been designed as a standard Extended VGA monitor sub-system using a cathode ray tube and electronics to display all the common Extended VGA modes but with an additional 15.625 KHz mode for the display of images such as TV, VCR, Satellite and games controls. These TV style images are produced by a television card (a printed circuit board) using TV industry standard components to receive terrestrial broadcast signals or any composite video source and convert them to standard TV signals for the cathode ray tube electronics to display. Thus the monitor supports VGA resolutions up to 1024 x 768 pixels: the TV mode supports the 625 line/50 Hz PAL 1 and PAL B/G standards.

The audio design of the PCTV is a combination of the standard sound capabilities found in all multimedia PC's and which are normally achieved by adding a PC industry standard sound card containing those functions. This PC industry function has been incorporated into the PCTV by making the power amplifier part of the TV printed circuit board so that the TV related sounds can be routed through the common amplifier as well as the PC generated sounds. Hi Fi quality stereo sound is delivered through 12W Phillips Acoustic Horn Technology speakers, which are built into the system unit, in both PC and TV modes.

The machine does not contain a VCR. It has the capacity to play back signals from a VCR, although it might be more usual to use a larger screen TV for this, say the main household set in the sitting room. The TV facility on the PCTV being seen by ICL as providing a secondary TV set.

The imported value of the PCTV is 1500 US\$ of which the TV printed circuit board represents a value of 120 US\$.

The PCTV was designed to exploit a perceived market opportunity for personal computers specifically to be used in the home. It is not designed to be networked. It is targeted primarily at people in social categories A, B, and C, with school age children and also at other high income groups, e.g. students.

It is sold through a number of well known retail outlets, some of whom also sell TV sets, and through some retail buying chains. Shops display the PCTV with computers in that part of the shop and retail advertisements, for example in computer magazines, but also in other advertisements, include it with multi-media and other PCs.

ICL commissioned research from an independent research organisation to find out who would be likely to buy a PCTV, where it would be used, who would make the decisions about buying it and how computer literate they were. The results were used in devising its advertising campaigns.

The marketing material and the guidance produced, for example for sales staff in the retail outlets, varies, as one would expect, in presenting the features and advantages of the PCTV to the particular audience at which that material is aimed. Consistently, however, it is presented as a fully integrated PC and TV, whereas sometimes it is the fully functional TV which is emphasized and at others it is its qualities as a multi-media PC which is put first.

In Professor Spence's opinion the PCTV in terms of its technical functionality is extremely rich. He identified those functions as including (a) programmability, (b) interactivity, (c) multi-modality (i.e. image, sound and text), (d) the storage of data and programs, (e) the representation of internally generated data, (f) the presentation of such data, (g) the performance, via a loudspeaker, of stored sound from a CD, (h) the presentation of externally generated data (i.e. the TV programmes). Of those technical functions, he said, only one can be described as a "TV set".

The cathode ray tube, which could well give the machine the appearance of being a TV set at first glance, simply takes data signals and displays them in graphical form. It does that equally for data created by the computer and data produced from the electronics which capture a broadcast signal and turn it into data that can be presented in sound and vision.

Professor Spence also examined the principal function of the PCTV in terms, as he put it, of its empowerment of human achievement in the cognitive and perceptual sense. In this he contrasted the passive role of the TV viewer and the interactive role offered by the ADP function of the PCTV.

The one he described as being as a "simple, passive one-way experience" and the other a "rich, active and interactive experience", the difference between them being "staggering".

All this led him to the opinion that the principal function of the PCTV was its ADP function. That was also in his view its essential character, the essence of the machine being a personal computer notwithstanding its ability to present TV programmes.

The Combined Nomenclature, upon which the Community Customs Tariff is based, is reproduced in the annual revision of Annex 1 to Council Regulation (EEC) No. 2658/87 of 23rd July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff. Section 1 of Part 1 sets out under A the general rules for the interpretation of the combined nomenclature (the "GIRs"). The GIRs lay down the principles which govern the classification of goods in the combined nomenclature (or "CN").

Rule 1 states:

"The titles of sections, chapters and sub-chapters are provided for ease of reference only: for legal purposes, classification shall be determined according to the terms of headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions:"

From this it appears that the titles of sections etc. have no legal bearing on classification, that must be determined according to the terms of the headings and any relevant section or chapter notes, and it is only where those headings or notes do not otherwise require - in other words they are paramount and thus the first consideration in determining classification - that classification may be determined, where appropriate, according to the provisions of the rules which follow.

Of those following rules, Rule 3 only was referred to in argument. Rule 3 states:

"When by application of rule 2(b) or for any other reason, goods are *prima facie* classifiable under two or more headings, classification shall be effected as follows:

(a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character in so far as this criterion is applicable.

(c) When goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration."

It is common ground that the PCTV falls within Section XVI of the CN. It is also common ground that the applicable Section Note is Section Note 3 which states:

"Unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines adapted for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function."

"Machine" for these purposes "means any machine, machinery, plant, equipment, apparatus or appliance cited in the headings of Chapter 84 or 85." - see Section Note 5.

Mrs. Hamilton for ICL submits that the PCTV is a "composite machine" and that its "principal function" is that of an Automatic Data Processing Machine ("ADPM") falling under heading No. 84.71.

Chapter Note 5 to Chapter 84 states -

"(A) For the purposes of heading No. 84.71, the expression "automatic data processing machines" means:

- (a) Digital machines, capable of (1) storing the processing program or programs and at least the data immediately necessary for execution of the program; (2) being freely programmed in accordance with the requirements of the user; (3) performing arithmetical computations specified by the user; and, (4) executing, without human intervention, a processing program which requires them to modify their execution, by logical decision during the processing run;
- (b) Analogue machines capable of simulating mathematical models and comprising at least: analogue elements, control elements and programming elements;
- (c) Hybrid machines consisting of either a digital machine with analogue elements or an analogue machine with digital elements."

Mrs. Hamilton also referred to what are commonly called "HSEs", that is to say the Explanatory Notes of the Customs Co-operation Council. The "HS" or "Harmonized System", which is itself short for the International Convention on the Harmonized Commodity and Coding System, is administered under the auspices of the Customs Co-operation Council. As the recitals to Council Regulation (EEC) No. 2658/87 show, the European Community is a signatory to the Convention and the Combined Nomenclature of the Common Customs Tariff of the Community had to "be established on the basis of the Harmonized System".

That being the case, the HSEs, whilst not having legal force, nevertheless may be considered as a valuable aid to the interpretation of the provisions of the tariff although they may not alter their proper meaning. See the judgment of the European Court of Justice in *Develop Dr. Eisbein v. Hauptzollamt Stuttgart-West* Case C-35/93 (1993) ECR I-2655: in particular paragraph 21 of that judgment, and the decision of this tribunal in *Tretec UK Limited v. Customs and Excise Commissioners* (1995) Case No. C2. We gratefully accept and adopt the reasoning at paragraphs 24 to 28 of the decision with which we respectfully agree.

HSEN (V1) to Section XVI Note 3 states - (so far as is here relevant) -

"In general, multi-function machines are classified according to the principal function of the machine:

Multi-function machines are, for example, machine tools for working metal using interchangeable tools, which enable them to carry out different machining operations (e.g. milling, boring, lapping).

Where it is not possible to determine the principal function, and where, as provided in Note 3 to the Section, the context does not otherwise require, it is necessary to apply General Interpretative Rule 3 (c): such is the case, for example, in respect of multi-function machines potentially classifiable in several of the headings 84.25 to 84.30, in several of the headings 84.58 to 84.63 or in several of the headings 84.69 to 84.72.

Composite machines consisting of two or more machines or appliances of different kinds, fitted together to form a whole, consecutively or simultaneously performing separate functions which are generally complementary and are described in different headings of Section XVI, are also classified according to the principal function of the composite machine.

The following are examples of such composite machines: printing machines with a subsidiary machine for holding the paper (heading 84.43); a cardboard box making machine combined with an auxiliary machine for printing a name or simple design (heading 84.41); industrial furnaces combined with lifting or handling machinery (heading 84.17 or 85.14); cigarette making machinery combined with subsidiary packaging machinery (Heading 84.78).

For the purposes of the above provisions, machines of different kinds are taken to be fitted together to form a whole when incorporated one in the other or mounted one on the other; or mounted on a common base or frame or in a common housing.

Assemblies of machines should not be taken to be fitted together to form a whole unless the machines are designed to be permanently attached either to each other or to a common base, frame, housing etc. This excludes assemblies which are of a temporary nature or are not normally built as a composite machine.....

Note 3 to Section XVI need not be invoked when the composite machine is covered as such by a particular heading, for example, some types of air conditioning machines (heading 84.15).....

In Mrs. Hamilton's submission the principal function of the PCTV as a "composite machine" is as an Automatic Data Processing Machine. She contended that principal function can be deduced from the following areas: Design; Development Strategy; Manufacture; Cost; Marketing; Advertising; Retailing; Price; Packaging and presentation; Technical and active functionality.

Further and in the alternative she submitted that the PCTV is within the definition of "composite goods" in GIR 3(b). As will have been seen, where such goods cannot be classified by reference to GIR 3(a), GIR 3(b) lays down that they "shall be classified as if they consisted of the material or component which gives them their essential character in so far as this criterion is applicable". (emphasis added).

She relied upon HSEN (IX) to GIR 3(b). This states:

"(IX) For the purposes of this Rule, composite goods made up of different components shall be taken to mean not only those in which the components are attached to each other to form a practically inseparable whole but also those with separate components, provided these components are adapted one to the other and are mutually complementary and that together they form a whole which would not normally be offered for sale in separate parts.

Examples of the latter category of goods are:

- (1) Ashtrays consisting of a stand incorporating a removable ash bowl.
- (2) Household spice racks consisting of a specially designed frame (usually of wood) and an appropriate number of empty spice jars of suitable shape and size.

As a general rule, the components of these composite goods are put up in a common packing".

The HSEN (VI) to GIR 3(b) says that this "second method" relates only to (i) Mixtures, (ii) Composite goods consisting of different materials, (iii) Composite goods consisting of different components, (iv) Goods put up in sets for retail sale. It applies only if Rule 3(a) fails.

HSEN (VII) to GIR 3(b) says that in all those cases the goods are to be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

HSEN (VIII) to GIR 3(b) then states:

"The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or, by the role of a constituent material in relation to the use of the goods".

Mrs. Hamilton submitted that the same evidence and criteria as she relied upon to establish the "principal function" of the PCTV were relevant and established that it was the ADPM component which gave it its "essential character".

Approaching the determination of the appropriate classification by that route, Section Note 3 to Section XVI requires the PCTV to be classified under 84.71 "Automatic Data Processing Machines" because, if Mrs. Hamilton is right, that is its "principal function". GIR 1 applies and that is an end of the matter. GIR 3 does not come into the picture because the terms of the headings and of the section note to Section XVI "do otherwise require" and they are paramount.

But, if it is not possible to determine its principal function as a composite machine, so that the PCTV is *prima facie* classifiable under two or more headings, one does go to GIR 3, and in particular GIR 3(b), and looks for the material or component which gives the PCTV as "composite goods" its essential character if that criterion is applicable.

It is only when that fails, and Mrs. Hamilton maintains that criterion is applicable and determines the classification of the PCTV as an ADPM, that GIR 3(c) can operate, as the Commissioners say



that it has to be operated, to classify the PCTV under 85.28 "Television Receivers" as "the heading which occurs last in numerical order among those which equally merit consideration".

Mr. Davies put at the forefront of his submissions on behalf of the Commissioners that there are wider principles governing classification of goods identified in the case law of the European Court of Justice. First, there is the principle of legal certainty at the point of customs clearance. Thus "the preference is, in the interests of legal certainty and ease of verification, to have recourse to criteria for classification based on the objective characteristics and properties, as defined in the wording of the headings of the Common Customs Tariff and of the notes to the sections and chapters, which can be ascertained at the point of customs clearance" - paragraph 18 of the judgment in the *Develop Dr. Eisbein* case (*supra*). He also referred to the court's judgments in Case No. C-233/88 *Gifs Van de Kolk Douane Expeditie BV v Inspecteur der Invoerrechten en Accijnsen* (1990) ECR I-265; paras 12 and 16; and Case No. 200/84 *Erika Daiber v. Hauptzollamt Reutlingen* (1985) ECR 3363; para 13. Second, there is the objective of securing uniformity in the interpretation and application of the Harmonized System relating, in particular, to the application of the nomenclature. Mr. Davies pointed to the institutionalised and permanent mechanism set up to this end under the Brussels Convention (which continues under the Harmonized System) as explained in the Opinion of the Advocate General (Tesauro) in the *Van de Kolk* case (*supra*) at (1990) ECR-I at pp. 273-5.

Mr. Davies submitted that there is no one heading which adequately classifies the PCTV. The classifications in the Tariff inevitably lag behind the advances in technology.

In his submission the route to the classification of the PCTV is through GIR 1 to the texts of the headings and relative section and chapter notes. ADPMs within heading 84.71 are narrowly defined; they do not equate with personal computers and, as the HSEN to that heading explains, that heading does not cover parts of the personal computer working in conjunction with an ADPM and having a specific function. Note 3 to Section XVI applies the principal function test both to "composite machines consisting of two or more machines fitted together to form a whole", the description contended for by the appellant, and "other machines adapted for the purpose of performing two or more alternative functions", as the Commissioners have regarded the PCTV. Either way classification is on the basis of treating the machine "as if consisting only of that component or as being that machine which performs the principal function".

Mr. Davies contended that it was not possible in relation to the PCTV to discern the component or machine which performs the principal function, that is to say a component or machine falling within a heading of the Tariff. The Commissioners on review had identified in relation to the PCTV four classifications in the Tariff based on function: 84.71 ADPMs; 85.19 "Other sound reproducing apparatus"; 85.21 "Video recording or reproducing apparatus"; and 85.28 "Television Receivers". None of these functions objectively considered could, in his submission, be said to be the principal one. The subjective tests put forward by Mrs. Hamilton are, in his view, manifestly undesirable: the proper approach to function is to determine what the machine does.

Where, as he maintained is the case with the PCTV, it is not possible to determine the principal function, HSEN (VI) to Section Note 3 explains that it is necessary to apply GIR 3(c), this being a case "where the context does not otherwise require". The HSEN does not alter the wording of the headings and notes but is entirely consistent with them in promoting certainty and consistency and uniformity in interpretation. The HSEN, which contains nothing to require a different approach for composite machines where it is not possible to determine a principal function, then makes the point of entry into GIR 3 specifically rule 3(c) - i.e. the last in the hierarchical structure of that rule which applies only if rules 3(a) and 3(b) fail in classification (see HSEN (1) to GIR 3) - and 3(c) provides

for the machine to be classified under the heading which appears last in numerical order among those which equally merit consideration.

That provided a somewhat crude classification but one which had the merit of producing consistency and ease of verification.

If he was wrong on that, and GIR 3(b) did come into the picture, Mr. Davies observed that it is very difficult conceptually to think of determining that component which gives the PCTV as "composite goods" its "essential character" when, by definition, it has not been possible to determine the component which performs the principal function. But it was equally impossible to determine objectively what component gives the PCTV its "essential character". The PCTV is both a PC and a television set.

Mr. Davies introduced, by way of illustration of a similar result by the correct application of the rules, Commission Regulation (EEC) No. 754/94 of 30th March 1994 concerning the classification of certain goods in the combined nomenclature. That regulation, as shown by the recitals, was made having regard to Article 9 of Council Regulation (EEC) No. 2658/87 establishing the CN. It also recites that "... pursuant to the [general rules of interpretation set down in that Council Regulation], the goods described in the column 1 of the table annexed to the Present Regulation must be classified under the appropriate CN codes indicated in column 2, by virtue of the reasons set out in column 3".

Products 4 and 5 in the table are both classified under heading 85 21 90 00 "Video recording or reproducing apparatus, whether or not incorporating a video tuner", sub-heading "other" and for the following reasons:

"Classification is determined by the provisions of General Rules 1, 3(c) and 6 for the interpretation of the combined nomenclature, Note 5 to Chapter 84 to the combined nomenclature as well as the texts of CN codes 85 21 and 85 21 90 00."

General Rule 6 applies the rules in GIR 1 at sub-heading levels.

The description of product 4 refers to it as "A multi-media interactive system in a single housing ... capable of reproducing on a monitor, loudspeakers or headphones, audio, graphics text and video data recorded on compact disc". An infra-red remote control forms part of the system and through "the addition of other accessories (e.g. disk drive, keyboard and mouse) it may be used as a personal computer". The list of components shows a printed circuit board, including a digital processing unit (CPU, 1MB RAM and 512 KB ROM), a graphics component, a video component, a sound component with own CD audio unit, and a CD ROM.

The full description of product 5 is:

"5. A CD interactive system in a single housing for the reproduction of digitally recorded pictures and sound for television by means of a laser optical reading system. It is supplied with a mouse and infra-red remote control unit.

It contains a control unit that processes signals from the playing unit, from the remote control or from the mouse unit, to the television display and loudspeaker unit, enabling interaction with picture and sound".

The question for us to decide first is thus whether the PCTV can be classified under a heading in Section XVI of the Combined Nomenclature applying Section Note 3 because that heading describes the machine which performs the principal function. It seems to us that Mr. Davies was right to stress that one has to focus on the headings. Section Note 5, in defining the expression "machine" makes that abundantly clear. Also Chapter Note 5A, as Mr. Davies pointed out, defines an "ADPM" for the purpose of heading 84.71 in a very specific way; one cannot approach the question that we have to decide by, as it were, treating the PCTV as if what is not a TV is all an "ADPM" within heading 84.71. Whilst we accept that what Mr. Burton did was in his words to put a TV on top of a PC, it is misleading for our present purpose to refer to the PC element of the PCTV as if it equated with an "ADPM" as defined. This, as we see it, lessens the value of Professor Spence's evidence interesting though that contribution was.

Although there is a difference between the parties as to which limb it falls under, there is no dispute at this point in the argument that we have to look for that machine or component - that is to say component machine - of the PCTV which performs the principal function. The test is not so much what it is used for but what does it do.

In our judgement it is not possible in these terms and given the approach which we are constrained to adopt to determine the principal function of the PCTV. Although Mrs. Hamilton was right to point out that the cases in the European Court of Justice relied on by Mr. Davies show that there are limits to these principles, the objectives of legal certainty, uniformity of interpretation and ease of verification at the point of customs clearance are very important. Much of the matter relied upon by Mrs. Hamilton is in our opinion far too subjective to serve as criteria for determining what is a machine's principal function. The PCTV functions equally as a high quality TV and as a state of the art PC.

It is perhaps worth noting, although it does not form the basis for our decision, that HSEN (VI) to Section Note 3 in describing composite machines classified according to their principal function (and, agreeing with Mrs. Hamilton, in our judgement the PCTV is a "composite machine" and not an other, multi-function machine, for the purposes of Section Note 3) gives examples of where there is clearly a principal function for the composite machine and the function of the other machines within the composite machine are equally clearly auxiliary or subsidiary. Viewed objectively the TV function of the PCTV is not an auxiliary or subsidiary function of an ADPM.

It is also common ground that if it is not possible to determine the principal function one is thrown back into GIR 3. It is also common ground that GIR 3 provides a hierarchical approach and that the first sub-rule (a) does not apply. The dispute is as to the point of entry, GIR 3(b) or GIR 3(c). If one goes straight to 3(c), the Commissioners on the basis of our judgement so far have applied the correct classification.

Mr. Davies contends that the PCTV is a multi-function machine and that in explaining Section Note 3 HSEN (VI), as we understand the argument, shows that the terms of that Section Note require the point of entry to be GIR 3(c) and the conclusion must be the same even if the PCTV is to be regarded instead as being a composite machine.

We reject that argument. HSEN (VI) quite plainly is dealing with multi-function machines separately from composite machines. We have also determined that the PCTV is not a multi-function machine, by which is meant, in the terms of Section Note 3, "other" - that is in contrast to "composite machines consisting of two or more machines fitted together to form a whole" - "machines adapted for the purpose of performing two or more complementary functions". HSEN (VI) gives as examples

of multi-function machines - "tools for working metal using interchangeable tools, which enable them to carry out different machinery operations (e.g. milling, boring, lapping)". It describes "composite machines" as "consisting of two or more machines or appliances of different kinds, fitted together to form a whole, consecutively or simultaneously performing separate functions, which are generally complementary and are described in different headings of Section XVI ...".

Making the necessary transition from mechanical machines as contemplated in the HSEN to the electronic machines before us, in our opinion a "composite machine" best describes the PCTV.

It also seems to us that Mrs. Hamilton was right to submit that the absence of a reference to GIR 3(c) in HSEN (VI) where it deals with composite machines is not accidental. The kind of multi-function machine contemplated, at least the kind of machine referred to in the example, seems to be one where it is very unlikely that it will be possible to determine a principal function let alone that machine which gives it its essential character. The latter may be possible in respect of a composite machine, although, as we have said, going by the examples it will be very much more likely to be able to determine a principal function. It is also, however, not difficult to see how in relation to the examples given of composite machines one could reasonably say that the machine performing the principal function also gives the machine its essential character.

We thus turn to GIR 3(b) which applies the "essential character" test "in so far as this criterion is applicable". We are prepared to accept that the PCTV can fairly be described as coming within the description "Composite goods consisting of different components" in HSEN (VI) to GIR 3(b) and as further explained in HSEN (IX) to that Rule (although the PCTV is a long way removed from the examples there given).

HSEN (VIII) to GIR 3(b) admits of a number of factors which may be relevant in determining the essential character of composite goods, some of which may well not assist in providing ease of verification but all of which are susceptible to objective evaluation. Although these factor admit, perhaps, more of the matters which Mrs. Hamilton relied upon, there is still force in Mr. Davies' submission that, when one has passed the point of being able to determine the component which performs the principal function of composite goods, in this case a composite machine, it is very difficult conceptually then to set about determining what component machine gives it its essential character.

For those reasons we doubt whether that criterion is applicable in classifying a machine such as the PCTV. But, even if it is, we are not persuaded, having carefully reviewed all the evidence, that it is the ADPM, as such, which gives the PCTV its essential character. It is, as Mr. Davies submitted, a new kind of hybrid machine which is both a PC and a TV, and neither gives it its essential character.

The appeal will accordingly be dismissed.

This does appear to be a case where the understandable desire of the importer to have goods classified as accurately as possible, preferably of course in a heading which relates to the item as a whole, comes into conflict with the objectives of the Harmonized System and Common Tariff in providing uniformity of interpretation, that conflict arising because rapid advances in technology with which the CN cannot keep pace produces new machines different in kind even if combining machines and functions which were historically separate.

The parties are at liberty to apply to the tribunal for a further deliberation if they are unable to agree about costs.

R.K. Miller CB  
Chairman

ANNEX 4 - SUMMARY TABLE OF EVIDENCE SUBMITTED BY THE UNITED STATES

TABLE 1

SUMMARY OF BTIS ISSUED BY EC MEMBER STATES

No.	Member State	Competent Customs Authority	Holder	Total no of BTIs	BTI reference number	Summarized Product Description	Date of Application	Date of start of validity	Classification
1.	DENMARK	NA*	NA	4	DK 47068	Adapter unit to be installed in digital data processors (Standard PC) so that these will be able to exchange coded data through a local network and function as in- and output units for another connected PC or central unit	NA	30/11/94	8473.3010
2.					DK 47069	Adapter unit to be installed in digital data processors (Standard PC) so that these will be able to exchange coded data through a local network and function as in- and output units for another connected PC or central unit	NA	1/12/94	8473.3010
3.					DK 47070	Adapter unit to be installed in digital data processors (Standard PC) so that these will be able to exchange coded data through a local network and function as in- and output units for another connected PC or central unit.	NA	1/12/94	8473.3010

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\*NA: not available

No.	Member State	Competent Customs Authority	Holder	Total no of BTIs	BTI reference number	Summarized Product Description	Date of Application	Date of start of validity	Classification
4.					DK 47071	Adapter unit to be installed in digital data processors (Standard PC) so that these will be able to exchange coded data through a local network and function as in- and output units for another connected PC or central unit.	NA	6/12/94	8473.3010
	<b>FRANCE</b>	Direction Générale des Douanes et Droits Indirects		8					
5.			NA		FR 16190199401777	Cartes modules électroniques destinées à être montées dans le châssis d'un concentrateur pour réseau ETHERNET.	16/8/94	20/9/94	8473.30109002
6.			NA		FR 16190199401776	Châssis de concentrateurs destiné à recevoir des cartes modules électroniques pour réseau ETHERNET.	16/8/94	20/9/94	8473 309000900
7.			NA		FR 16190199400755	Pont routeur permettant l'interconnexion de réseaux locaux d'entreprise (Ethernet, Token Ring, FFDI) qui utilisent des protocoles différents de commande de la liaison logique.	31/3/94	9/5/94	8471.9910.00
8.			NA		FR 16190199301442	Pont distant ETHERNET se présentant sous la forme d'un boîtier fermé incluant un logiciel interne.	24/9/93	21/10/93	8471 99 100000K
9.			NA		FR 16190199500062	Unité périphérique d'adaptation se connectant directement sur le Réseau ETHERNET ou TOKEN RING, se présentant sous la forme d'un boîtier.	19/12/94	13/1/95	8471 99 100000K

No.	Member State	Competent Customs Authority	Holder	Total no of BTIs	BTI reference number	Summarized Product Description	Date of Application	Date of start of validity	Classification
10.			BT France SA		FR 16190199401349	Equipements destinés à servir de noeuds du réseau de la gamme tymnet. .	2/6/94	29/6/94	8471 99 100000K
11.			BT France SA		FR 16190199401911	Compresseur de données numériques permettant la transmission de la voix par paquet à haute vitesse en minimisant le coût des télécommunications.	9/9/94	23/12/94	8471 99 100000K
12.			BT France SA		FR 16190199401350	Equipements destinés à servir de noeuds du réseau de la gamme tymnet.	2/6/94	4/7/94	8471 99 100000K
	<b>IRELAND</b>		Cabletron Systems Ltd.	32			28/4/93	12/7/93	8471 99 10000
13.					IE 93N4-14-2310-01-05	Desktop Network (DNI) Interface Cards			
14.					IE 93N4-14-2310-02-05	Desktop Network (DNI) Interface Cards			
15.					IE 93N4-14-2310-03-05	Desktop Network (DNI) Interface Cards			
16.					IE 93N4-14-2313-01-05	Token Ring Standalone Passive Concentrator			
17.					IE 93N4-14-2313-02-05	Standalone Hubs			
18.					IE 93N4-14-2313-03-05	Multi Media Access Centre			
19.					IE 93N4-14-2313-04-05	Standalone 24-port			
20.					IE 93N4-14-2313-05-05	Multi Media Access Centre Hubs			
21.					IE 93N4-14-2314-01-07	Ethernet-to-ethernet local bridges			
22.					IE 93N4-14-2314-02-07	Remote Bridge			
23.					IE 93N4-14-2314-03-07	Intelligent repeater Bridging Module			

No.	Member State	Competent Customs Authority	Holder	Total no of BTIs	BTI reference number	Summarized Product Description	Date of Application	Date of start of validity	Classification
24.					IE 93N4-14-2314-04-07	Ethernet Management Module			
25.					IE 93N4-14-2314-05-07	Multi-Protocol Router/Bridge (CRM-R)			
26.					IE 93N4-14-2314-06-07	Multi-Protocol Router/Bridge (CRM-L)			
27.					IE 93N4-14-2314-07-07	Local Talk to Ethernet Router/Repeater Module			
28.					IE 93N4-14-2315-01-03	Ethernet Local Repeater			
29.					IE 93N4-14-2315-02-03	Fibre Optic Repeater			
30.					IE 93N4-14-2315-03-03	Multiport Receivers			
31.					IE 93N4-14-2316-01-14	Intelligent Repeater Modules			
32.					IE 93N4-14-2316-02-14	Coaxial Repeater Module			
33.					IE 93N4-14-2316-03-14	Fibre Optic Modules			
34.					IE 93N4-14-2316-04-14	Twisted Pair Media Interface Modules			
35.					IE 93N4-14-2316-05-14	Media Interface Modules in a Local Area Network			
36.					IE 93N4-14-2316-06-14	Ethernet Terminal Server Modules			
37.					IE 93N4-14-2316-07-14	Multiport Transceiver Media Interface Module			
38.					IE 93N4-14-2316-08-14	Token Ring Management Module			
39.					IE 93N4-14-2316-09-14	Token Ring Media Interface Modules			
40.					IE 93N4-14-2316-10-14	Active Repeater Media Interface Modules			
41.					IE 93N4-14-2316-11-14	Token Ring Media Filter			
42.					IE 93N4-14-2316-12-14	Interface Modules			



No.	Member State	Competent Customs Authority	Holder	Total no of BTIs	BTI reference number	Summarized Product Description	Date of Application	Date of start of validity	Classification
43.					IE 93N4-14-2316-13-14	Concentrator Modules			
44.					IE 93N4-14-2316-14-14	Distributed Network Server Module			
	<b>NETHER- LANDS</b>	NA	NA	4					
45.					NL 51446	A 16-bits ISA bus Ethernet LAN adapter in the form of a computer built-in card.	NA	25/4/95	8473.3010
46.					NL 51447	A 16-bits ISA bus Ethernet LAN adapter in the form of a computer built-in card.	NA	25/4/95	8473.3010
47.					NL 51455	A LAN adapter card in the form of a computer built-in card	NA	25/4/95	8473.3010
48.					NL 51456	A 16-bits Aenet Ethernet LAN card in the form of a computer built-in card	NA	25/4/95	8473.3010

**TABLE 2**

**OTHER CLASSIFICATION DECISIONS BY EC MEMBER STATES**

<i>No.</i>	<i>Member State</i>	<i>Competent Customs Authority</i>	<i>Directed towards</i>	<i>Form</i>	<i>Reference Number</i>	<i>Summarized Product Description</i>	<i>Date of Application</i>	<i>Classification</i>
1.	UNITED KINGDOM	HM Customs and Excise	NA	letter	Ref. TC11/92	LAN adapter cards	20/3/92	8471 99 10 900
2.		HM Customs and Excise	NA	letter	Ref. SO1/1358/92	22 types of Ethernet LAN boards 12 types of token ring LAN boards 6 types of repeaters imported in complete units 5 types of repeaters imported in Board form	28/7/93	8473 3010 0 90 8473 301 0090 8471 99 10900 8473 301 0090
3.		HM Customs and Excise	NA	letter	Ref. CDO8/740/87	Multiport repeater Local repeater	19/2/1988	8471 999 0090 8471 999 0090

**TABLE 3**

**OTHER TYPES OF EVIDENCE**

<i>No.</i>	<i>Form</i>	<i>Place/occasion</i>	<i>Date</i>	<i>Product Description</i>	<i>Classification</i>
1.	<b>Belgium:</b> Shipping Invoice	-	19/9/95	"onderdelen voor computers"	8473.3010
2.	<b>France:</b> Shipping Invoice	-	21/2/96	"accessoires ordinateurs"	8473.3010
3.	Statement by the representative of <b>Sweden</b>	57th meeting of the tariff and statistical nomenclature section of the Customs Code Committee	29-30/6/95	LAN equipment	Prior to accession, under tariff heading 84.71
4.	Statement by the representative of <b>Finland</b>	77th meeting of the tariff and statistical nomenclature section of the Customs Code Committee.	18/4 /96	LAN equipment	Prior to accession, under tariff heading 84.71
5.	Statement by the representative of <b>France</b>	57th meeting of the tariff and statistical nomenclature section of the Customs Code Committee	29-30/6/95	LAN bridges, routers, hubs, repeaters, media interface modules, and multimedia access centre	Tariff heading 84.71
6.	Letter from 3Com	Providing information requested by Director of Customs Affairs, USTR	8/7/97	LAN equipment and units thereof exported to UK between 1991 and 1994	Under tariff headings 84.71 and 84.73, respectively.
7.	Letter from Bay Networks	Providing information requested by Director of Customs Affairs, USTR	9/7/97	LAN equipment and units thereof exported to UK and Ireland since 1992.	Under tariff headings 84.71 and 84.73, respectively.
8.	Letter from Cisco Systems	Providing information requested by Director of Customs Affairs, USTR	9/7/97	LAN products exported during 1991 to 1994 to the UK and Ireland.	Under Chapter 84.
9.	Letter from Cabletron Systems	Providing information requested by Director of Customs Affairs, USTR	3/7/97	LAN products shipped during 1990 and 1994 to the UK and 1992 and 1994 to Ireland	Treated under tariff heading 84.71.

<i>No.</i>	<i>Form</i>	<i>Place/occasion</i>	<i>Date</i>	<i>Product Description</i>	<i>Classification</i>
10.	European Court of Justice ruling (ECJ case C-11/93)	Siemens Nixdorf Informations system and the Hauptzollamt (principal customs office) Augsburg.	19/5/94	Colour Monitors	Ruled that colour monitors capable of accepting a signal only from the central processing unit of an automatic data-processing machine and not capable of reproducing a colour image from a composite video signal were to be classified under heading 8471 of the Combined Nomenclature of the Common Customs Tariff.

ANNEX 5 - ITA CLASSIFICATION\*

Network equipment in the ITA

Network equipment: Local Area Network (LAN) and Wide Area Network (WAN) apparatus, including those products dedicated for use solely or principally to permit the interconnection of automatic data processing machines and units thereof for a network that is used primarily for the sharing of resources such as central processor units, data storage devices and input or output units - including adaptors, hubs, in-line repeaters, converters, concentrators, bridges and routers, and printed circuit assemblies for physical incorporation into automatic data processing machines and units thereof.

Participant	Tariff Classification
Australia	847160, 847180, 847330, 85175010, 85175090
Canada	84711000, 84713000, 84714100, 84714910, 84714920, 84714931, 84714932, 84714933, 84714934, 84714935, 84714936, 84714939, 84714941, 84714942, 84714949, 84714951, 84714952, 84714959, 84714961, 84714969, 84714971, 84714972, 84714979, 84715000, 84716010, 84716021, 84716022, 84716023, 84716024, 84716025, 84716026, 84716029, 84716031, 84716032, 84716039, 84716050, 84716090, 84717010, 84717090, 84718010, 84718091, 84718099, 84719010, 84719090, 84733010, 84713021, 84713022, 84713023, 84713091, 84713099
Costa Rica	8473
Estonia	847150, 847160, 851750
EC	84715090, 84716090, 85175090
Hong Kong China	84718000
Iceland	847150, 847160, 847180, 847330, 851750
India	847190, 847330
Indonesia	847190
Japan	847180, 847330, 851750
Korea	851750
Macao	84715000, 84716000, 84718000, 84733000, 85175010, 85175020, 85175030, 85175090
Malaysia	ex847150000, ex847160000, ex847170000, ex847180000
New Zealand	847160, 847180, 847330, 851750
Norway	8471500, 8471600, 8471800, 8517800
Romania	84715090, 84716090, 85175090
Separate Customs Territory of Taiwan, Penghu, Kinmen & Matzo	84715000, 84716010, 84716020, 84716030, 84716090, 84718000, 84733010, 84733021, 84733029
Singapore	847150
Switzerland	85175000, 85178000, 85179010, 85179090
Thailand	847150, 847180
Turkey	84715090, 84716090, 85175090

Participant	Tariff Classification
USA	84718010, 84714960
Poland	847150900, 847160900, 851750900
Israel	84715090, 84716090, 85175000
Czech Republic	84715090, 84716090, 85175090
Slovak Republic	84715090, 84716090, 85175090
Panama	84719200, 84719300, 84719900, 84733000, 85044010, 85174000, 85366900, 85442000
Philippines	847110, 847130, 847141, 847149, 847150, 847160, 847170, 847180, 847190, 851750
El Salvador	84714900, 84718000

\*Table submitted by the EC.

ANNEX 6 - SUMMARY TABLE OF EVIDENCE SUBMITTED BY THE EC

TABLE 1

SUMMARY OF BTIS ISSUED BY EC MEMBER STATES

No.	Member state	Competent Customs Authority	Holder	Total no of BTIs	BTI reference number	Summarized Product Description	Date of Application	Date of start of validity	Classification
1.	<b>FRANCE</b>	Direction Générale des douanes et droits indirects.	NA*	3	FR 16190199401918	"Routeur d'accès dans les réseaux de type Ethernet permettant de diriger l'information vers des sites éloignés via le réseau public commuté, et vice-versa".	9/9/94	27/9/94 - 18/6/96	8517 4000 0009 S
2.					FR 16270199402539	"Routeur multiprotocole permettant d'interconnecter de réseaux ETHERNET ou IEEE 802.3."	3/10/94	28/11/94 - 18/6/96	8517 4000 0009 S
3.					FR 06190199102248	"Serveur de terminal multiprotocoles pour les échanges terminaux/ordinateur central."	1/10/91	3/2/92 - 12/3/96	8517 4000 9009 C
4.	<b>GERMANY</b>	Oberfinanz Direction Munchen	NA	1	DE/B/01242/92/02 01	Token ring adapter.	2/8/92	18/1/92	851782000000
5.	<b>NETHERLANDS</b>	Belastingdienst	NA	30	NL 199109209450089-0	Apparatus, capable of making multiple connections between different components of a computer network.	19/9/91	31/1/92 - 17/1/97	8517 8200 90000

\*NA: not available

No.	Member state	Competent Customs Authority	Holder	Total no of BTIs	BTI reference number	Summarized Product Description	Date of Application	Date of start of validity	Classification
6.					NL 199109209450091-0	Apparatus, capable of making multiple connections between different components of a computer network.	19/9/91	31/1/92 - 17/1/97	85178200 90000
7.					NL 199109209450115-0	Apparatus, capable of making multiple connections between different components of a computer network.	19/9/91	31/1/92 - 17/1/97	85178200 90000
8.					NL 199109209450114-0	Apparatus, capable of making multiple connections between different components of a computer network.	19/9/91	31/1/92 - 17/1/97	85178200 90000
9.					NL 199109209450090-0	Apparatus, capable of making multiple connections between different components of a computer network.	19/9/91	31/1/92 - 17/1/97	85178200 90000
10.					NL 199109209450089-0	Apparatus, capable of making multiple connections between different components of a computer network.	19/9/91	31/1/92 - 17/1/97	85178200 90000
11.					NL 199109209450113-0	Apparatus, capable of making multiple connections between different components of a computer network.	19/9/91	31/1/92 - 17/1/97	85178200 90000
12.					NL 199204239450098-0	Apparatus in a separate housing intended to amplify or to transform signals on certain points of a network.	23/4/92	7/9/92 - 17/1/97	85178200 90000
13.					NL 199204239450099-0	Apparatus in a separate housing intended to interconnect sub-networks into one network or to increase the effective scope of a network.	23/4/92	7/9/92 - 17/1/97	85178200 90000
14.					NL 199109209450092-0	Apparatus, capable of making multiple connections between different components of a computer network.	19/9/91	31/1/92 - 17/1/97	85178200 90000



No.	Member state	Competent Customs Authority	Holder	Total no of BTIs	BTI reference number	Summarized Product Description	Date of Application	Date of start of validity	Classification
15.					NL 199307219450116-0	Apparatus (integrated switching system) capable of making multiple connections between different components of a computer-network and between networks.	6/7/93	7/9/93 - 17/1/97	85178290
16.					NL 199307219450115-0	Apparatus (integrated switching system) capable of making multiple connections between different components of a computer-network and between networks.	6/7/93	7/9/93 - 17/1/97	85178290
17.					NL 199307219450114-0	Apparatus capable of making multiple connections between different components of a computer-network and between networks.	6/7/93	7/9/93 - 17/1/97	85178290
18.					NL 199307219450113-0	Apparatus (x 25 data communication network system) intended to make multiple connections between different components of a computer network.	6/7/93	7/9/93 - 17/1/97	85178290
19.					NL 199307249450123-0	Electronic multiplex apparatus in a housing.	14/7/93	23/11/93 - 17/1/97	8517829000000
20.					NL 199307249450122-0	Electronic apparatus consisting of a system housing, power supply, a processor card and three connection cards for ethernet or token ring connections.	14/7/93	23/11/93 - 17/1/97	8517829000000
21.					NL 199307249450121-0	Electronic apparatus consisting of a system housing, power supply, a processor card and a connection card.	14/7/93	23/11/93 - 17/1/97	8517829000000
22.					NL 199307249450120-0	Electronic apparatus consisting of a system housing, power supply, connection card, for token ring and FDDI.	14/7/93	23/11/93 - 17/1/97	8517829000000
23.					NL 199307249450119-0	Network steering unit.	14/7/93	6/12/93 -	8517829000000

<i>No.</i>	<i>Member state</i>	<i>Competent Customs Authority</i>	<i>Holder</i>	<i>Total no of BTIs</i>	<i>BTI reference number</i>	<i>Summarized Product Description</i>	<i>Date of Application</i>	<i>Date of start of validity</i>	<i>Classification</i>
24.					NL 199302089450020-0	Apparatus in a separate housing intended to amplify or to transform signals on a certain points of a network.	8/2/93	19/2/93 - 17/7/97	8517829000000
25.					NL199302089450040-0	Apparatus capable of making multiple connections between different components of a computer network.	8/2/93	19/2/93 - 17/7/97	8517829000000
26.					NL 199302089450039-0	Apparatus capable of making multiple connections between different components of a computer network.	8/2/93	19/2/93 - 17/7/97	8517829000000
27.					NL 199302089450038-0	Apparatus capable of making multiple connections between different components of a computer network.	8/2/93	19/2/93 - 17/7/97	8517829000000
28.					NL 199302089450037-0	Apparatus capable of making multiple connections between different components of a computer network.	8/2/93	19/2/93 - 17/7/97	8517829000000
29.					NL 199302089450036-0	Apparatus capable of making multiple connections between different components of a computer network.	8/2/93	19/2/93 - 17/7/97	8517829000000
30.					NL 199302089450035-0	Apparatus capable of making multiple connections between different components of a computer network.	8/2/93	19/2/93 - 17/7/97	8517829000000
31.					NL 199302089450034-0	Apparatus capable of making multiple connections between different components of a computer network.	8/2/93	19/2/93 - 17/7/97	8517829000000
32.					NL 199302089450021-0	Apparatus in a separate housing intended to interconnect sub-networks into one network or to increase the effective scope of a network	8/2/93	19/2/93 - 17/7/97	8517829000000
33.					NL 199308069450129-0	Network steering unit to steer from 4 to 8 channels.	5/8/93	3/1/94 - 17/1/97	8517829
34.					NL 199308069450128-0	Network steering unit to support a maximum of 4 LAN/WAN interfaces	5/8/93	3/1/94 - 17/1/97	85178290

No.	Member state	Competent Customs Authority	Holder	Total no of BTIs	BTI reference number	Summarized Product Description	Date of Application	Date of start of validity	Classification
	<b>UNITED KINGDOM</b>	HM Customs and Excise	NA	10					
35.					UK 57112	ILAN. A universal router that provides internetworking between LANs and wide area networks (WANs)	24/11/93	17/2/94 - 21/2/96	8517 8290 000
36.					UK 57127	Microcom bridge router 6000 series.	27/1/94	17/2/94 -21/2/96	8517 8290 000
37.					UK 57128	Microannex NCSS.	4/2/94	17/2/94 -16/2/96	8517 8290 000
38.					UK 57141	Access/one remote multiprotocol bridge/router.	7/12/93	18/2/94 - 16/2/96	8517 8290 000
39.					UK 57142	ASM 6301 Access/one remote ethernet bridge.	7/12/93	18/2/94 - 16/2/96	8517 8290 000
40.					UK 57110	Crossbow FX 6600. This is a network cabling hub that supports up to 14 LANs	24/11/93	17/2/94 - 21/2/96	8517 8290 000
41.					UK 55711	CISCO routers	11/10/93	6/12/93 - 16/2/96	8517 8290 000
42.					UK 55700	Intelligent Network Processors	15/10/93	6/12/93 - 16/2/96	8517 8290 000
43.					UK 55704	Modulus series. This is a family of data communication products. This has a variety of products which include multiplexers, processors, bridges, pads etc	15/10/93	6/12/93 - 16/2/96	8517 8290 000
44.					UK 57108	Magnum 100 - Multiprotocol time-division multiplexer.	24/11/93	17/2/94 - 21/2/96	8517 8290 000

TABLE 2

OTHER CLASSIFICATION DECISIONS BY EC MEMBER STATES

<i>No.</i>	<i>Member State</i>	<i>Competent Customs Authority</i>	<i>Directed towards</i>	<i>Form</i>	<i>Reference Number</i>	<i>Summarized Product Description</i>	<i>Date of Application</i>	<i>Classification</i>
1.	GERMANY	Bundesfinanzhof	Transtec	Judgement	NA	Multiplexers, bridge, server and three different repeaters	17/9/91	85.17

ANNEX 7

TRADE DATA\*

Heading	UR Base	1994	1995	1996
CN 851782	57,175	337,605	494,853	not available
CN 847199	1,244,068	1,385,569	731,533	not available
CN 847330	2,848,716	3,602,702	3,464,127	not available
USX 847199	417,696	1,071,967	1,407,577	4,361,160
USX 851782	15,825	24,189	51,962	568,463
USX 847330	4,308,369	5,126,879	6,592,151	6,810,744

Notes:

- (1) Full year EU import data are not released until late in the following year. Some member States are slow in reporting such data to EUROSTAT.
- (2) Headings 847199 and 851782 do not exist in the 1996 revision to the Harmonized System. Products previously entering under heading 847199 now enter under 847180, 847190 or 847149; products that previously entered under heading 851782 now enter under 851721, 851750 and 851780. The figures cited above for US exports in 847199 and 851782 represent the total of the new headings.

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\*Table submitted by the United States.