

CASE NOTES

EUROPEAN COMMUNITIES — MEASURES AFFECTING ASBESTOS AND ASBESTOS-CONTAINING PRODUCTS*

THE WORLD TRADE ORGANIZATION ON TRIAL FOR ITS HANDLING OF OCCUPATIONAL HEALTH AND SAFETY ISSUES

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I INTRODUCTION

The case of *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products* (*‘EC — Asbestos’*)¹ presented a number of tough substantive and procedural issues for the World Trade Organization (*‘WTO’*) when handling public policy issues, such as occupational health and safety, that are usually considered to be within the province of states’ exclusive competence. More significantly, the dispute highlighted the controversy surrounding both the evolving constitutional framework of free trade that is synonymous with the WTO and the deepening interaction of the WTO with global civil society.

* World Trade Organization Panel, *Report of the Panel: European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/R (18 September 2000) and WTO Appellate Body, *Report of the Appellate Body: European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R (12 March 2001).

¹ WTO Panel, *Report of the Panel: European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/R (18 September 2000) and WTO Appellate Body, *Report of the Appellate Body: European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R (12 March 2001).

As we discuss below, the Appellate Body of the WTO has had to respond to a number of important constituencies that are crucial not only to the internal and external legitimacy and authority of the Appellate Body in applying WTO rules, but also to the WTO as an institution. The constituencies can be divided into two camps: the first consists of delegates from the WTO membership (possibly supported by WTO Secretariat staff), who are the guardians of the multilateral trading system and are looking for clear economic guidelines in applying WTO legal rules; the second constituency is made up of civil society, comprising a loose group of non-governmental organisations ('NGOs'), industry representatives, organised labour and academics, together with public opinion at large. This second group's interests and values are concentrated in policy areas relating to health and safety, and its members are often fearful that such policies may be subordinated to the application of trade rules by mid-level, faceless decision makers in Geneva.²

The Appellate Body's ruling on procedural issues in *EC — Asbestos* ultimately frustrated both of these constituencies.³ However, it appears to have been more successful in navigating its way between the two with respect to the substantive aspect of its ruling, by balancing the economic interests of the first constituency with the health-protection concerns that exist among the second constituency. It is our contention that, given the limits within which the Appellate Body can operate, the ruling in *EC — Asbestos* may still be hailed as a minor improvement in the WTO's attempt to balance the objects of trade liberalisation with the freedom of governments to pursue legitimate domestic policy objectives such as health protection. Arguably this trend towards a new-found sensitivity on the part of the WTO has continued with the adoption of the *Declaration on the TRIPS Agreement and Public Health* at the Doha WTO Ministerial Conference, which affirms the right of WTO members to ensure access to essential medicines in the interests of public health protection.⁴

This extended case note provides a background to *EC — Asbestos* and a summary of the facts of the dispute between Canada and the European Communities ('EC'). It is then divided into three further sections. The first covers the procedural and systemic issues in *EC — Asbestos*, with a focus on the WTO's handling of amicus curiae ('friend of the court') briefs during the proceedings. The second discusses the substantive issues of the dispute with a particular focus on the way in which the Appellate Body in *EC — Asbestos* used 'likeness', within the meaning of article III:4 of the *General Agreement on*

² For a discussion of this issue, see, eg, Robert Howse and Elisabeth Tuerk, 'The WTO Impact on Internal Regulations: A Case Study of the Canada-EC Asbestos Dispute' in Gráinne de Búrca and Joanne Scott, *The EU and the WTO: Legal and Constitutional Issues* (2001) 283, 304. Howse and Tuerk's comments on the different constituencies were inspired by Joseph Weiler, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement' (2001) 35 *Journal of World Trade* 191.

³ As Petros Mavroidis points out, the Appellate Body's handling of the amicus curiae issue in *EC — Asbestos* 'managed to alienate all of the WTO constituency: the WTO members, the NGOs and some of us who continue to write on WTO issues': Petros Mavroidis, 'Amicus Curiae Briefs before the WTO: Much Ado About Nothing' (Working Paper No 02/01, Jean Monnet Program, 2001) 10.

⁴ WTO Ministerial Conference, *Declaration on the TRIPS Agreement and Public Health*, adopted on 14 November 2000, WTO Doc WT/MIN(01)/DEC/2 (20 November 2001).

Tariffs and Trade ('GATT'),⁵ as a criterion for the protection of workers' health and safety. The final section draws together the main findings and conclusions from the case.

II BACKGROUND TO *EC — ASBESTOS*

While the history of the use by humans of asbestos goes back several thousand years, its use in industrial contexts dates from the discovery of asbestos deposits in the Urals and the Canadian province of Quebec in the latter half of the 19th century, barely 150 years ago.⁶ Notwithstanding its relatively short life span as an industrial product, the catastrophic health effects of asbestos have been known for more than a century. Many countries, particularly industrial nations where high-quality statistical data is available, are witnessing a steadily rising death toll from asbestosis, lung cancer, pleural cancer (mesothelioma) and pneumoconiosis as a result of human exposure to chrysotile asbestos.⁷ At the same time, many industry apologists continue to advocate safe usage through the 'controlled use' of asbestos and asbestos products.⁸

Increased protests from industry over the costs of asbestos removal, opposition from organised labour in support of workers' health and safety, fear from multinational corporations of costly lawsuits from asbestos victims⁹ and adverse public opinion generally has caused many countries in Western Europe and the United States either to stop producing asbestos¹⁰ or no longer import it.¹¹ Fierce opposition to asbestos use has grown in Europe and is particularly prevalent in France, where from the 1960s onwards trade unions have battled continued asbestos production by industrial giants such as Saint Gobain and

⁵ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3, 33 ILM 1125 (1994) (entered into force 1 January 1995), annex 1A (*General Agreements on Tariffs and Trade*), 1869 UNTS 190, 33 ILM 1154 (1994).

⁶ Laurent Vogel, 'Special Report, Asbestos Ban' (2001) 17 *Trade Union Technical Bureau Newsletter* 19, 19.

⁷ See International Programme on Chemical Safety, *Environmental Health Criteria No 203: Chrysotile Asbestos* (1998) [9.33] <<http://www.inchem.org/documents/ehc/ehc/ehc203.htm>> at 13 April 2002. In 1987 the World Health Organisation classed asbestos (and chrysotile) a Group 1 substance (carcinogenic to humans): International Association of Research on Cancer, *Overall Evaluation of Carcinogenicity to Humans* (2000) <<http://193.51.164.11/monoeval/crthgr01.html>> at 30 April 2002.

⁸ See, eg. Asbestos Institute, *Safe Use of Chrysotile Asbestos: A Manual on Preventive and Control Measures* <<http://www.asbestos-institute.ca/safemanual/content.html>> at 30 April 2002.

⁹ For the recent experience of English courts in dealing with asbestos victims' claims arising out of the mining and milling operations of the British-based multinational company Cape plc in South Africa, see Peter Muchlinski, 'Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Cases' (2001) 50 *International and Comparative Law Quarterly* 1.

¹⁰ In 1997 89 per cent of the world's production was concentrated in just six countries: Russia, Canada, Brazil, China, Zimbabwe and Kazakhstan: Robert Virta, 'Asbestos' in US Geological Survey, *Minerals Yearbook* (1997) <<http://minerals.usgs.gov/minerals/pubs/commodity/asbestos/070497.pdf>> at 30 April 2002.

¹¹ Current asbestos imports are largely to be found in the transition economy countries of Central and Eastern Europe and in many developing countries, although Japan is on record as the largest single consumer of asbestos. It is used variously in: (1) mining and milling; (2) processing into products (friction materials, cement pipes and sheets, gaskets, seals, paper and textiles); (3) construction, repair and demolition; and (4) transportation and disposal: International Association of Research on Cancer, above n 7, [1.3].

Eternit. The French Government's decision in 1996 to ban all forms of asbestos fibres and products containing asbestos fibres was fuelled by the experience in France, which has been mirrored elsewhere,¹² that technical problems inherent in the use of asbestos 'substitutes' have been underestimated and available epidemiological data indicates that no kind of asbestos can be considered safe.¹³

III THE FACTS OF THE DISPUTE BETWEEN CANADA AND THE EUROPEAN COMMUNITIES

The dispute before the WTO was founded in the words of the French *Décret no 96-1133 du 24 décembre 1996 relatif à l'interdiction de l'amiante, pris en application du code du travail et du code de la consommation* ('Decree'), which prohibits 'the manufacture, processing, sale, import, placing on the domestic market and transfer under any title whatsoever of all varieties of asbestos fibres' irrespective of 'whether these substances have been incorporated into materials, products or devices'.¹⁴ Article 2 of the *Decree* sets out a temporary exception for 'certain existing materials, products or devices containing chrysotile fibre when ... no substitute for that fibre is available' and, based on current scientific knowledge, 'poses a lesser occupational health risk than chrysotile fibre'. Further, this exception only applies if the technical safety guarantees required for the product's ultimate purpose are satisfied.¹⁵

Canada, as the complainant, did not contest the toxicity of asbestos, but maintained that chrysotile asbestos, the only form of the substance still allowed to be used in France, was safe in circumstances of properly controlled use and should not be banned outright. As one of the few remaining major producers and exporters of asbestos, Canada alleged that the French ban severely damaged its export trade in chrysotile asbestos and was protectionist in intent, as France itself permitted controlled use of domestically-produced asbestos for certain purposes.

¹² In Australia the National Occupational Health and Safety Commission ('NOHSC') issued a ban on the use of asbestos on 17 October 2001: see NOHSC, *National Model Regulations for Hazardous Substances* (2001), sch 2 <<http://www.nohsc.gov.au/OHSInformation/NOHSCPublications/fulltext/docs/h4/377.htm>> at 30 April 2002. The ban followed publication of a lengthy report by the National Industry Chemicals Notification and Assessment Service ('NICNAS') in February 1999: NICNAS, *Chemical Assessment Report: Priority Existing Chemical (PEC/9) — Chrysotile Asbestos* (1999) <<http://www.nicnas.gov.au/publications/CAR/PEC/PEC9/PEC9index.htm>> at 30 April 2002, and action by individual Australian states and territories, which has since received support from the Federal Government. It is scheduled to take effect by 31 December 2003.

¹³ See NOHSC, *Regulatory Impact Statement on the Proposed Phase Out of Chrysotile Asbestos*, [7.3.1] <<http://www.nohsc.gov.au/PDF/Standards/hazsubsChrysotileAsbestosRIS.pdf>> at 30 April 2002.

¹⁴ *Decree* (1996) 300 *Journal Officiel* 19126, art 1(I), reproduced in English in *Addendum to the Report of the Panel: EC — Asbestos*, WTO Doc WT/DS135/R/Add.1 (18 September 2000) annex I. Since the *Decree* does not apply to asbestos as waste, it is not caught by the provisions contained in the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, opened for signature 22 March 1989, 1673 UNTS 57, 28 ILM 649 (1989) (entered into force 5 May 1992).

¹⁵ The remaining provisions in the *Decree* deal with additional rules governing the grant of an exception, the imposition of penalties for violation of the prohibition in art 1 and the temporary exclusion of certain 'vehicles' and 'agricultural and forestry machinery' from the scope of the prohibition. For further information on the factual aspects of the dispute, see WTO Panel, *Report of the Panel: EC — Asbestos*, WTO Doc WT/DS135/R (18 September 2000) [2.1]–[2.7].

Canada claimed that the *Decree* infringed the provisions relating to technical regulations and standards set out in article 2 of the *Agreement on Technical Barriers to Trade* ('*TBT Agreement*'),¹⁶ violated the principle of non-discrimination found in the national treatment provision of article III of the *GATT*, and was contrary to the *GATT* prohibition on quantitative import restrictions.¹⁷ Canada also claimed that the French ban nullified or impaired comparative advantages accruing to Canada within the meaning of article XXIII:1(b) of the *GATT*.

The Panel in *EC — Asbestos* at first instance found that the 'prohibition' provision of the *Decree* was not covered by the *TBT Agreement* whereas the 'exceptions' in article 2 were covered.¹⁸ However, Canada had not made separate claims with respect to the *Decree*'s exceptions, and thus the Panel declined to examine their compatibility with the *TBT Agreement*.¹⁹ Nevertheless the Panel established a violation of the principle of differential national treatment (prohibited by article III:4 of the *GATT*), since the *Decree* specifically treated chrysotile asbestos fibre less favourably than 'like' substitute fibre, and products containing chrysotile asbestos fibre were treated less favourably than 'like' products containing substitute fibre.²⁰ The Panel found that the measure was justified on the grounds of human health in accordance with article XX(b) of the *GATT* and fulfilled the conditions set out in the chapeau of that same article.²¹ While this may have been the first time in *GATT*–WTO history that a human health exemption was found to justify a measure that is otherwise inconsistent with the *GATT*, it raised serious concerns with the health and environmental communities, not least because the Panel's 'like product' analysis effectively disregarded the fact that, unlike their substitutes, chrysotile asbestos fibres were potentially life-threatening.²² Although not dealt with in this case note, the Panel also determined that Canada had failed to establish that the *Decree* had subsequently nullified or impaired benefits that accrued to Canada in accordance with article XXIII:1(b) of the *GATT*.²³

On appeal, Canada sought to overturn the Panel's approval of the asbestos ban in the *Decree*,²⁴ whilst the EC cross-appealed the Panel's article III:4 finding

¹⁶ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3, 33 ILM 1125 (1994) (entered into force 1 January 1995), annex 1A (*Agreement on Technical Barriers to Trade*), 1868 UNTS 120. The *TBT Agreement* specifically requires, inter alia, that regulations, including a ban in this instance, be based upon the descriptive characteristics of products and not on their performance.

¹⁷ Above n 5, art XI.

¹⁸ WTO Panel, *Report of the Panel: EC — Asbestos*, WTO Doc WT/DS135/R (18 September 2000) [8.63], [8.70].

¹⁹ *Ibid* [8.72].

²⁰ *Ibid* [8.157]–[8.158].

²¹ *Ibid* [8.223], [8.240].

²² *Ibid* [8.127]–[8.132].

²³ *Ibid* [8.304].

²⁴ WTO Panel; *Report of the Panel: EC — Asbestos*, WTO Doc WT/DS135/R (18 September 2000); Canada, *EC — Asbestos: Notification of an Appeal by Canada under Paragraph 4 of Article 16 of the DSU*, WTO Doc WT/DS135/8 (23 October 2000) ('*Notice of Appeal*'); WTO Appellate Body, *Report of the Appellate Body: EC — Asbestos*, WTO Doc WT/DS135/AB/R (12 March 2001) [10]–[22].

with respect to ‘like products’.²⁵ Canada also contested the Panel’s finding that the *Decree* was not a regulation under the *TBT Agreement*,²⁶ and the Panel’s findings with respect to article XX(b) of the *GATT*.²⁷ Before considering the substantive issues with respect to human health and safety raised by the Appellate Body decision in *EC — Asbestos*, we first consider a preliminary procedural issue which goes to the heart of the emerging debate on democracy and legitimacy in the WTO trading system. This procedural issue is especially acute in the WTO dispute settlement system, where only states are permitted to bring complaints²⁸ and there is no procedure for the submission of amicus curiae briefs that might be capable of injecting a broader range of social issues into the multilateral trading system.

IV PROCEDURAL AND SYSTEMIC ISSUES: THE APPELLATE BODY AND AMICUS CURIAE BRIEFS

One of the most controversial issues during *EC — Asbestos* proceedings was the question of whether the Panel and/or the Appellate Body could accept unsolicited submissions or amicus curiae briefs from sources other than WTO members. At stake was the WTO dispute resolution system’s internal and external authority. Internally, the question was whether individual organs of the WTO dispute settlement system, such as a Panel or the Appellate Body, could be considered as independent from the WTO members. Externally, the question was whether the WTO dispute settlement system was capable of fostering transparency and accommodate public sensitivity by acknowledging viewpoints from circles of influence outside of international trade and economics. While civil society groups clamoured for more transparency in the WTO system and greater access to the dispute resolution process, WTO members were increasingly alarmed by the incursion of non-members (indeed non-states) into *their* process, especially since many NGOs among the civil society coalition were among those simultaneously resisting increased international economic liberalisation. Ultimately, as we set out below, the Appellate Body managed to maintain and even enhance its legitimacy and authority, albeit at the cost of frustrating both the WTO’s membership and the NGOs concerned with the organisation’s impact.

²⁵ WTO Panel, *Report of the Panel: EC — Asbestos*, WTO Doc WT/DS135/R (18 September 2000) [8.101]–[8.158]; WTO Appellate Body, *Report of the Appellate Body: EC — Asbestos*, WTO Doc WT/DS135/AB/R (12 March 2001) [30]–[35].

²⁶ WTO Panel, *Report of the Panel: EC — Asbestos*, WTO Doc WT/DS135/R (18 September 2000) [8.34]–[8.72]; *Notice of Appeal*, above n 24; WTO Appellate Body, *Report of the Appellate Body: EC — Asbestos*, WTO Doc WT/DS135/AB/R (12 March 2001) [10]–[17].

²⁷ WTO Panel, *Report of the Panel: EC — Asbestos*, WTO Doc WT/DS135/R (18 September 2000) [8.160]–[8.240]; Canada, *EC — Asbestos: Notice of Appeal*, WTO Doc WT/DS135/8 (23 October 2000) 1–2; WTO Appellate Body, *Report of the Appellate Body: EC — Asbestos*, WTO Doc WT/DS135/AB/R (12 March 2001) [18]–[22].

²⁸ However, WTO members with a ‘substantial interest’ in the dispute may intervene: *Marrakesh Agreement Establishing the World Trade Organization*, 1867 UNTS 3, 33 ILM 1125 (1994) (entered into force 1 January 1995), annex 2 (*Understanding on Rules and Procedures Governing the Settlement of Disputes*) 1869 UNTS 401, 33 ILM 1226 (1994) (‘DSU’).

A Background to the Amicus Curiae Issue

The Appellate Body first established the practice of admitting submissions from NGOs in the case of *United States — Import Prohibition of Certain Shrimp and Shrimp Products* ('*Shrimp/Turtle*'),²⁹ where it held that WTO Dispute Settlement Panels have the right to consider such submissions³⁰ (overturning the Panel's overly limited view of its own powers³¹). Over the course of several decisions, the Appellate Body expanded and clarified this principle to include non-parties' and non-members' briefs, whether submitted as part of a member's brief or unsolicited to the WTO, at either panel or Appellate Body levels.³² However, over the course of these decisions the WTO dispute settlement system has proved itself immune to the charms of amicus curiae, having ignored nearly all the factual and legal arguments set forth in the briefs that came before it.

In *Shrimp/Turtle* the Appellate Body ruled that a 'panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, *whether requested by a panel or not*.'³³ In so doing, it based its decision partly on article 13.1 of the *DSU*, whereby a panel has 'the right to seek information and technical advice from any individual or body which it deems appropriate.'³⁴ The Appellate Body's interpretation of the right to seek information, which it perceived as a broad mandate to accept unsolicited information, has been criticised by some WTO members and academics, but overall this expansion of panels' authority seems necessary to maintain the legitimacy of WTO panels as judicial bodies. The acceptability of panels' use of amicus curiae briefs has also been enhanced by their conservative approach in respect of such briefs. Furthermore, WTO panels have (to a large extent) dealt with amicus curiae briefs in consultation with the parties to the dispute at hand, although article 13 of the *DSU* does not require such deference.

The *Shrimp/Turtle* decision was also the first instance in which the Appellate Body articulated its own right to receive unsolicited amicus curiae submissions. In a proceeding involving a preliminary ruling, the Appellate Body chose 'to accept for consideration' a brief submitted by a coalition of environmental NGOs

²⁹ WTO Appellate Body, *Report of the Appellate Body: United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R (12 October 1998).

³⁰ *Ibid* [89].

³¹ WTO Panel, *Report of the Panel: Shrimp/Turtle*, WTO Doc WT/DS58/R (15 May 1998) [7.8].

³² For a detailed discussion of the history of amicus curiae submissions to the WTO, see Georg Umbrecht, 'An "Amicus Curiae Brief" on Amicus Curiae Briefs at the WTO' (2001) 4 *Journal of International Economic Law* 773 and Mavroidis, above n 3.

³³ WTO Appellate Body, *Report of the Appellate Body: Shrimp/Turtle*, WTO Doc WT/DS58/AB/R (12 October 1998) [108] (emphasis in original).

³⁴ *DSU*, above n 28, art 13.1. The Appellate Body also relied on the inherent discretionary powers entrusted to panels under art 11 ('a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements'), art 12:1 ('Panels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute') and art 12:2 ('Panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process'). WTO Appellate Body, *Report of the Appellate Body: Shrimp/Turtle*, WTO Doc WT/DS58/AB/R (12 October 1998) [105–107].

led by the Center for International Environmental Law.³⁵ Although the Appellate Body promised in its preliminary ruling to explain its authority for receiving such a submission, its final ruling did not provide any explanation of this nature.³⁶ This was possibly due to the criticism that was levelled at the Appellate Body's ruling by the parties to the dispute and equally strong disapproval from the general membership of the WTO.³⁷

The Appellate Body finally set out its rationale for accepting amicus curiae briefs in its decision in *United States — Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* ('US — Carbon Steel'), where it cited article 17.9 of the *DSU* as authority for the creation of working procedures in areas that have been left unaddressed by the *DSU*.³⁸ However, the Appellate Body's argument for doing this is not so clear-cut from the text of the *DSU* alone. Whereas article 13.1 of the *DSU* explicitly grants panels the authority 'to seek' information (however that is interpreted), no such provisions are taken up in the *DSU* with respect to the Appellate Body, and certainly not in the article cited by the Appellate Body. Instead, article 17.9 of the *DSU* simply states that '[w]orking procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the [Dispute Settlement Body] and the Director-General, and communicated to the Members for their information.' It is clear that the Appellate Body considered itself to have wide latitude in setting its own regulations regarding procedural issues, since WTO members' approval is not required.

On the other hand, it is not clear that the acceptance of amicus curiae briefs is solely a procedural matter, given the serious issues of members' rights and the institutional balances that are involved. There is no evidence to suggest that the Appellate Body engaged in the consultation envisaged by article 17.9 of the *DSU* prior to its acceptance of amicus curiae briefs in *US — Carbon Steel*. It should also be pointed out that in 1997, when the Appellate Body promulgated the procedural rules for appellate review in the WTO dispute settlement system, it did not refer to amicus curiae briefs at all.³⁹ Nevertheless the Appellate Body in *US — Carbon Steel* did invoke rule 16(1) of its *Working Procedures for Appellate Review*⁴⁰ (in a footnote to its argument) as additional authority for accepting amicus curiae briefs.⁴¹

³⁵ WTO Appellate Body, *Report of the Appellate Body: Shrimp/Turtle*, WTO Doc WT/DS58/AB/R (12 October 1998) [83].

³⁶ Arthur Appleton, 'Amicus Curiae Submissions in the Carbon Steel Case: Another Rabbit from the Appellate Body's Hat?' (2000) 3 *Journal of International Economic Law* 691, 693.

³⁷ Ibid.

³⁸ WTO Appellate Body, *Report of the Appellate Body: US — Carbon Steel*, WTO Doc WT/DS138/AB/R (10 May 2000) [39].

³⁹ Appleton, above n 36, 695.

⁴⁰ WTO Appellate Body, *Working Procedures for Appellate Review*, WTO Doc WT/AB/WP/3 (28 February 1997). Rule 16(1) allows the Appellate Body to deal with a 'procedural question [that] arises that is not covered by these Rules' by adopting 'an appropriate procedure for the purposes of that appeal only, provided that it is not inconsistent with the *DSU*, the other covered agreements and these Rules.'

⁴¹ WTO Appellate Body, *Report of the Appellate Body: US — Carbon Steel*, WTO Doc WT/DS138/AB/R (10 May 2000) fn 33.

B EC — Asbestos and the Amicus Curiae Submissions

In *EC — Asbestos*, the Panel received a total of five amicus curiae briefs. Whilst hearing the case, the Panel received four amicus curiae submissions from, inter alia, the Collegium Ramazzini, the Ban Asbestos (International and Virtual) Network, Instituto Mexicano de Fibro-Industrias AC and the American Federation of Labor and Congress of Industrial Organizations ('AFL-CIO').⁴² The EC ultimately appended the submissions from the Collegium Ramazzini and the AFL-CIO to its own brief, and as such they were given the same treatment as any other brief submitted by one of the parties to the dispute.⁴³ The Panel exercised its discretion in summarily rejecting the other two, giving no explanation for its action.⁴⁴ A fifth amicus curiae brief, from Only Nature Endures, an organisation based in India, was submitted one year later in June 2000, but the Panel decided that it was too late in the proceedings to consider the views contained in the submission.⁴⁵

On appeal, the Appellate Body asked the parties and third parties to state how they wanted to address the issue of amicus curiae submissions. The parties indicated their disapproval of amicus curiae submissions in general by stating that any procedure for allowing such interventions should be made by the WTO membership. Brazil, one of the third parties, also expressed this view. With respect to the other two WTO members intervening as third parties in *EC — Asbestos*, the US signalled its support for the inclusion of NGO amicus curiae briefs, whilst Zimbabwe simply stated that it had no reason for rejecting them.⁴⁶

It was in this context that the Appellate Body, on 8 November 2000, circulated its *Additional Procedure Adopted under Rule 16(1) of the Working Procedures for Appellate Review* ('Additional Procedure'),⁴⁷ designed to regulate amicus curiae submissions by non-parties to the Appellate Body for the appeal in *EC — Asbestos*. The *Additional Procedure* set out a number of criteria for applications to submit briefs.⁴⁸ The obvious implication (at least for NGOs)

⁴² WTO Panel, *Report of the Panel: EC — Asbestos*, WTO Doc WT/DS135/R (18 September 2000) [6.1].

⁴³ Ibid [6.3], [8.12].

⁴⁴ Ibid [6.3].

⁴⁵ Ibid [6.4].

⁴⁶ WTO Appellate Body, *Report of the Appellate Body: EC — Asbestos*, WTO Doc WT/DS135/AB/R (12 March 2001) [50].

⁴⁷ WTO Appellate Body, *EC — Asbestos: Additional Procedure*, WTO Doc WT/DS135/9 (8 November 2000). The *Additional Procedure* was communicated to the parties and third parties in *EC — Asbestos* on 7 November 2000. The following day, the Chairman of the Appellate Body, Florentino Feliciano, informed the Chairman of the Dispute Settlement Body in writing of the *Additional Procedure* adopted and the procedure was circulated to WTO members.

⁴⁸ The first four procedural requirements in the *Additional Procedure* dealt with: (1) the deadline for submission (eight days were given for leave to file a written brief); (2) the format of the submission, which had to be in writing and no longer than three typed pages; (3) the content, which required a description of the applicant, including its legal status, activities, and financing; and (4) the requirement that the applicant announce any relationship, 'financial or otherwise', with any of the parties or third parties to the dispute. Two other requirements of the *Additional Procedure* were substantive. Firstly, the Appellate Body called for applicants to explain their interest in the appeal and to identify the specific legal issues they intended to address from among those set out in the *Notice of Appeal* filed by Canada (Canada, *EC — Asbestos: Notice of Appeal*, WTO Doc WT/DS135/8 (23

was that the Appellate Body would provide the opportunity to file *amicus curiae* briefs to all those who met these simple requirements. For NGOs, the development of the *Additional Procedure* must have seemed like a glimpse of the pearly gates and the near-fulfilment of their promised entry to the previously forbidden heights of international legal and economic authority. To most of the members of the WTO on the other hand, the *Additional Procedure* suggested that the gates had been thrown wide open and that the barbarians were about to rush into the city on the hill.⁴⁹

The Appellate Body initially received 13 submissions from asbestos industry groups.⁵⁰ These were not in accordance with the *Additional Procedure* (in fact, most of them were submitted before the *Additional Procedure* was promulgated) and were returned with instructions on how to resubmit. Only one (the Korea Asbestos Association) did so — presumably the others decided that they could not satisfy the requirements of the *Additional Procedure* (the most likely stumbling block may have been the requirement of financial independence from parties to the dispute). However, once the *Additional Procedure* was in place, the Appellate Body received another 17 applications for submissions of *amicus curiae* briefs. Six missed the deadline and were rejected;⁵¹ 11 others arrived on time and in accordance with the *Additional Procedure* and thus could have expected a serious response from the Appellate Body.⁵² The quality of the applications submitted varied widely. At one end of the spectrum, an application from the American Public Health Association barely merited half a page and did

October 2000)). Secondly, the Appellate Body required that applicants should demonstrate why their *amicus curiae* submission would be desirable in ‘the interests of achieving a satisfactory settlement of the matter at issue’ and that it was not repetitive of any submission made by a party or third party to the dispute: WTO Appellate Body, *Report of the Appellate Body: EC — Asbestos*, WTO Doc WT/DS135/AB/R (12 March 2001) [52].

⁴⁹ Mavroidis, above n 3, 4–5, 8–9.

⁵⁰ The *amici curiae* tendering submissions at this stage are named in the Appellate Body’s Report: WTO Appellate Body, *Report of the Appellate Body: EC — Asbestos*, WTO Doc WT/DS135/AB/R (12 March 2001) fn 30; see also Geert Zonnekeyn, ‘The Appellate Body’s Communication on *Amicus Curiae* Briefs in the *Asbestos* Case: An Echternach Procession’ (2001) 35 *Journal of World Trade* 553, 559.

⁵¹ WTO Appellate Body, *Report of the Appellate Body: EC — Asbestos*, WTO Doc WT/DS135/AB/R (12 March 2001) [55], fn 31.

⁵² These included submissions from academics: Professor Robert Howse (University of Michigan, US), the Centro de Estudios Comunitarios (Universidad Nacional de Rosario, Argentina), the Australian Centre for Environmental Law (Australian National University) and Associate Professor Jan McDonald and Mr Don Anton (Australian National University); asbestos and chemical industry groups: the Korea Asbestos Association, the European Chemical Industry Council (Belgium) and a joint application submitted by the International Council on Metals and the Environment (US) and the American Chemistry Council; public health organisations: the Occupational and Environmental Diseases Association (UK) and the American Public Health Association; and civil society and environmental groups: Only Nature Endures (India), and a joint application submitted by the Foundation for International Environmental Law and Development (UK), the International Ban Asbestos Secretariat (UK), Ban Asbestos (International and Virtual) Network (France), World Wide Fund for Nature, International (Switzerland), Center for International Environmental Law (Switzerland), Greenpeace International (The Netherlands) and the Lutheran World Federation (Switzerland) (collectively ‘the group applicants’): WTO Appellate Body, *Report of the Appellate Body: EC — Asbestos*, WTO Doc WT/DS135/AB/R (12 March 2001), fns 32–3.

not explain how it intended to address the legal issues raised on appeal.⁵³ At the other end of the spectrum were detailed applications, such as those from Professor Howse⁵⁴ and the joint application made on behalf of a number of NGOs,⁵⁵ which outlined the nature of the proposed briefs and the manner in which they differed from the parties' submissions and would therefore aid in the resolution of the dispute.

What followed next was somewhat extraordinary. On 16 November 2000 each of the applicants received an identically worded, two-paragraph letter reading: 'your application ... has been denied for failure to comply sufficiently with all the requirements set forth in paragraph 3 of the Additional Procedure'.⁵⁶ Since most of the applications had arrived at WTO headquarters in Geneva just a day or two previously, the response from the Appellate Body suggested that the members had spent little time considering the applications. Subsequently, two of the applicants asked the Appellate Body Secretariat for a clarification of the decision⁵⁷ but the response was no more illuminating than the original rejection. However, the Appellate Body Secretariat did promise that it would provide an explanation for its actions in its substantive decision on the *EC — Asbestos* appeal.⁵⁸

Not surprisingly, labour and public health organisations, which had hoped to intervene in the WTO's deliberations regarding asbestos protested, with the WWF describing the Appellate Body's decision thus: 'What the WTO gave with one hand, it took with the other.'⁵⁹ These groups were incensed that the Appellate Body had first put in place a procedure to admit amicus curiae briefs, and then refused to entertain their submission, a decision taken with such haste

⁵³ Letter from Mohammad Akhtar, Executive Director, American Public Health Association to Debra Steger, Director, WTO Appellate Body Secretariat, 15 November 2000 <http://www.ibas.btinternet.co.uk/Frames/f_alpha_app.htm> at 30 April 2002. Similarly the Letter from Nancy Tait, Executive Director, Occupational and Environmental Disease Association (UK) to Debra Steger, Director, WTO Appellate Body Secretariat, *Request for Permission to Make an Amicus Submission by Nancy Tait*, 14 November 2000 <http://www.ibas.btinternet.co.uk/Frames/f_oeda_app.htm> at 30 April 2002, was better suited to addressing factual issues raised at the Panel stage.

⁵⁴ Letter from Professor Robert Howse to the WTO Appellate Body, *Application to File a Written Brief, Pursuant to Appellate Body Special Procedure, WT/DS/135/9*, 10 November 2000 <http://www.ibas.btinternet.co.uk/Frames/f_howse_html.htm> at 30 April 2002.

⁵⁵ Letter from the group applicants to the WTO Appellate Body, *Application to File a Written Brief with the Appellate Body* <http://www.ibas.btinternet.co.uk/Frames/f_group_app.htm> at 30 April 2002.

⁵⁶ Letter from the WTO Appellate Body to the group applicants, *Decision Pursuant to the Additional Procedure Adopted under Rule 16(1) of the Working Procedures for Appellate Review*, 16 November 2000 <http://www.ibas.btinternet.co.uk/Frames/f_wto_rejection.htm> at 30 April 2002.

⁵⁷ Letter from Jacob Werksman, Acting Director, Foundation for International Environmental Law and Development and Matthew Stilwell, Managing Attorney, Center for International Environmental Law, to the WTO Appellate Body, 21 November 2000 <http://www.ibas.btinternet.co.uk/Frames/f_wto_question.htm> at 30 April 2002.

⁵⁸ Letter from Debra Steger, Director, WTO Appellate Body Secretariat, to Jacob Werksman, Acting Director, Foundation for International Environmental Law and Development, 27 November 2000 <http://www.ibas.btinternet.co.uk/Frames/f_wto_enq_response.htm> at 30 April 2002.

⁵⁹ Aimee Gonzales, Senior Policy Advisor, WWF, International in Center for International Environmental Law, *A Court without Friends?: One Year After Seattle, The WTO Slams the Door on NGOs*, Press Release (November 2000).

as to appear to undermine the fundamental principle of due process. It was also a dismal response on the part of a WTO organ to calls for greater transparency in the dispute settlement system. In the absence of an adequate response from the Appellate Body, observers were free to draw their own conclusions about the motivation for the Appellate Body's behaviour from another significant source — the very public anger of the WTO membership about the Appellate Body's decision to issue the *Additional Procedure* in the first place.

The extreme displeasure of a broad constituency of WTO members (with the exception of the US) at the unwanted and uninvited appearance of civil society groups in the global trading system stemmed from the apparently privileged position that the amicus curiae submission process appeared to afford them. It seemed that NGOs and asbestos industry groups could be granted *locus standi* to submit briefs in WTO dispute settlement proceedings at any time, whereas WTO members could only intervene as parties or third parties. Finally, the Appellate Body's attempt to assert an independent role for itself, in making a decision on what it perceived to be a procedural matter, while crucial as a step in the development of a genuine legal order in the sphere of international trade, alarmed some members already worried about the loss of sovereignty under the WTO regime.

One week after the Appellate Body posted the *Additional Procedure* on the WTO website, the representative of Egypt, on behalf of the Informal Group of Developing Countries (and supported by industrialised members), called an extraordinary meeting of the WTO General Council, which took place on 22 November 2000 with a single item on the agenda — the question of amicus curiae submissions.⁶⁰ The near unanimity in the membership's dissatisfaction with the Appellate Body's handling of such briefs⁶¹ is perhaps best summed up by the Egyptian representative's statement that 'the decision that had been taken went far beyond the Appellate Body's mandate and powers'.⁶² The special meeting of the WTO General Council served as a very public rebuke of the Appellate Body's approach — one could even go so far as to say that the WTO faced its first constitutional crisis over the amicus curiae issue.

C Follow-Up to the Amicus Curiae Submissions Question

When the Appellate Body finally handed down its decision in *EC — Asbestos*, the amicus curiae question merited only cursory attention. Contrary to the Appellate Body's promise, it did not deal with why it had rejected all the applications for submission of amicus curiae briefs. Instead, in a brief review of the amicus curiae issue under the heading 'Preliminary Procedural Manner', it

⁶⁰ WTO General Council, *General Council, 22 November 2000: Proposed Agenda*, WTO Doc WT/GC/W/423 (20 November 2000).

⁶¹ WTO General Council, *Minutes of Meeting Held in Centre William Rappard on 22 November 2000*, WTO Doc WT/GC/M/60 (23 January 2001).

⁶² Ibid [12]. Joining Egypt's sentiments, if not all its arguments, were Argentina, Australia, Bolivia, Brazil, Canada, Chile, Colombia (on behalf of the Andean countries), Costa Rica, Cuba, Hong Kong, Hungary (on its own behalf and that of Bulgaria, the Czech Republic, Latvia, Romania, the Slovak Republic and Slovenia), India, Jamaica, the Republic of Korea, Mexico, New Zealand, Norway, Pakistan, Panama, Singapore (on behalf of the Association of South East Asian Nations), Switzerland, Tanzania, Turkey, Uruguay and Zimbabwe.

provided a factual account of the *Additional Procedure* and the rejection of the applications received.⁶³

The Appellate Body was hardly more forthcoming in advancing the debate about the source of its authority to issue the *Additional Procedure* and to entertain amicus curiae briefs in the first place. The Appellate Body did not rely on article 17.9 of the *DSU*, but instead emphasised that it had acted pursuant to rule 16(1) of the *Working Procedures for Appellate Review*, in what it considered to be an eminently suitable manner for the handling of possible submissions.⁶⁴ However, the Appellate Body was at pains to point out that this *Additional Procedure* was ‘for the purposes of this appeal only’,⁶⁵ thereby seeking to mitigate the criticism it had received from the WTO membership over the creation of new procedural rules, a task that normally resides with the WTO membership exercised through the General Council.

The Appellate Body’s sparse reasoning failed to convince some WTO observers,⁶⁶ and alienated the civil society groups for its perceived cavalier treatment of their submissions. Even so, the Appellate Body managed to stave off a further confrontation with WTO members by emphasising that this was a case-specific, ad hoc procedure. This move may even have preserved the submission of amicus curiae briefs in the future, at least certainly through the already established procedures in the dispute settlement system; that is, by parties appending, and thereby incorporating, an amicus curiae brief to their own submissions.

D *Lessons from the Amicus Curiae Debacle in EC — Asbestos*

For many, the WTO has come to represent the public face of economic globalisation, and as such has faced more than its fair share of public criticism. *EC — Asbestos* was significant because it forced this fledgling international economic organisation to face the impact of global trade rules on the protection of occupational health and safety, a domain normally reserved for sovereign governments, rather than faceless, unelected functionaries. The WTO’s most visible and significant response to this public criticism has been its initial attempts to try and open up its dispute settlement system (‘the jewel in the crown of the Uruguay Round’)⁶⁷ to civil society and its activist representatives, mostly in the form of NGOs. The role of the Appellate Body in creating and fostering this trend cannot be overestimated — unlike the panels, which are mostly populated by former diplomats and trade official, the Appellate Body is composed of world-class jurists with a strong understanding of issues of international legitimacy and the necessity of accountability. The WTO’s treatment of civil society and its amicus curiae submissions is even more

⁶³ WTO Appellate Body, *Report of the Appellate Body: EC — Asbestos*, WTO Doc WT/DS135/AB/R (12 March 2001) [50]–[57].

⁶⁴ *Ibid* [50].

⁶⁵ *Ibid* [51] (emphasis in original).

⁶⁶ See, eg, the trenchant arguments raised by Umbricht, above n 32, 785–90.

⁶⁷ As described by Pascal Lamy, the EU’s Commissioner for Trade: Pascal Lamy, European Institute, ‘New Round or No Round: Prospects for Resolving Transatlantic Disputes and Liberalising Trade’ (2000) <<http://www.eurunion.org/news/speeches/2000/001102pl.htm>> at 30 April 2002.

important when it is considered that other international and regional trade dispute resolution bodies take their cue from the WTO.⁶⁸

The Appellate Body addressed the countervailing pressures in *EC — Asbestos* by adopting a cautiously progressive stance. It reiterated its independent authority by establishing a process whereby civil society groups could contribute to the dispute resolution process. At the same time, it mollified criticism from member states by rejecting all the proffered submissions. Although this outcome pleased neither side entirely, it does ensure that civil society groups will have access to future WTO disputes while maintaining the organisation's focus on international economic law. One commentator has described the Appellate Body's *EC — Asbestos* ruling regarding amicus briefs as three steps forward, two steps backward.⁶⁹ We generally agree with that characterisation, as it indicates that the WTO has moved one step forward in its ability to address important social questions in the context of trade and economic disputes. It is likely that the *EC — Asbestos* decision will one day be heralded as a modest but significant victory for civil society and the rule of law in international affairs.

V SUBSTANTIVE ISSUES: THE APPELLATE BODY ON OCCUPATIONAL HEALTH AND SAFETY

EC — Asbestos is not the first time that the WTO has been confronted with health and safety issues. In many ways, *European Communities — Measures Concerning Meat and Meat Products (Hormones)* ('*Beef Hormones*')⁷⁰ is the case nonpareil on this point. *Beef Hormones* dealt with the potential health and food safety risks arising from natural and synthetic growth hormones in foodstuffs. The case arose in the context of a ban imposed by the EC on the sale of hormone-injected beef and the EC's use of measures that differed from the voluntary international standards proposed by the Codex Alimentarius Commission of the UN Food and Agriculture Organisation. In the same way as Canada sought to challenge the French ban on asbestos used in construction materials, which poses a serious risk to workers' health and safety, in *Beef Hormones* the US sought to challenge the EC's ban on beef injected with growth hormones (which pose a potential risk to human health). The extent to which the WTO has been successful in balancing the freedom of governments to pursue

⁶⁸ See, eg, NAFTA Ch 11 Arbitral Tribunal, *Methanex Corporation v United States*, Decision of the Tribunal on Petitions from Third Persons to Intervene as Amicus Curiae (15 January 2001); the Arbitral Tribunal holding that it could allow amicus curiae briefs from non-parties by explicit reference to WTO practice. See also Zonnekeyn, above n 50, 561–2.

⁶⁹ Zonnekeyn, above n 50, 553.

⁷⁰ WTO Panel, *Report of the Panel: Beef Hormones — Complaint by the United States*, WTO Doc WT/DS26/R/USA; WTO Panel, *Report of the Panel: Beef Hormones — Complaint by Canada*, WT/DS48/R/CAN (18 August 1997) and WTO Appellate Body, *Report of the Appellate Body: Beef Hormones*, WTO Docs WT/DS26/AB/R and WT/DS48/AB/R (16 January 1998). For an analysis of *Beef Hormones* with respect to the reach of the *Agreement on the Application of Sanitary and Phytosanitary Measures* (Marrakesh Agreement Establishing the World Trade Organization, opened for signature 15 April 1994, 1867 UNTS 3, 33 ILM 1125 (1994) (entered into force 1 January 1995), annex 1A (*Agreement on the Application of Sanitary and Phytosanitary Measures*), 1867 UNTS 493 ('SPS Agreement')) into areas of domestic policy-making and its impact on human rights protection (in particular the right to development), see Anne Orford, 'Globalization and the Right to Development' in Philip Alston (ed), *Peoples' Rights* (2001) 127, 157–67.

legitimate health policy objectives with the need to further trade liberalisation may be tested yet again when it comes to genetically modified organisms ('GMOs') and the potential and unknown risks they may pose to the health and welfare of both humans and animals.⁷¹ Before turning to analyse the way in which the Appellate Body handled this balancing act in *EC — Asbestos*, we briefly examine the application of the *TBT Agreement* to this dispute.

A *Application of the TBT Agreement in EC — Asbestos*

Canada was successful in persuading the Appellate Body to reverse the Panel's findings that the *TBT Agreement* did not apply to the French *Decree*. At the Panel stage, the EC made the unusual claim that since the *Decree* contained an outright ban, it was not a technical regulation within the meaning of the *TBT Agreement*;⁷² that a measure banning a product is not the same as a measure which specifies its characteristics. The Panel agreed with the defendant, but in order to accept the EC's viewpoint, it had to divide the *Decree* into two parts — one banning asbestos, the other providing for certain limited exceptions — and thus ended up with two separate measures.

The Appellate Body considered that the *Decree* must be examined as 'an integrated whole, taking into account ... the prohibitive and the permissive elements that are part of it'.⁷³ In its view, the exceptions in the *Decree* would be rendered meaningless unless they were allowed to operate in conjunction with the ban. The Appellate Body also rejected the idea that because the *Decree* banned asbestos outright, it did not describe the product's characteristics within the meaning of the *TBT Agreement*. In particular, if the measure consisted only of a prohibition on asbestos fibres, it might not constitute a 'technical regulation', but since there is no known use for asbestos fibres in their mineral form, the 'regulation of asbestos can *only* be achieved through the regulation of products that contain asbestos fibres'.⁷⁴

Even so, the Appellate Body declined to complete the analysis under the *TBT Agreement* (that is, to apply a legal interpretation as corrected to the Panel's findings and conclusions in *EC — Asbestos*), whereas it has not shied away from this practice in other cases in order to facilitate the prompt settlement of a dispute.⁷⁵ Its reasons for not doing so were fourfold. First, the *TBT Agreement* constitutes a 'specialized legal regime that applies solely to a limited class of measures' and consequently it imposes obligations for members 'that seem to be

⁷¹ On 18 February 2002 the European Commission released its proposal on regulating cross-border movement of GMOs that is aimed at implementing the provisions of the *Cartagena Protocol on Biosafety to the Convention on Biological Diversity*, opened for signature 15 May 2000, 39 ILM 1027 (2000) (not yet in force), in European Community law: European Commission, *Proposal for a Regulation of the European Parliament and of the Council on the Transboundary Movement of Genetically Modified Organisms*, COM (2002), Final, 85.

⁷² Specifically it did not fulfil the definition in the *TBT Agreement*, above n 16, annex 1.1.

⁷³ WTO Appellate Body, *Report of the Appellate Body: EC — Asbestos*, WTO Doc WT/DS135/AB/R (12 March 2001) [64].

⁷⁴ *Ibid* [72] (emphasis in original).

⁷⁵ *Ibid* [78]. The Appellate Body provided a complete list, as of the ruling in *EC — Asbestos*, of all the other cases in which the Appellate Body has modified the Panel's reasoning or, following modification, has applied its own interpretation of the legal provisions at issue to the facts of the case: *ibid* fn 48.

different from, and additional to, the obligations imposed on members under the GATT'.⁷⁶ Second, the Panel had not made any findings on the *TBT Agreement*, and it had not previously been the subject of any interpretation or application by panels or the Appellate Body.⁷⁷ Third, there were no 'issues of law or legal interpretation' that could be reviewed within the meaning of article 17.6 of the *DSU*.⁷⁸ Finally, the sufficiency of the facts on the record depended upon the reach of the *TBT Agreement* provisions, as yet undetermined.⁷⁹

A proper interpretation of the *TBT Agreement* must be left to a future case, perhaps one involving foodstuffs with labelling and traceability requirements in respect of GMOs.⁸⁰ It seems almost certain, based upon the first reason given by the Appellate Body, that the *TBT Agreement* imposes obligations which are different from those under article III:4 of the *GATT*. We will have to wait for an interpretation of article 2.2 of the *TBT Agreement*, which arguably goes further than article III of the *GATT* in calling upon WTO members to ensure that 'technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade', and that they not be more trade-restrictive than necessary to fulfil a legitimate objective. In its third-party submission in *EC — Asbestos*, the US conceded that prima facie article 2 of the *TBT Agreement* employs a similar test to article XX of the *GATT*. Notwithstanding this, the US distinguished the test as nonetheless very different.⁸¹ When invoking article 2.2 of the *TBT Agreement*, the complainant will have the task of making a prima facie case of demonstrating that the measure creates an unnecessary barrier to trade. However, in the case of article XX of the *GATT*, the burden of proof is reversed and the defendant must make a prima facie case that the measure was not arbitrary nor unjustifiably discriminatory, and that it did not constitute a disguised restriction on trade.

⁷⁶ Ibid [80] (emphasis in original).

⁷⁷ Ibid [81]–[83].

⁷⁸ Ibid [82]–[83].

⁷⁹ Ibid [81]–[83].

⁸⁰ A dispute between the US and the EC over the question of GMOs is pending, as a result of the *Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the Deliberate Release into the Environment of Genetically Modified Organisms and Repealing Council Directive 90/220/EEC*, (2001) OJ (L 106). Prior to the adoption of the *Directive*, a number of European Union member states had declared a de facto moratorium on GMO foods and feedstuffs, which has still not been lifted. The *Directive* contains one of the world's strictest GMO regulations, including subjecting new approval of GMOs to strict environmental risk assessments, including long-term cumulative effects of GMOs on human health, the environment and the food/feed chain, together with full traceability of GMO products at every stage of the marketing process and labelling of all GMO products and could be contested at the WTO in the same way as the ban on asbestos. The EC's *Proposal for a Regulation of the European Parliament and of the Council Concerning the Traceability and Labelling of Genetically Modified Organisms and Traceability of Food and Feed Products Produced from Genetically Modified Organisms and Amending Directive 2001/18/EC* was notified to the WTO Committee on Technical Barriers to Trade in WTO Doc G/TBT/N/EEC/7 (30 August 2001) and WTO Doc G/TBT/N/EEC/7/Add.1 (31 October 2001), and to the WTO Committee on Sanitary and Phytosanitary Measures in WTO Doc G/SPS/N/EEC/150 (14 February 2002) and WTO Doc G/SPS/N/EEC/155/Add.1 (2 April 2002).

⁸¹ WTO Appellate Body, *Report of the Appellate Body: EC — Asbestos*, WTO Doc WT/DS135/AB/R (12 March 2001) [47].

B 'Likeness' as a Criterion for the Protection of Workers' Health and Safety

Having dispensed with the *TBT Agreement* argument, the Appellate Body proceeded to reverse the Panel's finding that chrysotile asbestos fibres and its substitutes (PVA, cellulose and glass fibres, collectively labelled 'PCG fibres') were all 'like products' under article III:4 of the *GATT*. The Appellate Body based its decision on the notion that a health risk may constitute a legitimate factor in determining 'likeness'.⁸² This marks a departure from the 'general exceptions' case law of article XX of the *GATT*, where exemptions have been sought in order to revalidate what would otherwise have been *GATT*-inconsistent measures. Instead, the Appellate Body in *EC — Asbestos* boldly introduced the idea that not only can a health risk determine 'likeness', but that it is also intimately bound up with what constitutes 'less favourable treatment' in article III: 4 of the *GATT*.

1 Determination of 'Likeness' and its Relationship to 'Less Favourable Treatment'

In its cross-appeal, the EC argued that the Panel had erred in its interpretation and application of the 'like products' concept in article III:4 of the *GATT*, since it had not considered the health risks associated with chrysotile asbestos fibres. First, the Appellate Body recalled, as it had done in *Japan — Taxes on Alcoholic Beverages* ('*Japan — Alcoholic Beverages*'),⁸³ that article III:1 of the *GATT* contains the general anti-protectionist principle which 'informs' the remaining provisions in that article, including paragraph 4.⁸⁴

Second, it proceeded to distinguish the concept of 'likeness' in *Japan — Alcoholic Beverages* from that in *EC — Asbestos*.⁸⁵ Whereas article III:2 of the *GATT* contains two 'distinct obligations', one in respect of 'like products', the other in respect of 'directly competitive or substitutable products', article III:4 of the *GATT* merely speaks of 'like products', into which should be read the general anti-protectionist principle of the first paragraph.⁸⁶ Thus 'given the textual difference between Articles III:2 and III:4, the "accordion" of "likeness" stretches in a different way in Article III:4'.⁸⁷

Third, the Appellate Body acknowledged that for protectionism to exist at all, the measure challenged under article III:4 of the *GATT* must address imported and domestic products that are in a 'competitive relationship'; domestic products in such a relationship could be affected by treatment that is 'less favourable' to imports.⁸⁸ We believe that the Appellate Body, in its first full interpretation of

⁸² Ibid [113], [126].

⁸³ WTO Appellate Body, *Report of the Appellate Body: Japan — Alcoholic Beverages*, WTO Doc WT/DS8/AB/R, WTO Doc WT/DS10/AB/R and WTO Doc WT/DS11/AB/R (4 October 1996) 18.

⁸⁴ WTO Appellate Body, *Report of the Appellate Body: EC — Asbestos*, WTO Doc WT/DS135/AB/R (12 March 2001) [93].

⁸⁵ Ibid [94]–[96].

⁸⁶ Ibid [94] (emphasis in original).

⁸⁷ Ibid [96].

⁸⁸ Ibid [99]. In that same paragraph, the Appellate Body was of the view that the scope of 'like', as used in art III:4, is broader than 'like', as used in first sentence of art III:2, although it is not broader than the combined scope of 'like' and 'directly competitive or substitutable', as used in the first two sentences of art III:2.

‘like products’ under article III:4 of the *GATT*, has introduced a subtle nuance. The mere existence of a competitive relationship between imported and domestic products is not enough; instead the issue of ‘likeness’ turns on the kind of relationship that exists — a qualitative judgment that ultimately lies in the hands of the relevant decision-maker. Only once this has been established is it possible to analyse whether differential treatment of ‘like products’ amounts to ‘less favourable treatment’ of imported products relative to domestic products.

Fourth, by way of obiter, the Appellate Body admitted that its general observations on ‘likeness’ may result in ‘a relatively broad product scope’ for article III:4 of the *GATT* (although no broader than in article III:2 of the *GATT*).⁸⁹ However, it believed that its interpretation was tempered by the second element in that same article whereby the complainant ‘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’ on a case-by-case basis.⁹⁰

In *EC — Asbestos* the Appellate Body no longer needed to apply the concept of ‘less favourable treatment’, because it had already reversed the Panel’s ruling that the chrysotile asbestos fibres and PCG fibres, were ‘like’ products, thereby making further analysis unnecessary. However, the rationale behind the ruling in *EC — Asbestos* may prove significant for other ‘like product’ analyses in future WTO jurisprudence, even where there is no discernible risk to human or animal welfare, but simply where different processes have been used in the manufacturing stages.⁹¹ Even so, the extent to which this might occur in practice may be limited by the specific, case-by-case application of the ‘likeness’ test in article III:4 of the *GATT*. The Appellate Body also adopted the same case-specific approach with respect to the criteria to be applied in determining ‘likeness’, to which we now turn our attention.

2 *Applicable Criteria in Determining ‘Likeness’: Health Protection*

In determining the ‘likeness’ of chrysotile asbestos fibres and PCG fibres, in comparison to products containing chrysotile asbestos and products containing PCG fibres, the Panel and the Appellate Body relied upon the three criteria for determining ‘likeness’ elaborated by an earlier *GATT* Working Party Report on Border Tax Adjustments.⁹² These were the properties, nature and quality of the product, the end-uses of the product, and consumers’ tastes and habits, with the

⁸⁹ This obiter dictum has caused considerable academic debate: see, eg, The Jean Monnet Workshop Newsgroup No 5 <<http://www.jeanmonnetprogram.org/wwwboard/index5.html>> at 30 April 2002.

⁹⁰ WTO Appellate Body, *Report of the Appellate Body: EC — Asbestos*, WTO Doc WT/DS135/AB/R (12 March 2001) [100] (emphasis in original).

⁹¹ See Howse and Tuerk, above n 2, 297–8 for some discussion with respect to the product–process debate and internal regulations consistent with national treatment.

⁹² GATT Working Party, *Report of the Working Party on Border Tax Adjustments*, BISD 18th Supp 97 (2 December 1970), cited in WTO Appellate Body, *Report of the Appellate Body: Japan — Alcoholic Beverages*, WTO Doc WT/DS8/AB/R, WTO Doc WT/DS10/AB/R and WTO Doc WT/DS11/AB/R (4 October 1996) [113].

addition of customs classification as a fourth criterion.⁹³ The Appellate Body noted that the four general criteria, or ‘groupings of potentially shared characteristics, provide a framework for analyzing “likeness” of particular products on a case-by-case basis’, but that they are not treaty-mandated ‘nor do they constitute a closed list of criteria that will determine the legal characterization of products’.⁹⁴ Indeed, a panel needs to consider ‘*all* of the pertinent evidence’, since each of the four criteria addresses a different aspect of the products involved.⁹⁵ The Appellate Body then proceeded to correct the Panel’s errors.

Having stated the criteria correctly, the Appellate Body was of the view that

the Panel should have examined the evidence relating to *each* of those four criteria and, then, weighed *all* of the evidence, along with other relevant evidence, in making an *overall* determination of whether products at issue could be characterized as ‘like’.⁹⁶

It issued a stern rebuke of the way in which the Panel had reached a conclusion on ‘likeness’ after having only examined the first of the four criteria, namely the properties, nature and quality of the products. Besides adopting a ‘market access’ approach to this first criterion, the Panel had ignored the fact that an examination of the physical properties of chrysotile asbestos fibres and PCG fibres should not be confused with an examination of their end-uses, in particular the fact that products with quite different physical properties may in some situations be capable of performing similar or identical end-uses.⁹⁷

The Appellate Body then turned to address the EC’s contention that an inquiry into the physical properties of a product may also include the risks posed to human health. The Appellate Body was 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*, although it does not say exactly why this should be so.⁹⁸ Taking its cue from the Panel’s own findings in *EC — Asbestos*,⁹⁹ the Appellate Body considered that carcinogenicity or toxicity constituted ‘the defining aspect of the physical properties of chrysotile asbestos fibres’. Since, on the evidence, PCG fibres did not share those properties to the same extent, this highly significant difference had to be taken into a consideration in determining ‘likeness’.¹⁰⁰ Additionally, the Panel had considered that health considerations could not be brought into a determination of ‘likeness’ under article III:4 of the *GATT* since there would be no place for the

⁹³ WTO Panel, *Report of the Panel: EC — Asbestos*, WTO Doc WT/DS135/R (12 March 2001) [8.103], [8.112]–[8.116]; WTO Appellate Body, *Report of the Appellate Body: EC — Asbestos*, WTO Doc WT/DS135/AB/R (12 March 2001) [109].

⁹⁴ WTO Appellate Body, *Report of the Appellate Body: EC — Asbestos*, WTO Doc WT/DS135/AB/R (12 March 2001) [102].

⁹⁵ *Ibid* (emphasis in original).

⁹⁶ *Ibid* [109] (emphasis in original).

⁹⁷ *Ibid* [110]–[112].

⁹⁸ *Ibid* [113].

⁹⁹ WTO Panel, *Report of the Panel: EC — Asbestos*, WTO Doc WT/DS135/R (18 September 2000) [8.220].

¹⁰⁰ WTO Appellate Body, *Report of the Appellate Body: EC — Asbestos*, WTO Doc WT/DS135/AB/R (12 March 2001) [114].

exception to ordinary *GATT* obligations found under article XX(b) of the *GATT*.¹⁰¹ The Appellate Body disagreed with the Panel because, in its view, the two articles contain distinct *GATT* provisions, each of which must be interpreted independently.

Turning to the second and third criteria, namely ‘end-uses’ and ‘consumers’ tastes and habits’, the Appellate Body emphasised their importance in determining likeness, given the focus of article III:4 of the *GATT* on ‘competitive relationships in the marketplace’.¹⁰² The Panel had erred in not adequately examining all the evidence relating to end-uses, because it had only focused on a few similar end-uses for which the chrysotile asbestos fibres were substitutable.¹⁰³

More strikingly, in its failure to examine consumers’ tastes and habits, the Panel had overlooked the possibility 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’.¹⁰⁴ Acknowledging the fact that the initial consumer or user is likely to be a manufacturer who incorporates the chrysotile asbestos or PCG fibres into other products (such as cement based construction products or brake linings) did not mean that the manufacturer was ignorant of the risks posed by a particular product, nor of the effects that it might have on the ultimate consumer or purchaser. Products that pose a risk to human health could lead to product liability claims, or add to the cost of ensuring adequate safety procedures in the manufacture of those products, both of which bring additional costs and will undoubtedly influence the manufacturer’s decisions in the market place.¹⁰⁵ In conclusion, the Appellate Body also took note of the fourth criterion determining likeness — tariff classification — and observed that chrysotile asbestos fibres and PCG fibres all had different tariff classifications.¹⁰⁶

The Appellate Body then proceeded to ‘complete the analysis’ of all the relevant determinative criteria and to apply them to both product groups. It found that the evidence suggested that chrysotile asbestos fibres and various PCG fibres were *not* ‘like products’ for the purposes of article III:4 of the *GATT*.¹⁰⁷ Similarly, cement-based products containing chrysotile asbestos fibres are not ‘like’ cement-based products containing PCG fibres.¹⁰⁸ Moreover, Canada as

¹⁰¹ The relevant exception in art XX(b) of the *GATT*, above n 5, to ordinary obligations refers to measures that are ‘necessary to protect human, animal or plant life or health’.

¹⁰² WTO Appellate Body, *Report of the Appellate Body: EC — Asbestos*, WTO Doc WT/DS135/AB/R (12 March 2001) [117].

¹⁰³ *Ibid* [119].

¹⁰⁴ *Ibid* [122].

¹⁰⁵ *Ibid*. In a concurring statement at [149]–[154], one member of the Appellate Body objected to the Appellate Body’s failure to characterise definitively the chrysotile asbestos fibres as *not* ‘like’ PCG fibres at [114]. In his view there was nothing in the evidence

relating to economic competitive relationships as reflected in end-uses and consumers’ tastes and habits that could outweigh and set at naught the undisputed deadly nature of the chrysotile asbestos fibres ... and thereby compel a characterization of ‘likeness’: at [152].

¹⁰⁶ *Ibid* [140].

¹⁰⁷ *Ibid* [141].

¹⁰⁸ *Ibid* [147].

complainant had failed to meet its burden of proof in establishing 'likeness' for the purposes of article III:4 of the *GATT*.¹⁰⁹

C *The Health Exemption in Article XX(b) of the GATT*

As Canada had failed to demonstrate less favourable treatment of 'like products' and thus any violation of article III:4 of the *GATT*, the Appellate Body could have applied the principle of judicial economy and decided not to rule on Canada's challenge to the Panel's finding that the French ban was justified under article XX(b) of the *GATT* on the grounds that it was a measure that was 'necessary to protect human ... life or health'. However, using this occasion as an opportunity to elaborate further upon earlier article XX case law,¹¹⁰ the Appellate Body addressed the relationship between the measure (the French *Decree* containing the ban) and the objective of article XX(b), deliberating whether the measure was 'necessary' in order to achieve the public policy goal of protecting human health.

First, the Appellate Body upheld the Panel's finding that the measure banning chrysotile cement products in the *Decree* was aimed at protecting human life or health within the meaning of article XX(b) of the *GATT*. In so doing, it determined that 'the Panel remained well within the bounds of its discretion'. The Appellate Body recognised that when it comes to asbestos, the four scientific experts which the Panel had consulted all concurred that chrysotile asbestos and chrysotile-cement products pose a risk to human health.¹¹¹ This is in addition to the acknowledgment since 1977 by various international scientific and technical bodies of the carcinogenic nature of chrysotile asbestos fibres.

Second, in addressing the Canadian arguments regarding the requirement of necessity in article XX(b) of the *GATT*, the Appellate Body made it clear that, as in the case of the *SPS Agreement* and its application in *Beef Hormones*, there is no requirement under this article to *quantify* the risk to human life or health; rather, a risk may be evaluated in either quantitative or qualitative terms.¹¹² As to the level of protection chosen by France, the Appellate Body noted that WTO members 'have the right to determine the level of protection of health that they consider appropriate in a given situation'.¹¹³ In response to the Canadian argument that PCG fibres might also pose a health risk, the Appellate Body stated that it is 'perfectly legitimate for a Member to seek to halt the spread of a

¹⁰⁹ Ibid [148].

¹¹⁰ For an overview of *GATT*/WTO practice with respect to art XX of the *GATT*, see WTO Committee on Trade and Environment, *GATT/WTO Dispute Settlement Practice Relating to Article XX, Paragraphs (b), (d) and (g) of GATT: Note from the Secretariat — Revision*, WTO Doc WT/CTE/W/53/Rev.1 (26 October 1998) and WTO Committee on Trade and Environment, *GATT/WTO Dispute Settlement Practice Relating to Article XX, Paragraphs (b), (d) and (g) of GATT: Note from the Secretariat — Corrigendum*, WTO Doc WT/CTE/W/53/Rev.1/Corr.1 (30 November 1998).

¹¹¹ WTO Appellate Body, *Report of the Appellate Body: EC — Asbestos*, WTO Doc WT/DS135/AB/R (12 March 2001) [162].

¹¹² WTO Appellate Body, *Report of the Appellate Body: EC — Asbestos*, WTO Doc WT/DS135/AB/R (12 March 2001) [167]; see also WTO Appellate Body, *Report of the Appellate Body: Beef Hormones*, WTO Doc WT/DS26/AB/R and WTO Doc WT/DS48/AB/R (16 January 1998) [186].

¹¹³ WTO Appellate Body, *Report of the Appellate Body: EC — Asbestos*, WTO Doc WT/DS135/AB/R (12 March 2001) [168].

highly risky product while allowing the use of a less risky product in its place.’¹¹⁴

Finally, the Appellate Body addressed the Canadian argument that ‘controlled use’ was reasonably available to France as a less trade-restrictive alternative to actually placing a ban on asbestos, thereby rendering the measure *not* ‘necessary’ within the meaning of article XX(b). With reference to its earlier decision in *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, in which it addressed the issue of ‘necessity’,¹¹⁵ the Appellate Body was of the view that one aspect of the weighing and balancing process, in determining whether a WTO-consistent alternative measure is reasonably available, was the extent to which that alternative contributes to the realisation of the end pursued, as well as the more vital or important common interests of the value pursued.¹¹⁶

In *EC — Asbestos*, the objective of the measure was 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. Since no value is higher than the basic right to life and health, there could be no reasonably available alternative to the ban and ‘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”’.¹¹⁷ This would have effectively prevented France from achieving its chosen level of health protection. The ‘controlled use’ argument was finally laid to rest when the Appellate Body agreed with the Panel that, in general, the efficacy of this principle remains to be demonstrated, and is ‘particularly doubtful for the building industry and for DIY enthusiasts, which are the most important users of cement-based products containing chrysotile asbestos’.¹¹⁸

Once again the Appellate Body showed considerable sensitivity to domestic policy making in the field of health protection, even deferring to states in their determination of the level of risk and the appropriateness of their regulatory regimes to address such risks. The Appellate Body’s pronouncements on article XX(b) of the *GATT* are thus not without significance and simply add to its earlier ruling on health protection as a criteria for determining likeness in article III:4 of the *GATT*.

VI CONCLUSION

While the WTO has come to represent the face of economic globalisation and has had to face a fair share of criticism for its lack of democracy and legitimacy both internally and externally, *EC — Asbestos* goes some way towards redressing this imbalance. The decision navigates the course between the trade liberalisation constituency and the civil society constituency referred to at the beginning of this case note. In respect of the trade liberalists, it takes note of the

¹¹⁴ Ibid.

¹¹⁵ WTO Appellate Body, *Report of the Appellate Body: Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO Doc WT/DS161/AB/R and WTO Doc WT/DS169/AB/R (11 December 2000) [166].

¹¹⁶ WTO Appellate Body, *Report of the Appellate Body: EC — Asbestos*, WTO Doc WT/DS135/AB/R (12 March 2001) [172].

¹¹⁷ Ibid [174] (emphasis in original).

¹¹⁸ Ibid.

'economic' framework in applying article III:4 of the *GATT* and continues the Appellate Body's interpretation and application of the national treatment principle. This can only enhance the Appellate Body's own authority.

In relation to civil society, it demonstrates that when analysing 'likeness' within the 'economic' framework, broader human interests such as health protection may be taken into account. In order to prevent an excessively broad application of this analysis, which could lead to charges of protectionist intent, the determination of what constitutes a 'like product' and its interrelationship with what is 'less favorable treatment' provides the basis for the decision as to whether the domestic regulation is consistent with the national treatment obligation.¹¹⁹ The most significant point in *EC — Asbestos* is that henceforth a health risk may constitute a legitimate factor in determining 'likeness' under article III:4 of the *GATT*.

However, we believe that the above comments must be set against the following facts. First, the Appellate Body avoided delivering a principled ruling, instead carefully crafting its main findings on a case-by-case basis, leaving a number of issues undecided. But, as Howse and Tuerk suggest, this may be the only way in which the WTO can resolve such competing values as health protection and free trade, which cannot be 'contested in any simple or straightforward way'.¹²⁰

Second, when it comes to internal legitimacy, the ruling in *EC — Asbestos* afforded the WTO the opportunity to set some clear limits on the ability of members to use product bans as a means of protecting the health of their citizens. Ironically, the high scientific understanding of the hazards of asbestos use may make it difficult to justify zero-risk-tolerance policies toward products whose hazardous nature is less well understood. In effect, by accepting a ban on chrysotile asbestos fibre and products containing chrysotile asbestos (products with a fairly low international trade value), the WTO could discourage bans on other products whose hazards are not as well known as those of asbestos.

Lastly, on the issue of external legitimacy, the Appellate Body has attempted to respond to public criticism about the WTO's intrusiveness into areas of social policy by theoretically supporting the right of members to use bans and zero-risk-tolerance toward public health threats, while striking down such policies in practice.¹²¹ A decision against Canada allowed the WTO to articulate its support for the sovereignty of its members and the interests of civil society at fairly minimal cost to the principles of international trade liberalisation. Had the WTO not accepted a ban on asbestos (one of the most widely studied carcinogens), then it is difficult to imagine what type of import restriction would have survived WTO scrutiny. It may be harder to do the same with respect to GMOs or other hazardous products such as chemicals and pesticides.

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¹¹⁹ See Howse and Tuerk, above n 2, 305.

¹²⁰ Ibid 306.

¹²¹ See, eg, WTO Appellate Body, *Report of the Appellate Body: Beef Hormones*, WTO Doc WT/DS26/AB/R and WTO Doc WT/DS48/AB/R (16 January 1998).

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