D. The Panel's Findings and Conclusions on "Likeness" under Article III:4 of the GATT 1994

1. Overview

104. In this case, the European Communities argues that the Panel erred in its consideration of "likeness", in particular, because it adopted an exclusively "commercial or market access approach" to the comparison of allegedly "like products"; placed excessive reliance on a single criterion, namely, end-use; and failed to include consideration of the health "risk" factors relating to asbestos. [FN75]

105. Before considering these arguments, we think it helpful to summarize the way in which the Panel assessed the "likeness" of chrysotile asbestos fibres, on the one hand, and the PCG fibres - PVA, cellulose and glass fibres - on the other. It will be recalled that the Panel adopted the approach in the Border Tax Adjustments report, using the four general criteria mentioned above. [FN76] After reviewing the first criterion, "properties, nature and quality of the products", the Panel "conclude[d] that ... chrysotile fibres are like PVA, cellulose and glass fibres." [FN77] (emphasis added) In reaching this "conclusion", the Panel found that it was not decisive that the products "do not have the same structure or chemical composition", nor that asbestos is "unique". Instead, the Panel focused on "market access" and whether the products have the "same applications" and can "replace" each other for some industrial uses. [FN78] The Panel also declined to "[i]ntroduce a criterion on the risk of a product". [FN79]

*31 106. Under the second criterion, "end-use", the Panel stated that it had already found, under the first criterion, that the products have "certain identical or at least similar end-uses" and that it did not, therefore, consider it necessary to elaborate further on this criterion. [FN80] The Panel declined to "take a position" on " consumers' tastes and habits", the third criterion, "[b]ecause this criterion would not provide clear results". [FN81] The Panel observed that consumers' tastes and habits are "very varied". [FN82] Finally, the Panel did not regard as "decisive" the different "tariff classification" of the fibres. [FN83]

107. Based on this reasoning, the Panel concluded that chrysotile asbestos fibres and PCG fibres are "like products" under Article III:4 of the GATT 1994. [FN84]

108. The Panel next examined whether cement-based products containing chrysotile asbestos fibres are "like" cement-based products containing PCG fibres. [FN85] Applying the reasoning from its findings on fibres, and noting that the individual cement-based products have the same tariff classification, irrespective of their fibre content, the Panel concluded that these cement- based products are also "like" under Article III:4. [FN86]

2. Chrysotile and PCG fibres

109. In our analysis of this issue on appeal, we begin with the Panel's findings on the "likeness" of chrysotile asbestos and PCG fibres and, in particular, with the Panel's overall approach to examining the "likeness" of these fibres. It is our view that, having adopted an approach based on the four criteria set forth in Border Tax Adjustments, the Panel should have examined the evidence relating to each of those four criteria and, then, weighed all of that evidence, along with any other relevant evidence, in making an overall determination of whether the products at issue could