

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. [FN87] 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 whether the Panel's overall approach has allowed the Panel to make a proper characterization of the "likeness" of the fibres at issue.

*32 110. 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." [FN88] (emphasis added) The Panel expressly acknowledged that, based on physical properties alone, "[i]t could ... be concluded that [the fibres] are not like products." [FN89] (emphasis added) However, to overcome that fact, the Panel adopted a "market access" approach to this first criterion. [FN90] 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. [FN91] The Panel then stated:

We therefore conclude that, taking into account the properties criterion, chrysotile fibres are like PVA, cellulose and glass fibres. [FN92]

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." [FN93] (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 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". [FN94] The Panel said that to do so "would largely nullify the effect of Article XX(b)" of the GATT 1994. [FN95] 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