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EUROPEAN COMMUNITIES – MEASURES AFFECTING ASBESTOS AND ASBESTOS-CONTAINING PRODUCTS

AB-2000-11

Report of the Appellate Body

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WORLD TRADE ORGANIZATION
APPELLATE BODY

**European Communities – Measures
Affecting Asbestos and Asbestos-Containing
Products**

Canada, *Appellant/Appellee*
European Communities, *Appellant/Appellee*

Brazil, *Third Participant*
United States, *Third Participant*

AB-2000-11

Present:

Feliciano, Presiding Member
Bacchus, Member
Ehlermann, Member

I. Introduction

1. Canada appeals certain issues of law and legal interpretations developed in the Panel Report in *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* (the "Panel Report").¹ The Panel was established to consider claims made by Canada regarding French Decree No. 96-1133 concerning asbestos and products containing asbestos (*décret no. 96-1133 relatif à l'interdiction de l'amiante, pris en application du code de travail et du code de la consommation*) ("the Decree"), which entered into force on 1 January 1997.²

2. Articles 1 and 2 of the Decree set forth prohibitions on asbestos and on products containing asbestos fibres, followed by certain limited and temporary exceptions from those prohibitions:

Article 1

I. For the purpose of protecting workers, and pursuant to Article L. 231-7 of the Labour Code, the manufacture, processing, sale, import, placing on the domestic market and transfer under any title whatsoever of all varieties of asbestos fibres shall be prohibited, regardless of whether these substances have been incorporated into materials, products or devices.

¹WT/DS135/R, 18 September 2000.

²*Journal officiel*, 26 December 1996.

II. For the purpose of protecting consumers, and pursuant to Article L. 221.3 of the Consumer Code, the manufacture, import, domestic marketing, exportation, possession for sale, offer, sale and transfer under any title whatsoever of all varieties of asbestos fibres or any product containing asbestos fibres shall be prohibited.

III. The bans instituted under Articles I and II shall not prevent fulfilment of the obligations arising from legislation on the elimination of wastes.

Article 2

I. On an exceptional and temporary basis, the bans instituted under Article 1 shall not apply to certain existing materials, products or devices containing chrysotile fibre when, to perform an equivalent function, no substitute for that fibre is available which:

- On the one hand, in the present state of scientific knowledge, poses a lesser occupational health risk than chrysotile fibre to workers handling those materials, products or devices;
- on the other, provides all technical guarantees of safety corresponding to the ultimate purpose of the use thereof.

II. The scope of application of paragraph I of this Article shall cover only the materials, products or devices falling within the categories shown in an exhaustive list decreed by the Ministers for Labour, Consumption, the Environment, Industry, Agriculture and Transport. To ascertain the justification for maintaining these exceptions, the list shall be re-examined on an annual basis, after which the Senior Council for the Prevention of Occupational Hazards and the National Commission for Occupational Health and Safety in Agriculture shall be consulted.

The remaining operative provisions of the Decree contain additional rules governing the grant of an exception (Articles 3 and 4), the imposition of penalties for violation of the prohibition in Article 1 (Article 5), and the temporary exclusion of certain "vehicles" and "agricultural and forestry machinery" from aspects of the prohibition (Article 7). Further factual aspects of this dispute are set forth in paragraphs 2.1 – 2.7 of the Panel Report, and the Decree is reproduced in its entirety as Annex I in the Addendum to the Panel Report.³

3. Canada claimed that the Decree is inconsistent with a number of obligations of the European Communities under Article 2 of the *Agreement on Technical Barriers to Trade* (the "TBT Agreement"), Articles III and XI of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"), and that, under Article XXIII:1(b) of the GATT 1994, the Decree nullified or

³WT/DS135/R/Add.1, pp. 3-6.

impaired advantages accruing to Canada directly or indirectly under the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*"), or impeded the attainment of an objective of that Agreement.⁴

4. In the Panel Report, circulated to WTO Members on 18 September 2000, the Panel concluded that:

- (a) ... the "prohibition" part of the Decree does not fall within the scope of the TBT Agreement. The part of the Decree relating to "exceptions" does fall within the scope of the TBT Agreement. However, as Canada has not made any claim concerning the compatibility with the TBT Agreement of the part of the Decree relating to exceptions, the Panel refrains from reaching any conclusion with regard to the latter.
- (b) ... chrysotile asbestos fibres as such and fibres that can be substituted for them as such are like products within the meaning of Article III:4 of the GATT 1994. Similarly, the Panel concludes that the asbestos-cement products and the fibro-cement products for which sufficient information has been submitted to the Panel are like products within the meaning of Article III:4 of the GATT 1994.
- (c) With respect to the products found to be like, the Panel concludes that the Decree violates Article III:4 of the GATT 1994.
- (d) However, ... the Decree, insofar as it introduces a treatment of these products that is discriminatory under Article III:4, is justified as such and in its implementation by the provisions of paragraph (b) and the introductory clause of Article XX of the GATT 1994.
- (e) Finally, ... Canada has not established that it suffered non-violation nullification or impairment of a benefit within the meaning of Article XXIII:1(b) of the GATT 1994.⁵

5. Having found that the Decree is subject to, and inconsistent with, the obligations set forth in Article III:4 of the GATT 1994, the Panel did not deem it necessary to examine the claims of Canada under Article XI of the GATT 1994.⁶

⁴Panel Report, paras. 1.1 and 1.2. In its request for the establishment of a panel (WT/DS/135/3, 9 October 1998), Canada also claimed that the Decree is inconsistent with the obligations of the European Communities under Articles 2 and 5 of the *Agreement on the Application of Sanitary and Phytosanitary Measures* (the "*SPS Agreement*"). However, Canada did not pursue this claim in its written or oral arguments before the Panel.

⁵Panel Report, para. 9.1.

⁶*Ibid.*, para. 8.159.

6. On 23 October 2000, Canada notified the Dispute Settlement Body (the "DSB") of its decision to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to Article 16.4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed a Notice of Appeal with the Appellate Body pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*").⁷ On 16 November 2000, Canada filed an appellant's submission.⁸ On 21 November 2000, the European Communities filed an other appellant's submission.⁹ On 1 December 2000, Canada and the European Communities each filed an appellee's submission.¹⁰ On the same day, Brazil and the United States each filed a third participant's submission.¹¹

7. On 21 November 2000, the Appellate Body received a letter from Zimbabwe indicating its interest in attending the oral hearing in this appeal. Zimbabwe participated in the proceedings before the Panel as a third party which had notified its interest to the DSB under Article 10.2 of the DSU, but it did not file a third participant's submission in the appeal. No participant or third participant objected to Zimbabwe's request. On 15 December 2000, the Members of the Division hearing this appeal informed Zimbabwe, the participants and third participants, that Zimbabwe would be allowed to attend the oral hearing as a passive observer.

8. On 20 December 2000, the Appellate Body informed the DSB that, due to the exceptional workload of the Appellate Body, and in light of the agreement of the participants, Canada and the European Communities, the Appellate Body Report in this appeal would be circulated to WTO Members no later than Monday, 12 March 2001.¹²

9. The oral hearing in the appeal was held on 17 and 18 January 2001.¹³ The participants and the third participants presented oral arguments and responded to questions put to them by Members of the Division hearing the appeal.

⁷WT/DS135/8, 23 October 2000.

⁸Pursuant to Rule 21(1) of the *Working Procedures*.

⁹Pursuant to Rule 23(1) of the *Working Procedures*.

¹⁰Pursuant to Rules 22 and 23(3) of the *Working Procedures*.

¹¹Pursuant to Rule 24 of the *Working Procedures*.

¹²WT/DS135/10, 20 December 2000.

¹³Pursuant to Rule 27 of the *Working Procedures*.

II. Arguments of the Participants and the Third Participants

A. Claims of Error by Canada – Appellant

1. TBT Agreement

10. Canada requests that the Appellate Body reverse the Panel's findings and conclusions on the definition of the term "technical regulation", hold that the Decree as a whole falls within the scope of the *TBT Agreement*, and find that the Decree is inconsistent with paragraphs 1, 2, 4 and 8 of Article 2 of the *TBT Agreement*.

11. Canada asserts that the Panel erred in law in failing to examine Canada's allegations under the *TBT Agreement*. The Panel wrongly split the Decree into two and considered the prohibitions and exceptions in the Decree to be separate measures for the purposes of determining whether the Decree is a technical regulation within the meaning of the *TBT Agreement*. Canada believes that the Panel's analysis is arbitrary, contrary to the internal coherence of the Decree, and allows the applicability of the *TBT Agreement* to be determined by the way in which a Member drafts its legislation.

12. Canada argues that the Panel also erred in its interpretation of the definition of "technical regulation" in Annex 1 to the *TBT Agreement*, in particular, in articulating two criteria that must be satisfied before a measure can be a "technical regulation": (i) the measure must concern identifiable products; and (ii) the measure must identify the technical characteristics that products must have to be marketed in the territory of the Member taking the measure. This interpretation adds requirements to the definition of "technical regulation" that have no basis in the text of the *TBT Agreement*, and are inconsistent with the object and purpose of that Agreement, namely to restrain non-tariff barriers to trade that may be disguised as technical regulations. In addition, with respect to the first criterion, requiring a measure to relate to identifiable products to constitute a technical regulation could lead to arbitrary results in practice. As for the second criterion, Canada alleges that it is too narrow and would exclude from characterization as "technical regulations", and thereby insulate from the disciplines of the *TBT Agreement*, measures regulating activities other than the marketing of products, such as measures relating to transportation of products, disposal of hazardous waste, and use of special equipment to repair certain products.

13. Canada challenges the Panel's conclusion that the *TBT Agreement* does not apply to a general prohibition like the one in the Decree. The Panel relied on a false distinction between general prohibitions, which it considered fall exclusively under the GATT 1994, and technical regulations, which are subject to the disciplines of the *TBT Agreement*. In fact, a technical regulation can have the effect on trade of a general prohibition.

14. Canada maintains that, had the Panel viewed the Decree as a unified measure, and correctly interpreted the term "technical regulation", the Panel would have concluded that the Decree is a technical regulation within the meaning of the *TBT Agreement*. However, even if the general prohibition contained in the Decree were not characterized as a technical regulation, the Panel nevertheless erred in failing to examine Canada's claims under the *TBT Agreement*, given that the Panel also found that the *TBT Agreement* applies to the part of the Decree concerning exceptions, and that Canada's claims related to the Decree as a whole. Canada therefore requests the Appellate Body to reverse the Panel's conclusions on the applicability of the *TBT Agreement* to the Decree, and to assess the compatibility of the Decree with that Agreement. Canada argues that, as in *United States – Import Prohibition of Certain Shrimp and Shrimp Products* ("*United States – Shrimp*"), "the facts on the record of the panel proceedings" allow the Appellate Body "to undertake the completion of the analysis required to resolve this dispute."¹⁴

15. Canada argues that the Decree is inconsistent with Article 2.1 of the *TBT Agreement*. Since the principle of national treatment in Article 2.1 is a specific, particular expression of Article III:4 of the GATT 1994, the interpretation of the words "like products" in Article 2.1 must be identical to the interpretation of the same words in Article III:4. The meaning of "like products" in Article III:4 is relevant context and, in the view of Canada, both Article III:4 of the GATT 1994 and Article 2.1 of the *TBT Agreement* have the same object and purpose, namely to avoid protectionism and to provide equality of competitive conditions for imported products in relation to domestic products. Thus, Canada maintains, the findings of "likeness", and of less favourable treatment, made by the Panel pursuant to Article III:4 of the GATT 1994 must be extended to Article 2.1 of the *TBT Agreement*.

16. In Canada's view, the Decree is inconsistent with Article 2.2 of the *TBT Agreement*. Canada insists, first, that there is no rational connection between the Decree and France's objective of protecting human health since: (i) it is friable materials containing amphiboles which pose a risk to human health; (ii) the manipulation of chrysotile-cement products and other high-density products containing chrysotile asbestos fibres does not pose a danger to human health; and (iii) the Decree exposes the French public to substitute fibres, the health risks of which are still poorly understood. Canada adds, second, that the Decree has effects that are more trade-restrictive than necessary to achieve its objective, in particular, because: (i) the manipulation of chrysotile-cement products and other high-density products containing chrysotile asbestos fibres does not create a risk to human health; and (ii) there is a less trade-restrictive alternative that protects human health, namely the "controlled use" of chrysotile-cement products and other high-density products containing chrysotile asbestos fibres. What must be demonstrated under Article 2.2 of the *TBT Agreement* is the same as

¹⁴Appellate Body Report, WT/DS58/AB/R, adopted 6 November 1998, para. 124.

what must be demonstrated under Article XX(b) of the GATT 1994. In this regard, according to Canada, the reports of the panel and the Appellate Body in *United States – Standards for Reformulated and Conventional Gasoline* ("*United States – Gasoline*") establish that a less trade-restrictive alternative can only be ruled out if it is shown to be impossible to implement.¹⁵ However, France did not demonstrate, and the Panel did not find, that it is impossible to implement "controlled use". Furthermore, Canada contends, it would be less trade-restrictive to ban products containing chrysotile asbestos fibres on the basis of a product-by-product demonstration of the ineffectiveness and unfeasibility of "controlled use", rather than on the basis of the existence of substitute products.

17. Canada also argues that the Decree is inconsistent with Article 2.4 of the *TBT Agreement*, because there are relevant international standards on the "controlled use" of chrysotile, which constitute an effective and appropriate means to achieve France's objective of protecting human health. In any event, the French government acted inconsistently with Article 2.4 because it did not use international standards as a basis for the Decree. Lastly, Canada considers that the Decree is inconsistent with Article 2.8 of the *TBT Agreement* because it institutes a prohibition based on the descriptive characteristics of products, rather than on requirements in terms of performance.

2. Article XX(b) of the GATT 1994 and Article 11 of the DSU

18. Canada requests that the Appellate Body reverse the Panel's findings and conclusions under Article XX(b) of the GATT 1994 and find that the Decree is not justified under that provision. Canada also asks the Appellate Body to find that the Panel did not make an "objective assessment of the matter", as required under Article 11 of the DSU, because it failed to assess the scientific data in accordance with the principle of the balance of probabilities, and failed to assess the facts objectively.

19. Canada argues that the Panel erred in finding that there is a risk to human health associated with the manipulation of chrysotile-cement products. Canada identifies seven factors it claims the Panel mistakenly relied on in reaching this conclusion: (i) a statement by Dr. Henderson that "building workers now count among those most exposed to chrysotile fibres and hence to the risk of mesothelioma"¹⁶; (ii) an "anecdotal" statement by Dr. Henderson concerning "cases of mesothelioma in patients who had been only incidentally exposed, without any relation to their occupational activity"¹⁷; (iii) the opinion of experts that it has not been established that there is a

¹⁵Panel Report, WT/DS2/R, adopted 20 May 1996, as modified by the Appellate Body Report, WT/DS2/AB/R, DSR 1996:1, 29.

¹⁶Panel Report, para. 8.191.

¹⁷*Ibid.*, para. 8.191 and footnote 147.

threshold below which exposure does not constitute a risk for mesothelioma or lung cancer; (iv) the "Charleston study"¹⁸; (v) "statistical data" adduced by Dr. Henderson, which, according to the Panel, confirmed "the impact of chrysotile on mechanics exposed to that material in a car brake maintenance context" despite a contrary study on automobile brake maintenance relied on by Canada¹⁹; (vi) the use of the no-threshold linear relationship model as a basis for concluding that there is a "real risk" and "an undeniable public health risk" associated with exposure to chrysotile asbestos fibres at low or intermittent levels²⁰; and (vii) data supplied by the European Communities concerning intermittent manipulation and a reference by Dr. Henderson to a Japanese study as a basis for concluding that the manipulation of chrysotile-cement using inappropriate tools could cause exposure levels above statutory limits.²¹ Canada sets forth detailed explanations as to why none of these factors supports the Panel's conclusion.

20. Canada also contends that the Panel erred in its application of the test of "necessity" under Article XX(b) of the GATT 1994. Canada accepts the Panel's view that the extent of the risk to human health is relevant to the assessment of "necessity". However, Canada disputes that there is any risk involved in the manipulation of such products, highlights that the evidence relied on by the Panel certainly could not form the basis for a finding that the health risk was so high that it could justify strict measures, and argues that the Panel failed to comply with its obligation to quantify this type of risk. In Canada's view, these errors distorted the Panel's analysis of the test of necessity and led it to take a much too restrictive approach to its consideration of reasonably available alternatives to the Decree.

21. Canada asserts that, in its examination of whether less restrictive international trade alternatives can achieve the level of protection inherent in the Decree, the Panel erred in accepting that such level of protection is a halt to the spread of the risk associated with chrysotile asbestos fibres. This premise does not take account of the risk associated with the use of substitute fibres, of the absence in France of any regulatory framework for "controlled use" of such fibres, or of the false sense of security created among the French public due to the absence of such a framework. The Panel also erred in law in finding that there was no reasonably available alternative to the Decree that is consistent or less inconsistent with the GATT 1994. In this regard, Canada makes the same arguments that it made above with respect to Article 2.2 of the *TBT Agreement*, and emphasizes that the Panel was overly strict in its examination of the alternatives, considering that France could have

¹⁸Panel Report, paras. 8.192 and 8.193.

¹⁹*Ibid.*, para. 8.192 and footnote 154.

²⁰*Ibid.*, paras. 8.202 and 8.203.

²¹*Ibid.*, para. 8.191.

adopted a measure establishing bans on specific products containing chrysotile asbestos fibres, based on demonstrations of the ineffectiveness and unfeasibility of the "controlled use" of each product.

22. Canada submits that the Panel failed to discharge its responsibility to make an objective assessment of the matter when it declined to take a position on the opinions expressed by the scientific community. For Canada, the principle of the balance of probabilities, or the preponderance of evidence, requires the trier of fact to take a position as to the respective weight of the evidence. Had the Panel properly applied this principle, it would not have been able to conclude that the Decree was justified under Article XX(b) of the GATT 1994, in view of the multiple studies submitted by Canada showing, for example, that there is no increased risk among garage and brake mechanics, or among construction workers, resulting from the manipulation of chrysotile asbestos. Canada adds that the Panel also failed to make an objective assessment of the matter before it because, in its determinations on the "controlled use" of chrysotile, it relied extensively on the opinions of the experts consulted, who in fact did not possess expertise in the area of "controlled use".

B. *Arguments of the European Communities – Appellee*

1. *TBT Agreement*

23. The European Communities urges the Appellate Body to reject Canada's appeal on the *TBT Agreement*. The Panel correctly concluded that the "prohibition part" of the Decree is not a technical regulation within the meaning of Annex 1.1 to the *TBT Agreement*. Canada's arguments with respect to the "exceptions part" of the Decree are legally irrelevant, since it would be impossible for the Appellate Body to complete the legal analysis due to the lack of sufficient and undisputed facts. The European Communities adds that the claims made by Canada under the *TBT Agreement* should, in any event, be denied.

24. The European Communities sees no error in the Panel's separation of the prohibitions part of the Decree from the exceptions part. The exceptions are ancillary to the prohibitions, and separating the two parts for the purpose of their legal characterization under the *TBT Agreement* in no way affects the internal coherence of the Decree. In this case, the issue before the Panel was whether the prohibitions laid down in the Decree constitute a technical regulation, *not* whether, in the abstract, a general ban may be a technical regulation. The European Communities also considers that the Panel correctly interpreted the term "technical regulation", and that the interpretation suggested by Canada would deprive other GATT 1994 provisions, such as Article XI, of effect.

25. The European Communities agrees with the Panel's treatment of the exceptions part of the Decree, and insists that, having made no specific violation claim regarding the narrowness of the

exceptions throughout these proceedings, Canada cannot now argue that the exceptions violate the *TBT Agreement*. The European Communities argues that the Appellate Body is in any case prevented from addressing Canada's claims under the *TBT Agreement* because to do so would require the Appellate Body to make findings of a factual and technical nature which, in the absence of undisputed facts and findings in the record, it cannot do on appeal. The Appellate Body could not simply use the findings of the Panel under Articles III:4 and XX of the GATT 1994 as a basis for an analysis under the *TBT Agreement*. While the two sets of rules are related, they are not "part of a logical continuum"²², and are not sufficiently closely related as to allow the Appellate Body to extrapolate the findings of the Panel under Article III:4 and Article XX(b) of the GATT 1994 into the sphere of the *TBT Agreement*. Should the Appellate Body examine Canada's claims under the *TBT Agreement*, the European Communities argues that these claims should be dismissed and refers, in this regard, to its arguments with respect to Article XX(b) of the GATT 1994, and to the arguments it made before the Panel with regard to Articles 2.1, 2.2, 2.4 and 2.8 of the *TBT Agreement*.

2. Article XX(b) of the GATT 1994 and Article 11 of the DSU

26. The European Communities submits that the Panel's finding that the violation of Article III:4 is justified under Article XX(b) of the GATT 1994 is legally sound and correct. Canada's arguments on this issue amount to a request that the Appellate Body make new factual and scientific findings on appeal, contrary to the limits on the scope of appellate review set out in Article 17.6 of the DSU.

27. The European Communities believes that the Panel concluded that the ban on asbestos was "necessary" based on a series of objective and verifiable findings, made after a detailed and careful evaluation of the factual and scientific evidence presented. In assessing whether the ban was "necessary", the Panel was not obliged to undertake a "quantitative" assessment of the identified risk. Neither the ordinary meaning of the terms "necessary to protect" in Article XX(b) nor the concept of risk assessment mandate such an approach. An assessment of risk may be made either in quantitative or qualitative terms. The European Communities adds that the Panel correctly found that, after the European Communities had established a *prima facie* case for the existence of a health risk in connection with the use of chrysotile, Canada bore the burden of refuting that case by showing the absence of such a health risk.

28. On the issue of whether another measure was reasonably available, the European Communities submits that Canada cannot, on appeal, make arguments based on the health risks associated with the substitute products for asbestos, or on the safety of the "controlled use" of

²²European Communities' appellee's submission, para. 43.

asbestos, as both arguments seek to have the Appellate Body revisit factual findings made by the Panel on the basis of the evidence submitted and the opinions advanced by the experts consulted.

29. With respect to the alleged inconsistency with Article 11 of the DSU, the European Communities considers that Canada's claim that the Panel committed a fundamental error in its appreciation of the facts seems to be based solely on the fact that the Panel based itself exclusively on the opinions of the experts consulted in this case. In this regard, the European Communities emphasizes that Canada did not object to the selection of the experts by the Panel, that Canada proposed one of those experts itself, and that the experts themselves answered a question on "controlled use" rather than professing a lack of expertise on the issue. As for Canada's argument that the Panel erred in law in failing to evaluate the scientific evidence in accordance with the principle of preponderance of the evidence, the Panel's approach does not seem inconsistent with such a principle and, in any case, the principle of preponderance of the evidence is inapposite in the context of risk assessment since such an approach would preclude Members from basing their regulatory decisions on diverging scientific opinions. The European Communities refuses to accept that the evidence relied on by the Panel – representing the unanimous views of the four experts consulted and of all international institutions that have evaluated asbestos – reflects, as Canada seems to suggest, a divergent, minority scientific point of view on asbestos.

C. *Claims of Error by the European Communities – Appellant*

1. "Like Products" in Article III:4 of the GATT 1994

30. The European Communities requests the Appellate Body to reverse the Panel's findings that chrysotile asbestos fibres are "like" polyvinyl alcohol ("PVA"), cellulose and glass fibres, and that chrysotile-cement products are "like" fibro-cement products, as well as the Panel's consequent finding that, with respect to the products found to be "like", the Decree violates Article III:4 of the GATT 1994.

31. The Panel's interpretation of the term "like products" in Article III:4, is of serious concern to the European Communities; is contrary to the ordinary meaning of Article III:4, read in context and in light of its object and purpose; and is inconsistent with established case law. As the Appellate Body has previously found, the first paragraph of Article III defines the object and purpose of the whole of Article III, namely, to provide equality of competitive conditions for imported products in relation to domestic products. In the view of the European Communities, the Panel, however, erroneously analyzed the term "like products" in light of the objective of ensuring market access for products, and, in so doing, adopted an exclusively commercial approach to the comparison of "like" products and erroneously expanded the scope of application of Article III:4.

32. The European Communities submits that this erroneous focus on market access led the Panel to exclude from its "like" product analysis the very reason why the Decree singles out asbestos fibres, namely, the fact that asbestos fibres are carcinogenic. While Article III:4 protects expectations concerning the competitive relationship between imported and domestic products, the impact of a measure on such expectations is not relevant in determining "likeness", but only later in the Article III:4 analysis, for the purposes of establishing whether the measure discriminates between imported and domestic products. For the European Communities, the decisive criterion for determining the "likeness" of products must be whether the basis for the regulatory distinction between products denies to imported products the treatment accorded to domestic products that are the subject of the relevant measure.

33. The European Communities contends that, because the Panel ignored the basis for the regulatory treatment set forth in the Decree, it compared the wrong products in its analysis of "likeness". The Decree prohibits *all carcinogenic asbestos fibres*, and it denies competitive opportunities to all such fibres equally. Thus, the prohibited carcinogenic asbestos fibres are not "like" the three substitute fibres because the application of the French regulatory distinction between them does not alter or affect the competitive opportunities of those substitute fibres. The European Communities concludes that, instead of comparing the products claimed by Canada to be "like" products (PVA, cellulose and glass fibres) with the category of products prohibited by the French Decree at issue (all carcinogenic asbestos fibres), the Panel erroneously compared the allegedly "like" products with an arbitrary third category of products, namely "fibres with certain industrial applications".²³

34. The European Communities challenges the Panel's conclusion that, in view of the relationship between Articles III and XX(b) of the GATT 1994, it is not appropriate to take the "risk" criterion into account either when examining the properties, nature and quality of the product, or when examining other criteria of "likeness".²⁴ The Panel found that the health, safety or other concerns that lead regulators to apply different treatment to products may *only* be taken into account in the analysis under Article XX, *not* in the analysis under Article III:4 of the GATT 1994. The Panel's approach misconstrues the relationship between Articles III:4 and XX of the GATT 1994, requires the "likeness" of two products to be determined solely on the basis of commercial factors and, in the view of the European Communities, entails a serious curtailment of national regulatory autonomy. If non-commercial considerations may only be considered at the Article XX stage of the analysis, then the list of policy purposes for which regulators may distinguish between products is unduly limited to the

²³European Communities' other appellant's submission, para. 29.

²⁴Panel Report, para. 8.132.

categories listed in Article XX. The application of a "risk" criterion in the analysis of "likeness" under Article III would not, as the Panel suggests, make the other criteria of "likeness" "totally redundant"²⁵, since all relevant criteria, including the "risk" criterion, must be considered in the assessment of "likeness".

35. The European Communities contends that the Panel committed a number of errors in its application of the four criteria used to assess "likeness", and placed excessive importance on the criterion of end-use. The Panel failed to follow the approach used in previous case law, and ignored the fact that Article III:4 of the GATT 1994, unlike Article III:2 and its accompanying Interpretive Note, does not contain the phrase "directly competitive or substitutable" products. The Panel's analysis of "end-use" is inadequately reasoned, in particular since the Panel failed to identify the small number of identical or similar end-uses for chrysotile asbestos, PVA, cellulose and glass fibres and ignored that, overall, the end-uses for asbestos and its substitutes are very different. The European Communities adds that the Panel relied on its conclusions on end-use in its analysis of the properties, nature and quality of the products, as well as their tariff classification, and, in effect disregarded these other criteria.

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

36. The European Communities appeals the Panel's findings on Article XXIII:1(b) of the GATT 1994 in paragraphs 8.262, 8.264, 8.273 and 8.274 of the Panel Report, but not the Panel's conclusion that Canada did not establish nullification or impairment of a benefit within the meaning of Article XXIII:1(b). The Panel's reasoning is inconsistent with the proper interpretation of the GATT 1994, past practice, and relevant case law. Historically, the non-violation remedy was conceived as a legal instrument designed to prevent the circumvention of tariff concessions. Only three non-violation complaints have succeeded. All previous non-violation complaints have related to measures imposed for commercial purposes, and all such complaints would today most likely be resolved as violation complaints under the expanded WTO competence, reflected in the covered agreements. The European Communities urges the Appellate Body to accept that the concept of non-violation nullification and impairment is an exceptional one, as WTO Members have recognized, and should be applied with utmost circumspection.

37. The European Communities challenges, in particular, the Panel's conclusion that "Article XXIII:1(b) applies to a measure whether it is consistent with the GATT because the GATT does not apply to it or is justified by Article XX."²⁶ In so finding, the Panel wrongly implied that

²⁵Panel Report, para. 8.131.

²⁶*Ibid.*, para. 8.264.

Article XXIII:1(b) of the GATT 1994 protects the expectation that, once a tariff concession has been made for a product, the regulatory framework applicable to that product will not be adapted in response to new scientific knowledge concerning health risks. In the view of the European Communities, the Panel's interpretation wrongly expanded the coverage of Article XXIII:1(b) in a manner that has grave systemic implications.

38. The European Communities urges the Appellate Body to reject, as a matter of legal principle, the possibility of finding nullification or impairment under Article XXIII:1(b) with respect to health and safety regulations, or with respect to measures that fall under any of the other grounds listed in Article XX, or under provisions such as Articles XIX and XXI of the GATT 1994. Article XXIII:1(b) cannot apply in cases involving health measures, since the legitimacy of an exporting Member's expectation that the health measure will not be taken cannot be assessed without examining the health measure itself and the balance of interests underlying that law. The participants in the Uruguay Round knew that the value of the concessions negotiated in that Round could be adversely affected by measures taken to protect, *inter alia*, human, animal or plant life or health, or a national security interest. Therefore, the European Communities concludes, if a Member takes a measure that is consistent with the GATT 1994, it does not disturb the balance of rights and obligations under the GATT 1994, and no redress is available under Article XXIII:1(b).

D. *Arguments of Canada – Appellee*

1. "Like Products" in Article III:4 of the GATT 1994

39. Canada requests the Appellate Body to dismiss the European Communities' appeal relating to Article III:4 of the GATT 1994. Canada is of the view that the Panel correctly separated the analysis of "likeness" from the issue of whether the competitive opportunities afforded to imports on the domestic market have been upset. In its appeal, the European Communities confounds these two distinct questions and attaches undue significance to the Panel's statement regarding the importance of "market access" under Article III:4 of the GATT 1994.

40. Canada considers that the Panel properly applied the criteria set out in the case law for determining whether products are "like". The European Communities appears to confuse the concept of "likeness" under Article III:4 of the GATT 1994 with "likeness" under Article III:2. "Likeness", however, under Article III:4 is different from, and broader than, "likeness" under the first sentence of Article III:2, and the Panel's approach properly reflects this distinction. In assessing the "likeness" of the fibres, the Panel recognized that the criteria of "properties" and "end-use" are interdependent, and analyzed them accordingly. Canada does not accept that the Panel created a hierarchy among the traditional "likeness" criteria, but, even so, this would not be an error of law, since "likeness" must be

approached on a case-by-case basis, and it is within a panel's discretion to establish a hierarchy among the criteria in any given case. Finally, Canada notes, the appeal of the European Communities focuses on the Panel's conclusion that chrysotile asbestos fibres are "like" PVA, cellulose and glass fibres, and the criticisms that the European Communities makes of this conclusion cannot be extended to the Panel's separate conclusion that chrysotile-cement products are "like" fibro-cement products.

41. Canada submits that the Panel correctly decided that the "dangerousness" of a product is not a factor to be considered in determining "likeness" and that to introduce a criterion of this nature into the analysis of "likeness" would nullify the effect of Article XX(b) of the GATT 1994. The object and purpose of Article III of the GATT 1994 is to provide equality of competitive conditions for imported and domestic products, and the four traditional criteria of "likeness" all relate to the state of *commercial* competition between such products. The "dangerousness" of products is unrelated to such commercial competition. Furthermore, to introduce such factors into the analysis of "likeness" under Article III:4 would lead to unpredictability as to the scope of that provision, and imply that determining the "likeness" of products requires complex scientific analysis for which panels have no special expertise. Canada adds that even if the "dangerousness" of a product were relevant to the determination of "likeness", it would not necessarily follow that chrysotile asbestos fibres are not "like" the substitute fibres. Since Article XX of the GATT 1994 was specially designed to balance the interest of promoting international trade with legitimate societal interests, it is a more appropriate framework than Article III for taking account of these types of considerations. Canada also stresses that, contrary to the argument of the European Communities, such an approach does not lead to a curtailment of national regulatory autonomy, because the list in Article XX covers a broad range of interests on the basis of which a Member may justify a measure.

42. Canada also submits that, in its appeal, the European Communities errs in asserting that the examination of "likeness" must be done on the basis of the regulatory distinction in question, and in claiming that the Panel should only have compared chrysotile asbestos fibres with carcinogenic fibres, rather than with other fibres that serve similar industrial uses. Such an approach is inconsistent with the proper interpretation of Article III:4. In seeking to focus the analysis on the reason for any given regulatory distinction, the European Communities would allow national regulatory authorities to predetermine the scope of Article III:4 through 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.²⁷

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*

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

²⁷ Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, DSR 1997:I, 323, at 340.

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 interpretation unduly excludes from the scope of the *TBT Agreement* a wide range of measures affecting products that could potentially represent barriers to trade. Brazil also contests the Panel's finding that a technical regulation must include specifications to be met in order for a product to be authorized for *marketing*. Brazil adds that, in its view, both France and the European Communities conceded, when they notified the Decree under the *TBT Agreement*, that the measure is a technical regulation.

2. United States

(a) *TBT Agreement*

46. The United States argues that the Panel erred in its interpretation of the phrase "technical regulation" in Annex 1 to the *TBT Agreement*, and, in consequence, improperly excluded from the scope of the *TBT Agreement* technical regulations that apply generally to products. Specifically, the United States contends that the Panel erred in finding that the phrase "product characteristics" in the definition of "technical regulation" refers to characteristics of "one or more given products", rather than characteristics of products generally.

47. Should the Appellate Body find that the *TBT Agreement* applies to the Decree and decide to complete the analysis of Canada's claims under that Agreement, the United States submits that the Appellate Body should find that the Decree is consistent with the *TBT Agreement*. Asbestos and asbestos-containing products, on the one hand, and substitute fibres and asbestos-free products, on the other, are not "like products" within the meaning of Article 2.1 of the *TBT Agreement* for the same reasons that they are not "like products" for the purposes of Article III:4 of the GATT 1994. The test to be applied under Article 2.2 of the *TBT Agreement* is very similar to the test to be applied under Article XX(b) and the introductory clause to Article XX. However, unlike Article XX of the GATT 1994, where the burden was on the European Communities to present a *prima facie* case that the Decree was justified, under Article 2.2 of the *TBT Agreement*, it is for Canada to make a *prima facie* case that the Decree creates an unnecessary barrier to trade, and it has not done so. The Decree is also consistent with Article 2.4 of the *TBT Agreement*, since the international standards identified by Canada are neither relevant to, nor an effective or appropriate means of achieving, France's public health objective. Lastly, the United States argues that the Decree is consistent with Article 2.8 of the *TBT Agreement*, since it would be inappropriate to express the technical regulation in any way other than as a prohibition on the use of asbestos.

(b) "Like Products" in Article III:4 of the GATT 1994

48. The United States submits that the Panel erred in concluding that asbestos fibres and substitute fibres are "like products" under Article III:4 of the GATT 1994. The Panel erred in law in concluding that, in examining the properties, nature and quality of asbestos, it could not take into account the fact that asbestos differs from other fibres because it splits longitudinally into narrow, or thin, fibres, and has a high potential to release particles that possess certain characteristics, and in concluding that, in examining consumer tastes and habits, it could not take account of the proven carcinogenic nature of asbestos. In so proceeding, the Panel ignored the single most important distinguishing feature between asbestos and its substitutes. The Panel also wrongly inflated the significance of another factor – the end uses of products concerned. In the view of the United States, the application of a proper "like product" analysis should lead the Appellate Body to find that asbestos is not "like" its substitute fibres, and that asbestos-containing products are not "like" asbestos-free products and, therefore, conclude that the Decree does not violate Article III:4 of the GATT 1994.

(c) Article XX(b) of the GATT 1994 and Article 11 of the DSU

49. Should the Appellate Body resort to Article XX(b) of the GATT 1994, the United States urges the Appellate Body to find that the Decree is permissible under Article XX(b). Canada's appeal on this issue is based on criticism of the Panel's findings with respect to the scientific information before it, and that Canada erroneously asserts that Article 11 of the DSU requires the Panel to decide which scientific view is the correct one. However, the role of a panel, under Article 11 of the DSU, is to make an objective assessment of the facts before it, and to evaluate whether there is a rational or objective relationship between the measure at issue and the scientific basis asserted for the measure. The United States argues that the Panel acted consistently with this mandate in finding that the Decree is necessary to protect human health, and the Appellate Body should not disturb this finding.

III. Preliminary Procedural Matter

50. On 27 October 2000, we wrote to the parties and the third parties indicating that we were mindful that, in the proceedings before the Panel in this case, the Panel received five written submissions from non-governmental organizations, two of which the Panel decided to take into account.²⁸ In our letter, we recognized the possibility that we might receive submissions in this appeal from persons other than the parties and the third parties to this dispute, and stated that we were of the view that the fair and orderly conduct of this appeal could be facilitated by the adoption of appropriate procedures, for the purposes of this appeal only, pursuant to Rule 16(1) of the

²⁸Panel Report, paras. 6.1-6.4 and 8.12-8.14.

Working Procedures, to deal with any possible submissions received from such persons. To this end, we invited the parties and the third parties in this appeal to submit their comments on a number of questions. These related to: whether we should adopt a "request for leave" procedure; what procedures would be needed to ensure that the parties and third parties would have a full and adequate opportunity to respond to submissions that might be received; and whether we should take any other points into consideration if we decided to adopt a "request for leave" procedure. On 3 November 2000, all of the parties and third parties responded in writing to our letter of 27 October. Canada, the European Communities and Brazil considered that issues pertaining to any such procedure should be dealt with by the WTO Members themselves. The United States welcomed adoption of a request for leave procedure, and Zimbabwe indicated that it had no specific reasons to oppose adoption of a request for leave procedure. Without prejudice to their positions, Canada, the European Communities and the United States each made a number of suggestions regarding any such procedure that might be adopted.

51. On 7 November 2000, and after consultations among all seven Members of the Appellate Body, we adopted, pursuant to Rule 16(1) of the *Working Procedures*, an additional procedure, *for the purposes of this appeal only*, to deal with written submissions received from persons other than the parties and third parties to this dispute (the "Additional Procedure"). The Additional Procedure was communicated to the parties and third parties in this appeal on 7 November 2000. On 8 November 2000, the Chairman of the Appellate Body informed the Chairman of the Dispute Settlement Body, in writing, of the Additional Procedure adopted, and this letter was circulated, for information, as a dispute settlement document to the Members of the WTO.²⁹ In that communication, the Chairman of the Appellate Body stated that:

... This additional procedure has been adopted by the Division hearing this appeal for the purposes of this appeal only pursuant to Rule 16(1) of the *Working Procedures for Appellate Review*, and is *not* a new working procedure drawn up by the Appellate Body pursuant to paragraph 9 of Article 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*. (original emphasis)

The Additional Procedure was posted on the WTO website on 8 November 2000.

52. The Additional Procedure provided:

²⁹WT/DS135/9, 8 November 2000.

1. In the interests of fairness and orderly procedure in the conduct of this appeal, the Division hearing this appeal has decided to adopt, pursuant to Rule 16(1) of the *Working Procedures for Appellate Review*, and after consultations with the parties and third parties to this dispute, the following additional procedure for purposes of this appeal only.

2. Any person, whether natural or legal, other than a party or a third party to this dispute, wishing to file a written brief with the Appellate Body, must apply for leave to file such a brief from the Appellate Body *by noon on Thursday, 16 November 2000*.

3. An application for leave to file such a written brief shall:

- (a) be made in writing, be dated and signed by the applicant, and include the address and other contact details of the applicant;
- (b) be in no case longer than three typed pages;
- (c) contain a description of the applicant, including a statement of the membership and legal status of the applicant, the general objectives pursued by the applicant, the nature of the activities of the applicant, and the sources of financing of the applicant;
- (d) specify the nature of the interest the applicant has in this appeal;
- (e) identify the specific issues of law covered in the Panel Report and legal interpretations developed by the Panel that are the subject of this appeal, as set forth in the Notice of Appeal (WT/DS135/8) dated 23 October 2000, which the applicant intends to address in its written brief;
- (f) state why it would be desirable, in the interests of achieving a satisfactory settlement of the matter at issue, in accordance with the rights and obligations of WTO Members under the DSU and the other covered agreements, for the Appellate Body to grant the applicant leave to file a written brief in this appeal; and indicate, in particular, in what way the applicant will make a contribution to the resolution of this dispute that is not likely to be repetitive of what has been already submitted by a party or third party to this dispute; and
- (g) contain a statement disclosing whether the applicant has any relationship, direct or indirect, with any party or any third party to this dispute, as well as whether it has, or will, receive any assistance, financial or otherwise, from a party or a third party to this dispute in the preparation of its application for leave or its written brief.

4. The Appellate Body will review and consider each application for leave to file a written brief and will, without delay, render a decision whether to grant or deny such leave.

5. The grant of leave to file a brief by the Appellate Body does not imply that the Appellate Body will address, in its Report, the legal arguments made in such a brief.

6. Any person, other than a party or a third party to this dispute, granted leave to file a written brief with the Appellate Body, must file its brief with the Appellate Body Secretariat *by noon on Monday, 27 November 2000*.

7. A written brief filed with the Appellate Body by an applicant granted leave to file such a brief shall:

- (a) be dated and signed by the person filing the brief;
- (b) be concise and in no case longer than 20 typed pages, including any appendices; and
- (c) set out a precise statement, strictly limited to legal arguments, supporting the applicant's legal position on the issues of law or legal interpretations in the Panel Report with respect to which the applicant has been granted leave to file a written brief.

8. An applicant granted leave shall, in addition to filing its written brief with the Appellate Body Secretariat, also serve a copy of its brief on all the parties and third parties to the dispute *by noon on Monday, 27 November 2000*.

9. The parties and the third parties to this dispute will be given a full and adequate opportunity by the Appellate Body to comment on and respond to any written brief filed with the Appellate Body by an applicant granted leave under this procedure. (original emphasis)

53. The Appellate Body received 13 written submissions from non-governmental organizations relating to this appeal that were not submitted in accordance with the Additional Procedure.³⁰ Several of these were received while we were considering the possible adoption of an additional procedure. After the adoption of the Additional Procedure, each of these 13 submissions was returned to its sender, along with a letter informing the sender of the procedure adopted by the Division hearing this

³⁰Such submissions were received from: Asbestos Information Association (United States); HVL Asbestos (Swaziland) Limited (Bulembu Mine); South African Asbestos Producers Advisory Committee (South Africa); J & S Bridle Associates (United Kingdom); Associação das Indústrias de Produtos de Amianto Crisótilo (Portugal); Asbestos Cement Industries Limited (Sri Lanka); The Federation of Thai Industries, Roofing and Accessories Club (Thailand); Korea Asbestos Association (Korea); Senac (Senegal); Syndicat des Métaux (Canada); Duralita de Centroamerica, S.A. de C.V. (El Salvador); Asociación Colombiana de Fibras (Colombia); and Japan Asbestos Association (Japan).

appeal and a copy of the Additional Procedure. Only one of these associations, the Korea Asbestos Association, subsequently submitted a request for leave in accordance with the Additional Procedure.

54. By letter dated 15 November 2000, Canada and the European Communities jointly requested that they be provided with copies of all applications filed pursuant to the Additional Procedure, and of the decision taken by the Appellate Body in respect of each such application. All such documents were subsequently provided to the parties and third parties in this dispute.

55. Pursuant to the Additional Procedure, the Appellate Body received 17 applications requesting leave to file a written brief in this appeal. Six of these 17 applications were received after the deadline specified in paragraph 2 of the Additional Procedure and, for this reason, leave to file a written brief was denied to these six applicants.³¹ Each such applicant was sent a copy of our decision denying its application for leave because the application was not filed in a timely manner.

56. The Appellate Body received 11 applications for leave to file a written brief in this appeal within the time limits specified in paragraph 2 of the Additional Procedure.³² We carefully reviewed and considered each of these applications in accordance with the Additional Procedure and, in each case, decided to deny leave to file a written brief. Each applicant was sent a copy of our decision denying its application for leave for failure to comply sufficiently with all the requirements set forth in paragraph 3 of the Additional Procedure.

57. We received a written brief from the Foundation for International Environmental Law and Development, on its behalf and on behalf of Ban Asbestos (International and Virtual) Network, Greenpeace International, International Ban Asbestos Secretariat, and World Wide Fund for Nature, International, dated 6 February 2001. As we had already denied, in accordance with the Additional

³¹ Applications from the following persons were received by the Division after the deadline specified in the Additional Procedure for receipt of such applications: Association of Personal Injury Lawyers (United Kingdom); All India A.C. Pressure Pipe Manufacturer's Association (India); International Confederation of Free Trade Unions/European Trade Union Confederation (Belgium); Maharashtra Asbestos Cement Pipe Manufacturers' Association (India); Roofit Industries Ltd. (India); and Society for Occupational and Environmental Health (United States).

³² Applications from the following persons were received by the Division within the deadline specified in the Additional Procedure for receipt of such applications: Professor Robert Lloyd Howse (United States); Occupational & Environmental Diseases Association (United Kingdom); American Public Health Association (United States); Centro de Estudios Comunitarios de la Universidad Nacional de Rosario (Argentina); Only Nature Endures (India); Korea Asbestos Association (Korea); International Council on Metals and the Environment and American Chemistry Council (United States); European Chemical Industry Council (Belgium); Australian Centre for Environmental Law at the Australian National University (Australia); Associate Professor Jan McDonald and Mr. Don Anton (Australia); and a joint application from Foundation for Environmental Law and Development (United Kingdom), Center for International Environmental Law (Switzerland), International Ban Asbestos Secretariat (United Kingdom), Ban Asbestos International and Virtual Network (France), Greenpeace International (The Netherlands), World Wide Fund for Nature, International (Switzerland), and Lutheran World Federation (Switzerland).

Procedure, an application from these organizations for leave to file a written brief in this appeal³³, we did not accept this brief.

IV. Issues Raised in this Appeal

58. This appeal raises the following issues:

- (a) whether the Panel erred in its interpretation of the term "technical regulation" in Annex 1.1 of the *TBT Agreement* in finding, in paragraph 8.72(a) of the Panel Report, that "the part of the Decree relating to the ban on imports of asbestos and asbestos-containing products" does not constitute a "technical regulation";
- (b) whether the Panel erred in its interpretation and application of the term "like products" in Article III:4 of the GATT 1994 in finding, in paragraph 8.144 of the Panel Report, that chrysotile asbestos fibres are "like" PVA, cellulose and glass fibres, and in finding, in paragraph 8.150 of the Panel Report, that cement-based products containing chrysotile asbestos fibres are "like" cement-based products containing polyvinyl alcohol, cellulose and glass fibres;
- (c) whether the Panel erred in finding that the measure at issue is "necessary to protect human ... life or health" under Article XX(b) of the GATT 1994, and whether, in carrying out its examination under Article XX(b) of the GATT 1994, the Panel failed to make an objective assessment of the matter under Article 11 of the DSU; and
- (d) whether the Panel erred in its interpretation of Article XXIII:1(b) of the GATT 1994 in finding that that provision applies to a measure which falls within the scope of application of other provisions of the GATT 1994, and in finding that Article XXIII:1(b) applies to measures which pursue health objectives.

V. *TBT Agreement*

59. Before the Panel, Canada claimed that the measure at issue is inconsistent with Articles 2.1, 2.2, 2.4 and 2.8 of the *TBT Agreement*. Each of these provisions applies solely to "technical regulations". Thus, a threshold issue in the examination of Canada's claims under the *TBT Agreement* is whether the measure at issue is a "technical regulation".

³³These organizations, together with the Center for International Environmental Law and the Lutheran World Federation, filed a joint application for leave to file a written brief. We decided to deny leave to these applicants to file a written brief. See *supra*, para. 56 and footnote 32.

60. In addressing this threshold issue, the Panel examined the nature and structure of the measure to assess how the *TBT Agreement* might apply to it. For this examination, the Panel decided that it would be appropriate to examine the measure in two stages. First, the Panel examined "the part of the Decree prohibiting the marketing of asbestos and asbestos-containing products"; next, the Panel analyzed the "exceptions" in the Decree.³⁴ The Panel concluded that the part of the Decree containing the prohibitions is *not* a "technical regulation", and that, therefore, the *TBT Agreement* does not apply to this part of the Decree.³⁵ However, the Panel also concluded that the part of the Decree containing the exceptions does constitute a "technical regulation", and that, therefore, the *TBT Agreement* applies to that part of the Decree. On this basis, the Panel decided not to examine Canada's claims under the *TBT Agreement* because, it said, those claims relate solely to the part of the Decree containing the prohibitions, which, in the Panel's view, does not constitute a "technical regulation", and, therefore, the *TBT Agreement* does not apply.³⁶

61. In concluding that the part of the Decree containing the prohibitions is not a "technical regulation", the Panel found that:

a measure constitutes a "technical regulation" if:

- (a) the measure affects one or more given products;
- (b) the measure specifies the technical characteristics of the product(s) which allow them to be marketed in the Member that took the measure;
- (c) compliance is mandatory.³⁷

62. Canada appeals the Panel's finding that the *TBT Agreement* does not apply to the part of the Decree relating to the prohibitions on imports of asbestos and asbestos-containing products. According to Canada, the Panel erred in considering the part of the Decree relating to those prohibitions *separately* from the part of the Decree relating to the exceptions to those prohibitions, and, therefore, the Panel should have examined the Decree as a *single*, unified measure. Furthermore, Canada argues that the Panel erred in its interpretation of a "technical regulation", as defined in Annex 1.1 to the *TBT Agreement*, because, in Canada's view, a general prohibition can be a "technical regulation".

³⁴Panel Report, heading (a) on p. 404 and heading (b) on p. 411.

³⁵*Ibid.*, para. 8.72(a).

³⁶*Ibid.*, para. 8.72.

³⁷*Ibid.*, para. 8.57.

63. We start with the measure at issue. It is clear from Canada's request for the establishment of a panel that Canada's complaint concerns Decree 96-1133 as a whole.³⁸ The Decree, in essence, consists of prohibitions on asbestos fibres and on products containing asbestos fibres (Article 1), coupled with limited and temporary exceptions from the prohibitions for certain "existing materials, products or devices containing chrysotile fibre" (Article 2). The remaining operative provisions of the Decree contain additional rules governing the grant of an exception (Articles 3 and 4) and the imposition of penalties for violation of the prohibitions in Article 1 (Article 5). Furthermore, certain used "vehicles" and "agricultural and forestry machinery" are entirely excluded, until 31 December 2001, from certain aspects of the prohibitions in Article 1, namely, from the prohibitions on "possession for sale, offering for sale and transfer under any title" (Article 7).³⁹

64. In our view, the proper legal character of the measure at issue cannot be determined unless the measure is examined as a whole. Article 1 of the Decree contains broad, general prohibitions on asbestos and products containing asbestos. However, the scope and generality of those prohibitions can only be understood in light of the exceptions to it which, albeit for a limited period, *permit, inter alia*, the use of certain products containing asbestos and, principally, products containing chrysotile asbestos fibres. The measure is, therefore, *not* a *total* prohibition on asbestos fibres, because it also includes provisions that *permit*, for a limited duration, the use of asbestos in certain situations. Thus, to characterize the measure simply as a general prohibition, and to examine it as such, overlooks the complexities of the measure, which include both prohibitive and permissive elements. In addition, we observe that the exceptions in the measure would have no autonomous legal significance in the absence of the prohibitions. We, therefore, conclude that the measure at issue is to be examined as an integrated whole, taking into account, as appropriate, the prohibitive and the permissive elements that are part of it.

65. Accordingly, we reverse the Panel's two-stage interpretive approach of examining, first, the application of the *TBT Agreement* to the prohibitions contained in the measure and, second and separately, its application to the exceptions contained in the measure.

³⁸WT/DS135/3. In its request for the establishment of a panel, Canada stated:

... the Government of Canada requested consultations with the European Communities concerning certain measures taken by France prohibiting asbestos and products containing asbestos, and concerning the general asbestos regulations in force in France. *These measures and regulations include, but are not limited to, Decree No. 96-1133 ...* (emphasis added)

Canada requested that the Panel "find that Decree No. 96-1133" is inconsistent with the European Communities' WTO obligations. (emphasis added) See, further, Canada's request for consultations, WT/DS135/1, G/SPS/GEN/72, G/TBT/D/15, which also identifies the measure at issue as Decree No. 96-1133.

³⁹The full text of the Decree is reproduced in Annex I in the Addendum to the Panel Report. Articles 1 and 2 of the Decree are reproduced in paragraph 2 of this Report.

66. We turn now to the term "technical regulation" and to the considerations that must go into interpreting the term. Article 1.2 of the *TBT Agreement* provides that, for the purposes of this Agreement, the meanings given in Annex 1 apply. Annex 1.1 of the *TBT Agreement* defines a "technical regulation" as a:

Document which lays down *product characteristics* or their related processes and production methods, including the *applicable administrative provisions*, with which *compliance is mandatory*. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method. (emphasis added)

67. The heart of the definition of a "technical regulation" is that a "document" must "lay down" – that is, set forth, stipulate or provide – "product *characteristics*". The word "characteristic" has a number of synonyms that are helpful in understanding the ordinary meaning of that word, in this context. Thus, the "characteristics" of a product include, in our view, any objectively definable "features", "qualities", "attributes", or other "distinguishing mark" of a product. Such "characteristics" might relate, *inter alia*, to a product's composition, size, shape, colour, texture, hardness, tensile strength, flammability, conductivity, density, or viscosity. In the definition of a "technical regulation" in Annex 1.1, the *TBT Agreement* itself gives certain examples of "product characteristics" – "terminology, symbols, packaging, marking or labelling requirements". These examples indicate that "product characteristics" include, not only features and qualities intrinsic to the product itself, but also related "characteristics", such as the means of identification, the presentation and the appearance of a product. In addition, according to the definition in Annex 1.1 of the *TBT Agreement*, a "technical regulation" may set forth the "applicable administrative provisions" for products which have certain "characteristics". Further, we note that the definition of a "technical regulation" provides that such a regulation "may also include or deal *exclusively* with terminology, symbols, packaging, marking *or* labelling requirements". (emphasis added) The use here of the word "exclusively" and the disjunctive word "or" indicates that a "technical regulation" may be confined to laying down only one or a few "product characteristics".

68. The definition of a "technical regulation" in Annex 1.1 of the *TBT Agreement* also states that "*compliance*" with the "product characteristics" laid down in the "document" must be "*mandatory*". A "technical regulation" must, in other words, regulate the "characteristics" of products in a binding or compulsory fashion. It follows that, with respect to products, a "technical regulation" has the effect of *prescribing* or *imposing* one or more "characteristics" – "features", "qualities", "attributes", or other "distinguishing mark".

69. "Product characteristics" may, in our view, be prescribed or imposed with respect to products in either a positive or a negative form. That is, the document may provide, positively, that products *must possess* certain "characteristics", or the document may require, negatively, that products *must not possess* certain "characteristics". In both cases, the legal result is the same: the document "lays down" certain binding "characteristics" for products, in one case affirmatively, and in the other by negative implication.

70. A "technical regulation" must, of course, be applicable to an *identifiable* product, or group of products. Otherwise, enforcement of the regulation will, in practical terms, be impossible. This consideration also underlies the formal obligation, in Article 2.9.2 of the *TBT Agreement*, for Members to notify other Members, through the WTO Secretariat, "of the *products to be covered*" by a proposed "technical regulation". (emphasis added) Clearly, compliance with this obligation requires identification of the product coverage of a technical regulation. However, in contrast to what the Panel suggested, this does not mean that a "technical regulation" must apply to "*given*" products which are actually *named, identified* or *specified* in the regulation.⁴⁰ (emphasis added) Although the *TBT Agreement* clearly applies to "products" generally, nothing in the text of that Agreement suggests that those products need be named or otherwise *expressly* identified in a "technical regulation". Moreover, there may be perfectly sound administrative reasons for formulating a "technical regulation" in a way that does *not* expressly identify products by name, but simply makes them identifiable – for instance, through the "characteristic" that is the subject of regulation.

71. With these considerations in mind, we examine whether the measure at issue is a "technical regulation". Decree 96-1133 aims primarily at the regulation of a named product, asbestos. The first and second paragraphs of Article 1 of the Decree impose a prohibition on asbestos *fibres*, as such. This prohibition on these *fibres* does not, *in itself*, prescribe or impose any "characteristics" on asbestos fibres, but simply bans them in their natural state. Accordingly, if this measure consisted *only* of a prohibition on asbestos *fibres*, it might not constitute a "technical regulation".

⁴⁰Panel Report, para. 8.57. We note that the Panel stated that a "technical regulation" must apply to "*identifiable*" products (Panel Report, para. 8.38; emphasis added). However, the Panel went on to state that a "technical regulation" must apply to "*given*" products (Panel Report, para. 8.57; emphasis added). The Panel also noted that the measure does not "*identify by name* nor even by function or category" the products covered by the measure (Panel Report, para. 8.40; emphasis added). Thus, in parts of the Panel Report, the Panel appears to require that a "technical regulation" apply to *given* products rather than *identifiable* products.

72. There is, however, more to the measure than this prohibition on asbestos *fibres*. It is not contested that asbestos fibres have no known use in their raw mineral form.⁴¹ Thus, the regulation of asbestos can *only* be achieved through the regulation of *products that contain asbestos fibres*. This, too, is addressed by the Decree before us. An integral and essential aspect of the measure is the regulation of "*products containing asbestos fibres*", which are also prohibited by Article 1, paragraphs I and II of the Decree. It is important to note here that, although formulated *negatively* – products containing asbestos are prohibited – the measure, in this respect, effectively prescribes or imposes certain objective features, qualities or "characteristics" on *all* products. That is, in effect, the measure provides that *all* products must *not* contain asbestos fibres. Although this prohibition against products containing asbestos applies to a large number of products, and although it is, indeed, true that the products to which this prohibition applies cannot be determined from the terms of the measure itself, it seems to us that the products covered by the measure are *identifiable*: all products must be asbestos free; any products containing asbestos are prohibited. We also observe that compliance with the prohibition against products containing asbestos is mandatory and is, indeed, enforceable through criminal sanctions.⁴²

73. Articles 2, 3 and 4 of the Decree also contain certain exceptions to the prohibitions found in Article 1 of the Decree. As we have already noted, these exceptions would have no meaning in the absence of the rest of the measure because they define the scope of the prohibitions in the measure. The nature of these exceptions is to *permit* the use of certain products containing chrysotile asbestos fibres, subject to compliance with strict administrative requirements. The scope of the exceptions is determined by an "exhaustive list" of products that are permitted to contain chrysotile asbestos fibres, which is promulgated and reviewed annually by a government Minister.⁴³ The inclusion of a product in the list of exceptions depends on the absence of an acceptable alternative fibre for incorporation into a particular product, and the demonstrable provision of "all technical guarantees of safety".⁴⁴ Any person seeking to avail himself of these limited exceptions must provide a detailed justification to the authorities, complete with necessary supporting documentation concerning "the state of

⁴¹Canada asserted that "chrysotile fibre has no use in its raw form; it serves as an input in the production of chrysotile materials" (Panel Report, paras. 3.418 and 3.439). This assertion is not contested by the European Communities.

⁴²Article 5 of the Decree characterizes a contravention of any aspect of Articles 1.I or 1.II as a "5th class offence".

⁴³Article 2.II of the Decree.

⁴⁴Article 2.I of the Decree.

scientific and technological progress".⁴⁵ Compliance with these administrative requirements is mandatory.⁴⁶

74. Like the Panel, we consider that, through these exceptions, the measure sets out the "applicable administrative provisions, with which compliance is mandatory" for products with certain objective "characteristics".⁴⁷ The exceptions apply to a narrowly defined group of products with particular "characteristics". Although these products are not named, the measure provides criteria which permit their identification, both by reference to the qualities the excepted products must possess and by reference to the list promulgated by the Minister.

75. Viewing the measure as an integrated whole, we see that it lays down "characteristics" for all products that might contain asbestos, and we see also that it lays down the "applicable administrative provisions" for certain products containing chrysotile asbestos fibres which are excluded from the prohibitions in the measure. Accordingly, we find that the measure is a "document" which "lays down product characteristics ... including the applicable administrative provisions, with which compliance is mandatory." For these reasons, we conclude that the measure constitutes a "technical regulation" under the *TBT Agreement*.

76. We, therefore, reverse the Panel's finding, in paragraph 8.72(a) of the Panel Report, that the *TBT Agreement* "does not apply to the part of the Decree relating to the ban on imports of asbestos and asbestos-containing products because that part does not constitute a 'technical regulation' within the meaning of Annex 1.1 to the TBT Agreement."

77. We note, however – and we emphasize – that this does not mean that *all* internal measures covered by Article III:4 of the GATT 1994 "affecting" the "sale, offering for sale, purchase, transportation, distribution or use" of a product are, necessarily, "technical regulations" under the *TBT Agreement*. Rather, we rule only that this particular measure, the Decree at stake, falls within the definition of a "technical regulation" given in Annex 1.1 of that Agreement.

78. As we have reached a different conclusion from the Panel's regarding the applicability of the *TBT Agreement* to the measure, we now consider whether it is appropriate for us to rule on the claims made by Canada relating to the *TBT Agreement*. In previous appeals, we have, on occasion, completed the legal analysis with a view to facilitating the prompt settlement of the dispute, pursuant

⁴⁵Article 3.I of the Decree.

⁴⁶Article 3.II of the Decree limits the benefit of the exception to activities that have been the subject of the necessary formalities.

⁴⁷Panel Report, para. 8.69.

to Article 3.3 of the DSU.⁴⁸ However, we have insisted that we can do so only if the factual findings of the panel and the undisputed facts in the panel record provide us with a sufficient basis for our own analysis. If that has not been the case, we have not completed the analysis.⁴⁹

79. The need for sufficient facts is not the only limit on our ability to complete the legal analysis in any given case. In *Canada – Periodicals*, we reversed the panel's conclusion that the measure at issue was inconsistent with Article III:2, first sentence, of the GATT 1994, and we then proceeded to examine the United States' claims under Article III:2, second sentence, which the panel had not examined at all. However, in embarking there on an analysis of a provision that the panel had not considered, we emphasized that "the first and second sentences of Article III:2 are *closely related*" and that those two sentences are "part of a *logical continuum*."⁵⁰ (emphasis added)

80. In this appeal, Canada's outstanding claims were made under Articles 2.1, 2.2, 2.4 and 2.8 of the *TBT Agreement*. We observe that, although the *TBT Agreement* is intended to "further the objectives of GATT 1994", it does so through a specialized legal regime that applies solely to a limited class of measures. For these measures, the *TBT Agreement* imposes obligations on Members

⁴⁸See, for instance, Appellate Body Report, *United States – Gasoline*, *supra*, footnote 15, at 18 ff; Appellate Body Report, *Canada – Certain Measures Concerning Periodicals* ("*Canada – Periodicals*"), WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, 449, at 469 ff; Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)* ("*European Communities – Hormones*"), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, paras. 222 ff; Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, paras. 156 ff; Appellate Body Report, *Australia – Measures Affecting Importation of Salmon* ("*Australia – Salmon*"), WT/DS18/AB/R, adopted 6 November 1998, paras. 117 ff, 193 ff and 227 ff; Appellate Body Report, *United States – Shrimp*, *supra*, footnote 14, paras. 123 ff; Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999, paras. 112 ff; Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, paras. 133 ff; Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft, Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/AB/RW, adopted 4 August 2000, paras. 43 ff; and Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities* ("*United States – Wheat Gluten*"), WT/DS166/AB/R, adopted 19 January 2001, paras. 80 ff and 127 ff.

In addition, after modifying the panel's reasoning, we have, on occasion, applied our interpretation of the legal provisions at issue to the facts of the case (see, for instance, Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R, adopted 22 April 1998, paras. 48 ff; Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R, adopted 27 October 1999, paras. 138 ff; Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, paras. 109 ff).

⁴⁹See Appellate Body Report, *Australia – Salmon*, *supra*, footnote 48, paras. 209 ff, 241 ff and 255; Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, paras. 91 ff and 102 ff; Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, paras. 133 ff and 144 ff; Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* ("*Korea – Beef*"), WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, paras. 128 ff.

⁵⁰*Supra*, footnote 48, at 469.

that seem to be *different* from, and *additional* to, the obligations imposed on Members under the GATT 1994.

81. As the Panel decided not to examine Canada's four claims under the *TBT Agreement*, it made no findings, at all, regarding any of these claims. Moreover, the meaning of the different obligations in the *TBT Agreement* has not previously been the subject of any interpretation or application by either panels or the Appellate Body. Similarly, the provisions of the Tokyo Round *Agreement on Technical Barriers to Trade*, which preceded the *TBT Agreement* and which contained obligations similar to those in the *TBT Agreement*, were also never the subject of even a single ruling by a panel.

82. In light of their novel character, we consider that Canada's claims under the *TBT Agreement* have not been explored before us in depth. As the Panel did not address these claims, there are no "issues of law" or "legal interpretations" regarding them to be analyzed by the parties, and reviewed by us under Article 17.6 of the DSU. We also observe that the sufficiency of the facts on the record depends on the reach of the provisions of the *TBT Agreement* claimed to apply – a reach that has yet to be determined.

83. With this particular collection of circumstances in mind, we consider that we do not have an adequate basis properly to examine Canada's claims under Articles 2.1, 2.2, 2.4 and 2.8 of the *TBT Agreement* and, accordingly, we refrain from so doing.

VI. "Like Products" in Article III:4 of the GATT 1994

A. Background

84. In addressing Canada's claims under Article III:4 of the GATT 1994, the Panel examined whether two different sets of products are "like".⁵¹ First, the Panel examined whether *chrysotile asbestos fibres* are "like" certain other fibres, namely *polyvinyl alcohol fibres ("PVA")*, *cellulose and glass fibres* (PVA, cellulose and glass fibres are all collectively referred to, in the remainder of this Report, as "PCG fibres"). The Panel concluded that chrysotile asbestos and PCG fibres are all "like products" under Article III:4.⁵² The Panel next examined whether *cement-based products containing chrysotile asbestos fibres* are "like" *cement-based products containing one of the PCG fibres*. The Panel also concluded that all these cement-based products are "like".⁵³

⁵¹The Panel's approach is set forth in para. 8.111 of the Panel Report.

⁵²Panel Report, para. 8.144.

⁵³*Ibid.*, para. 8.150.

85. In examining the "likeness" of these two sets of products, the Panel adopted an approach based on the Report of the Working Party on *Border Tax Adjustments*.⁵⁴ Under that approach, the Panel employed four general criteria in analyzing "likeness": (i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits; and, (iv) the tariff classification of the products. The Panel declined to apply "a criterion on the risk of a product", "neither in the criterion relating to the properties, nature and quality of the product, nor in the other likeness criteria ...".⁵⁵

86. On appeal, the European Communities requests that we reverse the Panel's findings that the two sets of products examined by the Panel are "like products" under Article III:4 of the GATT 1994, and requests, in consequence, that we reverse the Panel's finding that the measure is inconsistent with Article III:4 of the GATT 1994. The European Communities contends that the Panel erred in its interpretation and application of the concept of "like products", in particular, in excluding from its analysis consideration of the health risks associated with chrysotile asbestos fibres. According to the European Communities, in this case, Article III:4 calls for an analysis of the health objective of the regulatory distinction made in the measure between asbestos fibres, and between products containing asbestos fibres, and all other products. The European Communities argues that, under Article III:4, products should not be regarded as "like" unless the regulatory distinction drawn between them "entails [a] shift in the competitive opportunities" in favour of domestic products.⁵⁶

B. *Meaning of the Term "Like Products" in Article III:4 of the GATT 1994*

87. Article III:4 of the GATT 1994 reads, in relevant part:

The products of the territory of any Member imported into the territory of any other Member shall be accorded treatment no less favourable than that accorded to *like products* of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. ... (emphasis added)

88. The European Communities' appeal on this point turns on the interpretation of the word "like" in the term "like products" in Article III:4 of the GATT 1994. Thus, this appeal provides us with our

⁵⁴Working Party Report, *Border Tax Adjustments*, adopted 2 December 1970, BISD 18S/97.

⁵⁵Panel Report, paras. 8.130 and 8.132.

⁵⁶European Communities' other appellant's submission, para. 45.

first occasion to examine the meaning of the word "like" in Article III:4 of the GATT 1994.⁵⁷ Yet, this appeal is, of course, not the first time that the term "like products" has been addressed in GATT or WTO dispute settlement proceedings.⁵⁸ Indeed, the term "like product" appears in many different provisions of the covered agreements, for example, in Articles I:1, II:2, III:2, III:4, VI:1, IX:1, XI:2(c), XIII:1, XVI:4 and XIX:1 of the GATT 1994.⁵⁹ The term is also a key concept in the *Agreement on Subsidies and Countervailing Measures*, the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "Anti-Dumping Agreement"), the

⁵⁷We have already had occasion to interpret other aspects of Article III:4 of the GATT 1994 in two other appeals, but in neither appeal were we asked to address the meaning of the term "like products" (see Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, and Appellate Body Report, *Korea – Beef*, *supra*, footnote 49).

⁵⁸See, for instance, Working Party Report, *Brazilian Internal Taxes*, adopted 30 June 1949, BISD II/181, (Article III:2 of the GATT 1947); Working Party Report, *The Australian Subsidy on Ammonium Sulphate* ("Australia – Ammonium Sulphate"), adopted 3 April 1950, BISD II/188 (Articles I and III:4 of the GATT 1947); Panel Report, *Treatment by Germany of Imports of Sardines* ("Germany – Sardines"), adopted 31 October 1952, BISD 1S/53 (Articles I and XIII of the GATT 1947); Working Party Report, *Border Tax Adjustments*, *supra*, footnote 54 (Articles II, III and XVI of the GATT 1947); Panel Report, *EEC – Measures on Animal Feed Proteins* ("EEC – Animal Feed"), adopted 14 March 1978, BISD 25S/49 (Articles I, III:2 and III:4 of the GATT 1947); Panel Report, *Spain – Tariff Treatment of Unroasted Coffee*, adopted 11 June 1981, BISD 28S/102 (Article I:1 of the GATT 1947); Panel Report, *Spain – Measures Concerning Domestic Sale of Soyabean Oil* ("Spain – Soyabean"), L/5142, 17 June 1981, unadopted (Article III:4 of the GATT 1947); Panel Report, *Canada – Measures Affecting the Sale of Gold Coins*, L/5863, 17 September 1985, unadopted (Article III:2 of the GATT 1947); Panel Report, *United States – Taxes on Petroleum and Certain Imported Substances*, adopted 17 June 1987, BISD 34S/136 (Article III:2 of the GATT 1947); Panel Report, *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages* ("1987 Japan – Alcoholic Beverages"), adopted 10 November 1987, BISD 34S/83 (Article III:2 of the GATT 1947); Panel Report, *Canada/Japan – Tariff on Imports of Spruce, Pine, Fir (SPF) Dimension Lumber*, adopted 19 July 1989, BISD 36S/167 (Article I:1 of the GATT 1947); Panel Report, *United States – Definition of Industry Concerning Wine and Grape Products*, adopted 28 April 1992, BISD 39S/436 (Article VI of the GATT 1947); Panel Report, *United States – Denial of Most-favoured-nation Treatment as to Non-rubber Footwear from Brazil*, adopted 19 June 1992, BISD 39S/128 (Article I:1 of the GATT 1947); Panel Report, *United States – Measures Affecting Alcoholic and Malt Beverages*, adopted 19 June 1992, BISD 39S/206 (Article III:2 and III:4 of the GATT 1947); Panel Report, *United States – Taxes on Automobiles*, DS31/R, 11 October 1994, unadopted (Article III:2 and III:4 of the GATT 1947); Panel Report, *United States – Gasoline*, *supra*, footnote 15 (Article III:4 of the GATT 1994); Panel Report, *Japan – Taxes on Alcoholic Beverages* ("Japan – Alcoholic Beverages"), WT/DS8/R, WT/DS10/R, WT/DS11/R, adopted 1 November 1996, as modified by the Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, DSR 1996:I, 125 (Article III:2 of the GATT 1994); Appellate Body Report, *Japan – Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97 (Article III:2 of the GATT 1994); Panel Report, *Canada – Periodicals*, WT/DS31/R, adopted 30 July 1997, as modified by the Appellate Body Report, WT/DS31/AB/R, DSR 1997:I, 481 (Articles III:2 and III:4 of the GATT 1994); Appellate Body Report, *Canada – Periodicals*, *supra*, footnote 48 (Article III:2 of the GATT 1994); Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WTDS64/R, adopted 23 July 1998 (Articles I:1 and III:2 of the GATT 1994); Panel Report, *Korea – Taxes on Alcoholic Beverages* ("Korea – Alcoholic Beverages"), WT/DS75/R, WT/DS84/R, adopted 17 February 1999, as modified by the Appellate Body Report, WT/DS75/AB/R, WT/DS84/AB/R (Article III:2 of the GATT 1994); Appellate Body Report, *Korea – Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999 (Article III:2 of the GATT 1994); Panel Report, *Chile – Taxes on Alcoholic Beverages*, WT/DS87/R, WT/DS110/R, adopted 12 January 2000, as modified by the Appellate Body Report, WT/DS87/AB/R, WT/DS110/AB/R (Article III:2 of the GATT 1994).

⁵⁹In addition, the term "like commodity" appears in Article VI:7 and the term "like merchandise" is used in Article VII:2 of the GATT 1994.

Agreement on Safeguards and other covered agreements. In some cases, such as in Article 2.6 of the *Anti-Dumping Agreement*, the term is given a specific meaning to be used "[t]hroughout [the] Agreement", while in others, it is not. In each of the provisions where the term "like products" is used, the term must be interpreted in light of the context, and of the object and purpose, of the provision at issue, and of the object and purpose of the covered agreement in which the provision appears. Accordingly, and as we observed in an earlier case concerning Article III:2 of the GATT 1994:

... there can be *no one precise and absolute definition of what is "like"*. The concept of "likeness" is a relative one that evokes the image of an accordion. The accordion of "likeness" stretches and squeezes in different places as different provisions of the *WTO Agreement* are applied. *The width of the accordion in any one of those places must be determined by the particular provision in which the term "like" is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply.* ...⁶⁰
(emphasis added)

89. It follows that, while the meaning attributed to the term "like products" in other provisions of the GATT 1994, or in other covered agreements, may be relevant context in interpreting Article III:4 of the GATT 1994, the interpretation of "like products" in Article III:4 need not be identical, in all respects, to those other meanings.

90. Bearing these considerations in mind, we turn now to the ordinary meaning of the word "like" in the term "like products" in Article III:4. According to one dictionary, "like" means:

Having the same characteristics or qualities as some other ... thing; of approximately identical shape, size, etc., with something else; similar.⁶¹

91. This meaning suggests that "like" products are products that share a number of identical or similar characteristics or qualities. The reference to "similar" as a synonym of "like" also echoes the language of the French version of Article III:4, "*produits similaires*", and the Spanish version, "*productos similares*", which, together with the English version, are equally authentic.⁶²

⁶⁰Appellate Body Report, *Japan – Alcoholic Beverages*, *supra*, footnote 58, at 114. We also cautioned against the automatic transposition of the interpretation of "likeness" under the first sentence of Article III:2 to other provisions where the phrase "like products" is used (p. 113).

⁶¹*The New Shorter Oxford English Dictionary*, Lesley Brown (ed.) (Clarendon Press, 1993), Vol. I, p. 1588.

⁶²*WTO Agreement*, final, authenticating clause. See, also, Article 33(1) of the *Vienna Convention of the Law of the Treaties*, done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679.

92. However, as we have previously observed, "dictionary meanings leave many interpretive questions open."⁶³ In particular, this definition does not resolve three issues of interpretation. First, this dictionary definition of "like" does not indicate *which characteristics or qualities are important* in assessing the "likeness" of products under Article III:4. For instance, most products will have many qualities and characteristics, ranging from physical properties such as composition, size, shape, texture, and possibly taste and smell, to the end-uses and applications of the product. Second, this dictionary definition provides no guidance in determining the *degree or extent to which products must share qualities or characteristics* in order to be "like products" under Article III:4. Products may share only very few characteristics or qualities, or they may share many. Thus, in the abstract, the term "like" can encompass a spectrum of differing degrees of "likeness" or "similarity". Third, this dictionary definition of "like" does not indicate *from whose perspective* "likeness" should be judged. For instance, ultimate consumers may have a view about the "likeness" of two products that is very different from that of the inventors or producers of those products.

93. To begin to resolve these issues, we turn to the relevant context of Article III:4 of the GATT 1994. In that respect, we observe that Article III:2 of the GATT 1994, which deals with the internal tax treatment of imported and domestic products, prevents Members, through its first sentence, from imposing internal taxes on imported products "in excess of those applied ... to *like* domestic products." (emphasis added) In previous Reports, we have held that the scope of "like" products in this sentence is to be construed "narrowly".⁶⁴ This reading of "like" in Article III:2 might be taken to suggest a similarly narrow reading of "like" in Article III:4, since both provisions form part of the same Article. However, both of these paragraphs of Article III constitute specific expressions of the overarching, "general principle", set forth in Article III:1 of the GATT 1994.⁶⁵ As we have previously said, the "general principle" set forth in Article III:1 "informs" the rest of Article III and acts "as a guide to understanding and interpreting the specific obligations contained" in the other paragraphs of Article III, including paragraph 4.⁶⁶ Thus, in our view, Article III:1 has particular contextual significance in interpreting Article III:4, as it sets forth the "general principle" pursued by that provision. Accordingly, in interpreting the term "like products" in Article III:4, we must turn, first, to the "general principle" in Article III:1, rather than to the term "like products" in Article III:2.

⁶³Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, para. 153.

⁶⁴Appellate Body Report, *Japan – Alcoholic Beverages*, *supra*, footnote 58, at 112 and 113. See, also, Appellate Body Report, *Canada – Periodicals*, *supra*, footnote 48, at 473.

⁶⁵Appellate Body Report, *Japan – Alcoholic Beverages*, *supra*, footnote 58, at 111.

⁶⁶*Ibid.*

94. In addition, we observe that, although the obligations in Articles III:2 and III:4 both apply to "like products", the text of Article III:2 differs in one important respect from the text of Article III:4. Article III:2 contains *two separate* sentences, each imposing *distinct* obligations: the first lays down obligations in respect of "like products", while the second lays down obligations in respect of "directly competitive or substitutable" products.⁶⁷ By contrast, Article III:4 applies only to "like products" and does not include a provision equivalent to the second sentence of Article III:2. We note that, in this dispute, the Panel did not examine, at all, the significance of this textual difference between paragraphs 2 and 4 of Article III.

95. For us, this textual difference between paragraphs 2 and 4 of Article III has considerable implications for the meaning of the term "like products" in these two provisions. In *Japan – Alcoholic Beverages*, we concluded, in construing Article III:2, that the two separate obligations in the two sentences of Article III:2 must be interpreted in a harmonious manner that gives meaning to *both* sentences in that provision. We observed there that the interpretation of one of the sentences necessarily affects the interpretation of the other. Thus, the scope of the term "like products" in the first sentence of Article III:2 affects, and is affected by, the scope of the phrase "directly competitive or substitutable" products in the second sentence of that provision. We said in *Japan – Alcoholic Beverages*:

Because the second sentence of Article III:2 provides for a separate and distinctive consideration of the protective aspect of a measure in examining its application to a broader category of products that are not "like products" as contemplated by the first sentence, we agree with the Panel that the first sentence of Article III:2 must be construed narrowly so as not to condemn measures that its strict terms are not meant to condemn. Consequently, we agree with the Panel also that the definition of "like products" in Article III:2, first sentence, should be construed narrowly.⁶⁸

96. In construing Article III:4, the same interpretive considerations do not arise, because the "general principle" articulated in Article III:1 is expressed in Article III:4, not through two distinct obligations, as in the two sentences in Article III:2, but instead through a single obligation that applies solely to "like products". Therefore, the harmony that we have attributed to the two sentences of Article III:2 need not and, indeed, cannot be replicated in interpreting Article III:4. Thus, we conclude that, given the textual difference between Articles III:2 and III:4, the "accordion" of "likeness" stretches in a different way in Article III:4.

⁶⁷The meaning of the second sentence of Article III:2 is elaborated upon in the Interpretative Note to that provision. This note indicates that the second sentence of Article III:2 applies to "directly competitive or substitutable product[s]".

⁶⁸*Supra*, footnote 58, at 112 and 113.

97. We have previously described the "general principle" articulated in Article III:1 as follows:

The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. More specifically, the purpose of Article III "is to ensure that internal measures 'not be applied to imported and domestic products so as to afford protection to domestic production'". Toward this end, Article III obliges Members of the WTO to provide *equality of competitive conditions for imported products in relation to domestic products*. ... Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products. ...⁶⁹ (emphasis added)

98. As we have said, although this "general principle" is not explicitly invoked in Article III:4, nevertheless, it "informs" that provision.⁷⁰ Therefore, the term "like product" in Article III:4 must be interpreted to give proper scope and meaning to this principle. In short, there must be consonance between the objective pursued by Article III, as enunciated in the "general principle" articulated in Article III:1, and the interpretation of the specific expression of this principle in the text of Article III:4. This interpretation must, therefore, reflect that, in endeavouring to ensure "equality of competitive conditions", the "general principle" in Article III seeks to prevent Members from applying internal taxes and regulations in a manner which affects the competitive relationship, in the marketplace, *between the domestic and imported products involved*, "so as to afford protection to domestic production."

99. As products that are in a competitive relationship in the marketplace could be affected through treatment of *imports* "less favourable" than the treatment accorded to *domestic* products, it follows that the word "like" in Article III:4 is to be interpreted to apply to products that are in such a competitive relationship. Thus, a determination of "likeness" under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products. In saying this, we are mindful that there is a spectrum of degrees of "competitiveness" or "substitutability" of products in the marketplace, and that it is difficult, if not impossible, in the abstract, to indicate precisely where on this spectrum the word "like" in Article III:4 of the GATT 1994 falls. We are not saying that *all* products which are in *some* competitive relationship are "like products" under Article III:4. In ruling on the measure at issue, we also do not attempt to define the precise scope of the word "like" in Article III:4. Nor do we wish to decide if the scope of "like products" in Article III:4 is co-extensive with the combined scope of "like" and "directly competitive or substitutable" products in Article III:2. However, we recognize that the relationship between these two provisions is important, because there is no sharp distinction between fiscal

⁶⁹ Appellate Body Report, *Japan – Alcoholic Beverages*, *supra*, footnote 58, at 109 and 110.

⁷⁰ *Ibid.*, at 111.

regulation, covered by Article III:2, and non-fiscal regulation, covered by Article III:4. Both forms of regulation can often be used to achieve the same ends. It would be incongruous if, due to a significant difference in the product scope of these two provisions, Members were prevented from using one form of regulation – for instance, fiscal – to protect domestic production of certain products, but were able to use another form of regulation – for instance, non-fiscal – to achieve those ends. This would frustrate a consistent application of the "general principle" in Article III:1. For these reasons, we conclude that the scope of "like" in Article III:4 is broader than the scope of "like" in Article III:2, first sentence. Nonetheless, we note, once more, that Article III:2 extends not only to "like products", but also to products which are "directly competitive or substitutable", and that Article III:4 extends only to "like products". In view of this different language, and although we need not rule, and do not rule, on the precise product scope of Article III:4, we do conclude that the product scope of Article III:4, although broader than the *first* sentence of Article III:2, is certainly *not* broader than the *combined* product scope of the *two* sentences of Article III:2 of the GATT 1994.

100. We recognize that, by interpreting the term "like products" in Article III:4 in this way, we give that provision a relatively broad product scope – although no broader than the product scope of Article III:2. In so doing, we observe that there is a second element that must be established before a measure can be held to be inconsistent with Article III:4. Thus, even if two products are "like", that does not mean that a measure is inconsistent with Article III:4. A complaining Member must still establish that the measure accords to the group of "like" *imported* products "less favourable treatment" than it accords to the group of "like" *domestic* products. The term "less favourable treatment" expresses the general principle, in Article III:1, that internal regulations "should not be applied ... so as to afford protection to domestic production". If there is "less favourable treatment" of the group of "like" imported products, there is, conversely, "protection" of the group of "like" domestic products. However, a Member may draw distinctions between products which have been found to be "like", without, for this reason alone, according to the group of "like" *imported* products "less favourable treatment" than that accorded to the group of "like" *domestic* products. In this case, we do not examine further the interpretation of the term "treatment no less favourable" in Article III:4, as the Panel's findings on this issue have not been appealed or, indeed, argued before us.

C. *Examining the "Likeness" of Products under Article III:4 of the GATT 1994*

101. We turn to consideration of how a treaty interpreter should proceed in determining whether products are "like" under Article III:4. As in Article III:2, in this determination, "[n]o one approach ... will be appropriate for all cases."⁷¹ Rather, an assessment utilizing "an unavoidable element of

⁷¹ Appellate Body Report, *Japan – Alcoholic Beverages*, *supra*, footnote 58, at 114.

individual, discretionary judgement"⁷² has to be made on a case-by-case basis. The Report of the Working Party on *Border Tax Adjustments* outlined an approach for analyzing "likeness" that has been followed and developed since by several panels and the Appellate Body.⁷³ This approach has, in the main, consisted of employing four general criteria in analyzing "likeness": (i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits – more comprehensively termed consumers' perceptions and behaviour – in respect of the products; and (iv) the tariff classification of the products.⁷⁴ We note that these four criteria comprise four categories of "characteristics" that the products involved might share: (i) the physical properties of the products; (ii) the extent to which the products are capable of serving the same or similar end-uses; (iii) the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand; and (iv) the international classification of the products for tariff purposes.

102. These general criteria, or groupings of potentially shared characteristics, provide a framework for analyzing the "likeness" of particular products on a case-by-case basis. These criteria are, it is well to bear in mind, simply tools to assist in the task of sorting and examining the relevant evidence. They are neither a treaty-mandated nor a closed list of criteria that will determine the legal characterization of products. More important, the adoption of a particular framework to aid in the examination of evidence does not dissolve the duty or the need to examine, in each case, *all* of the pertinent evidence. In addition, although each criterion addresses, in principle, a different aspect of the products involved, which should be examined separately, the different criteria are interrelated. For instance, the physical properties of a product shape and limit the end-uses to which the products can be devoted. Consumer perceptions may similarly influence – modify or even render obsolete – traditional uses of the products. Tariff classification clearly reflects the physical properties of a product.

103. The kind of evidence to be examined in assessing the "likeness" of products will, necessarily, depend upon the particular products and the legal provision at issue. When all the relevant evidence has been examined, panels must determine whether that evidence, as a whole, indicates that the products in question are "like" in terms of the legal provision at issue. We have noted that, under

⁷²Appellate Body Report, *Japan – Alcoholic Beverages*, *supra*, footnote 58, at 113.

⁷³See, further, Appellate Body Report, *Japan – Alcoholic Beverages*, *supra*, footnote 58, at 113 and, in particular, footnote 46. See, also, Panel Report, *United States – Gasoline*, *supra*, footnote 15, para. 6.8, where the approach set forth in the *Border Tax Adjustment* case was adopted in a dispute concerning Article III:4 of the GATT 1994 by a panel. This point was not appealed in that case.

⁷⁴The fourth criterion, tariff classification, was not mentioned by the Working Party on *Border Tax Adjustments*, but was included by subsequent panels (see, for instance, *EEC – Animal Feed*, *supra*, footnote 58, para. 4.2, and *1987 Japan – Alcoholic Beverages*, *supra*, footnote 58, para. 5.6).

Article III:4 of the GATT 1994, the term "like products" is concerned with competitive relationships between and among products. Accordingly, whether the *Border Tax Adjustments* framework is adopted or not, it is important under Article III:4 to take account of evidence which indicates whether, and to what extent, the products involved are – or could be – in a competitive relationship in the marketplace.

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.⁷⁵

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.⁷⁶ 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."⁷⁷ (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.⁷⁸ The Panel also declined to "[i]ntroduce a criterion on the risk of a product".⁷⁹

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.⁸⁰ The Panel declined to "take a position" on "consumers' tastes and habits", the third criterion, "[b]ecause this criterion would not

⁷⁵European Communities' other appellant's submission, para. 33.

⁷⁶Panel Report, paras. 8.114 and 8.115.

⁷⁷*Ibid.*, para. 8.126.

⁷⁸*Ibid.*, paras. 8.123, 8.124 and 8.126.

⁷⁹*Ibid.*, para. 8.130.

⁸⁰*Ibid.*, para. 8.136.

provide clear results".⁸¹ The Panel observed that consumers' tastes and habits are "very varied".⁸² Finally, the Panel did not regard as "decisive" the different "tariff classification" of the fibres.⁸³

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 1994.⁸⁴

108. The Panel next examined whether *cement-based products containing chrysotile asbestos fibres* are "like" *cement-based products containing PCG fibres*.⁸⁵ 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:4.⁸⁶

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 be characterized as "like". Yet, the Panel expressed a "conclusion" that the products were "like" after examining only the *first* of the four criteria. The Panel then repeated that conclusion under the second criterion – without further analysis – before dismissing altogether the relevance of the third criterion and also before rejecting the differing tariff classifications under the fourth criterion. In our view, it was inappropriate for the Panel to express a "conclusion" after examining only one of the four criteria.⁸⁷ By reaching a "conclusion" without examining all of the criteria it had decided to examine, the Panel, in reality, expressed a conclusion after examining only some of the evidence. Yet, a determination on the "likeness" of products cannot be made on the basis of a partial analysis of the evidence, after examination of just one of the criteria the Panel said it would examine. For this reason, we doubt

⁸¹ Panel Report, para. 8.139.

⁸² *Ibid.*

⁸³ *Ibid.*, para. 8.143.

⁸⁴ *Ibid.*, para. 8.144.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*, para. 8.150. The Panel devoted six paragraphs to the "likeness" of the cement-based products, whereas it devoted 27 paragraphs to the "likeness" of chrysotile asbestos and PCG fibres.

⁸⁷ *Ibid.*, para. 8.126.

whether the Panel's overall approach has allowed the Panel to make a proper characterization of the "likeness" of the fibres at issue.

110. We must next examine more closely the Panel's treatment of the four individual criteria. We see the first criterion, "properties, nature and quality", as intended to cover the physical qualities and characteristics of the products. In analyzing the "properties" of the products, the Panel said that, "because of its physical and chemical characteristics, *asbestos is a unique product*."⁸⁸ (emphasis added) The Panel expressly acknowledged that, based on physical properties alone, "[i]t could ... be concluded that [the fibres] are *not* like products."⁸⁹ (emphasis added) However, to overcome that fact, the Panel adopted a "market access" approach to this first criterion.⁹⁰ Thus, in the course of its examination of "*properties*", the Panel went on to rely on "*end-uses*" – the second criterion – and on the fact that, in a "small number" of cases, the products have the "same applications" and can "replace" each other.⁹¹ The Panel then stated:

We therefore conclude that, taking into account the properties criterion, chrysotile fibres are like PVA, cellulose and glass fibres.⁹²

111. We believe that physical properties deserve a separate examination that should not be confused with the examination of end-uses. Although not decisive, the extent to which products share common physical properties may be a useful indicator of "likeness". Furthermore, the physical properties of a product may also influence how the product can be used, consumer attitudes about the product, and tariff classification. It is, therefore, important for a panel to examine fully the physical character of a product. We are also concerned that it will be difficult for a panel to draw the appropriate conclusions from the evidence examined under each criterion if a panel's approach does not clearly address each criterion separately, but rather entwines different, and distinct, elements of the analysis along the way.

112. In addition, we do not share the Panel's conviction that when two products can be used for the same end-use, their "*properties* are then *equivalent*, if not identical."⁹³ (emphasis added) Products with quite different physical properties may, in some situations, be capable of performing similar or identical end-uses. Although the *end-uses* are then "*equivalent*", the physical properties of the

⁸⁸Panel Report, para. 8.123.

⁸⁹*Ibid.*, para. 8.121.

⁹⁰*Ibid.*, paras. 8.122 and 8.124.

⁹¹*Ibid.*, paras. 8.123 and 8.125.

⁹²*Ibid.*, para. 8.126.

⁹³*Ibid.*, para. 8.125.

products are not thereby altered; they remain different. Thus, the physical "uniqueness" of asbestos that the Panel noted does not change depending on the particular use that is made of asbestos.

113. The European Communities argues that the inquiry into the physical properties of products must include a consideration of the risks posed by the product to human health. In examining the physical properties of the product at issue in this dispute, the Panel found that "it was not appropriate to apply the 'risk' criterion proposed by the EC".⁹⁴ The Panel said that to do so "would largely nullify the effect of Article XX(b)" of the GATT 1994.⁹⁵ In reviewing this finding by the Panel, we note that neither the text of Article III:4 nor the practice of panels and the Appellate Body suggest that any evidence should be excluded *a priori* from a panel's examination of "likeness". Moreover, as we have said, in examining the "likeness" of products, panels must evaluate *all* of the relevant evidence. We are very much of the view that evidence relating to the health risks associated with a product may be pertinent in an examination of "likeness" under Article III:4 of the GATT 1994. We do not, however, consider that the evidence relating to the health risks associated with chrysotile asbestos fibres need be examined under a *separate* criterion, because we believe that this evidence can be evaluated under the existing criteria of physical properties, and of consumers' tastes and habits, to which we will come below.

114. Panels must examine fully the physical properties of products. In particular, panels must examine those physical properties of products that are likely to influence the competitive relationship between products in the marketplace. In the case of chrysotile asbestos fibres, their molecular structure, chemical composition, and fibrillation capacity are important because the microscopic particles and filaments of chrysotile asbestos fibres are carcinogenic in humans, following inhalation. In this respect, we observe that, at paragraph 8.188 of its Report, the Panel made the following statements regarding chrysotile asbestos fibres:

⁹⁴Panel Report, para. 8.132.

⁹⁵*Ibid.*, para. 8.130.

... we note that the carcinogenicity of chrysotile fibres has been acknowledged for some time by international bodies.¹³⁵ This carcinogenicity was confirmed by the experts consulted by the Panel, with respect to both lung cancers and mesotheliomas, even though the experts appear to acknowledge that chrysotile is less likely to cause mesotheliomas than amphiboles. We also note that the experts confirmed that the types of cancer concerned had a mortality rate of close to 100 per cent. We therefore consider that we have sufficient evidence that there is in fact a serious carcinogenic risk associated with the inhalation of chrysotile fibres. Moreover, in the light of the comments made by one of the experts, the doubts expressed by Canada with respect to the direct effects of chrysotile on mesotheliomas and lung cancers are not sufficient to conclude that an official responsible for public health policy would find that there was not enough evidence of the existence of a public health risk.

¹³⁵Since 1977 by the IARC (see *List of Agents Carcinogenic to Humans, Overall Evaluations of Carcinogenicity to Humans*, Monographs of the International Agency for Research on Cancer, Volumes 1-63), see also WHO, *IPCS Environmental Health Criteria (203) on Chrysotile*, Geneva (1998), cited in para. 5.584 above. On the development of knowledge of the risks associated with asbestos, see Dr. Henderson, para. 5.595.

This carcinogenicity, or toxicity, constitutes, as we see it, a defining aspect of the physical properties of chrysotile asbestos fibres. The evidence indicates that PCG fibres, in contrast, do not share these properties, at least to the same extent.⁹⁶ We do not see how this highly significant physical difference *cannot* be a consideration in examining the physical properties of a product as part of a determination of "likeness" under Article III:4 of the GATT 1994.

115. We do not agree with the Panel that considering evidence relating to the health risks associated with a product, under Article III:4, nullifies the effect of Article XX(b) of the GATT 1994. Article XX(b) allows a Member to "adopt and enforce" a measure, *inter alia*, necessary to protect human life or health, even though that measure is inconsistent with another provision of the GATT 1994. Article III:4 and Article XX(b) are distinct and independent provisions of the GATT 1994 each to be interpreted on its own. The scope and meaning of Article III:4 should not be broadened or restricted beyond what is required by the normal customary international law rules of treaty interpretation, simply because Article XX(b) exists and may be available to justify measures inconsistent with Article III:4. The fact that an interpretation of Article III:4, under those rules, implies a less frequent recourse to Article XX(b) does not deprive the exception in Article XX(b) of *effet utile*. Article XX(b) would only be deprived of *effet utile* if that provision could *not* serve to allow a Member to "adopt and enforce" measures "necessary to protect human ... life or health". Evaluating evidence relating to the health risks arising from the physical properties of a product

⁹⁶Panel Report, para. 8.220.

does not prevent a measure which is inconsistent with Article III:4 from being justified under Article XX(b). We note, in this regard, that, different inquiries occur under these two very different Articles. Under Article III:4, evidence relating to health risks may be relevant in assessing the *competitive relationship in the marketplace* between allegedly "like" products. The same, or similar, evidence serves a different purpose under Article XX(b), namely, that of assessing whether a *Member* has a sufficient basis for "adopting or enforcing" a WTO-inconsistent measure on the grounds of human health.

116. We, therefore, find that the Panel erred, in paragraph 8.132 of the Panel Report, in excluding the health risks associated with chrysotile asbestos fibres from its examination of the physical properties of that product.

117. Before examining the Panel's findings under the second and third criteria, we note that these two criteria involve certain of the key elements relating to the competitive relationship between products: first, the extent to which products are capable of performing the same, or similar, functions (end-uses), and, second, the extent to which consumers are willing to use the products to perform these functions (consumers' tastes and habits). Evidence of this type is of particular importance under Article III of the GATT 1994, precisely because that provision is concerned with competitive relationships in the marketplace. If there is – or could be – *no* competitive relationship between products, a Member cannot intervene, through internal taxation or regulation, to protect domestic production. Thus, evidence about the extent to which products can serve the same end-uses, and the extent to which consumers are – or would be – willing to choose one product instead of another to perform those end-uses, is highly relevant evidence in assessing the "likeness" of those products under Article III:4 of the GATT 1994.

118. We consider this to be especially so in cases where the evidence relating to properties establishes that the products at issue are physically quite different. In such cases, in order to overcome this indication that products are *not* "like", a higher burden is placed on complaining Members to establish that, despite the pronounced physical differences, there is a competitive relationship between the products such that *all* of the evidence, taken together, demonstrates that the products are "like" under Article III:4 of the GATT 1994. In this case, where it is clear that the fibres have very different properties, in particular, because chrysotile is a known carcinogen, a very heavy burden is placed on Canada to show, under the second and third criteria, that the chrysotile asbestos and PCG fibres are in such a competitive relationship.

119. With this in mind, we turn to the Panel's evaluation of the second criterion, end-uses. The Panel's evaluation of this criterion is far from comprehensive. First, as we have said, the Panel entwined its analysis of "end-uses" with its analysis of "physical properties" and, in purporting to

examine "end-uses" as a distinct criterion, essentially referred to its analysis of "properties".⁹⁷ This makes it difficult to assess precisely how the Panel evaluated the end-uses criterion. Second, the Panel's analysis of end-uses is based on a "small number of applications" for which the products are substitutable. Indeed, the Panel stated that "[i]t suffices that, for a *given utilization*, the properties are the same to the extent that one product can replace the other."⁹⁸ (emphasis added) Although we agree that it is certainly relevant that products have similar end-uses for a "small number of ... applications", or even for a "given utilization", we think that a panel must also examine the other, *different* end-uses for products.⁹⁹ It is only by forming a complete picture of the various end-uses of a product that a panel can assess the significance of the fact that products share a limited number of end-uses. In this case, the Panel did not provide such a complete picture of the various end-uses of the different fibres. The Panel did not explain, or elaborate in any way on, the "small number of ... applications" for which the various fibres have similar end-uses. Nor did the Panel examine the end-uses for these products which were not similar. In these circumstances, we believe that the Panel did not adequately examine the evidence relating to end-uses.

120. The Panel declined to examine or make any findings relating to the third criterion, consumers' tastes and habits, "[b]ecause this criterion would not provide clear results".¹⁰⁰ There will be few situations where the evidence on the "likeness" of products will lend itself to "clear results". In many cases, the evidence will give conflicting indications, possibly within each of the four criteria. For instance, there may be some evidence of similar physical properties and some evidence of differing physical properties. Or the physical properties may differ completely, yet there may be strong evidence of similar end-uses and a high degree of substitutability of the products from the perspective of the consumer. A panel cannot decline to inquire into relevant evidence simply because it suspects that evidence may not be "clear" or, for that matter, because the parties agree that certain evidence is not relevant.¹⁰¹ In any event, we have difficulty seeing how the Panel could conclude that an examination of consumers' tastes and habits "would not provide clear results", given that the Panel did not examine *any* evidence relating to this criterion.

121. Furthermore, in a case such as this, where the fibres are physically very different, a panel *cannot* conclude that they are "like products" if it *does not examine* evidence relating to consumers' tastes and habits. In such a situation, if there is *no* inquiry into this aspect of the nature and extent of

⁹⁷Panel Report, para. 8.136.

⁹⁸*Ibid.*, para. 8.124.

⁹⁹*Ibid.*, paras. 8.124 and 8.125.

¹⁰⁰*Ibid.*, para. 8.139.

¹⁰¹In that respect, we note that, at the oral hearing before us, Canada stated that it believed that the parties were in agreement that consideration of consumers' tastes and habits "would add nothing" to the determination of "likeness".

the competitive relationship between the products, there is no basis for overcoming the inference, drawn from the different physical properties of the products, that the products are not "like".

122. In this case especially, we are also persuaded that evidence relating to consumers' tastes and habits would establish that the health risks associated with chrysotile asbestos fibres influence consumers' behaviour with respect to the different fibres at issue.¹⁰² We observe that, as regards *chrysotile asbestos and PCG fibres*, the consumer of the fibres is a *manufacturer* who incorporates the fibres into another product, such as cement-based products or brake linings. We do not wish to speculate on what the evidence regarding these consumers would have indicated; rather, we wish to highlight that consumers' tastes and habits regarding *fibres*, even in the case of commercial parties, such as manufacturers, are very likely to be shaped by the health risks associated with a product which is known to be highly carcinogenic.¹⁰³ A manufacturer cannot, for instance, ignore the preferences of the ultimate consumer of its products. If the risks posed by a particular product are sufficiently great, the ultimate consumer may simply cease to buy that product. This would, undoubtedly, affect a manufacturer's decisions in the marketplace. Moreover, in the case of products posing risks to human health, we think it likely that manufacturers' decisions will be influenced by other factors, such as the potential civil liability that might flow from marketing products posing a health risk to the ultimate consumer, or the additional costs associated with safety procedures required to use such products in the manufacturing process.

123. Finally, we note that, although we consider consumers' tastes and habits significant in determining "likeness" in this dispute, at the oral hearing, Canada indicated that it considers this criterion to be *irrelevant*, in this dispute, because the existence of the measure has disturbed normal conditions of competition between the products. In our Report in *Korea – Alcoholic Beverages*, we observed that, "[p]articularly in a market where there are regulatory barriers to trade or to competition, there may well be latent demand" for a product.¹⁰⁴ We noted that, in such situations, "it may be highly relevant to examine latent demand" that is suppressed by regulatory barriers.¹⁰⁵ In addition, we said that "evidence from other markets may be pertinent to the examination of the market at issue, particularly when demand on that market has been influenced by regulatory barriers to trade or to

¹⁰²We have already noted the health risks associated with chrysotile asbestos fibres in our consideration of properties (*supra*, para. 114).

¹⁰³We recognize that consumers' reactions to products posing a risk to human health vary considerably depending on the product, and on the consumer. Some dangerous products, such as tobacco, are widely used, despite the known health risks. The influence known dangers have on consumers' tastes and habits is, therefore, unlikely to be uniform or entirely predictable.

¹⁰⁴*Supra*, footnote 58, para. 115.

¹⁰⁵*Ibid.*, para. 120. We added that "studies of cross-price elasticity ... involve an assessment of latent demand" (para. 121).

competition."¹⁰⁶ We, therefore, do not accept Canada's contention that, in markets where normal conditions of competition have been disturbed by regulatory or fiscal barriers, consumers' tastes and habits cease to be relevant. In such situations, a Member may submit evidence of latent, or suppressed, consumer demand in that market, or it may submit evidence of substitutability from some relevant third market. In making this point, we do not wish to be taken to suggest that there *is* latent demand for chrysotile asbestos fibres. Our point is simply that the existence of the measure does not render consumers' tastes and habits irrelevant, as Canada contends.

124. We observe also that the Panel did not regard as decisive the different tariff classifications of the chrysotile asbestos, PVA, cellulose and glass fibres, each of which is classified under a different tariff heading.¹⁰⁷ In the absence of a full analysis, by the Panel, of the other three criteria addressed, we cannot determine what importance should be attached to the different tariff classifications of the fibres.

125. In sum, in our view, the Panel reached the conclusion that *chrysotile asbestos and PCG fibres* are "like products" under Article III:4 of the GATT 1994 on the following basis: the Panel disregarded the quite different "properties, nature and quality" of chrysotile asbestos and PCG fibres, as well as the different tariff classification of these fibres; it considered no evidence on consumers' tastes and habits; and it found that, for a "small number" of the many applications of these fibres, they are substitutable, but it did not consider the many other end-uses for the fibres that are different. Thus, the only evidence supporting the Panel's finding of "likeness" is the "small number" of shared end-uses of the fibres.

126. For the reasons we have given, we find this insufficient to justify the conclusion that the chrysotile asbestos and PCG fibres are "like products" and we, therefore, reverse the Panel's conclusion, in paragraph 8.144 of the Panel Report, "that chrysotile fibres, on the one hand, and PVA, cellulose and glass fibres, on the other, are 'like products' within the meaning of Article III:4 of the GATT 1994."

3. Cement-based products containing chrysotile and PCG fibres

127. Having reversed the Panel's finding on the "likeness" of the *fibres*, we now examine the Panel's findings regarding the "likeness" of *cement-based products containing chrysotile asbestos fibres* and *cement-based products containing PCG fibres*. In examining the "likeness" of these cement-based products, the Panel stated that, physically, the only difference between these products is

¹⁰⁶ *Supra*, footnote 58, para. 137.

¹⁰⁷ Panel Report, para. 8.143.

the incorporation of a different fibre.¹⁰⁸ In this respect, the Panel indicated that "many of the arguments put forward in relation to chrysotile asbestos, PVA, cellulose and glass fibres are applicable *mutatis mutandis* to products containing those fibres."¹⁰⁹ The Panel noted that, for any given cement-based product, the tariff classification is the same, irrespective of the fibre incorporated into the product.¹¹⁰ The Panel declined to examine the "risk" criterion advanced by the European Communities, and also considered it unnecessary to analyze consumers' tastes and habits.¹¹¹ On this basis, the Panel concluded that "chrysotile-fibre products and fibro-cement products are like products within the meaning of Article III:4 of the GATT 1994."¹¹²

128. As the Panel said, the primary physical difference between cement-based products containing chrysotile asbestos fibres and cement-based products containing PCG fibres lies in the particular fibre incorporated into the product. This difference is important because, as we have said in our examination of fibres, we believe that the health risks associated with a product may be relevant to the inquiry into the physical properties of a product when making a determination of "likeness" under Article III:4 of the GATT 1994.¹¹³ This is also true for cement-based products containing the different fibres. In examining the *physical properties* of the two sets of cement-based products, it cannot be ignored that one set of products contains a fibre known to be highly carcinogenic, while the other does not.¹¹⁴ In this respect, we recall that the Panel concluded that "there is an undeniable public health risk in relation to chrysotile contained in high-density chrysotile-cement products."¹¹⁵ We, therefore, reverse the Panel's finding, in paragraph 8.149 of the Panel Report, that these health risks are not relevant in examining the "likeness" of the cement-based products.

129. Furthermore, the Panel did not indicate whether or to what extent the incorporation of one type of fibre, instead of another, affects other physical properties of a particular cement-based product and, consequently, affects the suitability of that product for a specific *end-use*. The Panel noted that the fibres give the products their specific function – "mechanical strength, resistance to heat, compression, etc." – but the Panel did not examine the extent to which the presence of a particular

¹⁰⁸Panel Report, para. 8.145.

¹⁰⁹*Ibid.*

¹¹⁰*Ibid.*, para. 8.148.

¹¹¹*Ibid.*, para. 8.149.

¹¹²*Ibid.*, para. 8.150.

¹¹³*Supra*, para. 113.

¹¹⁴*Supra*, para. 114.

¹¹⁵Panel Report, para. 8.203.

fibre affects the ability of a cement-based product to perform one or more of these functions efficiently.¹¹⁶

130. In addition, even if the cement-based products were functionally interchangeable, we consider it likely that the presence of a known carcinogen in one of the products would have an influence on *consumers' tastes and habits* regarding that product. We believe this to be true irrespective of whether the consumer of the *cement-based* products is a commercial party, such as a construction company, or is an individual, for instance, a do-it-yourself ("DIY") enthusiast or someone who owns or lives or works in a building. This influence may well vary, but the possibility of such an influence should not be overlooked by a panel when considering the "likeness" of products containing chrysotile asbestos. In the absence of an examination of consumers' tastes and habits, we do not see how the Panel could reach a conclusion on the "likeness" of the cement-based products at issue.¹¹⁷

131. For all of these reasons, we reverse the Panel's conclusion, in paragraph 8.150 of the Panel Report, "that chrysotile-fibre products and fibro-cement products are like products within the meaning of Article III:4 of the GATT 1994."

132. As we have reversed the Panel's findings that chrysotile asbestos fibres and PCG fibres are "like products" under Article III:4 of the GATT 1994, and also the Panel's findings that cement-based products containing chrysotile asbestos fibres and cement-based products containing PCG fibres are "like products" under that provision, we also reverse, in consequence, the Panel's conclusion, in paragraph 8.158 of the Panel Report, that the measure is inconsistent with Article III:4 of the GATT 1994 as this finding rests, in part, on the Panel's findings that the two sets of products are "like".

E. *Completing the "Like Product" Analysis under Article III:4 of the GATT 1994*

133. As we have reversed both of the Panel's conclusions on "likeness" under Article III:4 of the GATT 1994, we think it appropriate to complete the analysis, on the basis of the factual findings of the Panel and of the undisputed facts in the Panel record. We have already examined the meaning of the term "like products", and we have also approved the approach for inquiring into "likeness" that is based on the Report of the Working Party in *Border Tax Adjustments* and that was also approved, though not entirely followed, by the Panel in this case. Under that approach, the evidence is to be examined under four criteria: physical properties; end-uses; consumers' tastes and habits; and tariff classification.

¹¹⁶Panel Report, para. 8.145.

¹¹⁷See, further, *supra*, paras. 117 and 118. See, also, *supra*, paras. 121 and 122.

1. Chrysotile and PCG fibres

134. We address first the "likeness" of *chrysotile asbestos fibres* and *PCG fibres*. As regards the physical properties of these fibres, we recall that the Panel stated that:

The Panel notes that no party contests that the structure of chrysotile fibres is unique by nature and in comparison with artificial fibres that can replace chrysotile asbestos. The parties agree that none of the substitute fibres mentioned by Canada in connection with Article III:4 has the same structure, either in terms of its form, its diameter, its length or its potential to release particles that possess certain characteristics. Moreover, they do not have the same chemical composition, which means that, in purely physical terms, none of them has the same nature or quality. ...¹¹⁸

135. We also see it as important to take into account that, since 1977, chrysotile asbestos fibres have been recognized internationally as a known carcinogen because of the particular combination of their molecular structure, chemical composition, and fibrillation capacity.¹¹⁹ In that respect, the Panel noted that:

... the carcinogenicity of chrysotile fibres has been acknowledged for some time by international bodies. This carcinogenicity was confirmed by the experts consulted by the Panel, with respect to both lung cancers and mesotheliomas, even though the experts appear to acknowledge that chrysotile is less likely to cause mesotheliomas than amphiboles. We also note that the experts confirmed that the types of cancer concerned had a mortality rate of close to 100 per cent. We therefore consider that we have sufficient evidence that there is in fact a serious carcinogenic risk associated with the inhalation of chrysotile fibres. ...¹²⁰

In contrast, the Panel found that the PCG fibres "are not classified by the WHO at the same level of risk as chrysotile."¹²¹ The experts also confirmed, as the Panel reported, that current scientific evidence indicates that PCG fibres do "not present the same risk to health as chrysotile" asbestos fibres.¹²²

136. It follows that the evidence relating to properties indicates that, physically, chrysotile asbestos and PCG fibres are very different. As we said earlier, in such cases, in order to overcome this indication that products are *not* "like", a high burden is imposed on a complaining Member to

¹¹⁸Panel Report, para. 8.121.

¹¹⁹*Supra*, para. 114.

¹²⁰Panel Report, para. 8.188.

¹²¹*Ibid.*, para. 8.220.

¹²²*Ibid.*

establish that, despite the pronounced physical differences, there is a competitive relationship between the products such that, *all* of the evidence, taken together, demonstrates that the products are "like" under Article III:4 of the GATT 1994.

137. The Panel observed that the end-uses of chrysotile asbestos and PCG fibres are the same "for a small number" of applications.¹²³ The Panel simply adverted to these overlapping end-uses and offered no elaboration on their nature and character. We note that Canada argued before the Panel that there are some 3,000 commercial applications for asbestos fibres.¹²⁴ Canada and the European Communities indicated that the most important end-uses for asbestos fibres include, in no particular order, incorporation into: cement-based products; insulation; and various forms of friction lining.¹²⁵ Canada noted that 90 percent, by quantity, of French imports of chrysotile asbestos were used in the production of cement-based products.¹²⁶ This evidence suggests that chrysotile asbestos and PCG fibres share a small number of similar end-uses and, that, as Canada asserted, for chrysotile asbestos, these overlapping end-uses represent an important proportion of the end-uses made of chrysotile asbestos, measured in terms of quantity.

138. There is, however, no evidence on the record regarding the nature and extent of the many end-uses for chrysotile asbestos and PCG fibres which are *not* overlapping. Thus, we do not know what proportion of all end-uses for chrysotile asbestos and PCG fibres overlap. Where products have a wide range of end-uses, only some of which overlap, we do not believe that it is sufficient to rely solely on evidence regarding the overlapping end-uses, without also examining evidence of the nature and importance of these end-uses in relation to all of the other possible end-uses for the products. In the absence of such evidence, we cannot determine the significance of the fact that chrysotile asbestos and PCG fibres share a small number of similar end-uses.

139. As we have already stated, Canada took the view, both before the Panel and before us, that consumers' tastes and habits have no relevance to the inquiry into the "likeness" of the fibres.¹²⁷ We have already addressed, and dismissed, the arguments advanced by Canada in support of this contention.¹²⁸ We have also stated that, in a case such as this one, where the physical properties of the fibres are very different, an examination of the evidence relating to consumers' tastes and habits is an indispensable – although not, on its own, sufficient – aspect of any determination that products are

¹²³Panel Report, para. 8.125.

¹²⁴*Ibid.*, para. 3.21.

¹²⁵*Ibid.*, paras. 3.21 (Canada) and 3.23 (European Communities). The lists of important uses given by the parties is not identical in all respects and we have distilled from each list the common elements.

¹²⁶Panel Report, para. 3.21, footnote 7.

¹²⁷*Supra*, paras. 120 and 123.

¹²⁸*Ibid.*

"like" under Article III:4 of the GATT 1994.¹²⁹ If there is no evidence on this aspect of the nature and extent of the competitive relationship between the fibres, there is no basis for overcoming the inference, drawn from the different physical properties, that the products are not "like". However, in keeping with its argument that this criterion is irrelevant, Canada presented *no* evidence on consumers' tastes and habits regarding chrysotile asbestos and PCG fibres.¹³⁰

140. Finally, we note that chrysotile asbestos fibres and the various PCG fibres all have different tariff classifications. While this element is not, on its own, decisive, it does tend to indicate that chrysotile and PCG fibres are not "like products" under Article III:4 of the GATT 1994.

141. Taken together, in our view, all of this evidence is certainly far from sufficient to satisfy Canada's burden of proving that chrysotile asbestos fibres are "like" PCG fibres under Article III:4 of the GATT 1994. Indeed, this evidence rather tends to suggest that these products are not "like products" for the purposes of Article III:4 of the GATT 1994.

2. Cement-based products containing chrysotile and PCG fibres

142. We turn next to consider whether *cement-based products containing chrysotile asbestos fibres* are "like" *cement-based products containing PCG fibres* under Article III:4 of the GATT 1994. We begin, once again, with physical properties. In terms of composition, the physical properties of the different cement-based products appear to be relatively similar. Yet, there is one principal and significant difference between these products: one set of cement-based products contains a known carcinogenic fibre, while the other does not. The Panel concluded that the presence of chrysotile asbestos fibres in cement-based products poses "an undeniable public health risk".¹³¹

143. The Panel stated that the fibres give the cement-based products their specific function – "mechanical strength, resistance to heat, compression, etc."¹³² These functions are clearly based on the physical properties of the products. There is no evidence of record to indicate whether the presence of chrysotile asbestos fibres, rather than PCG fibres, in a particular cement-based product, affects these particular physical properties of the products. For instance, a tile incorporating chrysotile asbestos fibres may be more heat resistant than a tile incorporating a PCG fibre.

¹²⁹Our reasons for reaching this conclusion are set forth, *supra*, in paras. 117, 118, 121 and 122.

¹³⁰Canada did present evidence that the impact of the Decree was to reduce demand for chrysotile (Panel Report, paras. 3.20 and 3.422). However, as Canada recognized, this is a necessary consequence of the prohibition on chrysotile and is not evidence of consumers' attitudes and choices regarding the products at issue. As we have said, regulatory measures *may* suppress latent consumer demand for a product (*supra*, para. 123).

¹³¹Panel Report, para. 8.203.

¹³²*Ibid.*, para. 8.145.

144. In addition, there is no evidence to indicate to what extent the incorporation of one type of fibre, instead of another, affects the suitability of a particular cement-based product for a specific end-use.¹³³ Once again, it may be that tiles containing chrysotile asbestos fibres perform some end-uses, such as resistance to heat, more efficiently than tiles containing a PCG fibre. Thus, while we accept that the two different types of cement-based products may perform largely similar end-uses, in the absence of evidence, we cannot determine whether each type of cement-based product can perform, with *equal* efficiency, *all* of the functions performed by the other type of cement-based product.

145. As with the fibres, Canada contends that evidence on consumers' tastes and habits concerning cement-based products is irrelevant. Accordingly, Canada submitted no such evidence to the Panel. We have dismissed Canada's arguments in support of this contention.¹³⁴ We have also indicated that it is of particular importance, under Article III of the GATT 1994, to examine evidence relating to competitive relationships in the marketplace.¹³⁵ We consider it likely that the presence of a known carcinogen in one of the products will have an influence on consumers' tastes and habits regarding that product.¹³⁶ It may be, for instance, that, although cement-based products containing chrysotile asbestos fibres are capable of performing the same functions as other cement-based products, consumers are, to a greater or lesser extent, not willing to use products containing chrysotile asbestos fibres because of the health risks associated with them. Yet, this is only speculation; the point is, there is no evidence. We are of the view that a determination on the "likeness" of the cement-based products cannot be made, under Article III:4, in the absence of an examination of evidence on consumers' tastes and habits. And, in this case, no such evidence has been submitted.

146. As regards tariff classification, we observe that, for any given cement-based product, the tariff classification of the product is the same.¹³⁷ However, this indication of "likeness" cannot, on its own, be decisive.

147. Thus, we find that, in particular, in the absence of any evidence concerning consumers' tastes and habits, Canada has not satisfied its burden of proving that cement-based products containing chrysotile asbestos fibres are "like" cement-based products containing PCG fibres, under Article III:4 of the GATT 1994.

148. As Canada has not demonstrated either that chrysotile asbestos fibres are "like" PCG fibres, or that cement-based products containing chrysotile asbestos fibres are "like" cement-based products

¹³³*Supra*, para. 129.

¹³⁴*Supra*, paras. 120 and 123.

¹³⁵*Supra*, para. 117.

¹³⁶*Supra*, para. 130.

¹³⁷Panel Report, para. 8.148.

containing PCG fibres, we conclude that Canada has not succeeded in establishing that the measure at issue is inconsistent with Article III:4 of the GATT 1994.

149. One Member of the Division hearing this appeal wishes to make a concurring statement. At the outset, I would like to make it abundantly clear that I agree with the findings and conclusions reached, and the reasoning set out in support thereof, by the Division, in: Section V (*TBT Agreement*); Section VII (Article XX(b) of the GATT 1994 and Article 11 of the DSU); Section VIII (Article XXIII:1(b) of the GATT 1994); and Section IX (Findings and Conclusions) of the Report. This concurring statement, in other words, relates only to Section VI ("Like Products" in Article III:4 of the GATT 1994) of the Report.

150. More particularly, in respect of Section VI of the Report, I join in the findings and conclusions set out in: paragraphs 116, 126, 128, 131, 132, 141, 147 and 148. I am bound to say that, in truth, I agree with a great deal more than just the bare findings and conclusions contained in these eight paragraphs of the Report. It is, however, as a practical matter, not feasible to sort out and identify which part of which paragraph, of the sixty-odd paragraphs comprising Section VI of our Report in which I join. Nor is it feasible to offer a detailed statement with respect to the portions that would then remain. Accordingly, I set out only two related matters below.

151. In paragraph 113 of the Report, we state that "[w]e are very much of the view that evidence relating to the health risks associated with a product may be pertinent in an examination of 'likeness' under Article III:4 of the GATT 1994." We also point out, in paragraph 114, that "[p]anels must examine fully the physical properties of products. In particular, ... those physical properties of products that are likely to influence the competitive relationship between products in the market place. In the cases of chrysotile asbestos fibres, their molecular structure, chemical composition, and fibrillation capacity are important because the microscopic particles and filaments of chrysotile asbestos fibres are carcinogenic in humans, following inhalation." This carcinogenicity we describe as "a defining aspect of the physical properties of chrysotile asbestos fibres"¹³⁸, which property is not shared by the PCG fibres, "at least to the same extent."¹³⁹ We express our inability to "see how this highly significant physical difference *cannot* be a consideration in examining the physical properties of a product as part of a determination of 'likeness' under Article III:4 of the GATT 1994."¹⁴⁰ (emphasis in the original) We observe also that the Panel, after noting that the carcinogenicity of chrysotile asbestos fibres has been acknowledged by international bodies and confirmed by the experts the Panel consulted, ruled that it "[has] sufficient evidence that *there is in fact a serious*

¹³⁸ *Supra*, para. 114.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

carcinogenic risk associated with the inhalation of chrysotile fibres."¹⁴¹ (emphasis added) In fact, the scientific evidence of record for this finding of carcinogenicity of chrysotile asbestos fibres is so clear, voluminous, and is confirmed, a number of times, by a variety of international organizations, as to be practically overwhelming.

152. In the present appeal, considering the nature and quantum of the scientific evidence showing that the physical properties and qualities of chrysotile asbestos fibres include or result in carcinogenicity, my submission is that there is ample basis for a definitive characterization, on completion of the legal analysis, of such fibres as *not* "like" PCG fibres. PCG fibres, it may be recalled, have not been shown by Canada to have the same lethal properties as chrysotile asbestos fibres. That definitive characterization, it is further submitted, may and should be made even in the absence of evidence concerning the other two *Border Tax Adjustments* criteria (categories of "potentially shared characteristics") of end-uses and consumers' tastes and habits. It is difficult for me to imagine what evidence relating to economic competitive relationships as reflected in end-uses and consumers' tastes and habits could outweigh and set at naught the undisputed deadly nature of chrysotile asbestos fibres, compared with PCG fibres, when inhaled by humans, and thereby compel a characterization of "likeness" of chrysotile asbestos and PCG fibres.

153. The suggestion I make is not that *any* kind or degree of health risk, associated with a particular product, would *a priori* negate a finding of the "likeness" of that product with another product, under Article III:4 of the GATT 1994. The suggestion is a very narrow one, limited only to the circumstances of this case, and confined to chrysotile asbestos fibres as compared with PCG fibres. To hold that these fibres are not "like" one another in view of the undisputed carcinogenic nature of chrysotile asbestos fibres appears to me to be but a small and modest step forward from mere reversal of the Panel's ruling that chrysotile asbestos and PCG fibres are "like", especially since our holding in completing the analysis is that Canada failed to satisfy a complainant's burden of proving that PCG fibres are "like" chrysotile asbestos fibres under Article III:4. That small step, however, the other Members of the Division feel unable to take because of their conception of the "fundamental", perhaps decisive, role of economic competitive relationships in the determination of the "likeness" of products under Article III:4.

154. My second point is that the necessity or appropriateness of adopting a "fundamentally" economic interpretation of the "likeness" of products under Article III:4 of the GATT 1994 does not appear to me to be free from substantial doubt. Moreover, in future concrete contexts, the line between a "fundamentally" and "exclusively" economic view of "like products" under Article III:4 may well prove very difficult, as a practical matter, to identify. It seems to me the better part of

¹⁴¹Panel Report, para. 8.188. See, *supra*, para. 114.

valour to reserve one's opinion on such an important, indeed, philosophical matter, which may have unforeseeable implications, and to leave that matter for another appeal and another day, or perhaps other appeals and other days. I so reserve my opinion on this matter.

VII. Article XX(b) of the GATT 1994 and Article 11 of the DSU

155. Under Article XX(b) of the GATT 1994, the Panel examined, first, whether the use of chrysotile-cement products poses a risk to human health and, second, whether the measure at issue is "necessary to protect human ... life or health". Canada contends that the Panel erred in law in its findings on both these issues. We will examine these two issues in turn before addressing Canada's appeal that the Panel failed to make an "objective assessment", under Article 11 of the DSU, in reaching its conclusions under Article XX(b) of the GATT 1994.

156. We recall that Article XX(b) of the GATT 1994 reads:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of *measures*:

...

(b) *necessary to protect human, animal or plant life or health; (emphasis added)*

...

A. "To Protect Human Life or Health"

157. On the issue of whether the use of chrysotile-cement products poses a risk to human health sufficient to enable the measure to fall within the scope of application of the phrase "to protect human ... life or health" in Article XX(b), the Panel stated that it "considers that the evidence before it *tends to show* that handling chrysotile-cement products constitutes a risk to health rather than the opposite."¹⁴² (emphasis added) On the basis of this assessment of the evidence, the Panel concluded that:

¹⁴²Panel Report, para. 8.193.

... the EC has made a *prima facie* case for the existence of a health risk in connection with the use of chrysotile, in particular as regards lung cancer and mesothelioma in the occupational sectors downstream of production and processing and for the public in general in relation to chrysotile-cement products. This *prima facie* case has not been rebutted by Canada. Moreover, the Panel considers that the comments by the experts confirm the health risk associated with exposure to chrysotile in its various uses. *The Panel therefore considers that the EC have shown that the policy of prohibiting chrysotile asbestos implemented by the Decree falls within the range of policies designed to protect human life or health. ...*¹⁴³ (emphasis added)

Thus, the Panel found that the measure falls within the category of measures embraced by Article XX(b) of the GATT 1994.

158. According to Canada, the Panel deduced that there was a risk to human life or health associated with manipulation of chrysotile-cement products from seven factors.¹⁴⁴ These seven factors all relate to the scientific evidence which was before the Panel, including the opinion of the scientific experts. Canada argues that the Panel erred in law by deducing from these seven factors that chrysotile-cement products pose a risk to human life or health.¹⁴⁵

159. Although Canada does not base its arguments about these seven factors on Article 11 of the DSU, we bear in mind the discretion that is enjoyed by panels as the trier of facts. In *United States – Wheat Gluten*, we said:

... in view of the distinction between the respective roles of the Appellate Body and panels, we have taken care to emphasize that a panel's appreciation of the evidence falls, in principle, "within the scope of the panel's discretion as the trier of facts". (emphasis added) In assessing the panel's appreciation of the evidence, we cannot base a finding of inconsistency under Article 11 simply on the conclusion that we might have reached a different factual finding from the one the panel reached. Rather, we must be satisfied that the panel has exceeded the bounds of its discretion, as the trier of facts, in its appreciation of the evidence. As is clear from previous appeals, we will not interfere lightly with the panel's exercise of its discretion.¹⁴⁶

160. In *Korea – Alcoholic Beverages*, we were faced with arguments that sought to cast doubt on certain studies relied on by the panel in that case. We stated:

¹⁴³Panel Report, para. 8.194.

¹⁴⁴Canada's appellant's submission, para. 170. The seven factors Canada relies upon are identified in para. 19 of this Report.

¹⁴⁵Canada's appellant's submission, para. 171.

¹⁴⁶*Supra*, footnote 48, para. 151.

The Panel's examination and weighing of the evidence submitted fall, in principle, within the scope of the Panel's discretion as the trier of facts and, accordingly, outside the scope of appellate review. This is true, for instance, with respect to the Panel's treatment of the Dodwell Study, the Sofres Report and the Nielsen Study. *We cannot second-guess the Panel in appreciating either the evidentiary value of such studies or the consequences, if any, of alleged defects in those studies.* Similarly, it is not for us to review the relative weight ascribed to evidence on such matters as marketing studies ...¹⁴⁷ (emphasis added)

161. The same holds true in this case. The Panel enjoyed a margin of discretion in assessing the value of the evidence, and the weight to be ascribed to that evidence. The Panel was entitled, in the exercise of its discretion, to determine that certain elements of evidence should be accorded more weight than other elements – that is the essence of the task of appreciating the evidence.

162. With this in mind, we have examined the seven factors on which Canada relies in asserting that the Panel erred in concluding that there exists a human health risk associated with the manipulation of chrysotile-cement products. We see Canada's appeal on this point as, in reality, a challenge to the Panel's assessment of the credibility and weight to be ascribed to the scientific evidence before it. Canada contests the conclusions that the Panel drew both from the evidence of the scientific experts and from scientific reports before it. As we have noted, we will interfere with the Panel's appreciation of the evidence only when we are "satisfied that the panel has *exceeded the bounds of its discretion*, as the trier of facts, in its appreciation of the evidence."¹⁴⁸ (emphasis added) In this case, nothing suggests that the Panel exceeded the bounds of its lawful discretion. To the contrary, all four of the scientific experts consulted by the Panel concurred that chrysotile asbestos fibres, and chrysotile-cement products, constitute a risk to human health, and the Panel's conclusions on this point are faithful to the views expressed by the four scientists. In addition, the Panel noted that the carcinogenic nature of chrysotile asbestos fibres has been acknowledged since 1977 by international bodies, such as the International Agency for Research on Cancer and the World Health Organization.¹⁴⁹ In these circumstances, we find that the Panel remained well within the bounds of its discretion in finding that chrysotile-cement products pose a risk to human life or health.

163. Accordingly, we uphold the Panel's finding, in paragraph 8.194 of the Panel Report, that the measure "protect[s] human ... life or health", within the meaning of Article XX(b) of the GATT 1994.

¹⁴⁷*Supra*, footnote 58, para. 161.

¹⁴⁸ Appellate Body Report, *United States – Wheat Gluten*, *supra*, footnote 48, para. 151.

¹⁴⁹ Panel Report, para. 8.188.

B. "Necessary"

164. On the issue of whether the measure at issue is "necessary" to protect public health within the meaning of Article XX(b), the Panel stated:

In the light of France's public health objectives as presented by the European Communities, the Panel concludes that the EC has made a *prima facie* case for the non-existence of a reasonably available alternative to the banning of chrysotile and chrysotile-cement products and recourse to substitute products. Canada has not rebutted the presumption established by the EC. We also consider that the EC's position is confirmed by the comments of the experts consulted in the course of this proceeding.¹⁵⁰

165. Canada argues that the Panel erred in applying the "necessity" test under Article XX(b) of the GATT 1994 "by stating that there is a high enough risk associated with the manipulation of chrysotile-cement products that it could in principle justify strict measures such as the Decree."¹⁵¹ Canada advances four arguments in support of this part of its appeal. First, Canada argues that the Panel erred in finding, on the basis of the scientific evidence before it, that chrysotile-cement products pose a risk to human health.¹⁵² Second, Canada contends that the Panel had an obligation to "quantify" itself the risk associated with chrysotile-cement products and that it could not simply "rely" on the "hypotheses" of the French authorities.¹⁵³ Third, Canada asserts that the Panel erred by postulating that the level of protection of health inherent in the Decree is a halt to the spread of asbestos-related health risks. According to Canada, this "premise is false because it does not take into account the risk associated with the use of substitute products without a framework for controlled use."¹⁵⁴ Fourth, and finally, Canada claims that the Panel erred in finding that "controlled use" is not a reasonably available alternative to the Decree.

166. With respect to Canada's first argument, we note simply that we have already dismissed Canada's contention that the evidence before the Panel did not support the Panel's findings.¹⁵⁵ We are satisfied that the Panel had a more than sufficient basis to conclude that chrysotile-cement products do pose a significant risk to human life or health.

¹⁵⁰Panel Report, para. 8.222.

¹⁵¹Canada's appellant's submission, para. 187.

¹⁵²*Ibid.*, paras. 188 and 189.

¹⁵³*Ibid.*, para. 193.

¹⁵⁴*Ibid.*, para. 195.

¹⁵⁵*Supra*, paras. 159-163.

167. As for Canada's second argument, relating to "quantification" of the risk, we consider that, as with the *SPS Agreement*, there is no requirement under Article XX(b) of the GATT 1994 to *quantify*, as such, the risk to human life or health.¹⁵⁶ A risk may be evaluated either in quantitative or qualitative terms. In this case, contrary to what is suggested by Canada, the Panel assessed the nature and the character of the risk posed by chrysotile-cement products. The Panel found, on the basis of the scientific evidence, that "no minimum threshold of level of exposure or duration of exposure has been identified with regard to the risk of pathologies associated with chrysotile, except for asbestosis."¹⁵⁷ The pathologies which the Panel identified as being associated with chrysotile are of a very serious nature, namely lung cancer and mesothelioma, which is also a form of cancer.¹⁵⁸ Therefore, we do not agree with Canada that the Panel merely relied on the French authorities' "hypotheses" of the risk.

168. As to Canada's third argument, relating to the level of protection, we note that it is undisputed that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation. France has determined, and the Panel accepted¹⁵⁹, that the chosen level of health protection by France is a "halt" to the spread of *asbestos*-related health risks. By prohibiting all forms of amphibole asbestos, and by severely restricting the use of chrysotile asbestos, the measure at issue is clearly designed and apt to achieve that level of health protection. Our conclusion is not altered by the fact that PCG fibres might pose a risk to health. The scientific evidence before the Panel indicated that the risk posed by the PCG fibres is, in any case, *less* than the risk posed by chrysotile asbestos fibres¹⁶⁰, although that evidence did *not* indicate that the risk posed by PCG fibres is non-existent. Accordingly, it seems to us perfectly legitimate for a Member to seek to halt the spread of a highly risky product while allowing the use of a less risky product in its place. In short, we do not agree with Canada's third argument.

169. In its fourth argument, Canada asserts that the Panel erred in finding that "controlled use" is not a reasonably available alternative to the Decree. This last argument is based on Canada's assertion that, in *United States – Gasoline*, both we and the panel held that an alternative measure "can only be ruled out if it is shown to be impossible to implement."¹⁶¹ We understand Canada to mean by this that an alternative measure is only excluded as a "reasonably available" alternative if implementation of

¹⁵⁶ Appellate Body Report, *European Communities – Hormones*, *supra*, footnote 48, para. 186.

¹⁵⁷ Panel Report, para. 8.202.

¹⁵⁸ *Ibid.*, para. 8.188. See Panel Report, para. 5.29, for a description of mesothelioma given by Dr. Henderson.

¹⁵⁹ *Ibid.*, para. 8.204.

¹⁶⁰ *Ibid.*, para. 8.220.

¹⁶¹ Canada's appellant's submission, para. 202, referring to, *inter alia*, para. 130 of that submission.

that measure is "impossible". We certainly agree with Canada that an alternative measure which is impossible to implement is not "reasonably available". But we do not agree with Canada's reading of either the panel report or our report in *United States – Gasoline*. In *United States – Gasoline*, the panel held, in essence, that an alternative measure did not *cease* to be "reasonably" available simply because the alternative measure involved *administrative difficulties* for a Member.¹⁶² The panel's findings on this point were not appealed, and, thus, we did not address this issue in that case.

170. Looking at this issue now, we believe that, in determining whether a suggested alternative measure is "reasonably available", several factors must be taken into account, besides the difficulty of implementation. In *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, the panel made the following observations on the applicable standard for evaluating whether a measure is "necessary" under Article XX(b):

The import restrictions imposed by Thailand could be considered to be "necessary" in terms of Article XX(b) only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it, which Thailand could *reasonably be expected to employ to achieve its health policy objectives*.¹⁶³ (emphasis added)

171. In our Report in *Korea – Beef*, we addressed the issue of "necessity" under Article XX(d) of the GATT 1994.¹⁶⁴ In that appeal, we found that the panel was correct in following the standard set forth by the panel in *United States – Section 337 of the Tariff Act of 1930*:

It was clear to the Panel that a contracting party cannot justify a measure inconsistent with another GATT provision as "necessary" in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.¹⁶⁵

172. We indicated in *Korea – Beef* that one aspect of the "weighing and balancing process ... comprehended in the determination of whether a WTO-consistent alternative measure" is reasonably available is the extent to which the alternative measure "contributes to the realization of the end

¹⁶²See Panel Report, *United States – Gasoline*, *supra*, footnote 15, paras. 6.26 and 6.28.

¹⁶³Adopted 20 February 1990, BISD 37S/200, para. 75.

¹⁶⁴*Supra*, footnote 49, paras. 159 ff.

¹⁶⁵Adopted 7 November 1989, BISD 36S/345, para. 5.26; we expressly affirmed this standard in our Report in *Korea – Beef*, *supra*, footnote 49, para. 166.

pursued".¹⁶⁶ In addition, we observed, in that case, that "[t]he more vital or important [the] common interests or values" pursued, the easier it would be to accept as "necessary" measures designed to achieve those ends.¹⁶⁷ In this case, the objective pursued by the measure is the preservation of human life and health through the elimination, or reduction, of the well-known, and life-threatening, health risks posed by asbestos fibres. The value pursued is both vital and important in the highest degree. The remaining question, then, is whether there is an alternative measure that would achieve the same end and that is less restrictive of trade than a prohibition.

173. Canada asserts that "controlled use" represents a "reasonably available" measure that would serve the same end. The issue is, thus, whether France could reasonably be expected to employ "controlled use" practices to achieve its chosen level of health protection – a halt in the spread of asbestos-related health risks.

174. In our view, France could not reasonably be expected to employ *any* alternative measure if that measure would involve a continuation of the very risk that the Decree seeks to "halt". Such an alternative measure would, in effect, prevent France from achieving its chosen level of health protection. On the basis of the scientific evidence before it, the Panel found that, in general, the efficacy of "controlled use" remains to be demonstrated.¹⁶⁸ Moreover, even in cases where "controlled use" practices are applied "with greater certainty", the scientific evidence suggests that the level of exposure can, in some circumstances, still be high enough for there to be a "significant residual risk of developing asbestos-related diseases."¹⁶⁹ The Panel found too that the efficacy of "controlled use" is particularly doubtful for the building industry and for DIY enthusiasts, which are the most important users of cement-based products containing chrysotile asbestos.¹⁷⁰ Given these factual findings by the Panel, we believe that "controlled use" would not allow France to achieve its chosen level of health protection by halting the spread of asbestos-related health risks. "Controlled use" would, thus, not be an alternative measure that would achieve the end sought by France.

175. For these reasons, we uphold the Panel's finding, in paragraph 8.222 of the Panel Report, that the European Communities has demonstrated a *prima facie* case that there was no "reasonably available alternative" to the prohibition inherent in the Decree. As a result, we also uphold the Panel's conclusion, in paragraph 8.223 of the Panel Report, that the Decree is "necessary to protect human ... life or health" within the meaning of Article XX(b) of the GATT 1994.

¹⁶⁶ Appellate Body Report, *Korea – Beef*, *supra*, footnote 49, paras. 166 and 163.

¹⁶⁷ *Ibid.*, para. 162.

¹⁶⁸ Panel Report, para. 8.209.

¹⁶⁹ *Ibid.*, paras. 8.209 and 8.211.

¹⁷⁰ *Ibid.*, paras. 8.213 and 8.214.

C. *Article 11 of the DSU*

176. As part of its argument that the Panel erred in finding that the measure is justified under Article XX(b) of the GATT 1994, Canada also asserts that the Panel failed to make an objective assessment of the matter, as required by Article 11 of the DSU. According to Canada, the requirement imposed on panels by Article 11 to make an objective assessment of the matter implies "that scientific data must be assessed in accordance with the principle of the balance of probabilities."¹⁷¹ In particular, Canada asserts that, where the evidence is divergent or contradictory, the "principle of the preponderance of evidence" implies that a panel must take a position as to the respective weight of the evidence.¹⁷² Canada also contends that the Panel failed to assess the facts objectively because the Panel accepted "the opinions of experts on the controlled use of chrysotile, when those experts had no controlled-use expertise."¹⁷³

177. These arguments by Canada on the "balance of probabilities" and the "preponderance of evidence" concern the credibility and weight that the Panel ascribed to different elements of evidence.¹⁷⁴ In essence, Canada argues that the Panel has not taken sufficient account of certain evidence and that the Panel has placed too much weight on certain other evidence. Thus, Canada is challenging the Panel's exercise of discretion in assessing and weighing the evidence. As we have already noted, "[w]e cannot second-guess the Panel in appreciating either the evidentiary value of ... studies or the consequences, if any, of alleged defects in [the evidence]".¹⁷⁵ And, as we have already said, in this case, the Panel's appreciation of the evidence remained well within the bounds of its discretion as the trier of facts.

178. In addition, in the context of the *SPS Agreement*, we have said previously, in *European Communities – Hormones*, that "responsible and representative governments may act in good faith on the basis of what, at a given time, may be a *divergent* opinion coming from qualified and respected sources."¹⁷⁶ (emphasis added) In justifying a measure under Article XX(b) of the GATT 1994, a Member may also rely, in good faith, on scientific sources which, at that time, may represent a divergent, but qualified and respected, opinion. A Member is not obliged, in setting health policy, automatically to follow what, at a given time, may constitute a majority scientific opinion. Therefore,

¹⁷¹Canada's appellant's submission, para. 204.

¹⁷²*Ibid.*

¹⁷³*Ibid.*, para. 209.

¹⁷⁴*Ibid.*, para. 204.

¹⁷⁵Appellate Body Report, *Korea – Alcoholic Beverages*, *supra*, footnote 58, para. 161. See, *supra*, para. 160.

¹⁷⁶*Supra*, footnote 48, para. 194.

a panel need not, necessarily, reach a decision under Article XX(b) of the GATT 1994 on the basis of the "preponderant" weight of the evidence.

179. With regard to Canada's argument that certain of the experts lacked expertise in "controlled use", we note that, from the beginning of the process for the selection of experts, the Panel made clear that it wished to consult experts on the "effectiveness of the controlled use of chrysotile."¹⁷⁷ The selection of the experts was the subject of a rigorous procedure which involved the consultation of five institutions with experience in this field and also of the parties.¹⁷⁸ At no stage did Canada object to the selection of any of the experts, nor indicate that any of them was unqualified to deal with issues relating to "controlled use".¹⁷⁹ We also note that the experts were instructed by the Panel to answer only those questions that fell within their area of expertise.¹⁸⁰ As Canada indicates, several experts indicated that particular questions, or parts of questions, posed to them went beyond their area of expertise.¹⁸¹

180. In these circumstances, we have serious difficulty accepting that the Panel failed to make an objective assessment by relying on experts who had no expertise. The Panel was entitled to assume that the experts possessed the necessary expertise to answer the questions, or parts of questions, they chose to answer. In other words, it was not incumbent on the Panel expressly to confirm, with respect to every opinion expressed by each expert, that the expert possessed the necessary expertise to give that particular opinion. If Canada thought that one of the experts did not possess the expertise necessary to answer certain questions posed to him, Canada should have raised those concerns, either with the expert, at the meeting the Panel held with the parties and the experts on 17 January 2000, or with the Panel at some other time. We observe, finally, that, where an expert declined to answer a specific question, or part of a question, because of a professed lack of expertise, the Panel had no opinion from that expert on which to rely.

181. For these reasons, we decline Canada's appeal on Article 11 of the DSU.

¹⁷⁷Panel Report, para. 5.1.

¹⁷⁸*Ibid.*, para. 5.20.

¹⁷⁹*Ibid.*

¹⁸⁰*Ibid.*, para. 5.22.

¹⁸¹Canada's appellant's submission, para. 211, footnote 219, referring to Panel Report, paras. 5.335, 5.345, 5.346, 5.353, 5.363, 5.364, 5.370, 5.371, and 5.374, and to Annex VI of the Panel Report, para. 222.

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

182. Before the Panel, Canada claimed, under Article XXIII:1(b) of the GATT 1994, that the application of the measure at issue nullified or impaired benefits accruing to Canada. The European Communities raised preliminary objections, arguing on two grounds that the measure falls outside the scope of application of Article XXIII:1(b). First, the European Communities contended that Article XXIII:1(b) only applies to measures which *do not otherwise fall* under other provisions of the GATT 1994.¹⁸² Second, the European Communities argued that, while it may be possible to have "legitimate expectations" in connection with a purely "commercial" measure, it is not possible to claim "legitimate expectations" with respect to a measure taken to protect human life or health, which can be justified under Article XX(b) of the GATT 1994. Such measures are, the European Communities asserted, excluded from the scope of Article XXIII:1(b).¹⁸³

183. Before examining the substance of Canada's claim under Article XXIII:1(b) of the GATT 1994, the Panel first considered, and rejected, both of these preliminary objections raised by the European Communities, and found, as a consequence, that Canada could invoke Article XXIII:1(b) in respect of the measure.¹⁸⁴ The European Communities appeals the Panel's findings and conclusions relating to the two preliminary objections.

184. Before considering this aspect of the appeal, we note that the Panel went on to examine the substance of Canada's claim under Article XXIII:1(b) and concluded that Canada had not established "the existence of nullification or impairment of a benefit within the meaning of Article XXIII:1(b) of the GATT 1994 as a result of the application of the measure".¹⁸⁵ We note also that this ultimate conclusion by the Panel has not been appealed by either party. Accordingly, we address only the two narrow issues that have been appealed by the European Communities, and we will not address any other aspects of the Panel's findings under Article XXIII:1(b) of the GATT 1994.

185. This appeal is our first occasion to examine Article XXIII:1(b) of the GATT 1994. For this reason, before turning to the appeal by the European Communities, it seems to us useful to make certain preliminary observations about the relationship between Articles XXIII:1(a) and XXIII:1(b) of the GATT 1994. Article XXIII:1(a) sets forth a cause of action for a claim that a Member has failed to carry out one or more of its obligations under the GATT 1994. A claim under Article XXIII:1(a), therefore, lies when a Member is alleged to have acted inconsistently with a provision of the

¹⁸²Panel Report, para. 8.255.

¹⁸³*Ibid.*, para. 8.257.

¹⁸⁴*Ibid.*, paras. 8.265 and 8.274.

¹⁸⁵*Ibid.*, para. 8.304.

GATT 1994. Article XXIII:1(b) sets forth a separate cause of action for a claim that, through the application of a measure, a Member has "nullified or impaired" "benefits" accruing to another Member, "whether or not that measure conflicts with the provisions" of the GATT 1994. Thus, it is not necessary, under Article XXIII:1(b), to establish that the measure involved is inconsistent with, or violates, a provision of the GATT 1994. Cases under Article XXIII:1(b) are, for this reason, sometimes described as "non-violation" cases; we note, though, that the word "non-violation" does not appear in this provision. The purpose of this rather unusual remedy was described by the panel in *European Economic Community - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins* ("EEC - Oilseeds") in the following terms:

The idea underlying [the provisions of Article XXIII:1(b)] is that *the improved competitive opportunities that can legitimately be expected from a tariff concession can be frustrated not only by measures proscribed by the General Agreement but also by measures consistent with that Agreement. In order to encourage contracting parties to make tariff concessions they must therefore be given a right of redress when a reciprocal concession is impaired by another contracting party as a result of the application of any measure, whether or not it conflicts with the General Agreement.*¹⁸⁶ (emphasis added)

186. Like the panel in *Japan - Measures Affecting Consumer Photographic Film and Paper* ("*Japan - Film*"), we consider that the remedy in Article XXIII:1(b) "should be approached with caution and should remain an exceptional remedy".¹⁸⁷ That panel stated:

¹⁸⁶ Adopted 25 January 1990, BISD 37S/86, para. 144.

¹⁸⁷ Adopted 22 April 1998, WT/DS44/R, para. 10.37.

Although the non-violation remedy is an important and accepted tool of WTO/GATT dispute settlement and has been "on the books" for almost 50 years, we note that there have only been eight cases in which panels or working parties have substantively considered Article XXIII:1(b) claims. This suggests that both the GATT contracting parties and WTO Members have approached this remedy with caution and, indeed, have treated it as an exceptional instrument of dispute settlement. We note in this regard that both the European Communities and the United States in the *EEC – Oilseeds* case, and the two parties in this case, have confirmed that *the non-violation nullification or impairment remedy should be approached with caution and treated as an exceptional concept*. The reason for this caution is straightforward. *Members negotiate the rules that they agree to follow and only exceptionally would expect to be challenged for actions not in contravention of those rules.*¹⁸⁸ (emphasis added)

187. Against this background, we turn now to the European Communities' argument that Article XXIII:1(b) does not apply to measures that fall within the scope of application of other provisions of the GATT 1994. The text of Article XXIII:1(b) stipulates that a claim under that provision arises when a "benefit" is being "nullified or impaired" through the "application ... of any measure, *whether or not it conflicts with the provisions of this Agreement*". (emphasis added) The wording of the provision, therefore, clearly states that a claim may succeed, under Article XXIII:1(b), *even if the measure "conflicts" with some substantive provisions of the GATT 1994*. It follows that a measure may, *at one and the same time*, be inconsistent with, or in breach of, a provision of the GATT 1994 *and*, nonetheless, give rise to a cause of action under Article XXIII:1(b). Of course, if a measure "conflicts" with a provision of the GATT 1994, that measure must actually fall within the

¹⁸⁸*Supra*, footnote 187, para. 10.36. Claims under Article XXIII:1(b) have been considered in the following reports: Working Party Report, *Australia – Ammonium Sulphate*, *supra*, footnote 58; Panel Report, *Germany – Sardines*, *supra*, footnote 58; Panel Report, *Uruguayan Recourse to Article XXIII*, adopted 16 November 1962, BISD 11S/95; Panel Report, *Spain – Soyabean*, *supra*, footnote 58; Panel Report, *European Community – Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region ("EC – Citrus Products")*, L/5776, 7 February 1985, unadopted; Panel Report, *European Economic Community – Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes ("EEC – Canned Fruit")*, L/5778, 20 February 1985, unadopted; Panel Report, *Japan – Trade in Semi-Conductors*, adopted 4 May 1988, BISD 35S/116; Panel Report, *United States – Trade Measures Affecting Nicaragua*, L/6053, 13 October 1986, unadopted; Panel Report, *EEC – Oilseeds*, *supra*, footnote 186; Panel Report, *United States – Restrictions on the Importation of Sugar and Sugar-Containing Products Applied under the 1955 Waiver and under the Headnote to the Schedule of Tariff Concessions*, adopted 7 November 1990, BISD 37S/228; Panel Report, *Japan – Film*, *supra*, footnote 187; Panel Report, *Korea – Measures Affecting Government Procurement*, WT/DS163/R, adopted 19 June 2000. We note that claims under Article XXIII:1(b) of the GATT 1947 were also examined in the Panel Report, *European Economic Community – Follow-up on the Panel Report, Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins ("EEC – Oilseeds II")*, 31 March 1992, BISD 39S/91, unadopted.

Including *EEC – Oilseeds II*, and the present dispute, there have, therefore, been 14 cases in which a claim under Article XXIII:1(b) has been considered by working parties, panels, and, now, the Appellate Body. In six of these cases, the claim under Article XXIII:1(b) was successful and, on three of these occasions, the report was adopted. The successful claims were made in: *Australia – Ammonium Sulphate* (adopted 3 April 1950), *Germany – Sardines* (adopted 31 October 1952), *EC – Citrus Products* (unadopted), *EEC – Canned Fruit* (unadopted), *EEC – Oilseeds* (adopted 25 January 1990) and *EEC – Oilseeds II* (unadopted).

scope of application of that provision of the GATT 1994. We agree with the Panel that this reading of Article XXIII:1(b) is consistent with the panel reports in *Japan – Film* and *EEC – Oilseeds*, which both support the view that Article XXIII:1(b) applies to measures which simultaneously fall within the scope of application of other provisions of the GATT 1994.¹⁸⁹ Accordingly, we decline the European Communities' first ground of appeal under Article XXIII:1(b) of the GATT 1994.

188. The European Communities also contends that the Panel erred in finding that Article XXIII:1(b) applies to measures which pursue health, rather than commercial, objectives and which can, therefore, be justified under Article XX(b) of the GATT 1994. Once again, we look to the text of Article XXIII:1(b), which provides that "the application by another Member of *any measure*" may give rise to a cause of action under that provision. The use of the word "any" suggests that measures of all types may give rise to such a cause of action. The text does not distinguish between, or exclude, certain types of measure. Clearly, therefore, the text of Article XXIII:1(b) contradicts the European Communities' argument that certain types of measure, namely, those with health objectives, are excluded from the scope of application of Article XXIII:1(b).

189. In any event, an attempt to draw the distinction suggested by the European Communities between so-called health and commercial measures would be very difficult in practice. By definition, measures which affect trade in goods, and which are subject to the disciplines of the GATT 1994, have a commercial impact. At the same time, the health objectives of many measures may be attainable only by means of commercial regulation. Thus, in practice, clear distinctions between health and commercial measures may be very difficult to establish. Nor do we see merit in the argument that, previously, only "commercial" measures have been the subject of Article XXIII:1(b) claims, as that does not establish that a claim *cannot* be made under Article XXIII:1(b) regarding a "non-commercial" measure.

190. An important aspect of the European Communities' argument is that a Member cannot have reasonable expectations of continued market access for products which are shown to pose a serious risk to human life or health. However, the paragraphs of the Panel Report appealed by the European Communities involve *exclusively* the Panel's findings on the threshold issues of the scope of application of Article XXIII:1(b). This particular argument of the European Communities, important as it is, simply does not relate to those threshold issues. Rather, the European Communities' argument relates to the substance of a claim that has been determined to fall within the scope of application of Article XXIII:1(b) and, in particular, concerns the issue whether a "benefit" has been "nullified or impaired" by a measure restricting market access for products posing a health risk. Here, we

¹⁸⁹See Panel Report, para. 8.263, which refers to the Panel Report in *Japan – Film*, *supra*, footnote 187, para. 10.50, and footnote 1214; and *EEC – Oilseeds*, *supra*, footnote 186, para. 144.

emphasize that the European Communities does *not* appeal the Panel's findings relating to the "nullification or impairment" of a "benefit" through the frustration of reasonable expectations by application of the measure at issue. We do not, therefore, find it necessary to examine the European Communities' argument relating to reasonable expectations.

191. For these reasons, we dismiss the European Communities' appeal under Article XXIII:1(b) of the GATT 1994 and uphold the Panel's finding that Article XXIII:1(b) applies to measures which fall within the scope of application of other provisions of the GATT 1994 and which pursue health objectives.

IX. Findings and Conclusions

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

- (a) reverses the Panel's finding, in paragraph 8.72(a) of the Panel Report, that the *TBT Agreement* "does not apply to the part of the Decree relating to the ban on imports of asbestos and asbestos-containing products because that part does not constitute a 'technical regulation' within the meaning of Annex 1.1 to the TBT Agreement", and finds that the measure, viewed as an integrated whole, does constitute a "technical regulation" under the *TBT Agreement*;
- (b) reverses the Panel's findings, in paragraphs 8.132 and 8.149 of the Panel Report, that "it is not appropriate" to take into consideration the health risks associated with chrysotile asbestos fibres in examining the "likeness", under Article III:4 of the GATT 1994, of those fibres and PCG fibres, and, also, in examining the "likeness", under that provision, of cement-based products containing chrysotile asbestos fibres or PCG fibres;
- (c) reverses the Panel's finding, in paragraph 8.144 of the Panel Report, that chrysotile asbestos fibres and PCG fibres are "like products" under Article III:4 of the GATT 1994; and finds that Canada has not satisfied its burden of proving that these fibres are "like products" under that provision;
- (d) reverses the Panel's finding, in paragraph 8.150 of the Panel Report, that cement-based products containing chrysotile asbestos fibres and cement-based products containing PCG fibres are "like products" under Article III:4 of the GATT 1994; and finds that Canada has not satisfied its burden of proving that these cement-based products are "like products" under Article III:4 of the GATT 1994;

- (e) reverses, in consequence, the Panel's finding, in paragraph 8.158 of the Panel Report, that the measure is inconsistent with Article III:4 of the GATT 1994;
- (f) upholds the Panel's finding, in paragraphs 8.194, 8.222 and 8.223 of the Panel Report, that the measure at issue is "necessary to protect human ... life or health", within the meaning of Article XX(b) of the GATT 1994; and, finds that the Panel acted consistently with Article 11 of the DSU in reaching this conclusion;
- (g) upholds the Panel's finding, in paragraphs 8.265 and 8.274 of the Panel Report, that the measure may give rise to a cause of action under Article XXIII:1(b) of the GATT 1994.

193. It follows from our findings that Canada has not succeeded in establishing that the measure at issue is inconsistent with the obligations of the European Communities under the covered agreements and, accordingly, we do not make any recommendations to the DSB under Article 19.1 of the DSU.

Signed in the original at Geneva this 16th day of February 2001 by:

Florentino P. Feliciano
Presiding Member

James Bacchus
Member

Claus-Dieter Ehlermann
Member