

the distinctions they choose to make. Such an approach is also inconsistent with the object and purpose of Article III:4, which aims to discipline measures that have trade-restrictive effects, even when those measures are not aimed at restricting trade. Finally, in Canada's view, the Panel correctly compared chrysotile asbestos fibres with the fibres with which they compete in certain industrial applications, since such a comparison is consistent with the aim of providing equality of competitive conditions, and since the Decree itself makes no reference to carcinogenic fibres.

2. Article XXIII:1(b) of the GATT 1994

43. Canada requests the Appellate Body to reject the European Communities' appeal with respect to Article XXIII:1(b) of the GATT 1994. Canada suggests, first, that the Appellate Body should apply the principle of judicial economy and refrain from ruling on these grounds of appeal. Canada argues that a ruling by the Appellate Body in respect of Article XXIII:1(b) of the GATT 1994 would not further the objective of dispute settlement, as set forth in Article 3.7 of the DSU, namely to secure a positive solution to a dispute. There is no dispute concerning Article XXIII:1(b) because neither party has appealed the Panel's conclusions on this issue. Canada also refers to Article 3.2 of the DSU and cautions the Appellate Body against "making law" by clarifying provisions of the WTO Agreement outside the context of resolving a particular dispute. [FN27]

44. Should the Appellate Body address the interpretation of Article XXIII:1(b) of the GATT 1994, Canada invites it to affirm the Panel's reasoning, in particular the Panel's recognition that there may be particularly exceptional cases in which a measure justified under Article XX(b) would nonetheless nullify or impair benefits within the meaning of Article XXIII:1(b). Article XX(b) and XXIII:1(b) may be applied simultaneously, since Article 26.1 of the DSU does not require the withdrawal of a measure that nullifies or impairs benefits within the meaning of Article XXIII:1(b). As regards the concept of legitimate expectations, Canada rejects as artificial, and without any textual basis, the distinction that the European Communities seeks to draw between pure trade measures and measures linked to the protection of health.

E. Arguments of the Third Participants

1. Brazil

(a) TBT Agreement

*14 45. Brazil believes that the Panel erred in its findings regarding the scope of the TBT Agreement. Brazil argues that the Panel erred in dividing the Decree into two separate parts in determining whether the TBT Agreement applies to the Decree. This division was arbitrary and inconsistent with the logic and objectives of the Decree, which deals with the same products in both the prohibition and the exception parts. Furthermore, Brazil is particularly concerned by the findings of the Panel in paragraphs 8.38, 8.39, 8.43, 8.49, 8.57, 8.60, 8.61 and 8.71 of the Panel Report, and by the serious systemic implications of the finding that a general prohibition does not constitute a technical regulation within the meaning of Annex 1.1 of the TBT Agreement. Contrary to the Panel's interpretation, nothing in the TBT Agreement specifies that a product must be "identifiable", or that a measure must relate to one, or more than one product, in order to be a technical regulation. Such a narrow