

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". [FN23]

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". [FN24] 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 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", [FN25] since all relevant criteria, including the "risk" criterion, must be considered in the assessment of "likeness".

*11 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