

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

*15 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