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EUROPEAN COMMUNITIES – MEASURES AFFECTING ASBESTOS AND ASBESTOS-CONTAINING PRODUCTS

AB-2000-11

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WORLD TRADE ORGANIZATION
APPELLATE BODY

European Communities – Measures Affecting Asbestos and Asbestos-Containing Products

Canada, *Appellant/Appellee*
European Communities, *Appellant/Appellee*

Brazil, *Third Participant*
United States, *Third Participant*

AB-2000-11

Present:

Feliciano, Presiding Member
Bacchus, Member
Ehlermann, Member

I. Introduction

1. Canada appeals certain issues of law and legal interpretations developed in the Panel Report in *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* (the "Panel Report").[1] The Panel was established to consider claims made by Canada regarding French Decree No. 96-1133 concerning asbestos and products containing asbestos (*décret no. 96-1133 relatif à l'interdiction de l'amiante, pris en application du code de travail et du code de la consommation*) ("the Decree"), which entered into force on 1 January 1997.[2]

2. Articles 1 and 2 of the Decree set forth prohibitions on asbestos and on products containing asbestos fibres, followed by certain limited and temporary exceptions from those prohibitions:

Article 1

> I. For the purpose of protecting workers, and pursuant to Article L. 231-7 of the Labour Code, the manufacture, processing, sale, import, placing on the domestic market and transfer under any title whatsoever of all varieties of asbestos fibres shall be prohibited, *For ----------4.25 re f 0.151041 T1r t4.5 11.25 T10conso9 Tc 0 Tw1*

II. For the purpose of protecting consumers, and pursuant to Article L. 221.3 of the Consumer Code, the manufacture, import, domestic marketing, exportation, possession for sale, offer, sale and

impaired advantages accruing to Canada directly or indirectly under the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*"), or impeded the attainment of an objective of that Agreement.[4]

4. In the Panel Report, circulated to WTO Members on 18 September 2000, the Panel concluded that:

> (a) … the "prohibition" part of the Decree does not fall within the scope of the TBT Agreement. The part of the Decree relating to "exceptions" does fall within the scope of the TBT
>
> September

6. On 23 October 2000, Canada notified the Dispute Settlement Body (the "DSB") of its decision to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to Article 16.4 of the *Understanding on Rules and Procedures*

II. Arguments of the Participants and the Third Participants

A. *Claims of Error by Canada – Appellant*

1. *TBT Agreement*

10. Canada requests that the Appellate Body reverse the Panel's findings and conclusions on the definition of the term "technical regulation", hold that the Decree as a whole falls within the scope of the *TBT Agreement*, and find that the Decree is inconsistent with paragraphs 1, 2, 4 and 8 of Article 2 of the *TBT Agreement*.

11. Canada asserts that the Panel erred in law in failing to examine Canada's allegations under the *TBT Agreement*. The Panel wrongly split the Decree into two and considered the prohibitions and exceptions in the Decree to be separate measures for the purposes of determining whether the Decree is a technical regulation within the meaning of the *TBT Agreement*. Canada believes that the Panel's analysis is arbitrary, contrary to the internal coherence of the Decree, and allows the applicability of the *TBT Agreement* to be determined by the way in which a Member drafts its legislation.

12. Canada argues that the Panel also erred in its interpretation of the definition of "technical regulation" in Annex 1 to the *TBT Agreement*, in particular, in articulating two criteria that must be satisfied before a measure can be a "technical regulation": (i) the measure must concern identifiable products; and (ii) the measure must identify the technical characteristics that products must have to be marketed in the territory of the Member taking the measure. This interpretation adds requirements to the definition of "technical regulation" that have no basis in the text of the *TBT Agreement*, and are inconsistent with the object and purpose of that Agreement, namely to restrain non-tariff barriers to trade that may be disguised as technical regulations. In addition, with respect to the first criterion, requiring a measure to relate to identifiable products to constitute a technical regulation could lead to arbitrary results in practice. As for the second criterion, Canada alleges that it is too narrow and would exclude from characterization as "technical regulations", and thereby insulate from the disciplines of the *TBT Agreement*, measures regulating activities other than the marketing of products, such as measures relating to transportation of products, disposal of hazardous waste, and use of special equipment to repair certain products.

13. Canada challenges the Panel's conclusion that the *TBT Agreement* does not apply to a general prohibition like the one in the Decree. The Panel relied on a false distinction between general prohibitions, which it considered fall exclusively under the GATT 1994, and technical regulations, which are subject to the disciplines of the *TBT Agreement*. In fact, a technical regulation can have the effect on trade of a general prohibition.

14. Canada maintains that, had the Panel viewed the Decree as a unified measure, and correctly

threshold below which exposure does not constitute a risk for mesothelioma or lung cancer; (iv) the "Charleston study"[18]; (v) "statistical data" adduced by Dr. Henderson, which, according to the Panel, confirmed "the impact of chrysotile on mechanics exposed to that material in a car brake maintenance context" despite a contrary study on automobile brake maintenance relied on by Canada[19]; (vi) the use of the no-threshold linear relationship model as a basis for concluding that there is a "real risk" and "an undeniable public health risk" associated with exposure to chrysotile asbestos fibres at low or intermittent levels[20]; and (vii) data supplied by the European Communities concerning intermittent manipulation and a reference by Dr. Henderson to a Japanese study as a basis for concluding that the manipulation of chrysotile-cement using inappropriate tools could cause exposure levels above statutory limits.[21] Canada sets forth detailed explanations as to why none of these factors supports the Panel's conclusion.

20. Canada also contends that the Panel erred in its application of the test of "necessity" under Article XX(b) of the GATT 1994. Canada accepts the Panel's view that the extent of the risk to human health is relevant to the assessment of "necessity". However, Canada disputes that there is any risk involved in the manipulation of such products, highlights that the evidence relied on by the Panel certainly could not form the basis for a finding that the health risk was so high that it could justify strict measures, and argues that the Panel failed to comply with its obligation to quantify this type of risk. In Canada's view, these errors distorted the Panel's analysis of the test of necessity and led it to take a much too restrictive approach to its consideration of reasonably available alternatives to the Decree.

21.

adopted a measure establishing bans on specific products containing chrysotile asbestos fibres, based on demonstrations of the ineffectiveness and unfeasibility of the "controlled use" of each product.

22. Canada submits that the Panel failed to discharge its responsibility to make an objective assessment of the matter when it declined to take a position on the opinions expressed by the scientific community. For Canada, the principle of the balance of probabilities, or the preponderance of evidence, requires the trier of fact to take a position as to the respective weight of the evidence. Had the Panel properly applied this principle, it would not have been able to conclude that the Decree was justified under Article XX(b) of the GATT 1994, in view of the multiple studies submitted by Canada showing, for example, that there is no increased risk among garage and brake mechanics, or among construction workers, resulting from the manipulation of chrysotile asbestos. Canada adds that the Panel also failed to make an objective assessment of the matter before it because, in its determinations on the "controlled use" of chrysotile, it relied extensively on the opinions of the experts consulted, who in fact did not possess expertise in the area of "controlled use".

B. *Arguments of the European Communities – Appellee*

1. *TBT Agreement*

23. The European Communities urges the Appellate Body to reject Canada's appeal on the *TBT Agreement.* The Panel correctly concluded that the "prohibition part" of the Decree is not a technical regulation within the meaning of Annex 1.1 to the *TBT Agreement.* Canada's arguments with respect to the "exceptions part" of the Decree are legally irrelevant, since it would be impossible for the Appellate Body to complete the legal analysis due to the lack of sufficient and undisputed facts. The European Communities adds that the claims made by Canada under the *TBT Agreement* should, in any event, be denied.

24. The European Communities sees no error in the Panel's separation of the prohibitions part of the Decree from the exceptions part. The exceptions are ancillary to the prohibitionsu Tw 531 ee f8u6For 7n8,garag

exceptions throughout these proceedings, Canada cannot now argue that the exceptions violate the *TBT Agreement.* The European Communities argues that the Appellate Body is in any case prevented from addressing Canada's claims under the *TBT Agreement* because to do so would require the Appellate Body to make findings of a factual and technical nature which, in the absence of undisputed facts and findings in the record, it cannot do on appeal. The Appellate Body could not simply use the findings of the Panel under Articles III:4 and XX of the GATT 1994 as a basis for an analysis under the *TBT Agreement.* While the two sets of rules are related, they are not "part of a logical continuum"[22], and are not sufficiently closely related as to allow the Appellate Body to extrapolate the findings of the Panel under Article III:4 and Article XX(b) of the GATT 1994 into the sphere of the *TBT Agreement.* Should the Appellate Body examine Canada's claims under the *TBT Agreement*, the European Communities argues that these claims should be dismissed and refers, in this regard, to its arguments with respect to Article XX(b) of the GATT 1994, and to the arguments it made before the Panel with regard to Articles 2.1, 2.2, 2.4 and 2.8 of the *TBT Agreement.*

2. Article XX(b) of the GATT 1994 and Article 11 of the 11 of the 1994 and Annex 1 of

asbestos, as both arguments seek to have the Appellate Body revisit factual findings made by the Panel on the basis of the evidence submitted and the opinions advanced by the experts consulted.

29.

32. The European Communities submits that this erroneous focus on market access led the Panel to exclude from its "like" product analysis the very reason why the Decree singles out asbestos fibres, namely, the fact that asbestos fibres are carcinogenic. While Article III:4 protects expectations concerning the competitive relationship between imported and domestic products, the impact of a measure on such expectations is not relevant in determining "likeness", but only later in the Article III:4 analysis, for the purposes of establishing whether the measure discriminates between imported and domestic products. For the European Communities, the decisive criterion for determining the "likeness" of products must be whether the basis for the regulatory distinction between products denies to imported products the treatment accorded to domestic products that are the subject of the relevant measure.

33. The European Communities contends that, because the Panel ignored the basis for the regulatory treatment set forth in the Decree, it compared the wrong products in its analysis of "likeness". The Decree prohibits *all carcinogenic asbestos fibres*, and it denies competitive opportunities to all such fibres equally. Thus, the prohibited carcinogenic asbestos fibres are not "like" the three substitute fibres because the application of the French regulatory distinction between them does not alter or affect the competitive opportunities of those substitute fibres. The European Communities concludes that, instead of comparing the products claimed by Canada to be "like" products (PVA, cellulose and glass fibres) with the category of products prohibited by the French Decree at issue (all carcinogenic asbestos fibres), the Panel erroneously compared the allegedly "like" products with an arbitrary third category of products, namely "fibres with certain industrial applications". [23]

34. The European Communities challenges the Panel's conclusion that, in view of the relationship between Articles III and XX(b) of the GATT 1994, it is not appropriate to take the "risk" criterion into account either when examining the properties, nature and quality of the product, or when examining other criteria of "likeness". [24] The Panel found that the health, safety or other concerns that lead regulators to apply different treatment to products may *only* be taken into account in the analysis under Article XX, *not* in the analysis under Article III:4 of the GATT 1994. The Panel's approach misconstrues the relationship between Articles III:4 and XX of the GATT 1994, requires the "likeness" of two products to be determined solely on the basis of commercial factors and, in the view of the European Communities, entails a serious curtailment of national regulatory autonomy. If non-commercial considerations may only be considered at the Article XX stage of the analysis, then the list of policy purposes for which regulators may distinguish between products is unduly limited to the

[23]European Communities' other appellant's submission, para. 29.

[24]Panel Report, para. 8.132.

categories listed in Article XX. The application of a "risk" criterion in the analysis of "likeness" under Article III would not, as the Panel suggests, make the other criteria of "likeness" "totally redundant"[25], since all relevant criteria, including the "risk" criterion, must be considered in the assessment of "likeness".

35. The European Communities contends that the Panel committed a number of errors in its application of the four criteria used to assess "likeness", and placed excessive importance on the criterion of end-use. The Panel failed to follow the approach used in previous case law, and ignored the fact that Article III:4 of the GATT 1994, unlike Article III:2 and its accompanying Interpretive Note, does not contain the phrase "directly competitive or substitutable" products. The Panel's analysis of "end-use" is inadequately reasoned, in particular since the Panel failed to identify the small number of identical or similar end-uses for chrysotile asbestos, PVA, cellulose and glass fibres and ignored that, overall, the end-uses for asbestos and its substitutes are very different. The European Communities adds that the Panel relied on its conclusions on end-use in its analysis of the properties, nature and quality of the products, as well as their tariff classification, and, in effect disregarded these other criteria.

2. Article XXIII:1(b) of the GATT 1994

36. The European Communities appeals the Panel's findings on Article XXIII:1(b) of the GATT [illegible]

Article XXIII:1(b) of the GATT 1994 protects the expectation that, once a tariff concession has been made for a product, the regulatory framework applicable to that product will not be adapted in response to new scientific knowledge concerning health risks. In the view of the European Communities, the Panel's interpretation wrongly expanded the coverage of Article XXIII:1(b) in a manner that has grave systemic implications.

38. The European Communities urges the Appellate Body to reject, as a matter of legal principle, the possibility of finding nullification or impairment under Article XXIII:1(b) with respect to health and safety regulations, or with respect to measures that fall under any of the other grounds listed in Article XX, or under provisions such as Articles XIX and XXI of the GATT 1994. Article XXIII:1(b) cannot apply in cases involving health measures, since the legitimacy of an exporting Member's expectation that the health measure will not be taken cannot be assessed without examining the health measure itself and the balance of interests underlying that law. The participants in the Uruguay Round knew that the value of the concessions negotiated in that Round could be adversely affected by measures taken to protect, *inter alia*, human, animal or plant life or health, or a national security interest. Therefore, the European Communities concludes, if a Member takes a measure that is consistent with the GATT 1994, it does not disturb the balance of rights and obligations under the GATT 1994, and no redress is available under Article XXIII:1(b).

D. *Arguments of Canada – Appellee*

1. "Like Products" in Article III:4 of the GATT 1994

39. Canada requests the Appellate Body to dismiss the European Communities' appeal relating to Article III:4 of the GATT 1994. Canada is of the view that the Panel correctly separated the analysis of "likeness" from the issue of whether the competitive opportunities afforded to imports on the domestic market have been upset. In its appeal, the European Communities confounds these two distinct questions and attaches undue significance to the Panel's statement regarding the importance of "market access" under Article III:4 of the GATT 1994.

40. Canada considers that the Panel properly applied the criteria set out in the case law for determining whether products are "like". The European Communities appears to confuse the concept of "likeness" under Article III:4 of the GATT 1994 with "likeness" under Article III:2. "Likeness", however, under Article III:4 is different from, and broader than, "likeness" under the first sentence of Article III:2, and the Panel's approach properly reflects this distinction. In assessing the "likeness" of the fibres, the Panel recognized that the criteria of "properties" and "end-use" are interdependent, and analyzed them accordingly. Canada does not accept that the Panel created a hierarchy among the traditional "likeness" criteria, but, even so, this would not be an error of law, since "likeness" must be

2. Article XXIII:1(b) of the GATT 1994

43. Canada requests the Appellate Body to reject the European Communities' appeal with respect to Article XXIII:1(b) of the GATT 1994. Canada suggests, first, that the Appellate Body should apply the principle of judicial economy and refrain from ruling on these grounds of appeal. Canada argues that a ruling by the Appellate Body in respect of Article XXIII:1(b) of the GATT 1994 would not further the objective of dispute settlement, as set forth in Article 3.7 of the DSU, namely to secure a positive solution to a dispute. There is no dispute concerning Article XXIII:1(b) because neither party has appealed the Panel's conclusions on this issue. Canada also refers to Article 3.2 of the DSU and cautions the Appellate Body against "making law" by clarifying provisions of the *WTO Agreement* outside the context of resolving a particular dispute.[27]

44. Should the Appellate Body address the interpretation of Article XXIII:1(b) of the GATT 1994, Canada invites it to affirm the Panel's reasoning, in particular the Panel's recognition that there may be particularly exceptional cases in which a measure justified under Article XX(b) would nonetheless nullify or impair benefits within the meaning of Article XXIII:1(b). Article XX(b) and XXIII:1(b) may be applied simultaneously, since Article 26.1 of the DSU does not require the withdrawal of a measure that nullifies or impairs benefits within the meaning of Article XXIII:1(b). As regards the concept of legitimate expectations, Canada rejects as artificial, and without any textual basis, the distinction that the European Communities seeks to draw between pure trade measures and measures linked to the protection of health.

E. *Arguments of the Third Participants*

1. Brazil

(a) *TBT Agreement*

45. Brazil believes that the Panel erred in its findings regarding the scope of the *TBT Agreement.* Brazil argues that the Panel erred in dividing the Decree into two separate parts in determining whether the *TBT Agreement* applies to the Decree. This division was arbitrary and inconsistent with the logic and objectives of the Decree, which deals with the same products in both the prohibition and the exception parts. Furthermore, Brazil is particularly concerned by the findings of the Panel in paragraphs 8.38, 8.39, 8.43, 8.49, 8.57, 8.60, 8.61 and 8.71 of the Panel Report, and by the serious systemic implications of the finding that a general prohibition does not constitute a technical regulation within the meaning of Annex 1.1 of the *TBT Agreement.* Contrary to the Panel's

[27] Appellate Body Report,

interpretation, nothing in the *TBT Agreement* specifies that a product must be "identifiable", or that a measure must relate to one, or more than one product, in order to be a technical regulation. Such a narrow interpretation unduly excludes from the scope of the *TBT*

(b) "Like Products" in Article III:4 of the GATT 1994

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

Working Procedures, to deal with any possible submissions received from such persons. To this end, we invited the parties and the third parties in this appeal to submit their comments on a number of questions. These related to: whether we should adopt a "request for leave" procedure; what procedures would be needed to ensure that the parties and third parties would have a full and adequate opportunity to respond to submissions that might be received; and whether we should take any other points into consideration if we decided to adopt a "request for leave" procedure. On 3 November 2000, all of the parties and third parties responded in writing to our letter of 27 October. Canada, the European Communities and Brazil considered that issues pertaining to any such procedure should be dealt with by the WTO Members themselves. The United States welcomed adoption of a request for leave procedure, and Zimbabwe indicated that it had no specific reasons to oppose adoption of a request for leave procedure. Without prejudice to their positions, Canada, the European Communities and the United States each made a number of suggestions regarding any such procedure that might be adopted.

51. On 7 November 2000, and after consultations among all seven Members of the Appellate Body, we adopted, pursuant to Rule 16(1) of the *Working Procedures*, an additional procedure,

1. In the interests of fairness and orderly procedure in the conduct of this appeal, the Division hearing this appeal has decided to adopt, pursuant to Rule 16(1) of the *Working Procedures for Appellate Review*, and after consultations with the parties and third parties to this dispute, the following additional procedure for purposes of this appeal only.

2. Any person, whether natural or legal, other than a party or a third party to this dispute, wishing to file a written brief with the Appellate Body, must apply for leave to file such a brief from the Appellate Body *by noon* on *Thursday, 16 November 2000*.

3.

> 4. The Appellate Body will review and consider each application for leave to file a written brief and will, without delay, render a decision whether to grant or deny such leave.
>
> 5. The grant of leave to file a brief by the Appellate Body does not imply that the Appellate Body will address, in its Report, the legal arguments made in such a brief.
>
> 6. Any person, other than a party or a third party to this dispute, granted leave to file a written brief with the Appellate Body, must file its brief with the Appellate Body Secretariat *by noon* on *Monday, 27 November 2000*.
>
> 7. A written brief filed with the Appellate Body by an applicant granted leave to file such a brief shall:
>
> (a) be dated and signed by the person filing the brief;
>
> (b) be concise and in no case longer than 20 typed pages, including any appendices; and
>
> (c) set out a precise statement, strictly limited to legal arguments, supporting the applicant's legal position on the issues of law or legal interpretations in the Panel Report with respect to which the applicant has been granted leave to file a written brief.
>
> 8. An applicant granted leave shall, in addition to filing its written brief with the Appellate Body Secretariat, also serve a copy of its brief on all the parties and third parties to the dispute *by noon* on *Monday, 27 November 2000*.
>
> 9. The parties and the third parties to this dispute will be given a full and adequate opportunity by the Appellate Body to comment on and respond to any written brief filed with the Appellate Body by an applicant granted leave under this procedure. (original emphasis)

53. The Appellate Body received 13 written submissions from non-governmental organizations relating to this appeal that were not submitted in accordance with the Additional Procedure.[30] Several of these were received while we were considering the possible adoption of an additional procedure. After the adoption of the Additional Procedure, each of these 13 submissions was returned to its sender, along with a letter informing the sender of the procedure adopted by the Division hearing this

[30]Such submissions were received from: Asbestos Information Association (United States); HVL Asbestos (Swaziland) Limited (Bulembu Mine); South African Asbestos Producers Advisory Committee (South Africa); J & S Bridle Associates (United Kingdom); Associação das Indústrias de Produtos de Amianio Crisótilo (Portugal); Asbestos Cement Industries Limited (Sri Lanka); The Federation of Thai Industries, Roofing and Accessories Club (Thailand); Korea Asbestos Association (Korea); Senac (Senegal); Syndicat des Métallos (Canada); Duralita de Centroamerica, S.A. de C.V. (El Salvador); Asociación Colombiana de Fibras (Colombia); and Japan Asbestos Association (Japan).

appeal and a copy of the Additional Procedure. Only one of these associations, the Korea Asbestos Association, subsequently submitted a request for leave in accordance with the Additional Procedure.

54.

Procedure, an application from these organizations for leave to file a written brief in this appeal[33], we did not accept this brief.

IV. Issues Raised in this Appeal

58. This appeal raises the following issues:

(a) whether the Panel erred in its interpretation of the term "technical regulation" in Annex 1.1 of the *TBT Agreement* in finding, in paragraph 8.72(a) of the Panel Report, that "the part of the Decree relating to the ban on imports of asbestos and asbestos-containing products" does not constitute a "technical regulation";

(b) whether the Panel erred in its interpretation and application of the term "like products" in Article III:4 of the GATT 1994 in finding, in paragraph 8.144 of the Panel Report, that chrysotile asbestos fibres are "like" PVA, cellulose and glass fibres, and in finding, in paragraph 8.150 of the Panel Report, that cement-based products containing chrysotile asbestos fibres are "like" cement-based products containing polyvinyl alcohol, cellulose and glass fibres;

(c) whether the Panel erred in finding that the measure at issue is "necessary to protect human … life or health" under Article XX(b) of the GATT 1994, and whether, in carrying out its examination under Article (b) c a r 7 h r y 0 T c 4 . 0

60. In addressing this threshold issue, the Panel examined the nature and structure of the measure to assess how the *TBT Agreement* might apply to it. For this examination, the Panel decided that it would be appropriate to examine the measure in two stages. First, the Panel examined "the part of the Decree prohibiting the marketing of asbestos and asbestos-containing products"; next, the Panel analyzed the "exceptions" in the Decree.[34] The Panel concluded that the part of the Decree containing the prohibitions is *not* a "technical regulation", and that, therefore, the *TBT Agreement* does not apply to this part of the Decree.[35] However, the Panel also concluded that the part of the Decree containing the exceptions does constitute a "technical regulation", and that, therefore, the *TBT Agreement* applies to that part of the Decree. On this basis, the Panel decided not to examine Canada's claims under the *TBT Agreement* because, it said, those claims relate solely to the part of the Decree containing the prohibitions, which, in the Panel's view, does not constitute a "technical regulation", and, therefore, the *TBT Agreement* does not apply.[36]

61. In concluding that the part of the Decree containing the prohibitions is not a "technical regulation", the Panel found that:

> a measure constitutes a "technical regulation" if:
>
> (a) the measure affects one or more given products;
>
> (b) the measure specifies the technical characteristics of the product(s) which allow them to be marketed in the Member that took the measure;
>
> (c) compliance is mandatory.[37]

62. Canada appeals the Panel's finding that the *TBT Agreement* does not apply to the part of the Decree relating to the prohibitions on imports of asbestos and asbestos-containing products. According to Canada, the Panel erred in considering the part of the Decree relating to those prohibitions *separately* from the part of the Decree relating to the exceptions to those prohibitions, and, therefore, the Panel should have examined the Decree as a *single*, unified measure. Furthermore, Canada argues that the Panel erred in its interpretation of a "technical regulation", as defined in Annex 1.1 to the *TBT Agreement*, because, in Canada's view, a general prohibition can be a "technical regulation".

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[34]Panel Report, heading (a) on p. 404 and heading (b) on p. 411.

[35]*Ibid*., para. 8.72(a).

[36]*Ibid*., para. 8.72.

[37]*Ibid*., para. 8.57.

63. We start with the measure at issue. It is clear from Canada's request for the establishment of a panel that Canada's complaint concerns Decree 96-1133 as a whole.[38] The Decree, in essence, consists of prohibitions on asbestos fibres and on products containing asbestos fibres (Article 1), coupled with limited and temporary exceptions from the prohibitions for certain "existing materials, products or devices containing chrysotile fibre" (Article 2). The remaining operative provisions of the Decree contain additional rules governing the grant of an exception (Articles 3 and 4) and the imposition of penalties for violation of the prohibitions in Article 1 (Article 5). Furthermore, certain used "vehicles" and "agricultural and forestry machinery" are entirely excluded, until 31 December 2001, from certain aspects of the prohibitions in Article 1, namely, from the prohibitions on "possession for sale, offering for sale and transfer under any title" (Article 7).[39]

64. In our view, the proper legal character of the measure at issue cannot be determined unless the measure is examined as a whole. Article 1 of the Decree contains broad, general prohibitions on asbestos and products containing asbestos. However, the scope and generality of those prohibitions can only be understood in light of the exceptions to it which, albeit for a limited period, *permit*, *inter alia*, the use of certain products containing asbestos and, principally, products containing chrysotile asbestos fibres. The measure is, therefore, *not* a *total* prohibition on asbestos fibres, because it also includes provisions that *permit*, for a limited duration, the use of asbestos in certain

66. We turn now to the term "technical regulation" and to the considerations that must go into interpreting the term. Article 1.2 of the *TBT Agreement* provides that, for the purposes of this Agreement, the meanings given in Annex 1 apply. Annex 1.1 of the *TBT Agreement* defines a "technical regulation" as a:

> Document which lays down *product characteristics* or their related processes and production methods, including the *applicable administrative provisions*, with which *compliance is mandatory.* It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method. (emphasis added)

67. The heart of the definition of a "technical regulation" is that a "document" must "lay down" – that is, set forth, stipulate or provide – "product *characteristics*". The word "characteristic" has a number of synonyms that are helpful in understanding the ordinary meaning of that word, in this context. Thus, the "characteristics" of a product include, in our view, any objectively definable "features", "qualities", "attributes", or other "distinguishing mark" of a product. Such "characteristics" might relate, *inter alia*, to a product's composition, size, shape, colour, texture, hardness, tensile strength, flammability, conductivity, density, or viscosity. In the definition of a "technical regulation" in Annex 1.1, the *TBT Agreement* itself gives certain examples of "product characteristics" – "terminology, symbols, packaging, marking or labelling requirements". These examples indicate that "product characteristics" include, not only features and qualities intrinsic to the product itself, but also related "characteristics", such as the means of identification, the presentation and the appearance of a product. In addition, according to the definition in Annex 1.1 of the *TBT Agreement*, a "technical regulation" may set forth the "applicable administrative provisions" for products which have certain "characteristics". Further, we note that the definition of a "technical regulation" provides that such a regulation "may also include or deal *exclusively* with terminology, symbols, packaging, marking *or* labelling requirements". (emphasis added) The use here of the word "exclusively" and the disjunctive word "or" indicates that a "technical regulation" may be confined to laying down only one or a few "product characteristics".

68. The definition of a "technical regulation" in Annex 1.1 of the *TBT Agreement* also states that "*compliance*" with the "product characteristics" laid down in the "document" must be "*mandatory*". A "technical regulation" must, in other words, regulate the "characteristics" of products in a binding or compulsory fashion. It follows that, with respect to products, a "technical regulation" has the effect of *prescribing* or *imposing* one or more "characteristics" – "features", "qualities", "attributes", or other "distinguishing mark".

69. "Product characteristics" may, in our view, be prescribed or imposed with respect to products in either a positive or a negative form. That is, the document may provide, positively, that products *must possess* certain "characteristics", or the document may require, negatively, that products *must not possess* certain "characteristics". In both cases, the legal result is the same: the document "lays down" certain binding "characteristics" for products, in one case affirmatively, and in the other by negative implication.

70. A "technical regulation" must, of course, be applicable to an *identifiable* product, or group of products. Otherwise, enforcement of the regulation will, in practical terms, be impossible. This consideration also underlies the formal obligation, in Article 2.9.2 of the *TBT Agreement*, for Members to notify other Members, through the WTO Secretariat, "of the *products to be covered* " by a proposed "technical regulation". (emphasis added) Clearly, compliance with this obligation requires identification of the product coverage of a technical regulation. However, in contrast to what the Panel suggested, this does not mean that a "technical regulation" must apply to "*given*" products which are actually *named*, *identified* or *specified* in the regulation.[40] (emphasis added) Although the *TBT Agreement* clearly applies to "products" generally, nothing in the text of that Agreement suggests that those products need be named or otherwise *expressly* identified in a "technical regulation". Moreover, there may be perfectly sound administrative reasons for formulating a "technical regulation" in a way that does *not* "e reason

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scientific and technological progress".[45] Compliance with these administrative requirements is mandatory.[46]

74. Like the Panel, we consider that, through these exceptions, the measure sets out the "applicable administrative provisions, with which compliance is mandatory" for products with certain objective "characteristics".[47] The exceptions apply to a narrowly defined group of products with particular "characteristics". Although these products are not named, the measure provides criteria which permit their identification, both by reference to the qualities the excepted products must possess and by reference to the list promulgated by the Minister.

75. Viewing the measure as an integrated whole, we see that it lays down "characteristics" for all products that might contain asbestos, and we see also that it lays down the "applicable administrative provisions" for certain products containing chrysotile asbestos fibres which are excluded from the prohibitions in the measure. Accordingly, we find that the measure is a "document" which "lays down product characteristics … including the applicable administrative provisions, with which compliance is mandatory." For these reasons, we conclude that the measure constitutes a "technical regulation" under the *TBT Agreement*.

76. We, therefore, reverse the Panel's finding, in paragraph 8.72(a) of the Panel Report, that the *TBT Agreement* "does not apply to the part of the Decree relating to the ban on imports of asbestos and asbestos-containing products because that part does not constitute a 'technical regulation' within the meaning of Annex 1.1 to the TBT Agreement."

77. We note, however – and we emphasize – that this does not mean that *all* internal measures covered by Article III:4 of the GATT 1994 "affecting" the "sale, offering for sale, purchase, transportation, distribution or use" of a product are, necessarily, "technical regulations" under the *TBT Agreement*

to Article 3.3 of the DSU.[48] However, we have insisted that we can do so only if the factual findings of the panel and the undisputed facts in the panel record provide us with a sufficient basis for our own analysis. If that has not been the case, we have not completed the analysis.[49]

79. The need for sufficient facts is not the only limit on our ability to complete the legal analysis in any given case. In *Canada – Periodicals*, we reversed the panel's conclusion that the measure at issue was inconsistent with Article III:2, first sentence, of the GATT 1994, and we then proceeded to examine the United States' claims under Article III:2, second sentence, which the panel had not examined at all. However, in embarking there on an analysis of a provision that the panel had not considered, we emphasized that "the first and second sentences of Article III:2 are *closely related* " and that those two sentences are "part of a *logical continuum.*"[50] (emphasis added)

80. In this appeal, Canada's outstanding claims were made under Articles 2.1, 2.2, 2.4 and 2.8 of the *TBT Agreement.* We observe that, although the *TBT Agreement* is intended to "further the objectives of GATT 1994", it does so through a specialized legal regime that applies solely to a limited class of measures. For these measures, the *TBT Agreement* imposes obligations on Members

[48]See, for instance, Appellate Body Report, *United States – Gasoline*, *supra*, footnote 15, at 18 ff; Appellate Body Report, *Canada – Certain Measures Concerning Periodicals* ("*Canada – Periodicals*"), WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, 449, at 469 ff; Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)* ("*European Communities – Hormones*"), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, paras. 222 ff; Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, paras. 156 ff; Appellate Body Report, *Australia – Measures Affecting Importation of Salmon* ("*Australia – Salmon*"), WT/DS18/AB/R, adopted 6 November 1998, paras. 117 ff, 193 ff and 227 ff; Appellate Body Report, *United States – Shrimp*, *supra*, footnote 14, paras. 123 ff; Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999, paras. 112 ff; Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, paras. 133 ff; Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, *Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/AB/RW, adopted 4 August 2000, paras. 43 ff; and Appellate Body Report, *United States – Definitive SafeSs0.273 T 0 TD /Ft Appellate B.1205 t, 211.9.75 Tf*

that seem to be *different*

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*.[54] 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 …".[55]

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.[56]

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

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

[54]Working Party j1t no less

first occasion to examine the meaning of the word "like" in *Article III:4* of the GATT 1994.[57] 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.[58] 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.[59] 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

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[57]We have already had occasion to interpret other aspects of Article III:4 of the GATT 1994 in two other appeals, but in neither appeal were we asked to address the meaning of the term "like products" (see Appellate Body Repiurp,

92. However, as we have previously observed, "dictionary meanings leave many interpretive questions open."[63] In particular, this definition does not resolve three issues of interpretation. First, this dictionary definition of "like" does not indicate *which characteristics or qualities are important* in assessing the "likeness" of products under Article III:4. For instance, most products will have many qualities and characteristics, ranging from physical properties such as composition, size, shape, texture, and possibly taste and smell, to the end-uses and applications of the product. Second, this dictionary definition provides no guidance in determining the *degree or extent to which products must share qualities or characteristics* in order to be "like products" under Article III:4. Products may share only very few characteristics or qualities, or they may share many. Thus, in the abstract, the term "like" can encompass a spectrum of differing degrees of "likeness" or "similarity". Third, this dictionary definition of "like" does not indicate *from whose perspective* "likeness" should be judged. For instance, ultimate consumers may have a view about the "likeness" of two products that is very different from that of the inventors or producers of those products.

93. To begin to resolve these issues, we turn to the relevant context of Article III:4 of the GATT 1994. In that texto9 issf5d3hobse2J5d318.75 ds330veryn.7594.5 5

97. We have previously described the "general principle" articulated in Article

regulation, covered by Article III:2, and non-fiscal regulation, covered by Article III:4. Both forms of

individual, discretionary judgement"[72] has to be made on a case-by-case basis. The Report of the Working Party on *Border Tax Adjustments* outlined an approach for analyzing "likeness" that has been followed and developed since by several panels and the Appellate Body.[73] This approach has, in the main, consisted of employing 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 – more comprehensively termed consumers' perceptions and behaviour – in respect of the products; and (iv) the tariff classification of the products.[74] We note that these four criteria comprise four categories of "characteristics" that the products involved might share: (i) the physical properties of the products; (ii) the extent to which the products are capable of serving the same or similar end-uses; (iii) the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand; and (iv) the international classification of the products for tariff purposes.

102. These general criteria, or groupings of potentially shared characteristics, provide a framework for analyzing the "likeness" of particular products on a case-by-case basis. These criteria are, it is well to bear in mind, simply tools to assist in the task of sorting and examining the relevant evidence. They are neither a treaty-mandated nor a closed list of criteria that will determine the legal characterization of products. More important, the adoption of a particular framework to aid in the examination of evidence does not dissolve the duty or the need to examine, in each case, *all* of the pertinent evidence. In addition, although each criterion addresses, in principle, a different aspect of the products involved, which should be examined separately, the different criteria are interrelated. For instance, the physical properties of a product shape and limit the end-uses to which the products can be devoted. Consumer perceptions may similarly influence – modify or even render obsolete – traditional uses of the products. Tariff classification clearly reflects the physical properties of a product.

103. The kind of evidence to be examined in assessing the "likeness" of products will, necessarily, depend upon the particular products and the legal provision at issue. When all the relevant evidence has been examined, panels must determine whether that evidence, as a whole, indicates that the products in question are "like" in terms of the legal provision at issue. We have noted that, under

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[72]Appellate Body Report, *Japan – Alcoholic Beverages*, *supra*, footnote 58, at 113.

[73]See, further, Appellate Body Report, *Japan – Alcoholic Beverages*, *supra*, footnote 58, at 113 and, in particular, footnote 46. See, also, Panel Report, *United States – Gasoline*, *supra*, footnote 15, para. 6.8, where the approach set forth in the *Border Tax Adjustment* case was adopted in a dispute concerning Article III:4 of the GATT 1994 by a panel. This point was not appealed in that case.

[74]The fourth criterion, tariff classification, was not mentioned by the Working Party on *Border Tax Adjustments*, but was included by subsequent panels (see, for instance, *EEC – Animal Feed*, *supra*, footnote 58, para. 4.2, and *1987 Japan – Alcoholic Beverages*, *supra*, footnote 58, para. 5.6).

Article III:4 of the GATT 1994, the term "like products" is concerned with competitive relationships between and among products. Accordingly, whether the *Border Tax Adjustments* framework is adopted or not, it is important under Article III:4 to take account of evidence which indicates whether, and to what extent, the products involved are – or could be – in a competitive relationship in the marketplace.

D. *The Panel's Findings and Conclusions on "Likeness" under Article III:4 of the GATT 1994*

1. Overview

104. In this case, the European Communities argues that the Panel erred in its consideration of "likeness", in particular, because it adopted an exclusively "commercial or market access approach" to the comparison of allegedly "like products"; placed excessive reliance on a single criterion, namely, end-use; and failed to include consideration of the health "risk" factors relating to asbestos.[75]

105. Before considering these arguments, we think it helpful to summarize the way in which the Panel assessed the "likeness" of *chrysotile asbestos fibres*, on the one hand, and the *PCG fibres* – PVA, cellulose and glass fibres – on the other. It will be recalled that the Panel adopted the approach in the *Border Tax Adjustments* report, using the four general criteria mentioned above.[76] After reviewing the *first* criterion, "properties, nature and quality of the products", the Panel "conclude[d] that … chrysotile fibres *are like* PVA, cellulose and glass fibres."[77] (emphasis added) In reaching this "conclusion", the Panel found that it was not decisive that the products "do not have the same structure or chemical composition", nor that asbestos is "unique". Instead, the Panel focused on "market access" and whether the products have the "same applications" and can "replace" each other for some industrial uses.[78] The Panel also declined to "[i]ntroduce a criterion on the risk of a product".[79]

106. Under the second criterion, "end-use", the Panel stated that it had already found, under the first criterion, that the products have "certain identical or at least similar end-uses" and that it did not, therefore, consider it necessary to elaborate further on this criterion.[80] The Panel declined to "take a position" on "consumers' tastes and habits", the third criterion, "[b]ecause this criterion would not

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[75]European Communities' other appellant's submission, para. 33.

[76]Panel Report, paras. 8.114 and 8.115.

[77]*Ibid*., para. 8.126.

[78]*Ibid*., paras. 8.123, 8.124 and 8.126.

[79]*Ibid*., para. 8.130.

[80]*Ibid*., para. 8.136.

provide clear results".[81] The Panel observed that consumers' tastes and habits are "very varied".[82] Finally, the Panel did not regard as "decisive" the different "tariff classification" of the fibres.[83]

107. Based on this reasoning, the Panel concluded that *chrysotile asbestos fibres* and *PCG fibres* are "like products" under Article III:4 of the GATT 1994.[84]

108. The Panel next examined whether *cement-based products containing chrysotile asbestos fibres* are "like" *cement-based products containing PCG fibres*.[85] Applying the reasoning from its findings on fibres, and noting that the individual cement-based products have the same tariff classification, irrespective of their fibre content, the Panel concluded that these cement-based products are also "like" under Article III:4.[86]

2. Chrysotile and PCG fibres

109. In our analysis of this issue on appeal, we begin with the Panel's findings on the "likeness" of *chrysotile asbestos and PCG fibres* and, in particular, with the Panel's overall approach to examining the "likeness" of these fibres. It is our view that, having adopted an approach based on the four criteria set forth in *Border Tax Adjustments*, the Panel should have examined the evidence relating to *each* of those four criteria and, then, weighed *all* of that evidence, along with any other relevant evidence, in making an *overall* determination of whether the products at issue could be characterized as "like". Yet, the Panel expressed a "conclusion" that the products were "like" after examining only the

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

110.

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".[94] The Panel said that to do so "would largely nullify the effect of Article XX(b)" of the GATT 1994.[95] 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

> … we note that the carcinogenicity of chrysotile fibres has been acknowledged for some time by international bodies.[135] This carcinogenicity was confirmed by the experts consulted by the Panel, with respect to both lung cancers and mesotheliomas, even though the experts appear to acknowledge that chrysotile is less likely to cause mesotheliomas than amphiboles. We also note that the experts confirmed that the types of cancer concerned had a mortality rate of close to 100 per cent. We therefore consider that we have sufficient evidence that there is in fact a serious carcinogenic risk associated with the inhalation of chrysotile fibres. Moreover, in the light of the comments made by one of the experts, the doubts expressed by Canada with respect to the direct effects of chrysotile on mesotheliomas and lung cancers are not sufficient to conclude that an official responsible for public health policy would find that there was not enough evidence of the existence of a public health risk.

[135] Since 1977 by the IARC (see *List of Agents Carcinogenic to Humans, Overall Evaluations of Carcinogenicity to Humans*, Monographs of the International Agency for Research on Cancer, Volumes 1-63), see also WHO, *IPCS Environmental Health Criteria (203) on Chrysotile*, Geneva (1998), cited in para. 5.584 above. On the development of knowledge of the risks associated with asbestos, see Dr. Henderson, para. 5.595.

This carcinogenicity, or toxicity, constitutes, as we see it, a defining aspect of the physical properties of chrysotile asbestos fibres. The evidence indicates that PCG fibres, in contrast, do not share these properties, at least to the same extent.[96] We do not see how this highly significant physical difference *cannot* be a consideration in examining the physical properties of a product as part of a determination of "likeness" under Article III:4 of the GATT 1994.

115. We do not agree with the Panel that considering evidence relating to the health risks associated with a product, under Article III:4, nullifies the effect of Article XX(b) of the GATT 1994. Article XX(b) allows a Member to "adopt and enforce" a measure, *inter alia*, necessary to protect human life or health, even though that measure is inconsistent with another provision of the GATT 1994. Article III:4 and Article XX(b) are distinct and independent provisions of the GATT 1994 each to be interpreted on its own. The scope and meaning of Article III:4 should not be broadened or restricted beyond what is required by the normal customary international law rules of treaty interpretation, simply because Article XX(b) exists and may be available to justify measures inconsistent with Article III:4. The fact that an interpretation of Article III:4, under those rules, implies a less frequent recourse to Article XX(b) does not deprive the exception in Article XX(b) of *effet utile*. Article XX(b) would only be deprived of *effet utile* if that provision could *not* serve to allow a Member to "adopt and enforce" measures "necessary to protect human … life or health". Evaluating evidence relating to the health risks arising from the physical properties of a product

[96] Panel Report, para. 8.220.

does not prevent a measure which is inconsistent with Article III:4 from being justified under Article XX(b). We note, in this regard, that, different inquiries occur under these two very different Articles. Under Article III:4, evidence relating to health risks may be relevant in assessing the *competitive relationship in the marketplace* between allegedly "like" products. The same, or similar, evidence serves a different purpose under Article XX(b), namely, that of assessing whether a *Member* has a sufficient basis for "adopting or enforcing" a WTO-inconsistent measure on the grounds of human health.

116. We, therefore, find that the Panel erred, in paragraph 8.132 of the Panel Report, in excluding the health risks associated with chrysotile asbestos fibres from its examination of the physical properties of that product.

117. Before examining the Panel's findings under the second and third criteria, we note that these two criteria involve certain of the key elements relating to the competitive relationship between products: first, the extent to which products are capable of performing the same, or similar, functions (end-uses), and, second, the extent to which consumers are willing to use the products to perform these functions (consumers' tastes and habits). Evidence of this type is of particular importance under Article III of the GATT 1994, precisely because that provision is concerned with competitive relationships in the marketplace. If there is – or could be – *no* competitive relationship between products, a Member cannot intervene, through internal taxation or regulation, to protect domestic production. Thus, evidence about the extent to which products can serve the same end-uses, and the extent to which consumers are – or would be – willing to choose one product instead of another to perform those end-uses, is highly relevant evidence in assessing the "likeness" of those products under Article III:4 of the GATT 1994.

118. We consider this to be especially so in cases where the evidence relating to properties establishes that the products at issue are physically quite different. In such cases, in order to overcome this indication that products are *not* "like", a higher burden is placed on complaining Members to establish that, despite the pronounced physical differences, there is a competitive relationship between the products such that *all* of the evidence, taken together, demonstrates that the products are "like" under Article III:4 of the GATT 1994. In this case, where it is clear that the fibres have very different properties, in particular, because chrysotile is a known carcinogen, a very heavy burden is placed on Canada to show, under the second and third criteria, that the chrysotile asbestos and PCG fibres are in such a competitive relationship.

119. With this in mind, we turn to the Panel's evaluation of the second criterion, end-uses. The Panel's evaluation of this criterion is far from comprehensive. First, as we have said, the Panel entwined its analysis of "end-uses" with its analysis of "physical properties" and, in purporting to

examine "end-uses" as a distinct criterion, essentially referred to its analysis of "properties".[97] This makes it difficult to assess precisely how the Panel evaluated the end-uses criterion. Second, the Panel's analysis of end-uses is based on a "small number of applications" for which the products are substitutable. Indeed, the Panel stated that "[i]t suffices that, for a *given utilization*, the properties are the same to the extent that one product can replace the other."[98] (emphasis added) Although we agree that it is certainly relevant that products have similar end-uses for a "small number of … applications", or even for a "given utilization", we think that a panel must also examine the other, *different* end-uses for products.[99] It is only by forming a complete picture of the various end-uses of a product that a panel can assess the significance of the fact that products share a limited number of end-uses. In this case, the Panel did not provide such a complete picture of the various end-uses of the different fibres. The Panel did not explain, or elaborate in any way on, the "small number of … applications" for which the various fibres have similar end-uses. Nor did the Panel examine the end-uses for these products which were not similar. In these circumstances, we believe that the Panel did not adequately examine the evidence relating to end-uses.

120. The Panel declined to examine or make any findings relating to the third criterion, consumers' tastes and habits, "[b]ecause this criterion would not provide clear results".[100] There will be few situations where the evidence on the "likeness" of products will lend itself to "clear results". In many cases, the evidence will give conflicting indications, possibly within each of the four criteria. For instance, there may be some evidence of similar physical properties and some evidence of differing physical properties. Or the physical properties may differ completely, yet there may be strong evidence of similar end-uses and a high degree of substitutability of the products from the perspective

the competitive relationship between the products, there is no basis for overcoming the inference, drawn from the different physical properties of the products, that the products are not "like".

122. In this case especially, we are also persuaded 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.[102] We observe that, as regards *chrysotile asbestos and PCG fibres*, the consumer of the fibres is a *manufacturer* who incorporates the fibres into another product, such as cement-based products or brake linings. We do not wish to speculate on what the evidence regarding these consumers would have indicated; rather, we wish to highlight that consumers' tastes and habits regarding *fibres*, even in the case of commercial parties, such as manufacturers, are very likely to be shaped by the health risks associated with a product which is known to be highly carcinogenic.[103] A manufacturer cannot, for instance, ignore the preferences of the ultimate consumer of its products. If the risks posed by a particular product are sufficiently great, the ultimate consumer may simply cease to buy that product. This would, undoubtedly, affect a manufacturer's decisions in the marketplace. Moreover, in the case of products posing risks to human health, we think it likely that manufacturers' decisions will be influenced by other factors, such as the potential civil liability that might flow from marketing products posing a health risk to the ultimate consumer, or the additional costs associated with safety procedures required to use such products in the manufacturing process.

123. Finally, we note that, although we consider consumers' tastes and habits significant in determining "likeness" in this dispute, at the oral hearing, Canada indicated that it considers this criterion to be *irrelevant*, in this dispute, because the existence of the measure has disturbed normal conditions of competition between the products. In our Report in *Korea – Alcoholic Beverages*, we observed that, "[p]articularly in a market where there are regulatory barriers to trade or to competition, there may well be latent demand" for a product.[104] We noted that, in such situations, "it may be highly relevant to examine latent demand" that is suppressed by regulatory barriers.[105] In addition, we said that "evidence from other markets may be pertinent to the examination of the market at issue, particularly when demand on that market has been influenced by regulatory barriers to trade or to

[102]We have already noted the health risks associated with chrysotile asbestos fibres in our consideration of properties (*supra*, para. 114).

[103]We recognize that consumers' reactions to products posing a risk to human health vary considerably depending on the product, and on the consumer. Some dangerous products, such as tobacco, are widely used, despite the known health risks. The influence known dangers have on consumers' tastes and habits is, therefore, unlikely to be uniform or entirely predictable.

[104]*Supra*, footnote 58, para. 115.

[105]*Ibid*., para. 120. We added that "studies of cross-price elasticity … involve an assessment of latent demand" (para. 121).

competition."[106] We, therefore, do not accept Canada's contention that, in markets where normal conditions of competition have been disturbed by regulatory or fiscal barriers, consumers' tastes and habits cease to be relevant. In such situations, a Member may submit evidence of latent, or suppressed, consumer demand in that market, or it may submit evidence of substitutability from some relevant third market. In making this point, we do not wish to be taken to suggest that there *is* latent demand for chrysotile asbestos fibres. Our point is simply that the existence of the measure does not render consumers' tastes and habits irrelevant, as Canada contends.

124. We observe also that the Panel did not regard as decisive the different tariff classifications of the chrysotile asbestos, PVA, cellulose and glass fibres, each of which is classified under a different tariff heading.[107] In the absence of a full analysis, by the Panel, of the other three criteria addressed, we cannot determine what importance should be attached to the different tariff classifications of the fibres.

125. In sum, in our view, the Panel reached the conclusion that *chrysotile asbestos and PCG fibres* are "like products" under Article III:4 of the GATT 1994 on the following basis: the Panel disregarded the quite different "properties, nature and quality" of chrysotile asbestos and PCG fibres, as well as the different tariff classification of these fibres; it considered no evidence on consumers' tastes and habits; and it found that, for a "small number" of the many applications of these fibres, they are substitutable, but it did not consider the many other end-uses for the fibres that are different. Thus, the only evidence supporting the Panel's finding of "likeness" is the "small number" of shared end-uses of the fibres.

126. For the reasons we have given, we find this insufficient to justify the conclusion that the chrysotile asbestos and PCG fibres are "like products" and we, therefore, reverse the Panel's conclusion, in paragraph 8.144 of the Panel Report, "that chrysotile fibres, on the one hand, and PVA, cellulose and glass fibres, on the other, are 'like products' within the meaning of Article III:4 of the GATT 1994."

3. Cement-based products containing chrysotile and PCG fibres

127. Having reversed the Panel's finding on the "likeness" of the *fibres*, we now examine the Panel's findings regarding the "likeness" of *cement-based products containing chrysotile asbestos fibres* and *cement-based products containing PCG fibres*. In examining the "likeness" of these cement-based products, the Panel stated that, physically, the only difference between these products is

[106] *Supra*, footnote 58, para. 137.

[107] Panel Report, para. 8.143.

the incorporation of a different fibre.[108] In this respect, the Panel indicated that "many of the arguments put forward in relation to chrysotile asbestos, PVA, cellulose and glass fibres are applicable *mutatis mutandis* to products containing those fibres."[109] The Panel noted that, for any given cement-based product, the tariff classification is the same, irrespective of the fibre incorporated into the product.[110] The Panel declined to examine the "risk" criterion advanced by the European Communities, and also considered it unnecessary to analyze consumers' tastes and habits.[111] On this basis, the Panel concluded that "chrysotile-fibre products and fibrt 0.502639 T5.2ie6SIi3 t0b-yo32TD -0.1w425bre.

fibre affects the ability of a cement-based product to perform one or more of these functions efficiently. [116]

130. In addition, even if the cement-based products were functionally interchangeable, we consider it likely that the presence of a known carcinogen in one of the products would have an influence on *consumers' tastes and habits*

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1. Chrysotile and PCG fibres

134. We address first the "likeness" of *chrysotile asbestos fibres* and *PCG fibres*. As regards the physical properties of these fibres, we recall that the Panel stated that:

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establish that, despite the pronounced physical differences, there is a competitive relationship between the products such that, *all* of the evidence, taken together, demonstrates that the products are "like" under Article III:4 of the GATT 1994.

137. The Panel observed that the end-uses of chrysotile asbestos and PCG fibres are the same "for a small number" of applications.[123] The Panel simply adverted to these overlapping end-uses and offered no elaboration on their nature and character. We note that Canada argued before the Panel that there are some 3,000 commercial applications for asbestos fibres.[124] Canada and the European Communities indicated that the most important end-uses for asbestos fibres include, in no particular order, incorporation into: cement-based products; insulation; and various forms of friction lining.[125] Canada noted that 90 percent, by quantity, of French imports of chrysotile asbestos were used in the production of cement-based products.[126] This evidence suggests that chrysotile asbestos and PCG fibres share a small number of similar end-uses and, that, as Canada asserted, for chrysotile asbestos, these overlapping end-uses represent an important proportion of the end-uses made of chrysotile asbestos, measured in terms of quantity.

138. There is, however, no evidence on the record regarding the nature and extent of the many end-uses for chrysotile asbestos and PCG fibres which are *not* overlapping. Thus, we do not know what proportion of all end-uses for chrysotile asbestos and PCG fibres overlap. Where products have a wide range of end-uses, only some of which overlap, we do not believe that it is sufficient to rely solely on evidence regarding the overlapping end-uses, without also examining evidence of the nature and importance of these end-uses in relation to all of the other possible end-uses for the products. In the absence of such evidence, we cannot determine the significance of the fact that chrysotile asbestos and PCG fibres share a small number of similar end-uses.

139. As we have already stated, Canada took the view, both before the Panel and before us, that consumers' tastes and habits have no relevance to the inquiry into the "likeness" of the fibres.[127] We have already addressed, and dismissed, the arguments advanced by Canada in support of this contention.[128] We have also stated that, in a case such as this one, where the physical properties of the fibres are very different, an examination of the evidence relating to consumers' tastes and habits is an indispensable – although not, on its own, sufficient – aspect of any determination that products are

[123]Panel Report, para. 8.125.

[124]*Ibid*., para. 3.21.

[125]*Ibid*., paras. 3.21 (Canada) and 3.23 (European Communities). The lists of important uses given by the parties is not identical in all respects and we have distilled from each list the common elements.

[126]Panel Report, para. 3.21, footnote 7.

[127]*Supra*, paras. 120 and 123.

[128]*Ibid*.

"like" under Article III:4 of the GATT 1994.[129] If there is no evidence on this aspect of the nature and extent of the competitive relationship between the fibres, there is no basis for overcoming the inference, drawn from the different physical properties, that the products are not "like". However, in keeping with its argument that this criterion is irrelevant, Canada presented *no* evidence on consumers' tastes and habits regarding chrysotile asbestos and PCG fibres.[130]

140. Finally, we note that chrysotile asbestos fibres and the various PCG fibres all have different tariff classifications. While this element is not, on its own, decisive, it does tend to indicate that chrysotile and PCG fibres are not "like products" under Article III:4 of the GATT 1994.

141. Taken together, in our view, all of this evidence is certainly far from sufficient to satisfy Canada's burden of proving that chrysotile asbestos fibres are "like" PCG fibres under Article III:4 of the GATT 1994. Indeed, this evidence rather tends to suggest that these products are not "like

144. In addition, there is no evidence to indicate to what extent the incorporation of one type of fibre, instead of another, affects the suitability of a particular cement-based product for a specific end-use.[133] Once again, it may be that tiles containing chrysotile asbestos fibres perform some end-uses, such as resistance to heat, more efficiently than tiles containing a PCG fibre. Thus, while we accept that the two different types of cement-based products may perform largely similar end-uses, in the absence of evidence, we cannot determine whether each type of cement-based product can perform, with *equal* efficiency, *all* of the functions performed by the other type of cement-based product.

145. As with the fibres, Canada contends that evidence on consumers' tastes and habits concerning cement-based products is irrelevant. Accordingly, Canada submitted no such evidence to the Panel. We have dismissed Canada's arguments in support of this contention.[134] We have also indicated that it is of particular importance, under Article III of the GATT 1994, to examine evidence relating to competitive relationships in the marketplace.[135] We consider it likely that the presence of a known carcinogen in one of the products will have an influence on consumers' tastes and habits regarding that product.[136] It may be, for instance, that, although cement-based products containing chrysotile asbestos fibres are capable of performing the same functions as other cement-based products, consumers are, to a greater or lesser extent, not willing to use products containing chrysotile asbestos fibres because of the health risks associated with them. Yet, this is only speculation; the point is, there is no evidence. We are of the view that a determination on the "likeness" of the cement-based products cannot be made, under Article III:4, in the absence of an examination of evidence on consumers' tastes and habits. And, in this case, no such evidence has been submitted.

146. As regards tariff classification, we observe that, for any given cement-based product, the tariff classification of the product is the same.[137] However, this indication of "likeness" cannot, on its own, be decisive.

147. Thus, we find that, in particular, in the absence of any evidence concerning consumers' tastes and habits, Canada has not satisfied its burden of proving that cement-based products containing chrysotile asbestos fibres are "like" cement-based products containing PCG fibres, under Article III:4 of the GATT 1994.

148. As Canada has not demonstrated either that chrysotile asbestos fibres are "like" PCG fibres, or that cement-based products containing chrysotile asbestos fibres are "like" cement-based products

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[133] *Supra*, para. 129.

[134] *Supra*, paras. 120 and 123.

[135] *Supra*, para. 117.

[136] *Supra*, para. 130.

[137] Panel Report, para. 8.148.

carcinogenic risk associated with the inhalation of chrysotile fibres."[141] (emphasis added) In fact, the scientific evidence of record for this finding of carcinogenicity of chrysotile asbestos fibres is so clear, voluminous, and is confirmed, a number of times, by a variety of international organizations, as to be practically overwhelming.

152. In the present appeal, considering the nature and quantum of the scientific evidence showing that the physical properties and qualities of chrysotile asbestos fibres include or result in carcinogenicity, my submission is that there is ample basis for a definitive characterization, on completion of the legal analysis, of such fibres as

valour to reserve one's opinion on such an important, indeed, philosophical matter, which may have unforeseeable implications, and to leave that matter for another appeal and another day, or perhaps other appeals and other days. I so reserve my opinion on this matter.

VII. Article XX(b) of the GATT 1994 and Article 11 of the DSU

155.

> … the EC has made a prima facie case for the existence of a health risk in connection with the use of chrysotile, in particular as regards lung cancer and mesothelioma in the occupational sectors downstream of production and processing and for the public in general in relation to chrysotile-cement products. This prima facie case has not been rebutted by Canada. Moreover, the Panel considers that the comments by the experts confirm the health risk associated with exposure to chrysotile in its various uses. *The Panel therefore considers that the EC have shown that the policy of prohibiting chrysotile asbestos*

> The Panel's examination and weighing of the evidence submitted fall, in principle, within the scope of the Panel's discretion as the trier of facts and, accordingly, outside the scope of appellate review. This is true, for instance, with respect to the Panel's treatment of the Dodwell Study, the Sofres Report and the Nielsen Study. *We cannot second-guess the Panel in appreciating either the evidentiary value of such studies or the consequences, if any, of alleged defects in those studies*. Similarly, it is not for us to review the relative weight ascribed to evidence on such matters as marketing studies … [147] (emphasis added)

161. The same holds true in this case. The Panel enjoyed a margin of discretion in assessing the value of the evidence, and the weight to be ascribed to that evidence. The Panel was entitled, in the exercise of its discretion, to determine that certain elements of evidence should be accorded more weight than other elements – that is the essence of the task of appreciating the evidence.

162. With this in mind, we have examined the seven factors on which Canada relies in asserting that the Panel erred in concluding that there exists a human health risk associated with the manipulation of chrysotile-cement products. We see Canada's appeal on this point as, in reality, a challenge to the Panel's assessment of the credibility and weight to be ascribed to the scientific evidence before it. Canada contests the conclusions that the Panel drew both from the evidence of the scientific experts and from scientific reports before it. As we have noted, we will interfere with the Panel's appreciation of the evidence only when we are "satisfied that the panel has *exceeded the bounds of its discretion*, as the trier of facts, in its appreciation of the evidence."[148] (emphasis added) In this case, nothing suggests that the Panel exceeded the bounds of its lawful discretion. To the contrary, all four of the scientific experts consulted by the Panel concurred that chrysotile asbestos fibres, and chrysotile-cement products, constitute a risk to human health, and the Panel's conclusions on this point are faithful to the views expressed by the four scientists. In addition, the Panel noted that the carcinogenic nature of chrysotile asbestos fibres has been acknowledged since 1977 by international bodies, such as the International Agency for Research on Cancer and the World Health Organization. [149] In these circumstances, we find that the Panel remained well within the bounds of its discretion in finding that chrysotile-cement products pose a risk to human life or health.

163. Accordingly, we uphold the Panel's finding, in paragraph 8.194 of the Panel Report, that the measure "protect[s] human … life or health", within the meaning of Article XX(b) of the GATT 1994.

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[147] *Supra*, footnote 58, para. 161.

[148] Appellate Body Report, *United States – Wheat Gluten, s 0 Tw (,)4 0 5 0 TDi1G3E475 Tf 0.05483 Tc 0.2999 Tw 4, fo*

B. *"Necessary"*

164. On the issue of whether the measure at issue is "necessary" to protect public health within the meaning of Article XX(b), the Panel stated:

> In the light of France's public health objectives as presented by the European Communities, the Panel concludes that the EC has made a prima facie case for the non-existence of a reasonably available alternative to the banning of chrysotile and chrysotile-cement products and recourse to substitute products. Canada has not rebutted the presumption established by the EC. We also consider that the EC's position is confirmed by the comments of the experts consulted in the course of this proceeding. [150]

165. Canada argues that the Panel erred in applying the "necessity" test under Article XX(b) of the GATT 1994 "by stating that there is a high enough risk associated with the manipulation of chrysotile-cement products that it could in principle justify strict measures such as the Decree."[151] Canada advances four arguments in support of this part of its appeal. First, Canada argues that the Panel erred in finding, on the basis of the scientific evidence before it, that chrysotile-cement products pose a risk to human health. [152] Second, Canada contends that the Panel had an obligation to "quantify" itself the risk associated with chrysotile-cement products and that it could not simply "rely" on the "hypotheses" of the French authorities. [153] Third, Canada asserts that the Panel erred by postulating that the level of protection of health inherent in the Decree is a halt to the spread of asbestos-related health risks. According to Canada, this "premise is false because it does not take into account the risk associated with the use of substitute products without a framework for controlled use."[154] Fourth, and finally, Canada claims that the Panel erred in finding that "controlled use" is not a reasonably available alternative to the Decree.

166. With respect to Canada's first argument, we note simply that we have already dismissed Canada's contention that the evidence before the Panel did not support the Panel's findings. [155] We are satisfied that the Panel had a more than sufficient basis to conclude that chrysotile-cement products do pose a significant risk to human life or health.

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[150]Panel Report, para. 8.222.

[151]Canada's appellant's submission, para. 187.

[152]*Ibid*., paras. 188 and 189.

[153]*Ibid*., para. 193.

[154]*Ibid*., para. 195.

[155]*Supra*, paras. 159-163.

that measure is "impossible". We certainly agree with Canada that an alternative measure which is impossible to implement is not "reasonably available". But we do not agree with Canada's reading of either the panel report or our report in *United States – Gasoline*. In *United States – Gasoline*, the panel held, in essence, that an alternative measure did not *cease* to be "reasonably" available simply because the alternative measure involved *administrative difficulties* for a Member.[162] The panel's findings on this point were not appealed, and, thus, we did not address this issue in that case.

170. Looking at this issue now, we believe that, in determining whether a suggested alternative measure is "reasonably available", several factors must be taken into account, besides the difficulty of implementation. In *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, the panel made the following observations on the applicable standard for evaluating whether a measure is "necessary" under Article XX(b):

> The import restrictions imposed by Thailand could be considered to be "necessary" in terms of Article XX(b) only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it, which Thailand could *reasonably be expected to employ to achieve its health policy objectives*.[163] (emphasis added)

171. In our Report in *Korea –Beef*, we addressed the issue of "necessity" under Article XX(d) of the GATT 1994.[164]

pursued".[166] In addition, we observed, in that case, that "[t]he more vital or important [the] common interests or values" pursued, the easier it would be to accept as "necessary" measures designed to achieve those ends.[167] In this case, the objective pursued by the measure is 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. The value pursued is both vital and important in the highest degree. The remaining question, then, is whether there is an alternative measure that would achieve the same end and that is less restrictive of trade than a prohibition.

173.

C. *Article 11 of the DSU*

176. As part of its argument that the Panel erred in finding that the measure is justified under Article XX(b) of the GATT 1994, Canada also asserts that the Panel failed to make an objective assessment of the matter, as required by Article 11 of the DSU. According to Canada, the requirement imposed on panels by Article 11 to make an objective assessment of the matter implies "that scientific data must be assessed in accordance with the principle of the balance of probabilities."[171] In particular, Canada asserts that, where the evidence is divergent or contradictory, the "principle of the preponderance of evidence" implies that a panel must take a position as to the respective weight of the evidence.[172] Canada also contends that the Panel failed to assess the facts objectively because the Panel accepted "the opinions of experts on the controlled use of chrysotile, when those experts had no controlled-use expertise."[173]

177. These arguments by Canada on the "balance of probabilities" and the "preponderance of evidence" concern the credibility and weight that the Panel ascribed to different elements of evidence.[174] In essence, Canada argues that the Panel has not taken sufficient account of certain evidence and that the Panel has placed too much weight on certain other evidence. Thus, Canada is challenging the Panel's exercise of discretion in assessing and weighing the evidence. As we have already noted, "[w]e cannot second-guess the Panel in appreciating either the evidentiary value of … studies or the consequences, if any, of alleged defects in [the evidence]".[175] And, as we have already said, in this case, the Panel's appreciation of the evidence remained well within the bounds of its discretion as the trier of facts.

178. In addition, in the context of the *SPS Agreement*, we have said previously, in *European Communities – Hormones*, that "responsible and representative governments may act in good faith on the basis of what, at a given time, may be a *divergent* opinion coming from qualified and respected sources."[176] opinionsdomaij, bpls.Tc 0"[wpled-ufor expertis33"scretio6

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a panel need not, necessarily, reach a decision under Article XX(b) of the GATT 1994 on the basis of the "preponderant" weight of the evidence.

179. With regard to Canada's argument that certain of the experts lacked expertise in "controlled use", we note that, from the beginning of the process for the selection of experts, the Panel made clear that it wished to consult experts on the "effectiveness of the controlled use of chrysotile."[177] The selection of the experts was the subject of a rigorous procedure which involved the consultation of five institutions with experience in this field and also of the parties.[178] At no stage did Canada object to the selection of any of the experts, nor indicate that any of them was unqualified to deal with issues relating to "controlled use".[179] We also note that the experts were instructed by the Panel to answer only those questions that fell within their area of expertise.[180] As Canada indicates, several experts indicated that particular questions, or parts of questions, posed to them went beyond their area of expertise.[181]

180. In these circumstances, we have serious difficulty accepting that the Panel failed to make an objective assessment by relying on experts who had no expertise. The Panel was entitled to assume that the experts possessed the necessary expertise to answer the questions, or parts of questions, they chose to answer. In other words, it was not incumbent on the Panel expressly to confirm, with respect to every opinion expressed by each expert, that the expert possessed the necessary expertise to give that particular opinion. If Canada thought that one of the experts did not possess the expertise necessary to answer certain questions posed to him, Canada should have raised those concerns, either with the expert, at the meeting the Panel held with the parties and the experts on 17 January 2000, or with the Panel at some other time. We observe, finally, that, where an expert declined to answer a specific question, or part of a question, because of a professed lack of expertise, the Panel had no opinion from that expert on which to rely.

181. For these reasons, we decline Canada's appeal on Article 11 of the DSU.

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[177]Panel Report, para. 5.1.

[178]*Ibid*., para. 5.20.

[179]*Ibid*.

[180]*Ibid*., para. 5.22.

[181]Canada's appellant's submission, para. 211, footnote 219, referring to Panel Report, paras. 5.335, 5.345, 5.346, 5.353, 5.363, 5.364, 5.370, 5.371, and 5.374, and to Annex VI of the Panel Report, para. 222.

GATT 1994. Article XXIII:1(b) sets forth a separate cause of action for a claim that, through the application of a measure, a Member has "nullified or impaired" "benefits" accruing to another Member, "whether or not that measure conflicts with the provisions" of the GATT 1994. Thus, it is not necessary, under Article XXIII:1(b), to establish that the measure involved is inconsistent with, or violates, a provision of the GATT 1994. Cases under Article XXIII:1(b) are, for this reason, sometimes described as "non-violation" cases; we note, though, that the word "non-violation" does not appear in this provision. The purpose of this rather unusual remedy was described by the panel in *European Economic Community - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins* ("*EEC – Oilseeds*") in the following terms:

> The idea underlying [the provisions of Article XXIII:1(b)] is that *the*
> *199a mes1 result64.25 0 easure, a Memberny has "nullt measure conflit1 11.T*7mpe125 XXIII:*

scope of application of that provision of the GATT 1994. We agree with the Panel that this reading of Article XXIII:1(b) is consistent with the panel reports in *Japan – Film* and *EEC – Oilseeds*, which both support the view that Article

emphasize that the European Communities does *not* appeal the Panel's findings relating to the "nullification or impairment" of a "benefit" through the frustration of reasonable expectations by application of the measure at issue. We do not, therefore, find it necessary to examine the European Communities' argument relating to reasonable expectations.

191. For these reasons, we dismiss the European Communities' appeal under Article XXIII:1(b) of the GATT 1994 and uphold the Panel's finding that Article XXIII:1(b) applies to measures which fall within the scope of application of other provisions of the GATT 1994 and which pursue health objectives.

IX. Findings and Conclusions

192. For the reasons set out in this Report, the Appellate Body:

(a) reverses the Panel's finding, in paragraph 8.72(a) of the Panel Report, that the *TBT Agreement* "does not apply to the part of the Decree relating to the ban on imports of asbestos and asbestos-containing products because that part does not constitute a 'technical regulation' within the meaning of Annex 1.1 to the TBT Agreement", and finds that the measure, viewed as an integrated whole, does constitute a "technical regulation" under the

(e) reverses, in consequence, the Panel's finding, in paragraph 8.158 of the Panel Report, that the measure is inconsistent with Article III:4 of the GATT 1994;

(f) upholds the Panel's finding, in paragraphs 8.194, 8.222 and 8.223 of the Panel Report, that the measure at issue is "necessary to protect human … life or health", within the