

examined whether two different sets of products are "like". [FN51] 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. [FN52] 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". [FN53]

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. [FN54] 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 ...". [FN55]

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. [FN56]

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

*25 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 first occasion to examine the meaning of the word "like" in Article III:4 of the GATT 1994. [FN57] 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. [FN58] 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. [FN59] 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 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