VII. INTERIM REVIEW[1]

A. INTRODUCTION

7.1 The Panel's interim report was given to the parties on 13 June 2000, pursuant to Article 15.2 of the Understanding. On 27 June 2000, Canada and the European Communities sent a request to the Panel in writing asking it to review certain aspects of the interim report. Neither of the parties requested the Panel to hold a further meeting with them. When sending the interim report to the parties, the Panel gave each party an opportunity to transmit in writing its comments on the initial request for review submitted by the other party, if no meeting was requested, provided that the comments were strictly confined to the questions identified by the other party in its initial request for review. The parties submitted their comments on 4 July 2000.[2]

7.2 As a preliminary remark, the Panel notes that the parties requested the Panel to improve upon some of its summaries of their arguments in the findings. The Panel indicates, however, that neither party claimed that the Panel had made any substantive error in its assessment of the facts.[3]

7.3 The Panel also notes that the two Parties have put forward corrections of form and of substance. Wherever appropriate, the Panel accepted the former.[4] The following observations therefore only concern the comments which the Panel considered to be remarks concerning the substance.

B. COMMENTS BY CANADA

7.4 Regarding Canada's comments on substance, the Panel amended footnote 1 to take into account both Canada's remark and the objections of the European Communities.[5]

7.5 Canada's first substantive comment concerning the part of our findings on the application of the Agreement on Technical Barriers to Trade to Decree No. 96-1133[6] relates to the Panel's summary of Canada's arguments in paras. 8.19 and 8.20 of the interim report (paras. 8.20 and 8.21 of the final

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[1] Pursuant to Article 15.3 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter the "Understanding"), "The findings of the final panel report shall include a discussion of the arguments made at the interim review stage". The following section entitled "interim review" therefore forms part of our report's findings.

[2] The comments received on 4 July 2000 are dealt with where necessary in the sections on the comments from Canada and the European Communities below.

[3] The Panel notes that, in the letter attached to Canada's comments, the latter indicates that its request for review "is without prejudice to Canada's position on all the aspects of the Panel's Report". In this connection, the Panel considers that, if it had misunderstood or misrepresented some of the factual aspects of the case in its findings, the parties would need the interim review stage in order to make the necessary corrections or clarifications because, unlike errors of law, errors of fact cannot usually be modified on appeal. The parties should take advantage of this last opportunity to rectify the factual assessments of the Panel otherwise the Panel could unnecessarily be at risk of being accused of not having made an objective evaluation of the facts. It might be claimed that the fact that a party does not inform the Panel of a factual error in its findings may be contrary to the obligation in Article 3.10 of the Understanding, which provides *inter alia* that "all Members will engage in these procedures [settlement of disputes] in good faith in an effort to resolve the dispute" (emphasis added).

[4] For example, the Panel kept the words "in good faith" in para. 8.29 because the good faith requirement applies both to the person interpreting the text and the person having drafted it (see Ian Sinclair: The Vienna Convention on the Law of Treaties (1980, p. 119).

[5] Hereinafter the "EC".

[6] Hereinafter the "Decree".

Report).[7] The Panel considers that this summary adequately reflects Canada's arguments in the descriptive part. It did not therefore deem it necessary to replace the text as suggested by Canada. The next comment concerns para. 8.28 (para. 8.29 of the final Report). In response to Canada's remark that the Panel referred to the object and purpose of the WTO Agreement without examining it subsequently, in para. 8.48 of the final Report we have made it clear that we did not find any particularly relevant elements in the preamble to the WTO Agreement relating to the terms we had to interpret. As regards the comment on footnote 37 in the interim report (footnote 41 in the final Report), we did not consider it necessary to delete it because it is not a question of turning to the preparatory work within the meaning of Article 32 of the Vienna Convention on the Law of Treaties (1969), but of a reference to a document showing that the Agreement on Technical Barriers to Trade of the Tokyo Round was already seen as a development of certain rules of the GATT. We have nevertheless edited the footnote in order to make our intention clearer. We have also reworded paras. 8.61 and 8.62 of the final Report and the footnote concerning para. 8.61 in order to make it clear that, in the light of our previous findings, it was not necessary to examine whether the Decree met the five requirements which, in Canada's opinion, are contained in the definition of "technical regulation" in the TBT Agreement. Likewise, we did not wish to give the impression that Canada confirmed the initial view of the Panel that it would be appropriate to analyse the two aspects of the Decree separately. We have also clarified this point. The same applies to para. 8.72 of the final Report. Having reached the conclusion that the legal characterization of the exceptions in the Decree did not affect the legal characterization of the ban, we have simply found that Canada did not make any claims concerning the exceptions and, consequently, we could not reach any findings thereon according to our terms of reference.

7.6 With regard to the section of our findings on application of Article III and/or Article XI of the GATT 1994, we have made our summary of Canada's arguments (para. 8.84 of the final Report) clearer and have revised the rest of the section (paras. 8.87-8.100 of the final Report) in order to respond to the comments concerning paras. 8.85 and 8.95 of the interim report.

7.7 In connection with the discussion on violation of Article III:4 of the GATT 1994, we have also made paras. 8.109, 8.117, 8.121 and 8.145 of the final Report clearer, taking into account Canada's pertinent remarks.

7.8 Concerning application of Article XX(b) of the GATT 1994, we have amended footnote 128 in the interim report (footnote 142 in the final Report) in order to include the EC's arguments, while maintaining the reference to Dr. Henderson's remarks. The Panel has also revised para. 8.187 of the final Report because this was not a reference by Canada but by a Canadian scientist cited by one of the experts consulted pursuant to Article 13 of the Understanding. The Panel did not deem the EC's objection relating to para. 8.187 to be relevant. In addition, while maintaining the order of paras. 8.196 and 8.197 in the final Report, because the EC referred to Article XX of the GATT 1994, the Panel completed the summary of Canada's arguments in para. 8.197 by including the factual elements as well, as was done in the summary of the EC's arguments. The Panel notes that the factual elements mentioned by Canada have already been summarized in para. 8.164 of the final Report, but more concisely.

7.9 With regard to para. 8.233 (para. 8.238 of the final Report), the Panel does not consider that the fall in French imports of asbestos from 1996 onwards (see para. 3.20 above) is proof of protectionist intentions underlying the adoption of the Decree. In this connection, the Panel notes that Canada devotes a long passage (paras. 3.26 and 3.27 above) to showing that the Decree was adopted hastily under the pressure of public opinion. Regarding the industrial and commercial aspects,

[7] The change in the numbering of paragraphs is due to the introduction of a paragraph on the Panel's decision concerning a written submission and a request for a hearing made by a non-governmental organization during the interim review procedure.

Canada's description in para. 3.28 above makes this a secondary element. The French Government's call for research proposals in July 1996, specifically to develop substitute fibres, does not appear to be the consequence of the choice already made for reasons that bear no direct relation to industrial or commercial considerations.

7.10 Lastly, in our considerations on Article XXIII:1(b) of the GATT 1994, we have harmonized our terminology in paras. 8.293, 8.294 and 8.303 of the final Report.

C. COMMENTS BY THE EUROPEAN COMMUNITIES

7.11 Like Canada, the EC have made a number of comments with a view to amending the Panel's summary of their arguments in its findings. As was the case for Canada, we have generally taken these comments into account provided that we were able to identify them in the submissions made to the Panel in the course of the procedure.

7.12 This is the case for para. 8.7 in relation to para. 3.6. Regarding the description of the EC's arguments in para. 8.25 of the final Report, we have taken the relevant parts of paras. 3.264 and 3.265 above, which contain the EC's arguments on these points. We did not accept Canada's comments of 4 July 2000 because they essentially repeated arguments already made and taken into account during the procedure.

7.13 We have made clearer the last sentence of para. 8.32 and the first sentence of para. 8.41 of the final Report. We have also amended the content of footnotes 55 and 58 of the final Report and have revised the text of paras. 8.119, 8.149, 8.162 and 8.185 of the final Report, taking into account Canada's comments of 4 July 2000 and provided that the EC's suggestions were in line with their submissions to the Panel or the terms of the Decree. We have also made the first sentence of para. 8.149 of the final Report clearer. On the other hand, we did not consider it appropriate to replace the words "Canada's position" in para. 8.56 of the final Report by the words "Canada's contextual interpretation", particularly since Canada opposed this in its comments of 4 July 2000. Likewise, we did not consider that the complementary nature of the EC's argument on the transitional nature of the exceptions in the Decree warranted the deletion or amendment of para. 8.65 of the final Report. In this connection, the Panel notes that the EC did not clearly state what they wished the Panel to do with this paragraph.

7.14 The EC also requested the Panel to amend paras. 8.66-8.70 and 9.1(a) of the interim report to take account of the fact that Canada did not include the implementing Decree referred to in Article 2 of the Decree in the terms of reference of the Panel and that, consequently, no finding could be made in this respect. Although we agree with the EC that we cannot reach any *findings* regarding the part of the Decree on exceptions, we consider that this is primarily due to the absence of allegations by Canada regarding these exceptions. In this sense, our assessment is fully in compliance with the practice of the Appellate Body on interpretation of the terms of reference for panels. On the other hand, we do not consider that the fact that the implementing Decree was not specifically mentioned in the Panel's terms of the reference prevents us from taking it into account when evaluating the *legal characterization* of the part of the Decree on exceptions. If this were the case, the legal characterization of a measure could depend on the scope of the terms of reference defined by the complaining party, which is unacceptable from a legal point of view. It thus appears appropriate to us to consider the Decree in the light of the implementing measures it provides. For us, the implementing decree is a fact.[8] In addition, we can infer its existence simply by reading the text of

[8] In this connection, see the approach adopted by the Appellate Body in *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, adopted on 16 January 1998, WT/DS50/AB/R, paras. 65-67. See also the Report of the Panel in *United States – Sections 301-310 of the Trade Act of 1974*, adopted on 20 January 2000, WT/DS152/R, paras. 7.18 and 7.25-7.27.

the Decree. Consequently, we do not consider that we have exceeded our terms of reference by evaluating the legal characterization of one part of the Decree in the light of the facts before us. We are aware that our efforts to define the legal characterization of the exceptions in the Decree might, at first sight and in the absence of claims from Canada, appear to be an *obiter dictum*. Nevertheless, this procedure was necessary for two reasons: (a) it provides positive confirmation of our analysis of the scope of the TBT Agreement; and (b) it permits a comprehensive analysis of the elements of the Decree, fulfilling our obligation to make an objective examination of the facts. We did not therefore deem it necessary to amend the paragraphs in question, except for para. 9.1(a), in order to make the meaning of our conclusions clearer in the light of the comments above.

7.15 In response to the EC's comments and also those of Canada in its communication of 4 July 2000, we have explained in para. 8.273 of the final Report why we considered that the risk of an effective increase in the cost of health measures following application of Article XXIII:1(b) to measures justified under Article XX(b) would be marginal. We have also made the last sentence of para. 8.296 of the final Report clearer.

7.16 Finally, the Panel considered it necessary to add a paragraph concerning the request by a non-governmental organization, received on 27 June 2000, to be allowed to make a written submission and to be heard by the Panel. Moreover, bearing in mind the nature of the comments by the parties, the Panel considered it appropriate to add a footnote to para. 8.35, to revise footnotes 44 and 50, and to amend the first sentence of para. 8.183 of the final Report. The Panel has also clarified its comments in paras. 8.211 and 8.214. Other changes of form have been made in order to take into account the change in the numbering of certain paragraphs. Lastly, the Panel adopted the word "exceptions" to describe the regime applicable under Articles 2 *et seq.* of the Decree, in conformity with the term used in the Decree itself.

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VIII. FINDINGS

A. SUMMARY OF THE FACTS AT THE ORIGIN OF THIS DISPUTE AND CLAIMS BY THE PARTIES

1. Measure at the origin of the dispute

8.1 The measure at the origin of this dispute is Decree No. 96-1133 of 24 December 1996, issued by the Prime Minister of the Government of the French Republic, banning asbestos[1], implemented pursuant to the Labour Code and the Consumer Code[2] (hereinafter the "Decree"). The relevant provisions of the Decree are set out below:[3]

"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, regardless of whether these substances have been incorporated into materials, products or devices.

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 transfer under any title whatsoever of all varieties of asbestos fibres or any product containing asbestos fibres shall be prohibited.

III. The bans instituted under Articles I and II shall not prevent fulfilment of the obligations arising from legislation on the elimination of wastes.

Article 2

I. On an exceptional and temporary basis, the bans instituted under Article 1 shall not apply to certain existing materials, products or devices containing chrysotile fibre when, to perform an equivalent function, no substitute for that fibre is available which:

- On the one hand, in the present state of scientific knowledge, poses a lesser occupational health risk than chrysotile fibre to workers handling those materials, products or devices;

- on the other, provides all technical guarantees of safety corresponding to the ultimate purpose of the use thereof.

II. The scope of application of paragraph I of this Article shall cover only the materials, products or devices falling within the categories shown in an exhaustive list decreed by the Ministers for Labour, Consumption, the Environment, Industry, Agriculture and Transport. To ascertain the justification for maintaining these exceptions, the list shall be re-examined on an annual basis, after which the Senior Council for the Prevention of Occupational Hazards and the National Commission for Occupational Health and Safety in Agriculture shall be consulted.

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[1] In these findings, the word "asbestos" is used to describe all varieties of asbestos without distinction (see paras. 2.1 and 2.2 above for a description of the product). "The Panel notes that, although the only variety of asbestos referred to by Canada is chrysotile asbestos, Decree No. 96-1133 does not distinguish among the different varieties of asbestos. Only Article 2 on exceptions specifically mentions chrysotile fibres. Consequently, wherever necessary, the Panel will indicate whether it is referring to asbestos in general or chrysotile in particular.

[2] *Official Journal of the French Republic* of 26 December 1996.

[3] The full text of the Decree is attached to this report as Annex I.

Article 3

I. The manufacture, processing, importation and domestic marketing of any of the materials, products or devices falling into one of the categories mentioned on the list envisaged under Article 2 shall be subject to a statement, signed, as appropriate, by the head of the business establishment, the importer or the party responsible for domestic marketing, which should be addressed to the Minister for Labour. This statement shall be filed in January of each year or, as appropriate, three months before the start of a new activity or the alteration of an existing production activity, by means of a form decreed by the Ministers for Labour, Consumption, Industry and Agriculture.

The statement shall be accompanied by all the supporting documents in the possession of the declaring party making it possible, considering the state of scientific and technological progress, to determine that as of the date of signature of the statement, the activity covered by the statement meets the conditions set forth in Article 2.I.

II. Activities that have not been the subject of a full statement submitted within the set time-frame may not benefit from the exception granted under Article 2.

III. The Minister for Labour may at all times convey to the author of the statement such information as may seem to him to establish that the material, product or device in question, although falling into one of the categories on the list mentioned in Article 2, does not meet the conditions laid down in paragraph I of that same Article. After requesting comments from the declaring party, he may serve notice to said party to cease manufacture, processing, importation or domestic marketing and to observe the ban instituted under Article 1. He may make such notification public.

Article 4

The manufacture and processing of the materials, products and devices falling into the categories on the list mentioned in Article 2 of this Decree must conform with the rules laid down under Chapters I and II and Chapter III, Section 1 of the aforementioned Decree dated 7 February 1999.

Labelling and marking shall conform with the requirements of Article L. 231-6 of the Labour Code and the rules established by the aforementioned Decree dated 28 April 1998.[4]

Article 5

Without prejudice to the application of the penalties envisaged under Article L. 263-2 of the Labour Code in the event of violation of the provisions of Article 1.I of this Decree, the act of manufacturing, importing, introducing into the domestic market, exporting, offering, selling, transferring under any title or possessing for sale all varieties of asbestos fibres or any product containing asbestos fibres, in contravention of the provisions of Article 1.II shall be punishable by the fine prescribed for fifth class offences.

Article 6

I. Articles 1, 2, 3 and Article 6.I of the above-mentioned Decree No. 88-466 of 28 April 1998 are hereby repealed.[5]

II. In the first subparagraph of Article 4 of the same Decree, the words: 'bans envisaged in Article 2 above' shall be replaced by the word: 'bans'.

III. In Article 6.II of the same Decree, the words: 'other than those envisaged under Article 2' shall be replaced by the words: 'which are not subject to bans'.

[4] The preambular paragraphs of the Decree have not been included here. The full text of the Decree is attached as Annex I to this Report.

[5] Ibid.

Article 7

Until 31 December 2001 and on a transitional basis, the ban on possession for sale, offering for sale and transfer under any title shall not apply to the used vehicles nor to the agricultural or forestry machinery put into circulation before the effective date of this Decree, and covered by Article R.138 of the Traffic Law. […]"[6]

8.2 The Decree entered into force on 1 January 1997.

2. Main claims by the parties[7]

(a) Main claims by Canada

8.3 Canada claims, firstly that the Decree is a technical regulation covered by the Agreement on Technical Barriers to Trade.[8] As such, it is incompatible with paras. 1, 2, 4 and 8 of Article 2 of the TBT Agreement.

8.4 Secondly, Canada claims that the Decree is incompatible with Articles XI and III:4 of the GATT 1994.

8.5 Lastly, Canada requests that, in the event that the Panel is unable to find a violation of Article XXIII:1(a) of the GATT 1994, it nevertheless finds that the provisions of Article XXIII:1(b) of the GATT 1994 apply.

(b) Main claims by the European Communities

8.6 The European Communities[9] ask the Panel to find that the Decree is not covered by the TBT Agreement and that, in any case, it complies with the relevant provisions of that Agreement.

8.7 With regard to the GATT 1994, the EC request the Panel to confirm that either the Decree does not establish less favourable treatment for imported products than for like domestic products within the meaning of Article III:4 or that the Decree is necessary to protect human health within the meaning of Article XX(b). Lastly, the EC ask the Panel to find that Article XXIII:1(b) of the GATT 1994 does not apply.

8.8 Before going further into the claims by the parties, we must first recall certain decisions taken in the course of the procedure.

B. ISSUES ON WHICH THE PANEL HAD TO TAKE A POSITION DURING THE PROCEDURE

1. Introduction

8.9 In the course of the procedure, the Panel took two decisions which it considers should be reproduced as an integral part of these findings. These were (a) its decision to consult scientific experts on an individual basis taking into account Article 13.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes; and (b) its decision on whether or not to take into account "*amicus curiae* briefs" received during the procedure.

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[6] Articles 8 and 9 of the Decree have not been reproduced. The full text of the Decree is attached as Annex I to this report.

[7] The full text of the claims by the parties can be found in section III.A above.

[8] Hereinafter the "TBT Agreement".

[9] Hereinafter the "EC".

2. Consultation of experts

8.10 At the first substantive meeting, the Panel informed the parties of its intention to seek the opinion of individual scientific experts except where, in the light of the parties' written rebuttals, it deemed that such a procedure was not necessary. Having consulted the parties and received their comments, the Panel decided to consult experts individually, in accordance with para. 1 and the first sentence of para. 2 of Article 13 of the Understanding.[10] The Panel's decision was reaffirmed on 2 August 1999. The following are the relevant parts of its letter:

> "[…] The Panel carefully examined the arguments put forward by the parties concerning the method of consulting experts, in particular the argument of the European Communities that Article 13.2 of the Understanding requires that, when consulting scientific experts, there should be an expert review group according to the terms of Appendix 4 to the Understanding.
>
> We draw attention to Article 13 of the Understanding which states *inter alia* that "each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate" and "panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter.
>
> We also note that Article 13.2 provides that panels 'may' request an advisory report in writing from an expert review group, in particular but not exclusively in order to consider a factual issue concerning a scientific matter. We consider that this text allows the establishment of such an expert review group but does not prevent experts being consulted on an individual basis with respect to scientific matters or any 'other technical matter'. In our view, this interpretation of Article 13.2 of the Understanding fully complies with the text of this provision interpreted according to Article 31 of the Vienna Convention on the Law of Treaties and the interpretation of the Appellate Body whereby Article 13 of the Understanding does not prevent a panel from consulting experts individually and leaves the panel free to determine whether it is necessary or appropriate to establish an expert review group.[11]
>
> The Panel also took account of the argument of the European Communities that, if the measure in question should be considered as coming under the TBT Agreement, which it contests in any case, Article 14.2 of the Agreement would mean that a technical expert group would have to be consulted for any scientific or technical question, as well as the position of the European Communities that this provision, pursuant to Article 1.2 of the Understanding, would prevail over the provisions in Article 13 of the Understanding.
>
> Article 14.2 of the TBT Agreement is one of the provisions mentioned in Appendix 2 to the Understanding and which, according to Article 1.2 of the Understanding, prevails over the latter if there is any difference between the two. We note, however, that it is only 'if there is any difference' between the rules and procedures in the Understanding and a special or additional rule or procedure covered by Appendix 2 to the Understanding that the latter would prevail. As the Appellate Body has already pointed out, it is only when the provisions in the Understanding and the special or additional rules and procedures in Appendix 2 *cannot* be construed as *complementary* that the special or additional rules will prevail over those in the Understanding, in other words, in a situation where the

[10] These comments can be found in paras. 5.2 to 5.16 above.

[11] The letter contains the following note: "See the reports of the Appellate Body in *European Communities – Measures Concerning Meat and Meat Products (Hormones)* (WT/DS26-DS48/AB/R, para. 147 ('… in disputes involving scientific or technical issues, neither Article 11.2 of the *SPS Agreement*, nor Article 13 of the DSU prevents panels from consulting with individual experts. Rather, both the *SPS Agreement* and the DSU leave to the sound discretion of a panel the determination of whether the establishment of an expert review group is necessary or appropriate.') and in *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items* (WT/DS56/AB/R), para. 84 (' … Article 13 of the DSU enables a panel to seek information and technical advice as it deems appropriate in a particular case, and (…) the DSU leaves 'to the sound discretion of a panel the determination of whether the establishment of an expert review group is necessary or appropriate'.").

two provisions would be mutually incompatible.[12] In this particular case, Article 14.2 of the TBT Agreement provides that a panel 'may' establish a technical expert group. Like Article 13.2 of the Understanding, this text allows the *possibility* of establishing an expert group and determines the procedures applicable to it, where applicable. It does not however make the establishment of such a group mandatory and, in our view, this possibility is not incompatible with the overall possibility given in Article 13 of the Understanding of consulting experts individually. The two provisions can be seen as complementary.

In this case, it appeared to us that consultation of experts on an individual basis was the most appropriate method inasmuch as it would be the most appropriate way of allowing the Panel to obtain useful information and opinions on the scientific and technical issues raised by this case. In view of the wide variety of fields of competence involved, in particular, it appeared to us to be preferable to obtain different information and opinions individually rather than requesting a joint report on the various scientific or technical issues raised.

[…]

In the light of the foregoing, we emphasize that our decision to consult experts individually is without prejudice to the question of the applicability of the TBT Agreement to the measure in question, on which the parties disagree."

8.11 The Panel reaffirms the decision and the reasoning in this letter.

3. *Amicus curiae* briefs

8.12 In the course of the procedure, the Panel received written submissions or "*amicus curiae*" briefs from four sources other than Members of the WTO.[13] Referring to the position taken by the Appellate Body in *United States – Import Prohibition of Certain Shrimp and Shrimp Products*[14] on the interpretation of Article 13 of the Understanding concerning *amicus curiae* briefs, the Panel informed the parties accordingly and transmitted the submissions to them. The EC included two of these submissions in their own submission. Having examined each of the *amicus curiae* briefs, the Panel decided to take into account the submissions by the *Collegium Ramazzini* and the *American Federation of Labor and Congress of Industrial Organizations*, as they had been included by the EC in their own submissions on an equal footing. At the second meeting with the parties, Canada was given an opportunity to respond in writing and orally to the arguments in the two *amicus curiae* briefs.

8.13 On the other hand, the Panel decided not to take into account the *amicus curiae* briefs submitted respectively by the *Ban Asbestos Network* and by the *Instituto Mexicano de Fibro-Industrias A.C.* and informed Canada and the EC accordingly at the second meeting with the parties held on 21 January 2000.

8.14 On 27 June 2000, the Panel received a written brief from the non-governmental organization *ONE ("Only Nature Endures")* situated in Mumbai, India. In view of the provisions in the Understanding on the interim review, the Panel considered that this brief had been submitted at a stage in the procedure when it could no longer be taken into account. It therefore decided not to accept the request of *ONE* and informed the organization accordingly. The Panel transmitted a copy of the documents received from *ONE* to the parties for information and notified them of the decision it

[12] The letter contains the following note: "See the Report of the Appellate Body in *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico* (WT/DS60/AB/R), paras. 65 and 66."

[13] See paras. 6.1-6.3 above.

[14] Adopted on 20 September 1999, WT/DS58/AB/R (hereinafter "*United States – Shrimp*"), paras. 101-109. See also the report of the Appellate Body in *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, adopted on 7 June 2000, WT/DS/138/AB/R, paras. 40-42.

had taken. At the same time, it also informed the parties that the same decision would apply to any briefs received from non-governmental organizations between that point and the end of the procedure.

C. ORDER IN WHICH THE PANEL EXAMINED THE CLAIMS

8.15 The Panel notes that Canada considers that the TBT Agreement is applicable to the Decree because the Decree is a "technical regulation" covered by the Agreement. The EC, on the other hand, consider that the Decree is not a technical regulation, that the TBT Agreement does not apply to it and that it should be considered in the context of the GATT 1994 alone.

8.16 We note that the Marrakesh Agreement Establishing the World Trade Organization[15] constitutes a single treaty instrument that was accepted by the WTO Members as a "single undertaking"[16] within whose framework all the applicable provisions must be given meaning.[17] Both the GATT 1994 and the TBT Agreement form part of Annex 1A to the WTO Agreement and may apply to the measures in question. Consequently, although we do not in principle exclude application of the TBT Agreement and/or the GATT 1994 to the Decree, we have to determine the order in which we should consider this case. According to the Appellate Body in *European Communities – Regime for the Importation, Sale and Distribution of Bananas*[18], when the GATT 1994 and another Agreement in Annex 1A appear *a priori* to apply to the measure in question, the latter should be examined on the basis of the Agreement that deals "specifically, and in detail," with such measures. In this particular case, as the parties do not agree on the legal nature of the measure itself (technical regulation covered by the TBT Agreement or general ban coming under the scope of the GATT 1994 alone), it is difficult at this stage to determine which Agreement, either the GATT 1994 or the TBT Agreement, deals with the measure in question most specifically and in the most detailed manner without undertaking an in-depth examination of the measure in the light of each Agreement.

8.17 In order to decide upon the order in which our consideration should proceed, in the way suggested by the Appellate Body, the hypothesis should be that, if the Decree is a "technical regulation" within the meaning of the TBT Agreement, then the latter would deal with the measure in the most specific and most detailed manner. Consequently, in our view it must first be determined whether the Decree is a technical regulation within the meaning of the TBT Agreement. If this is the case, we shall start considering this case by examining the ways in which the Decree violates the TBT Agreement. If we find that the Decree is not a "technical regulation", we shall then immediately start to consider it in the context of the GATT 1994.

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[15] Hereinafter "the WTO Agreement". Reference will also be made in these findings to the Marrakesh Agreement Establishing the World Trade Organization without its Annexes using the words "Agreement Establishing the WTO". The words "WTO Agreements" refer to the Agreements annexed to the Agreement Establishing the WTO.

[16] See the Report of the Appellate Body in *Brazil – Measures Affecting Desiccated Coconut*, adopted on 20 March 1997, WT/DS22/AB/R (hereinafter "*Brazil – Desiccated Coconut*"), pp. 12 and 13.

[17] See the Reports of the Appellate Body in *Brazil – Desiccated Coconut*, op. cit. p. 16 and 17; *Argentina – Safeguard Measures on Imports of Footwear*, (hereinafter "*Argentina – Safeguards*") adopted on 13 January 2000, WT/DS/121/AB/R, para. 89.

[18] Adopted on 25 September 1997, WT/DS27/AB/R, hereinafter "*European Communities – Bananas*", para. 204.

D. APPLICABILITY OF THE TBT AGREEMENT TO THE DECREE

1. Arguments of the parties and approach adopted by the Panel

(a) Arguments of the parties concerning the applicability of the TBT Agreement to the Decree[19]

8.18 Canada considers that the Decree is a "technical regulation" within the meaning of the definition given in Annex 1 to the TBT Agreement. The EC consider that the Decree does not come under the definition of a technical regulation in the TBT Agreement.

8.19 The following is the definition of "technical regulation" in Annex 1.1 to the TBT Agreement:

> "1. *Technical regulation*
>
> Document which lays down product characteristics or the 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."

8.20 Canada contends that the Decree considers that all asbestos fibres and all materials, products or devices containing such fibres pose risks for people's health. The Decree is a "technical regulation" in particular because it lays down a characteristic of a product, a process and a production method, as well as administrative provisions applicable to a product.

8.21 Referring to the definition of "technical regulation" in Annex 1 to the TBT Agreement, Canada considers that the ordinary meaning of the word "characteristic" is "that which constitutes a recognizable distinctive feature". The Decree describes a recognizable distinctive feature because it bans asbestos fibre, particularly chrysotile, in the manufacturing and processing of materials, products or devices placed on the French market. The characteristic of these materials, products and devices is the absence of asbestos fibres. The Decree indicates precisely or describes the features of the materials, products or devices in whose manufacture or processing the incorporation of asbestos is prohibited. The Decree refers to the processing of all asbestos fibres, whether or not included in products. By so doing, it imposes restrictions on the processes and production methods for asbestos fibres. Moreover, the Decree stipulates that manufacturing activities are subject to the standards governing exposure to asbestos dust in places of business and this imposes a manufacturing process. It includes administrative provisions and a declaration mechanism applicable to products which, exceptionally, contain chrysotile fibre. Lastly, the Decree also deals with labelling requirements and its principal provisions are binding.

8.22 The EC claim that the Decree cannot be construed as a "technical regulation" within the meaning of the TBT Agreement because the latter does not cover general prohibitions on the use of a product for reasons to do with the protection of human health, which come under the GATT 1994. It follows from the preamble, from the background to the TBT Agreement and from the actual wording of several of its provisions that the fundamental objective of the Agreement is to monitor the adoption and application of the "standards" and "technical regulations" that relate to the detailed characteristics of products or their methods of production (e.g. the minimum resistance level for seat-belts). The definition in Annex 1 means that the TBT Agreement does not apply to the Decree because, according to this definition, a technical regulation is a document which lays down the characteristics or processes or production methods with which a specific/identified product must comply, in particular if it is to be released for free circulation on a given market.

[19] The parties' arguments are set out in detail in Section III above.

8.23 For the EC, any other approach would be equivalent to nullifying the effect of certain provisions of the GATT 1994, for example, Articles I and III, which apply to general prohibitions. The TBT Agreement must be considered as the specific application of the principles of the GATT 1994 to technical regulations. The Decree prohibits asbestos fibres at all stages. It does not specify the characteristics, the processes or production methods for asbestos fibres and asbestos-containing products or the products exempt from the prohibition measure. The EC do not consider that the fact of not containing asbestos serves to characterize products placed on the French market. For the Decree to be able to lay down the "characteristics" of a product, it would have had to identify the product(s) to which the said characteristics relate. The Decree, however, does not designate any product. It lays down the principle of prohibition. As regards the "processes and methods", the EC emphasize that the Decree does not lay down any means or set of rules governing the production of asbestos fibres or products containing them.

8.24 In Canada's view, including a general prohibition within the scope of the TBT Agreement is contrary neither to its object nor its purpose. The distinction made by the EC between prohibitions that apply to all products without distinction and measures aimed particularly at a specific product is not supported by the TBT Agreement. The EC's interpretation is contrary to the principle of effectiveness: it would suffice to give a measure the form of a general prohibition in order to allow it to evade the disciplines of the TBT Agreement. Canada also considers that, in order to determine whether the Decree satisfies the criteria for the definition of a "technical regulation", its provisions on both asbestos and exceptions must be examined.

8.25 For the EC, the fact that the definition of "technical regulation" is narrow is not a matter of chance, but signifies that the authors intended to limit the scope of the Agreement. The object and purpose of the TBT Agreement is to deal with technical regulations and standards, not to resolve market access problems associated with general prohibitions. This does not result in a legal vacuum because the general prohibitions continue to be covered by other provisions, in particular Articles I and III of the GATT 1994. The general prohibition eliminates these products from the market. A technical regulation, on the other hand, means that the products affected by the regulation can still be placed on the market. Even in the case of limited and transitional exceptions, the sole preoccupation of the French authorities has been to protect human health. The Decree does not define either the processes and production methods for the products that may be exempted from the general prohibition adopted. The provisions of the Decree concerning exceptions, therefore, do not fall within the scope of the TBT Agreement either.

8.26 Canada claims that the fact that the Decree qualifies as a "technical regulation" is confirmed by France's notification to the Committee on Technical Barriers to Trade. According to Canada, France thereby recognized the applicability of the TBT Agreement in to the Decree. The EC also recognized the applicability of the TBT Agreement in a document from the European Commission and during the consultations relating to this case.

8.27 According to the EC, the fact that the Decree was notified to the Committee on Technical Barriers to Trade in no way prejudges the applicability of the Agreement. The notification was made in good faith for the sake of transparency. Any other interpretation would create additional obligations for Members and would induce them to discontinue, or at least reduce, notifications.

(b) Approach followed by the Panel

(i) Criteria for the application of the TBT Agreement

8.28 The Panel considers that, for the TBT Agreement to apply to the Decree, the measures imposed under the Decree must come within the definition of "technical regulation" in Annex 1.1 to

the TBT Agreement.[20] On the basis of the arguments put forward by Canada and the EC, it appears that the parties share this view. The Panel will therefore examine this definition.

8.29 According to Article 3.2 of the Understanding, the Panel must clarify the terms of the WTO Agreement in accordance with customary rules of interpretation of public international law, more particularly those set out in Articles 31, 32 and 33 of the 1969 Vienna Convention on the Law of Treaties.[21] The Panel will therefore first consider the ordinary meaning to be given in good faith to the wording of the definition of "technical regulation" in Annex 1 to the TBT Agreement, taken in context and in the light of the object and purpose of the TBT Agreement and the WTO Agreement in general. If necessary, additional ways of interpreting Article 32 will be taken into account. As the WTO Agreement is a treaty with authentic texts in three languages, it is also important to bear in mind the spirit underlying the provisions of Article 33.[22]

(ii) Differentiation among the prohibitions as such and the exceptions

8.30 We note that Canada claims that the exceptions to the ban on asbestos in the Decree confirm that the latter is a technical regulation. The EC state that neither the provisions on exceptions nor the prohibition itself are covered by the TBT Agreement.

8.31 Notwithstanding the fact that the main purpose of the Decree is to ban the use of asbestos in France, we note that the text is essentially composed of a general prohibition on the one hand (Articles 1 and 5) and, on the other, exceptions, including the administrative regime applicable to them (Articles 2-4). It must therefore be determined whether we should examine the prohibitions and exceptions as one single measure or as separate measures that might come under different Agreements.

8.32 We note first of all that it is possible for several components of the same administrative act to be covered by a single Agreement or by different Agreements. While it is the responsibility of the parties to prove the facts they claim[23], it is within the competence and is one of the duties of the Panel to determine the law applicable to the facts, with the help of the parties' arguments.[24] Nothing

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[20] The wording of the definition is given in paragraph 8.18 above.

[21] United Nations Document A/CONF. 39/27 (1969). Hereinafter the "Vienna Convention".

[22] The Panel also notes the importance attached by the Appellate Body to the principle of effectiveness (*ut res magis valeat quam pereat)* concerning the interpretation of the provisions of the WTO Agreement in several cases (see, for example, *United States – Standards for Reformulated and Conventional Gasoline*, adopted on 20 May 1996, WT/DS60/AB/R (hereinafter "*United States – Gasoline"*), op. cit., pp.18 and 23; *Guatemala – Cement*, op. cit., para. 75; *Argentina – Safeguards*, op. cit., para. 88. The Panel also notes in the *Reports of the Commission to the General Assembly, Yearbook of the International Law Commission*, 1966, Volume II, A/CN.4/SER.A/1966/Add.1, p. 219, that the International Law Commission indicates that:

> "[…] in so far as the maxim *ut res magis valeat quam pereat* reflects a true general rule of interpretation, it is embodied in Article [31], paragraph 1, which requires that a treaty shall be interpreted *in good faith* in accordance with the ordinary meaning to be given to its terms in the context of the treaty *and in the light of its object and purpose*. When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the object and purposes of the treaty demand that the former interpretation should be adopted." [Italics in the original.]

[23] See the report of the Appellate Body in *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, adopted on 23 May 1997, WT/DS33/AB/R (hereinafter "*United States – Shirts and Blouses*"), p. 14 and Section VIII.E.1(b) below.

[24] The Panel is not, however, obliged to base itself solely on the arguments of the parties. See the report of the Appellate Body in *EC Measures Concerning Meat and Meat Products (Hormones), adopted on 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R (hereinafter "European Communities – Hormones"),* para. 156:

therefore prevents the Panel from examining the Decree as a single and unique measure, if it believes there are legal grounds for this. Likewise, if the Panel considers that certain provisions of the Decree are covered by provisions of the WTO Agreement other than those applicable to the rest of the Decree, nothing prevents it from considering these provisions in the light of those other provisions of the WTO Agreement.[25]

8.33 Consequently, without taking any decision at this stage on the ultimate need for a separate study of the two parts of the Decree – we might in fact reach the conclusion that both parts have the same legal characterization or that one should be considered as supplementing the other – we consider that there should be a separate examination of the provisions specifically concerning the ban on asbestos and the provisions on exceptions in order to make our analysis clearer. We shall therefore first consider the applicability of the definition of "technical regulation" in Annex 1 to the TBT Agreement to the provisions of the Decree on the prohibition. On the basis of these conclusions, we shall then consider the legal nature of the exceptions and any effect they may have on the legal status of the Decree as a whole.

2. Is the Decree a technical regulation within the meaning of the TBT Agreement?

(a) Examination of the part of the Decree prohibiting the marketing of asbestos and asbestos-containing products

(i) Preliminary remarks

8.34 Canada puts forward its arguments in general in relation to chrysotile fibres and products containing chrysotile fibres (mainly chrysotile-cement products). Although Canada claims that chrysotile fibre is simply an input in other products and is of no use *per se*, we consider that it is a product. In our examination of the applicability of the TBT Agreement to the Decree, there is no reason to treat chrysotile fibre differently to products containing chrysotile.

8.35 The Panel notes that the measure at issue in this case is a general ban excluding a given product from the French market as such or when it is incorporated in other products not specified in the Decree. Consequently, the Panel wishes to emphasize that its findings regarding the scope of the concept of technical regulation in the context of the TBT Agreement are linked to the specificities of the measure in question and in no way prejudge the conclusions that any other panel might reach concerning the same provisions of the TBT Agreement in other factual circumstances.[26]

"Panels are inhibited from addressing legal claims falling outside their terms of reference. However, nothing in the DSU limits the faculty of a panel freely to use arguments submitted by any of the parties – or to develop its own legal reasoning – to support its own findings and conclusions on the matter under its consideration. A panel might well be unable to carry out an objective assessment of the matter, as mandated by Article 11 of the DSU, if in its reasoning it had to restrict itself solely to arguments presented by the parties to the dispute."

See also the Report of the Panel in *United States – Sections 301-310 of the Trade Act of 1974*, adopted on 27 January 2000, WT/DS152/R, para. 7.16.

[25] With regard to the provisions which the Panel must take into account when considering the Decree, the Panel is of course limited by the provisions in its terms of reference (see the Report of the Appellate Body in *European Communities – Bananas*, op. cit., para. 141).

[26] This is precisely why our analysis lays greater emphasis on the characteristics of the product than on the process and production methods.

(ii) Analysis

Ordinary meaning of the terms in the definition in Annex 1 to the TBT Agreement

8.36 The Panel notes first of all that the definition of "technical regulation" relates to the characteristics of a product or its processes or production methods. The Panel notes that the definition uses the word *product*. Applying the principle of effectiveness[27], we must assume that there was a specific purpose underlying the use of the word "product" in the definition in Annex 1.1 to the TBT Agreement and that it does not appear by chance.[28]

8.37 An initial explanation might be that the authors wished to indicate that this definition related to products rather than services, for example. However, as the TBT Agreement is in Annex 1A to the WTO Agreement, which deals with trade in goods, specifying that the definition applies to products was not necessary.[29] Moreover, it is possible to define a technical regulation applicable to products without specifically using the word "product". As an example, we note that paragraph 3.5.1 of the ISO Guide/IEC 2:1991 contains a definition of the words "technical regulation" that does not employ the word "product".[30] We therefore consider that the authors when using the word "product" were pursuing another objective.

8.38 Another interpretation would be that the purpose sought by introducing the word "product" was to create a link between the technical characteristics and one or more given products. In other words, the product(s) to which the characteristics refer must be clearly identifiable in the document in question. If, in the document, the characteristics described do not refer to an identifiable *product*, the document does not meet the criteria in Annex 1.1 to the TBT Agreement.[31] We consider that this interpretation is better able to give a proper meaning to the word "product" in the definition of "technical regulation" in Annex 1.1 to the TBT Agreement.

8.39 We therefore conclude that a technical regulation is a regulation which sets out the specific characteristics of one or more identifiable products in comparison with general characteristics that may be shared by several unspecified products.

8.40 In this connection, the Panel notes that the ban introduced by the Decree is generally applicable both to asbestos and products containing it, in other words, a very large number of products which the Decree does not identify by name nor even by function or category.

8.41 The Panel also notes that the EC contend that the Decree does not describe the *characteristics* of a product and that its purpose cannot be to describe the *characteristics* of an *imported* product because placing asbestos and asbestos-containing products on the French market is prohibited. In our

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[27] See footnote 22 above on application of the principle of interpretation *ut res magis valeat quam pereat*.

[28] See the Report of the Appellate Body in *European Communities – Hormones*, op. cit., para. 164.

[29] Although the title of Annex 1A is "Multilateral Agreements on Trade in Goods" (emphasis added), we note that the Agreement on Agriculture uses the word "products", as do the Agreement on Textiles and Clothing and other Agreements in Annex 1A. The scope of Annex 1A therefore covers trade in "products". See also the Report of the Panel in *United States – Restrictions on Imports of Tuna*, unadopted, DS21/R, 3 September 1991, para. 5.11: "… Article III covers only measures affecting products as such".

[30] The definition in para. 3.5.1 of the ISO/IEC Guide General Vocabulary Concerning Standardization and Related Activities reads as follows:

"**3.5.1 technical regulation: regulation** that provides technical **requirements**, either directly or by referring to or incorporating the content of a **standard**, **technical specification** or **code of practice**" (in bold in the original, note omitted)

[31] In relation to the foregoing, we also note that the standard notification forms under the TBT Agreement contain a section to be completed by a description of the product affected by the notification, which in our view seems to confirm the second meaning we have given for the word "product".

view, according to the applicable customary rules of interpretation, it is also necessary to examine the meaning of the word "characteristics". The ordinary meaning of "characteristic" is "that which constitutes the distinctive feature, is typical of a person or thing"[32], "a recognizable distinctive feature".[33] There is thus a link between the characteristics of a product and the product itself. Nevertheless, the "characteristics" must be differentiated from the identification of the product itself. It is indeed possible to describe technical characteristics without specifically identifying the product(s) to which they relate. Likewise, the identification of a product does not suffice to show its characteristics. The Panel notes that the reference to "characteristics" is the special feature of the definition of "technical regulation" in Annex 1.1 to the TBT Agreement. The measure must not only relate to one or more given products, but its *purpose* must be to define the characteristics, i.e. the criteria or elements which the product(s) concerned must satisfy in order to be introduced into the territory of the Member that adopted the measure.

8.42 By adding the word "product" before "characteristics", the authors of Annex 1.1 therefore wished to specify the circumstances in which the TBT Agreement applied. In order purely and simply to ban the import of a product, it is not absolutely necessary to define its characteristics. In the same way, if it is desired to exclude certain raw materials as such, it is not necessary to specify the products in which they can be incorporated. On the other hand, if the *characteristics of a given product* are identified – even those which mean that import is not allowed – at the same time the characteristics of products which can be introduced into the territory of the country applying the measure are identified.

8.43 The Panel therefore concludes that, taking into account the ordinary meaning of the words "characteristics" and "product", the definition of "technical regulation" in Annex 1.1 to the TBT Agreement applies to the measures which define the technical specifications that one or more given products must meet in order to be authorized for marketing in a Member.

8.44 It may, however, be considered, as Canada does, that the prohibitions in the Decree concern a given product: asbestos, because of its specific characteristics. Nevertheless, as far as the ban on asbestos as such is concerned, the Decree does not concern itself with the characteristics of this product, in any event, not specifically. What is banned is not asbestos which possesses certain characteristics but all types of asbestos. As regards asbestos-containing products, the Panel notes Canada's argument that the characteristic of the products authorized for import is the absence of asbestos. We note, however, that the definition in Annex 1.1 to the TBT Agreement refers to the technical characteristics of a given product. In this case, the products whose characteristic would be that they contained asbestos are not identified in the Decree. As we have already found, the identification of a product appears to be one of the criteria in the definition in Annex 1.1.

8.45 Lastly, the Panel notes that the ban applicable to asbestos-containing products is in fact one *aspect of* or *complementary to* the general ban on asbestos. It can therefore only be considered together with the ban on asbestos as such. It is in fact there in order to ensure that asbestos is not imported into France in any form whatsoever. In such a context, not defining the products concerned is not simply a choice of wording but is the result of the logic of the objective sought (a ban on *all forms* of asbestos). To specify each product affected would be pointless.

Object and purpose

8.46 To the extent that Article 31 of the Vienna Convention contains a single rule of interpretation and not a number of alternative rules, the various criteria in the Article should be considered as forming part of a whole. Although the Panel subdivided its analysis for reasons of clarity, this does

[32] Petit Larousse illustré (1986), p. 162.
[33] Le Nouveau Petit Robert (1994), p. 304.

not mean that there has to be a hierarchy among the various elements in the rule of interpretation.[34] In this particular case, we deem it preferable to analyse the context after examining the object and purpose because the latter help to clarify the understanding of the context of "technical regulation" in Annex 1 to the TBT Agreement.

8.47 We note that the object and purpose of a treaty can also be found in its preamble.[35] Applying the practice of the Appellate Body in this respect[36], it is relevant to look not only at the preamble to the WTO Agreement but also at the preamble to the TBT Agreement itself, which provides certain indications.

8.48 In this connection, we note first of all that, although the preamble to the WTO Agreement refers in particular to expanding trade in goods, it does not give sufficiently precise information on the terms which we must interpret. We therefore turn to the preamble to the TBT Agreement. This refers to standards for products and their role in improving efficiency of production.[37] The TBT Agreement thus aims to improve market access by encouraging *inter alia* the use of international standards, while at the same time exercising control over the development and use of standards at the national level. The reference in the preamble to packaging, marking and labelling[38] appears to confirm that the object and purpose of the Agreement relate to the criteria for marketing these products.[39]

8.49 It might be argued that the fact that the TBT Agreement only refers to elements relating to the marketing criteria for a product does not in itself mean that it does not apply to import bans. Strict application of standards can in fact lead to a ban on the import of certain products. The Panel notes, however, that there is no specific reference in the TBT Agreement to the type of measure involved in this particular case (i.e. a pure and simple import ban without any reference to the characteristics of given products), even though a ban is by its very nature the most restrictive market access measure. Consequently, if the Members had agreed that the TBT Agreement also applied to general bans, they would undoubtedly have mentioned it. It would appear that the purpose of the TBT Agreement is to prevent much more complex situations than a straightforward unconditional ban on a product, which is covered by the very strict provisions in Article XI:1 of the GATT 1994. In the Panel's view

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[34] See *Report of the Commission to the General Assembly*, *Yearbook of the International Law Commission*, 1966, Volume II, A/CN.4/SER.A/1966/Add.1, pages 219-220:

> "The Commission, by heading the article "General rule of interpretation" in the singular and by underlining the connexion between paragraphs 1 and 2 [of Article 31] and again between paragraph 3 and the two previous paragraphs, intended to indicate that the application of the means of interpretation in the article would be a single combined operation. […] the Commission desired to emphasize that the process of interpretation is a unity and the provisions of the article form a single, closely integrated rule."

[35] See I. Sinclair: The Vienna Convention on the Law of Treaties (1980), pp. 127 and 130.

[36] See the Report of the Appellate Body in *European Communities – Customs Classification of Certain Computer Equipment*, adopted on 22 June 1998, WT/DS62/AB/R; WT/DS67/AB/R; WT/DS68/AB/R, para. 88.

[37] "*Desiring*, therefore to encourage the development of such international standards and conformity assessment systems;".

[38] "*Desiring*, however to ensure that technical regulations and standards, including packaging, marking and labelling requirements, and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade;".

[39] Although technically these are additional ways of interpreting Article 32, we note that the *preparatory work* confirms this objective. Document TRE/W/21 of 17 January 1994 notes that the draft Code (Spec(72)3) elaborated in the course of the preparatory work for the Tokyo Round refers to the preparation and adoption of "mandatory standards". The use of the words "mandatory *standards*" (one of the definitions of the word "standard" in English is "a document specifying nationally or internationally agreed properties for manufactured goods, principles for procedure, etc.". The New Shorter Oxford English Dictionary (1993), p. 3028) implies that the purpose of the Agreement was to ensure a product's conformity with the characteristics of other products marketed.

the purpose of adopting the TBT Agreement was to control the development and application of standards - situations in which protectionist aims can be better disguised and for which the existing disciplines within the GATT appeared to be inadequate. A general prohibition by nature does not usually involve any technical specifications. It thus appears that the drafters were concerned at the development and application of technical characteristics for protectionist purposes or leading to protectionist effects, as can be seen from the preamble to the TBT Agreement:

> "*Desiring* however to ensure that technical regulations and standards, including packaging, marking and labelling requirements […] do not create unnecessary obstacles to international trade;". (Emphasis added).

8.50 It would therefore seem that in principle the object and purpose of the TBT Agreement were that it should apply to potentially protectionist aspects of the application of technical regulations and standards which, even if their effect might be purely and simply a ban, could circumvent the GATT disciplines more easily for a number of reasons.

8.51 The Panel nevertheless notes that Canada points out that the imposition of technical characteristics applicable to the import of a product implies a ban on products which do not meet these characteristics. Consequently, any technical regulation is also a general prohibition on products that are not in conformity. The Panel does not disagree. It notes however that, in this particular case, none of the products covered by the Decree can be imported, with the exception of those given a temporary exemption. This is a major difference compared with a technical regulation that defines the characteristics of one or more given products. Even if the number of products that can in fact be imported is very restricted, import remains possible, in theory or in practice.

8.52 This does not mean either that a technical regulation which defines the characteristics of a product negatively does not come under the TBT Agreement. It is always possible to define the characteristics of a product negatively as long as these technical characteristics are specified in such a way as to allow the product to be marketed in the importing countries. As we emphasized in para. 8.40 above, the Decree contains a general prohibition that does not define the characteristics of specific products.

Context

8.53 The Panel notes that the provisions of the TBT Agreement are situated within the broader context of Annex 1A to the WTO Agreement. The EC emphasize in this connection that an interpretation reaffirming the applicability of the TBT Agreement to a general prohibition measure would be equivalent to nullifying the effect of Articles I, III, and XI of the GATT. Canada considers that, if the ban in the Decree is not deemed to be a "technical regulation", there is a risk of circumventing the disciplines of the TBT Agreement by introducing "horizontal" prohibitions instead of technical regulations in the strict sense. We consider that these matters should be examined more specifically in the light of the context of the TBT Agreement because it is by taking into account the content of the obligations in the provisions that form part of the context of the TBT Agreement that we will be able to determine the scope of the definition of "technical regulation" in the TBT Agreement.

8.54 The Panel considers that the concept of circumvention implies that a given attitude makes it possible to avoid an obligation that would otherwise apply. An obligation must be generally applicable before circumvention can occur. Firstly, nothing proves that it is in a Member's interest to try to evade the obligations in the TBT Agreement because its provisions represent a combination of rights and obligations whose balance was carefully negotiated. Nevertheless, assuming that it was in the Member's interest, if the object and purpose of the TBT Agreement are to regulate the marketing conditions, a measure that quite simply banned market access would not come under the Agreement. This does not, however, mean that such measures would not be penalized if they created "unnecessary

obstacles to international trade". To the extent that the GATT 1994 applies, especially Articles I, III or XI whose scope is particularly broad, there would not be any legal vacuum.

8.55 We also note that the criteria on the preparation, adoption or application of technical regulations in Article 2.2 of the TBT Agreement are very similar to those in Article XX of the GATT 1994. The preamble to the TBT Agreement in fact repeats some of the wording of Article XX of the GATT.[40] In the Panel's view the TBT Agreement is a development of the GATT. As mentioned in para. 8.49 above, the TBT Agreement appears to have been adopted in order to strengthen the disciplines applicable to the specific area of manufacturing standards, where they appeared to be insufficient to prevent certain forms of protectionism.[41]

8.56 We also note that the EC claim that Canada's interpretation of the TBT Agreement would be equivalent to nullifying the effect of Articles I and III of the GATT 1994. We note in this connection that the Appellate Body has on many occasions, most recently in the *Argentina – Safeguards* case, recalled that "a treaty interpreter must read all applicable provisions of the treaty in a way that gives meaning to *all* of them, harmoniously".[42] It is therefore important that our interpretation of the provisions of the TBT Agreement in this case should not result "in reducing whole clauses or paragraphs of a treaty to redundancy or inutility".[43] Canada is concerned that a particular interpretation might allow Members to circumvent the obligations imposed by the TBT Agreement. As already indicated above, in our view the main reason for circumventing a provision is to avoid certain obligations. If a general prohibition is not covered by the TBT Agreement, this does not mean that it is not subject to any other provision in the WTO Agreement. At the very least, it will come within the scope of Articles I, and/or III, and/or XI of the GATT 1994 and may have to meet the criteria in Article XX in order to be justified under this Agreement. There may be grounds for Canada's position if it is established that the provisions of the TBT Agreement impose stricter disciplines than those in the GATT 1994 and that excluding general prohibitions from their scope would nullify their effect. The elements before us, however, do not allow us to conclude that this is the case.

8.57 The Panel therefore concludes that, taking into account the terms of the definition considered within their context and in the light of the object and purpose of the TBT Agreement, 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[44];

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[40] "*Recognizing* that no country should be prevented from taking measures necessary […] for the protection of human […] life or health […] subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade […]" (identical wording to that in Article XX of the GATT 1994, emphasis added).

[41] We note in this connection that the preparatory work on the Agreement on Technical Barriers to Trade in the Tokyo Round show that the TBT Agreement that should have emerged from the Tokyo Round was already seen as being a development of the existing rules of the GATT, notably Article XX. See for example the extract from document MTN/3E/W/26, October 1974, quoted in paragraph 7 of document TRE/W/21, 17 January 1994.

[42] Op. cit., para. 81 and footnote 72, (underlined in the original).

[43] Report of the Appellate Body in *United States – Gasoline,* op. cit., p. 23.

[44] According to the definition in Annex 1.1 to the TBT Agreement, the criteria for placing a product on the market must concern its characteristics or the related processes or production methods, including the applicable administrative provisions.

(c) compliance is mandatory.

8.58 In the light of the above, we provisionally conclude that the part of the Decree dealing with the general prohibition on marketing asbestos and asbestos-containing products does not constitute a "technical regulation" within the meaning of the definition in Annex 1.1 to the TBT Agreement.

(iii) Additional arguments by Canada

8.59 The Panel notes that Canada puts forward two additional arguments that must be examined before coming to a definite conclusion on this matter. Firstly, in Canada's view, the EC recognized that the TBT Agreement applied by notifying the Decree to the Committee on Technical Barriers to Trade and during the consultations relating to this dispute.

8.60 From a legal point of view, the question seems to be whether there is *estoppel* on the part of the EC because they notified the Decree or because of their statements, including those during the consultations. This would be the case if it was determined that Canada had legitimately relied on the notification of the Decree and was now suffering the negative consequences resulting from a change in the EC's position.[45] In this case, however, it does not appear that Canada was able legitimately to rely on a notification to the Committee on Technical Barriers to Trade or on a statement made during the consultations. We consider that notifications under the TBT Agreement are made for reasons of transparency.[46] It has been recognized that such notifications do not have any recognized legal effects.[47] Furthermore, notification under the TBT Agreement is one of the few ways of notifying this type of measure for a Member who wishes to show transparency in good faith. Lastly we consider that both the notification and the comments made by the EC during the consultations or in another context constitute observations on the legal characterization of the Decree. Claims regarding the legal characterization of a fact by the parties, however, cannot bind the Panel.

8.61 Lastly, we note that Canada asserts that the Decree contains five of the requirements in the definition in Annex 1.1 to the TBT Agreement, namely, it indicates the characteristics of a product,

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[45] See the decision by the International Court of Justice in the *North Sea Continental Shelf* case, Reports of Judgements 1969, p. 26, para. 30. Regarding the procedural aspect of the use of the word "estopppel", see also Daillier & Pellet: Droit International Public (1994), p. 834, citing Guggenheim, Traité de Droit international public, volume II, p. 158.

[46] See the preamble to the Decision on Notification Procedures, adopted by the Trade Negotiations Committee on 15 December 1993.

[47] See the second paragraph in Section I of the Decision on Notification Procedures, adopted by the Committee on Trade Negotiations on 15 December 1993, as annexed to the Final Act embodying the results of the Uruguay Round of multilateral trade negotiations, done at Marrakesh on 15 April 1994.

> "Members recall their undertakings set out in the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance adopted on 28 November 1979 (BISD 26S/210). With regard to their undertaking therein to notify, to the maximum extent possible, their adoption of trade measures affecting the operation of the GATT 1994, such notification itself being without prejudice to views on the consistency of measures with or their relevance to rights and obligations under the Multilateral Trade Agreements and, where applicable, the Plurilateral Trade Agreements, Members agree to be guided, as appropriate, by the annexed list of measures. Members therefore agree that the introduction or modification of such measures is subject to the notification requirements of the 1979 Understanding." (Emphasis added)

Paragraph 3 of the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, adopted on 28 November 1979 (BISD 26S/210) provides that:

> "Contracting parties moreover undertake, to the maximum extent possible, to notify the CONTRACTING PARTIES of their adoption of trade measures affecting the operation of the General Agreement, it being understood that such notification would of itself be without prejudice to views on the consistency of measures with or their relevance to rights and obligations under the General Agreement."

the processes and production methods relating to a product, the administrative provisions applicable to a product, and packaging or labelling requirements for a product. Finally, compliance is mandatory.[48] We do not in principle rule out that the Decree may include some or even all the requirements mentioned by Canada. We note, however, that our consideration of the terms of the definition of "technical regulation" in Annex 1.1 in their context and in light of the object and purpose of the TBT Agreement in relation to the part of the Decree prohibiting the marketing of asbestos has led us to conclude that this part of the Decree is not covered by the TBT Agreement. Concerning Canada's arguments, we have found that the part of the Decree prohibiting asbestos and for the production of asbestos-containing products does not define the characteristics of the products whose import is banned. We have also found that this part of the Decree does not cover processes or methods for the production of asbestos or asbestos-containing products. Even if we adopt the approach suggested by Canada for the identification of the five requirements, in our view, the absence of the first two requirements suffices to conclude that the Decree does not meet the criteria for the definition of "technical regulation" in the TBT Agreement. We do not therefore think it necessary to consider whether the three other requirements referred to by Canada are to be found in this part of the Decree.

8.62 We nevertheless note that, in its arguments, Canada does not distinguish, as the Panel does, between the part of the Decree banning asbestos and the part relating to exceptions to the ban. It is thus possible that the elements to which Canada refers are to be found in the part of the Decree on exceptions. If this was the case, this would be even greater justification for our decision to analyse the two aspects of the Decree separately.

8.63 We therefore conclude that the part of the Decree dealing with the general ban on the marketing of asbestos and asbestos-containing products does not constitute a "technical regulation" within the meaning of the definition in Annex 1.1 to the TBT Agreement.

(b) Analysis of exceptions and the effect of the type of exceptions on the findings concerning prohibitions

(*i*) *The exceptions in the Decree constitute technical regulations*

8.64 Bearing in mind the discussion in the preceding section, we point out that the following aspects of a measure are likely to mean that the measure is covered by the definition of "technical regulation" in Annex 1.1 to the TBT Agreement.[49]

(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[50];

(c) compliance is mandatory.

8.65 First of all, we note that the EC contend that exceptions are transitional measures limited by their purpose and temporary by nature. Consequently, they should not be covered by the TBT Agreement. We do not consider that the "transitional" nature of a measure suffices to exclude it from the scope of the TBT Agreement. The Agreement does not distinguish between measures according to whether or not they are transitional or temporary.

[48] See Canada's arguments, section III.C.1(a) above, in particular paras. 3.246 and 3.260-3.261.

[49] These criteria are by no means exhaustive.

[50] According to the definition in Annex 1.1 of the TBT Agreement, the criteria for placing a product on the market must concern its characteristics or the related processes or production methods, including the applicable administrative provisions.

8.66 We also note the EC's arguments on the ancillary nature of the exceptions.[51] We have already indicated above that, in theory, there is no reason why two parts of the same text could not have a different legal characterization. We note that, pursuant to the accessory theory (*accessorium sequitur principale),* the legal regime applicable to a good or an action may be related or subject to the regime for a principal good or action.[52] Assuming that this theory applies to a public international law situation, we consider that this particular case does not come within its scope. The measures before us do not relate to application of the ban in the strict sense but to an exception which in practice allows chrysotile asbestos to enter the French market. In such a context, we hesitate to consider the exceptions in the Decree as ancillary to the ban on asbestos.

8.67 We note that the part of the Decree concerning exceptions to the general ban on importing asbestos or asbestos-containing products (Articles 2-4) does not define the products benefiting from such exceptions. Article 2.II, however, covers the identification of the materials, products or devices shown in an exhaustive list drawn up by decree by the Ministers for Labour, Consumption, the Environment, Industry, Agriculture and Transport. We therefore consider that the applicable French regulation (i.e. the Decree as implemented by the above-mentioned Decree) identifies the products benefiting from an exception.

8.68 We also note that Article 2 of the Decree sets out the criteria for marketing the products identified in the Decree and not solely the criteria for excluding products from the market. The second sentence in Article 3.I of the Decree completes these criteria.

8.69 In our view, the marketing criteria in Article 2.I of the Decree relate to the characteristics of one or more given products or processes or production methods relating to them. This is particularly true of the second subparagraph on the technical guarantees of safety appropriate to the use, which has to be read in conjunction with the second paragraph of Article 3.I of the Decree. We also note that Article 2.II and Article 3 in particular cover the administrative provisions applicable to the technical regulations. The second paragraph of Article 4 contains provisions on the labelling and marking of products benefiting from an exception. Lastly, compliance with these provisions is mandatory and there is provision for penalties (see Article 3.III).

8.70 We thus conclude that the part of the Decree concerning exceptions to the ban on asbestos comes within the scope of the definition of technical regulation in Annex 1.1 to the TBT Agreement.

(ii) Effect of the legal characterization of the exceptions on the legal characterization of the prohibitions

8.71 The Panel notes that Canada considers that the regime applicable to exceptions proves that the Decree as a whole is a technical regulation. We are of the opinion that there is no legal reason why certain parts of the Decree should not come under one of the WTO Agreements and other parts under another Agreement. We have already referred above to application of the accessory concept in this particular case. Even assuming that the accessory concept might apply to this particular case, the fact that it is the exceptions to the general ban which come under the TBT Agreement and not the principal element of the Decree (namely the general ban on asbestos) makes it difficult to conclude that the ban must follow the exceptions regime. Consequently, the fact that the exceptions in the

[51] See the reply by the EC to question 2 in the questions by the Panel at the second substantive meeting, paras. 220-221.

[52] See R. Guillien and J. Vincent: Lexique de termes juridiques (1981), p. 3: in civil law "the subsidiary follows the principal in the sense that the principal good transmits its legal characterization to the good attached to it". (WTO translation). See also Black's Law Dictionary (1990), p. 14, regarding the criminal law applicable in certain Members.

Decree are covered by the TBT Agreement in our view should not affect the legal characterization of the general ban and especially the fact of whether or not the ban comes within the scope of the TBT Agreement.

8.72 In any event, as the legal characterization of the exceptions does not affect that of the general ban and even though Canada contests the legality of the Decree as a whole, the Panel should not go further than the question of the legal characterization of the exceptions. The Panel considers that Canada did not make any specific claims concerning the exceptions in the terms of reference drawn up under Article 6.2 of the Understanding. The Panel therefore concludes that it does not have to reach any findings concerning the exceptions.

3. Conclusion

(a) 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.

(b) The TBT Agreement applies to the part of the Decree relating to exceptions to the ban on imports of asbestos and asbestos-containing products because that part constitutes a "technical regulation" within the meaning of Annex 1.1 to the TBT Agreement. This legal characterization, however, does not affect the legal characterization of the part of the Decree banning asbestos nor our consideration of the rest of this case because Canada did not make any specific claims regarding the exceptions to the general ban.[53]

8.73 Having concluded that the part of the Decree banning asbestos and asbestos-containing products does not come within the scope of the TBT Agreement, we shall now consider Canada's claims relating to the GATT 1994.

E. APPLICATION OF THE GATT 1994 TO THE DECREE

1. Preliminary questions

(a) The effect of practice within the GATT 1947 and the WTO

8.74 The Panel notes that, in support of their arguments, the parties refer to panel and Appellate Body reports adopted in the WTO. They also refer at length to panel reports under the GATT 1947, some of which were adopted and others not. As certain issues raised by the parties have been dealt with in detail or even exclusively under the GATT 1947, we deem it useful to explain how we intend to take into account the panel reports issued within the framework of the GATT 1947. For this purpose, we shall base ourselves on the approach followed by the Appellate Body in *Japan – Taxes on Alcoholic Beverages.*[54]

8.75 In this particular case, the Appellate Body emphasized that, with regard to the reports adopted by panels under the GATT 1947, Article XVI:1 of the Agreement Establishing the WTO and paragraph 1(b)(iv) of Annex 1A incorporating the GATT 1994 into the WTO Agreement allow the "legal history and experience under the GATT 1947" to be brought into the new WTO. Adopted

[53] For example, Canada did not claim that the WTO Agreement had been violated by the way in which France administered the exceptions. Moreover, the Panel notes that they are exceptional and temporary exemptions. They will disappear as and when reliable and effective substitute products are developed.

[54] Adopted on 1 November 1996, WT/DS8; DS10;DS11/AB/R, hereinafter "*Japan – Alcoholic Beverages*", pp. 14-15.

panel reports "are an important part of the GATT *acquis*".[55] They create legitimate expectations among WTO Members and should thus be taken into account when they are relevant to any dispute.

8.76 Turning to unadopted reports, the Appellate Body stated that *unadopted* panel reports "have no legal status in the GATT or WTO system since they have not been endorsed through decisions by the CONTRACTING PARTIES to GATT or WTO Members". [footnote omitted]. Likewise, "a panel could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant". [footnote omitted].

8.77 Following this approach, we shall duly take into account the relevant adopted panel reports and, to the extent necessary, we shall take into account the reasoning set out in unadopted panel reports when we deem it relevant to the issues raised in our examination.

(b) Burden of proof

8.78 Canada claims violation of Articles III:4 and XI:1 of the GATT 1994. The EC consider that, even if there is a violation of these provisions, the measure is justified pursuant to Article XX(b). We note that the Appellate Body reaffirmed the general rules applicable to the burden of proof in the case of *United States – Shirts and Blouses.*[56]

8.79 Applying these rules, it is our opinion that Canada, as the complaining party, should normally provide sufficient evidence to establish a presumption that there are grounds for each of its claims. If it does so, it will then be up to the EC to adduce sufficient evidence to rebut the presumption. When the EC puts forward a particular method of defence in the affirmative, it is up to them to furnish sufficient evidence, just as Canada must do for its own claims. If both parties furnish evidence that meets these requirements, it is the responsibility of the Panel to assess these elements as a whole. Where the evidence concerning a claim or a particular form of defence is, in general, equally balanced, a finding has to be made against the party on which the burden of proof relating to this claim or this form of defence is incumbent.

8.80 The Panel also notes the extreme factual and scientific complexity of this case, which led to the consultation of experts under Article 13 of the Understanding. It notes that, in the context of the Agreement on the Application of Sanitary and Phytosanitary Measures, where scientific facts and data play a very important role, the Appellate Body has taken a special approach. As it is necessary to examine the application of Articles III:4 and XI:1 of the GATT 1994 before even considering the EC's arguments based on Article XX, we simply take note of this approach and, if necessary, will return to it when examining the issues raised in connection with Article XX.

8.81 Bearing in mind the above, we consider that it is important for each party to state clearly its *arguments and factual evidence* in support of its claims. If not, the Panel will only be able to conclude that the party concerned did not make the prima facie case needed to establish its claim.[57] The Panel considers that it can only reach findings concerning a claim or part of a claim, even when it is clearly defined in the terms of reference set by the DSB, if the party making the claim

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[55] Ibid., page 14.

[56] Op. cit., page 14:

"The burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption".

[57] Report of the Appellate Body in *Japan – Measures Affecting Agricultural Products,* adopted on 19 March 1999, WT/DS76/AB/R, para. 126.

spontaneously makes the prima facie case needed to establish its claim.[58] Information provided by the experts consulted by the Panel pursuant to Article 13 of the Understanding "to help it to understand and evaluate the evidence submitted and the arguments made by the parties"[59], even where it has been requested by the Panel, can under no circumstances be used by a panel to rule in favour of a party which has not established a prima facie case based on specific legal claims or pleas asserted by it.[60] Put another way, the Panel cannot utilize the information furnished by the experts in order to establish the validity of a claim by one of the parties if that party has not already established a prima facie case.

8.82 On any *legal matter*, notably the interpretation of the Agreements concerned, the Panel will be assisted by the arguments of the parties but will not be bound by them. Pursuant to Article 3:2 of the Understanding, our decision on these matters must be in accordance with the customary rules of interpretation of public international law applicable to the WTO Agreement.

(c) Application of Article III:4 and/or Article XI of the GATT 1994

(i) Question before the Panel[61]

8.83 The Panel notes that the parties have differing views concerning the applicability to the Decree of Article III:4 and Article XI:1 of the GATT 1994.

8.84 Canada considers that the Decree should be examined in the light of these two Articles because it comprises two distinct aspects. On the one hand, it prohibits imports of asbestos in a manner incompatible with Article XI:1. On the other, it includes internal regulations prohibiting the sale and use of asbestos in a manner incompatible with Article III:4. Canada considers that two different aspects of the same measure can be examined in the light of two different articles of the same Agreement. Canada considers that the interpretative Note *Ad Article III* does not apply in this case. If the Panel considers that the Decree cannot be examined under the two Articles, it should be considered as a measure affecting imports and incompatible with Article XI:1. If it cannot be considered as a measure affecting imports, it should be considered as a measure affecting sales and other transactions on the French market and so incompatible with Article III:4.

8.85 The EC assert that either the measure is an internal regulation, in which case it is covered by Article III:4, or it only concerns the import of products, in which case it must be assessed in the light of Article XI:1. The distinction made by Canada fails to take account of the relationship between the two Articles, which means that a single measure that applies both to domestic and imported products must necessarily be covered as a whole by Article III:4 if it is imposed on an imported product at the time or place of importation. Previous practice in the GATT confirms that there can be no cumulative application with Article XI. The practical application of the Decree means that the same measure, namely a general ban on asbestos and asbestos-containing products, applies to all products irrespective of their origin. As one and the same measure is applied to both domestic and imported products – application is at the border for the latter – only Article III:4 is applicable in this case.

(ii) Analysis[62]

8.86 The Panel notes that the relevant provisions of Article III:4 provide the following:

> "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of

[58] Ibid., para. 130.
[59] Ibid., paras. 128-129.
[60] Ibid., para. 129.
[61] The arguments of the parties are set out in detail in Section III above.
[62] The arguments of the parties are set out in detail in Section III above.

> national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use."

Note *Ad Article III* in the Notes and Supplementary Provisions in Annex I to the GATT 1994 states the following:

> "Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III."

Article XI:1 of the GATT 1994 states the following:

> "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party."

8.87 The Panel notes first of all that the parties agree that Article III:4 applies to that aspect of the Decree which bans in particular the sale, domestic marketing and transfer under any title of all varieties of asbestos fibres and any product containing them. This aspect concerns the "treatment accorded to products […] in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use" within the meaning of Article III:4. Canada, on the other hand, considers that Article XI:1 applies to the ban on imports affecting products from Canada.[63]

8.88 The Panel draws attention to Note *Ad Article III*, which specifically covers a situation in which a law, regulation or requirement applies both to an imported product and to the like domestic product and is enforced in the case of the imported product at the time or point of importation. The latter is in fact the case. Consequently, the Panel considers it proper to commence its analysis by determining whether the Note *Ad Article III* applies to this case. As neither of the parties contests the fact that the measure applicable to the imported product is imposed at the time or point of importation, it is necessary to examine whether the Decree "applies to an imported product and to the like domestic product".

8.89 In Canada's view, interpretative Note *Ad Article III* only applies if the measure is applicable to the imported product and to the domestic product. The explicit import ban does not, however, apply to the domestic product because the domestic product is obviously not imported. Moreover, as France neither produces nor mines asbestos fibres on its territory, the ban on manufacturing, processing, selling and domestic marketing is, in practical terms, equivalent to a ban on importing chrysotile asbestos fibre.

8.90 For the EC, the import ban is merely the logical corollary of the general prohibition on the use of asbestos and asbestos-containing products. Article III:4 must be assessed in the light of the interpretative Note relating to it. When a domestic measure applies to both domestic and imported products, Article III must apply.

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[63] It is only if the Panel rejects Canada's first interpretation that the Decree comes in part under Article III:4 and in part under Article XI.1 that Canada considers that the whole of the Decree should fall under Article XI:1 or, if the Panel also rejects this approach, Article III:4.

8.91 The Panel notes that the word "comme" in the French text of Note *Ad Article III* ["and" in the English text] implies in the first place that the measure applies to the imported product and to the like domestic product.[64] The Panel notes in this connection that the fact that France no longer produces asbestos or asbestos-containing products does not suffice to make the Decree a measure falling under Article XI:1. It is in fact because the Decree prohibits the manufacture and processing of asbestos fibres that there is no longer any French production. The cessation of French production is the consequence of the Decree and not the reverse. Consequently, the Decree is a measure which "applies to an imported product and to the like domestic product" within the meaning of Note *Ad Article III*.

8.92 Secondly, the Panel notes that the words "any law, regulation or requirement […] which applies to an imported product and ["comme" in the French text] to the like domestic product" in the Note *Ad Article III* could also mean that the same regime must apply to the imported product and the domestic product.[65] In this case, under the Decree, the domestic product may not be sold, placed on the domestic market or transferred under any title, possessed for sale, offered or exported. If we follow Canada's reasoning, products from third countries are subject to a different regime because, as they cannot be imported, they cannot be sold, placed on the domestic market, transferred under any title, possessed for sale or offered. Firstly, the regulations applicable to domestic products and foreign products lead to the same result: the halting of the spread of asbestos and asbestos-containing products on French territory. In practice, in one case (domestic products), they cannot be placed on the domestic market because they cannot be transferred under any title. In the other (imported products), the import ban also prevents their marketing.

8.93 For the following reasons, we also consider that the wording of Note *Ad Article III* and practice in the GATT 1947 in this respect do not support Canada's approach that an *identical* measure must be applied to the domestic product and the like imported product if the measure applicable to the imported product is to fall under Article III.

8.94 We note that the relevant part of the English text of Note *Ad Article III* reads as follows: "Any […] law, regulation or requirement […] which applies to an imported product *and* to the like domestic product".[66] The word "and" does not have the same meaning as "in the same way as", which can be another meaning for the word "comme" in the French text. We therefore consider that the word "comme" cannot be interpreted as requiring an identical measure to be applied to imported products and domestic products if Article III is to apply.

8.95 We note that our interpretation is confirmed by practice under the GATT 1947. In *United States – Section 337 of the Tariff Act of 1930*[67], the Panel had to examine measures specifically applicable to imported products suspected of violating an American patent right. In this case, referring to Note *Ad Article III*, the Panel considered that the provisions of Article III:4 did apply to the special procedures prescribed for imported products suspected of violating a patent protected in the United States because these procedures were considered to be "laws, regulations and requirements" affecting the internal sale of the imported products, within the meaning of Article III of the GATT. It should be noted that in this case the procedures examined were not the same as the equivalent procedures applicable to domestic products.[68]

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[64] Le Nouveau Petit Robert, op. cit., p. 411.

[65] "In the same way as", "to the same extent as" are among the alternative meanings for the word "comme" in the French text (Le Nouveau Petit Robert, op. cit., p. 411). [In the English text the word is "and"].

[66] Emphasis added. In the place of "and" and "comme", the Spanish version uses the conjunction "y" ("et" in French).

[67] See the Report of the Panel in *United States – Section 337 of the Tariff Act of 1930*, adopted on 7 November 1989, BISD 36S/345, (hereinafter "*United States – Section 337*").

[68] The Panel gave the grounds for its decision in para. 5.10 as follows:

"The fact that Section 337 is used as a means for the enforcement of United States Patent Law at the border does not provide an escape from the applicability of Article III:4; the interpretative Note to

8.96 Canada also claims that the import ban is not an internal measure imposed at the border, for administrative reasons. We consider that an internal charge applied to a domestic product must also be imposed on an imported product. Nevertheless, if it is deemed appropriate to impose the charge at the border rather than waiting until the imported product is actually marketed, the same logic applies in the case of a regulatory measure prescribing a ban on marketing. Is it not equally preferable from the administrative point of view and in the interests of the importers themselves to prevent the entry of the like product into the country applying the measure rather than waiting until it is placed in a warehouse before banning its sale?

8.97 The Panel also notes that Canada makes reference to paras. 4.24 and 4.26 of the Report of the Panel in *Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*[69] to support its claim that the Decree should be examined under Article XI:1 of the GATT 1994. We note that in paragraph 4.24 of the Report, the Panel considered that according to the Note *Ad Articles* XI, XII, XIII, XIV and XVIII, restrictions made effective through state-trading operations were "import restrictions" or "export restrictions". It considered that, in the case of enterprises enjoying a monopoly of both importation and distribution in the domestic market, the distinction normally made between restrictions affecting the importation of products and restrictions affecting imported products lost much of its significance since both types of restriction could be made effective through decision by the monopoly. In this case, the Decree did not institute a monopoly on the import or distribution of asbestos and like products, so the Note *Ad Articles* XI, XII, XIII, XIV and XVIII is not relevant to settlement of this matter.

8.98 As regards Canada's reference to paragraph 4.26 of the aforementioned report[70], we consider that it does not substantiate Canada's position in this case either. In this paragraph, the Panel refrains from ruling on a violation of Article III:4. It appears to do so, however, for reasons of legal economy because it simultaneously recognizes that Article III:4 could apply to state-trading transactions. Contrary to Canada's assertion, this paragraph does not confirm the non-applicability of Article III:4 to the part of an internal measure dealing with the treatment of imported products. At the most, it could confirm the application of both provisions. Nevertheless, as explained in the preceding paragraph, the Panel found that Article XI:1 applied, referring to the Note *Ad Articles* XI, XII, XIII, XIV and XVIII. This Note only applies to state-trading transactions. In the present case, however, there is no question of a measure applied in the context of state-trading activities.

8.99 For the foregoing reasons, we consider that Article III:4 of the GATT 1994 applies to the ban on importing asbestos and asbestos-containing products imposed by the Decree. On the basis of the

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Article III states that any law, regulation or requirement affecting the internal sale of products that is enforced in the case of the imported product at the time or point of importation is nevertheless subject to the provisions of Article III. Nor could the applicability of Article III:4 be denied on the ground that most of the procedures in the case before the Panel are applied to persons rather than products, since the factor determining whether persons might be susceptible to Section 337 proceedings or federal district court procedures is the source of the challenged products, that is whether they are of United States origin or imported. For these reasons, the Panel found that the procedures under Section 337 come within the concept of 'laws, regulations and requirements' affecting the internal sale of imported products, as set out in Article III of the General Agreement."

[69] Adopted on 22 March 1998, BISD 35S/37.

[70] "The Panel considered that it was not necessary to decide in this particular case whether the practices complained of were contrary to Article III:4 because it had already found that they were inconsistent with Article XI. However, the Panel saw great force in the argument that Article III:4 was also applicable to state-trading enterprises at least when the monopoly of the importation and monopoly of the distribution in the domestic markets were combined, as was the case of the provincial liquor boards in Canada. This interpretation was confirmed *a contrario* by the wording of Article III:8(a)."

grounds for this conclusion, we do not consider it necessary to examine further Canada's arguments on the exclusive application of Article XI:1.

8.100 Looking at Canada's arguments, it is difficult to see whether Canada is claiming that, even if the import ban falls under Article III:4, it is also covered by Article XI:1. If Canada does in fact make such a claim for the cumulative application of Article III:4 and Article XI:1 to the part of the Decree banning imports, we do not consider that this forms part of the terms of reference given to the Panel by the DSB and, even if that were the case, Canada's arguments do not make a prima facie case in the sense given to this concept by the Appellate Body.[71] Consequently, we do not consider it necessary to examine this point any further.[72]

2. Violation of Article III of the GATT 1994

(a) Arguments of the parties[73]

8.101 According to Canada the likeness of products should be assessed on a case-by-case basis, considering, in particular, the end-use of the product, consumers' tastes and habits, and the properties, nature and quality of the product. To these should be added tariff classification. Precedents under the GATT 1947 and the GATT 1994 do not, however, require that all the criteria be applied when evaluating the likeness of given products. Moreover, "like" does not mean "identical", it is a matter of showing that the products compared share many similar features. For Canada, applying the criteria in the precedents confirms the likeness of polyvinyl alcohol (hereinafter "PVA"), cellulose and glass fibres and chrysotile fibre, on the one hand, and fibro-cement and chrysotile-cement products on the other.

8.102 The EC contend that asbestos and asbestos-containing products, on the one hand, and substitute products, on the other, are not like products within the meaning of Article III:4 of the GATT 1994. Four criteria in particular can be used to assess the likeness of products: (a) their properties, nature and quality; (b) their tariff classification; (c) their end-use; and (d) consumers' tastes and habits. In this case, three criteria are relevant: the properties, nature and quality; the tariff classification and the end-use of the product. In the EC's view Canada is confusing the concept of "like" product in Article III:4 with that of "competitive" or "directly substitutable" product in Article III:2, read in conjunction with the relevant interpretative Note. In this case, although certain fibrous products are indeed "substitutable" for chrysotile asbestos and products containing it, they are nevertheless not "like" products. Asbestos has unique physical characteristics and properties that make it difficult to replace for certain industrial purposes. This is why the Decree envisages exceptions. As asbestos has so many uses, there is no single natural or synthetic product which, alone, could replace it in all the products and materials that contain asbestos.

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[71] See the Reports of the Appellate Body in *United States – Shirts and Blouses,* op. cit. and *Australia – Salmon,* op. cit. See also Section VIII.E.1(b) above.

[72] We note in this connection that the Report of the Panel in *Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies,* adopted on 18 February 1992, BISD 39S/27, in para. 5.28 specifically examines the question of whether minimum prices fell under Article XI:1 or Article III:4 and noted the following:

> "The Panel first examined whether the minimum prices fell under Article XI:1 or Article III:4. The Panel noted that, according to the Note Ad Article III, a regulation is subject to the provisions of Article III if it 'applies to an imported product and to the like domestic product' even if it is 'enforced in case of the imported product at the time or point of importation'. The Panel *found* that, as the minimum prices were applied to both imported and domestic beer, they fell, according to this Note, under Article III."

[73] The arguments of the parties are set out in detail in Section III above.

(b) Issues raised in connection with the arguments of the parties relating to Article III:4 of the GATT 1994

8.103 The Panel considers that the arguments of the parties raise the following issues:

(a) The first issue is the criteria to be applied in order to determine the likeness of the products in question. The Panel notes that the parties do not in fact agree on the scope of the concept of like product under Article III:4. Nevertheless, with regard to the criteria to be taken into consideration when assessing likeness, the parties referred to the criteria contained *inter alia* in the Report of the Working Party on *Border Tax Adjustments*[74] and in the Reports of the Panel and the Appellate Body in *Japan – Taxes on Alcoholic Beverages*.[75] The problem can therefore be summarized as whether the criteria developed in these cases must be applied as such or in a particular way in the context of Article III:4, or whether additional criteria should be taken into consideration. Inasmuch as these are the only criteria developed to date in connection with Article III, we consider it appropriate to commence our analysis by applying them to the facts in this case. If, when applying these criteria, we encounter difficulties specific to Article III:4, we shall deal with them at that stage. Moreover, we note that in the above-mentioned case the Appellate Body specified that each criterion should be assessed on a case-by-case basis.[76] It is thus not a question of systematically determining the criteria applicable in the context of Article III:4 but rather of deciding which are relevant in this case.

(b) The second issue is related to the fact that the parties often refer in general to substitute products for chrysotile, products containing asbestos in general, chrysotile-cement products or fibro-cement products. Taking into account the practice of the Appellate Body regarding determination of the likeness of products and the burden of proof in this connection, we consider that the identification of the products which have to be compared pursuant to Article III:4 is of importance in our findings.[77] We also have to decide how to deal with the fibres as such as compared to products containing the fibres.[78]

8.104 In view of the particular implications of the second question for our findings, it appears to us necessary first to devote a special section of the report to this.

(c) The Panel's approach to product-by-product analysis and certain specific aspects of the burden of proof.

8.105 The Panel notes that the EC have indicated that 90 per cent of imported chrysotile fibre was used for making asbestos-cement products prior to the application of the Decree.[79] The Panel also notes that Canada "focuses" its arguments on chrysotile fibres and substitute fibres for chrysotile, as well as on chrysotile-cement and fibro-cement products. With regard to substitute fibres for

[74] Report of the Working Party on *Border Tax Adjustments*, adopted on 2 December 1970, BISD 18S/97, para. 18.

[75] Op. cit., pp. 22-25.

[76] Ibid., p. 22.

[77] See the Report of the Appellate Body in *Japan – Measures Affecting Agricultural Products*, op. cit., paras. 136-138.

[78] Bearing in mind Canada's reply to question No. 15 by the Panel, paras. 74-76, we conclude that Canada does not raise the issue of the likeness of non-fibrous products, whether substitute products or products containing them, as compared to chrysotile or products containing it.

[79] See the EC's reply to question 30 by the Panel, Annex II, para. 113 below.

chrysotile, Canada points out that there are more than 150 substitute fibres for chrysotile fibre. Nevertheless, Canada indicates that, in view of Article III:4 of the GATT 1994, it considers that the Panel's findings and conclusions should take into account the impact of the Decree in relation to three substitute fibres: PVA, cellulose fibres and glass fibres, as well as the fibro-cement products incorporating these. Canada also indicates that it does not invoke the argument of likeness with respect to non-fibrous substitutes for chrysotile fibres (e.g. PVC or ductile iron), nor to non-fibrous products used as substitutes for chrysotile-cement products.

8.106 The EC indicate that in its request for consultations and its request for the establishment of a panel, Canada never claimed that this dispute concerned high-density cement products containing chrysotile. The Panels terms of reference do not refer to these either. Moreover, the EC point out that Canada only exported chrysotile asbestos as a raw material and not in the form of high-density cement products containing chrysotile.

8.107 Taking into account the rules governing the burden of proof[80], the Panel in the first place considers that it should restrict its examination of the likeness of products in the context of Article III:4 to those products identified by Canada for which the parties provided evidence or made an adequate prima facie case to establish their likeness or their absence of likeness to chrysotile and products containing it.[81]

8.108 We note, that although friction products are mentioned, Canada does not include these in its comparisons relating to Article III:4. We therefore conclude that Canada does not intend the Panel to rule on the likeness of friction products containing chrysotile and other products.[82] We shall therefore not examine these products in our findings relating to the provisions of the GATT 1994.

8.109 Secondly, although Canada appears sometimes to consider that chrysotile fibre is simply an input and not a product *per se*, we note that the Decree refers to "varieties of asbestos fibres, … regardless of whether these substances have been incorporated into materials, products or devices". We also note that the two parties discussed the likeness of asbestos fibres as such, irrespective of the products into which they were incorporated.

8.110 Concerning the EC's argument that neither in the request for consultations nor in the request for the establishment of a panel nor in the Panel's terms of reference is it specified that the dispute concerns high-density cement products containing chrysotile, the Panel wishes to recall that it is not necessary for the request for the establishment of a panel to list all the products concerned in detail. The Panel also considers that the fact that Canada did not export high-density cement products containing chrysotile cannot constitute an obstacle to claims relating to these products.[83]

8.111 In the light of the foregoing, it would appear appropriate to structure our analysis as follows:

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[80] See in particular the reports of the Appellate Body in *Australia – Salmon*, op. cit. and *Japan – Agricultural Products*, op. cit..

[81] We are aware that Canada's claims (see para. 3.1 above) state that the Decree is incompatible with Article III:4 of the GATT 1994 because it "favours the national industry of products like chrysotile cement and chrysotile-cement products …" Moreover, our terms of reference are not confined to PVA, cellulose and glass fibres (see WT/DS135/3). We note, however, that Canada does not ask for findings on other fibres. We therefore limit our findings to the products for which we consider Canada had requested findings, namely, PVA, cellulose and glass fibres.

[82] See Annex II, Canada's reply to question 15 by the Panel, paras. 74 *et seq.*.

[83] See the Report of the Appellate Body in *European Communities – Bananas*, op. cit., para. 136, where it is mentioned that the potential export interest by the United States could not be excluded even though at that time the United States did not export bananas from their territory to the EC. See also the Report of the Panel in *Indonesia – Certain Measures Affecting the Automobile Industry*, adopted on 23 July 1998, WT/DS54, 55, 59, 64/R, para. 14.113.

(a) First of all, to examine whether PVA, cellulose and glass fibres, taken separately (i.e. not incorporated in a product), are products like to chrysotile fibre. Even if they are not a finished product, the fibres themselves are products which are exported and marketed and we believe it is relevant to compare them.

(b) Secondly, with regard to products containing asbestos or substitute fibres, we note that Canada confines its comparison to products combining cement and chrysotile ("chrysotile-cement") or one or the other of the three aforementioned fibres ("fibro-cement"). We shall therefore limit our findings to these categories.

(c) Lastly, we note that, although Canada makes a specific reference to and cites as an example certain products: pipes, tiles, insulating tiles or boards, it does not furnish an exhaustive list of the products actually affected by the measure and its claims are not arranged on a "product-by-product" basis. Canada refers in generic terms to two major categories of product: (a) chrysotile, PVA, cellulose and glass fibres; and (b) products combining chrysotile and cement or other fibres and cement. We also note that the EC does not distinguish between various fibro-cement or chrysotile-cement products. Even though the different products composed of chrysotile-cement or fibro-cement have different uses (water pipes, thermal insulation, roofing, etc.), we do not consider it necessary to identify each product manufactured in chrysotile-cement or fibro-cement because they are all composed of either fibro-cement or chrysotile-cement and the matters discussed by the parties concerning their likeness are essentially related to whether or not they contain chrysotile.

(d) Analysis of likeness

(i) Introductory remarks

8.112 We note that both Canada and the EC refer to the Report of the Working Party on *Border Tax Adjustments*, which, using the terms of the Appellate Body in *Japan – Alcoholic Beverages*, lays down the fundamental principle for interpreting the words "like products" in general in the various provisions of the GATT 1947. This Report states the following:

> " … the interpretation of the term ['like products'] should be examined on a case-by-case basis. This would allow a fair assessment in each case of the different elements that constitute a 'similar' product. Some criteria were suggested for determining, on a case-by-case basis, whether a product is 'similar': the product's end-uses in a given market: consumers' tastes and habits, which change from country to country; the product's properties, nature and quality".[84]

8.113 The Panel and the Appellate Body in *Japan – Alcoholic Beverages* recognized the relevance of this list and added tariff classification in the Harmonized System ("HS"). The Appellate Body also pointed out that the principle elaborated by the Working Party in *Border Tax Adjustments* had been followed in almost all the reports of subsequent panels. We note in this connection that the panel in *United States – Gasoline*, in the context of the GATT 1994, applied this principle when examining likeness in relation to Article III:4.[85]

8.114 Finally we note that in *Japan – Alcoholic Beverages* the Appellate Body reaffirmed that panels must use their best judgement when determining whether, products are in fact like products, and this would always inevitably involve a degree of discretionary judgement. The Appellate Body

[84] Op. cit., para. 18.
[85] Op. cit., paras. 6.8 and 6.9.

also confirmed that, when making an assessment, no single approach would be appropriate to every single case. The circumstances peculiar to each case must be taken into account. The criteria outlined in the report on *Border Tax Adjustments* should be examined, but there could be no precise and absolute definition of like.

8.115 We would add that even though, for reasons of clarity, each criterion has to be examined separately, it is more than likely that they are largely interdependent. In other words, it does not appear appropriate to examine each of the criteria in isolation. Our examination should be based on an assessment of each criterion in its context, that is to say in the light of the other criteria deemed relevant in this case.

8.116 Having defined the approach to be used, we commence our analysis by examining the likeness of fibres.

(ii) Likeness of asbestos fibres and substitute fibres

8.117 We note that, in their arguments, the parties have not always distinguished between fibres as such and products containing such fibres.[86] In this section, therefore, we shall examine the relevant criteria provided that they can be related specifically to the fibres.

Properties, nature and quality of the products

8.118 Canada considers that the nature of chrysotile and substitute fibres is the same because they are all fibres. Even if the length, diameter and width-diameter ratio have an effect on pathogenicity, this does not mean that fibres of different dimensions cannot be like fibres. The dimensional parameters set by the WHO do not constitute the criterion of the nature, quality and properties according to which the likeness of fibrous products is determined. Too much importance should not be attached to the special nature of asbestos fibres claimed by the EC. Even if substitute fibres are more costly than chrysotile fibres and have other uses, chrysotile-cement or fibro-cement manufacturers use them for the same purposes and the likeness of the manufacturing processes for chrysotile-cement and fibro-cement shows the similarities of the properties and the nature of these fibres. In order to offer the same technical guarantees as chrysotile-cement products (one of the conditions for substitutability in the Decree), fibro-cement products must indubitably have the same properties, quality and nature. Similarly, the "lower" pathogenicity of substitute fibres should not preclude the conclusion that they are like asbestos. Products may be considered like despite their differing impact on health. There is no contradiction between distinguishing two types of fibre in scientific terms and according to their pathogenicity, on the one hand, and, on the other, applying the criteria derived from WTO and GATT practice for determining whether products are like. The toxicity of a product is not recognized as a criterion for the evaluation of likeness.

8.119 The EC consider that the properties, nature and quality of products are important when assessing likeness within the meaning of Article III:4. Unlike other criteria, this criterion has always been used by panels in connection with Article III:4. In the light of this criterion, the products are in any case different. Asbestos fibres have a very particular fibrous texture (bundles of fibrils that can easily be separated lengthways and have a very small diameter). The physical and chemical characteristics of substitute fibres are not the same as those of asbestos fibres (for example, their diameter is much bigger and their fibrillation capacity is more limited). No single natural or synthetic substitute product is able to combine, or combines, all the properties of asbestos, bearing in mind the unique nature of the characteristics of asbestos fibres. These characteristics also make asbestos fibres particularly dangerous for health. Since 1977, the WHO has classified asbestos fibres in category 1 of

[86] See, for example, the arguments of the parties on the concept of "like products", Section III.C. 2(b)(i) above.

proven carcinogens. The EC point out that, in contrast, none of the substitute products for chrysotile asbestos is classified as a proven carcinogen for humans. The nature, composition, physical properties and proven effects on human health of chrysotile make it radically different from substitute products. In such a situation, the health risk posed by the product must necessarily be taken into account. A dangerous product should be regarded as being different in nature and quality from a harmless or less dangerous product.

8.120 The Panel considers that, in addition to the factual elements, the parties' arguments raise a first issue, namely, in what context should the criterion of the properties, nature and quality of the fibres be taken into account for the likeness test within the meaning of Article III:4? The parties in fact basically take up the question of the way in which the properties, nature and quality of the fibres should be taken into account by the Panel.

8.121 The Panel notes that no party contests that the structure of chrysotile fibres is unique by nature and in comparison with artificial fibres that can replace chrysotile asbestos. The parties agree that none of the substitute fibres mentioned by Canada in connection with Article III:4 has the same structure, either in terms of its form, its diameter, its length or its potential to release particles that possess certain characteristics.[87] Moreover, they do not have the same chemical composition[88], which means that, in purely physical terms, none of them has the same nature or quality. It could therefore be concluded that they are not like products.

8.122 It should be recalled, nevertheless, that the context for the application of Article III:4 is not a scientific classification exercise. The objective of Article III concerns market access for products.[89] Its purpose is to prevent internal measures from being applied in such a way as to protect domestic production.[90] Article III:4 upholds this objective in respect of laws, regulations and requirements affecting the sale, marketing, purchase, transportation, distribution and use of products on the domestic market. We also note that the criterion includes the concept of the "quality" of a product, which is indicative of a commercial approach, otherwise the word "quality" would no doubt have been used in the plural, in which case it would have been the same as "properties" in the sense of a particular quality of a product.[91] It is thus with a view to market access that the properties, nature and quality of imported and domestic products have to be evaluated.

8.123 Although we share Canada's view that all the products are "fibres" and thus like products, we do not consider that the examination of the physical structure and chemical composition (which in our view relate to the nature of the product) should be taken to the other extreme, even though it has been argued that other panels followed a narrower approach in this respect.[92] If such an approach was adopted, many products would never be like in respect of their nature, even if they had a similar use.

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[87] In this connection, we note the observation by one of the experts consulted by the Panel that the characteristics of some artificial substitute fibres can be altered by industry if necessary (Dr. Henderson, para. 5.383 above).

[88] Regarding the chemical composition of asbestos, see the table provided by the EC in reply to question 29 by the Panel, para. 106.

[89] See the Report of the Panel in *United States – Measures Affecting Alcoholic and Malt Beverages*, adopted on 19 June 1992, BISD 39S/206, para. 5.25.

[90] Ibid., para. 5.71. See also the Report of the Panel in *Italian Discrimination Against Imported Agricultural Machinery*, adopted on 23 October 1958, 7S/60, para. 11, and the Report of the Panel *United States – Section 337 of the Tariff Act of 1930*, adopted on 7 November 1989, 36S/345, para. 5.10.

[91] In this connection, we note that the English text of the Report on *Border Tax Adjustments*, op. cit., para. 18, uses the words "properties" and "quality".

[92] See the EC's arguments in para. 3.44 above concerning the Report of the Panel in *EEC – Measures on Animal Feed Proteins*, adopted on 14 March 1978, BISD 25S/49. The Panel does not consider that the factual elements peculiar to this affair and the conclusions of the Panel (see para. 4.2) make it possible to draw the conclusions suggested by the EC in the present case.

On the other hand, products which bore no relation to each other in terms of their use in everyday life could be considered as like products because of their chemical composition. As mentioned in para. 8.114 above, we note the need to evaluate these criteria on a case-by-case basis, in other words, bearing in mind the factual circumstances. In this particular case, because of its physical and chemical characteristics, asbestos is a unique product. We note, nevertheless, that for many industrial uses other products have the same applications as asbestos. If the chemical and physical characteristics were to be recognized as decisive in this case, we would have to disregard all the other criteria and this does not appear to us to be consistent with the flexibility given to panels by the Appellate Body when examining the principle of likeness.

8.124 As regards properties, we note that no substitute fibre alone combines all the properties and qualities of chrysotile fibre itself. Article 2, paragraph I, second sub-paragraph of the Decree recognizes this by basing the criteria for substitution *inter alia* on "all technical guarantees of safety corresponding to the ultimate purpose of the use thereof". A narrow interpretation of the concept of like product might perhaps lead us to exclude the likeness of products which do not always show the same properties in all circumstances. In the context of market access, it is not necessary for domestic products to possess all the properties of the imported product in order to be a like product. It suffices that, for a given utilization, the properties are the same to the extent that one product can replace the other. If the properties of products always had to be the same, the category of like products would be very small, sometimes even just one product. We note in this connection that the Panel in *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*[93] considered that gin, vodka, whisky, brandy, liqueurs, still wine and sparkling wine should be considered as like products within the meaning of Article III:2 in view of their similar properties and end-uses[94] we consider that this Report upholds our approach. If products whose nature is not exactly the same and whose properties are not always identical, for example wine on the one hand and whisky on the other, can be considered like products, the same approach can be followed pursuant to Article III:4 for chrysotile fibres on the one hand and PVA, cellulose and glass fibres on the other.

8.125 In this case, even if the end-uses of chrysotile fibres on the one hand and PVA, cellulose and glass fibres on the other are only the same for a small number of their respective applications, in some cases the applications are similar. Their properties are then equivalent, if not identical. This is the juncture of interest to us, the moment when the products are used for the same purpose. As we have already mentioned above, the criteria proposed for determining likeness should not be examined in isolation. In this particular case, we consider that the end-use of the products should affect the way in which we examine the properties of the fibres compared, inasmuch as none of the fibres mentioned by Canada always fulfils the same functions.

8.126 We therefore conclude that, taking into account the properties criterion, chrysotile fibres are like PVA, cellulose and glass fibres. With regard to nature and quality, we consider that these criteria should not be applied narrowly in the factual circumstances of the present case. Consequently, the fact that chrysotile fibres do not have the same structure or chemical composition as PVA, cellulose or glass fibres cannot be decisive for the evaluation of the likeness of these products.

8.127 The second question that must be answered in relation to the application of the properties, nature and quality criterion is that of the relevance of the risk of the product raised by the EC.[95]

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[93] Adopted on 10 November 1987, BISD 34S/84, hereinafter "*Japan – Alcoholic Beverages (1987)*".

[94] Ibid., para. 5.6.

[95] We note that the EC draw attention to the risk posed by chrysotile fibres not only in connection with the properties, nature and quality criterion but also in relation to the end-use and the tastes and habits of consumers. In this subsection, however, we examine the criterion of the risk of a product inasmuch as the EC, in its arguments, referred to this criterion mainly in relation to the criterion of the properties, nature and quality of asbestos fibres. The conclusions of our examination, however, will apply to all the circumstances in which

8.128 The Panel has noted the EC's argument that the capacity of chrysotile fibres to break up into extremely fine particles that can penetrate the pulmonary alveoli gave these fibres a property which meant that they were not like because this property was the basis for chrysotile's potential to cause diseases of the lung and the pleura, mainly lung cancers and mesotheliomas.[96]

8.129 We note first of all that the risk of a product for human or animal health has never been used as a factor of comparison by panels entrusted with applying the concept of "likeness" within the meaning of Article III. In addition to the fact that no other panel has probably ever been called upon to examine a question similar to the one before us, in our view the reason is to be found in the *economy* of the GATT 1994. Its primordial role is to ensure that a certain number of disciplines are applied to domestic trade regulations. Article XX of the GATT, however, recognizes that certain interests may take precedence over the rules governing international trade and authorizes the adoption of trade measures aimed at preserving these interests while at the same time observing certain criteria.[97]

8.130 We consider that introducing a criterion on the risk of a product into the analysis of likeness within the meaning of Article III would largely nullify the effect of Article XX(b).[98] The protection of human health and life is specifically covered by this Article. Article III, on the other hand, does not refer to this. The burden of proof would not of course be greatly modified because the EC would still have to prove the risk of the product, applying the principle of *probatio incumbit ejus que dixit.* We nevertheless consider that other aspects that form part of the rights and obligations negotiated by the Members would be affected. Introducing the protection of human health and life into the likeness criteria would allow the Member concerned to avoid the obligations in Article XX, particularly the test of necessity for the measure under paragraph (b) and the control exerted by the introductory clause to Article XX concerning any abuse of Article XX(b) when applying the measure. As the Appellate Body has emphasized on a number of occasions[99], all these provisions in the WTO Agreement must be given meaning. Introducing a risk criterion into the examination of likeness under Article III would be contrary to this basic principle of interpretation.

8.131 Finally, if such a criterion was applied, it would make all the other criteria mentioned by the Working Party on *Border Tax Adjustments*[100] totally redundant because it would become decisive when assessing the likeness of products in every case in which it was invoked, irrespective of the other criteria applied.

8.132 We therefore conclude that, bearing in mind the overall economy of the WTO Agreement, in particular the relationship between Article III and Article XX(b), it is not appropriate to apply the "risk" criterion proposed by the EC, neither in the criterion relating to the properties, nature and quality of the product, nor in the other likeness criteria invoked by the parties.

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the EC refer to the risk of a product in relation to the determination of likeness within the meaning of Article III:4 of the GATT 1994.

[96] Mesothelioma is a form of pleural cancer. See for example the description by Dr. Henderson, para. 5.29 above.

[97] See the report of the Panel in *Canada – Measures on Export of Unprocessed Herring and Salmon*, adopted on 22 March 1988, BISD 35S/98, para. 4.6.

[98] See the discussion on the concept of effectiveness, footnote 22 above.

[99] See in particular *Argentina – Safeguards,* op. cit; *Brazil – Desiccated Coconut,* op. cit.

[100] See para. 8.112 above.

End-use

8.133 Canada considers that, given the nature of chrysotile fibre (a raw mineral resource), special importance must be attached to the criterion of the product's end-use. Chrysotile fibre has no use in its raw form. After incorporation into the cement, chrysotile fibre and PVA, cellulose and glass fibres are used for the manufacture of chrysotile-cement and fibro-cement products respectively. At the end-use stage, these products constitute one single product to be used for the same purpose. According to Canada, applying the end-use criterion suffices to conclude that chrysotile fibres and the aforementioned substitute fibres are like products. If end-use is a key criterion for determining whether two products are directly competitive or substitutable pursuant to Article III:2, it is equally important for likeness. It is the market which determines the end-use of a product.

8.134 According to the EC, the end-uses of these fibres are different and this criterion is not decisive when determining "likeness" within the meaning of Article III:4, which is essentially "technical". Even where products may have some end-uses in common, these uses are not sufficient to classify the products as like products when each of them also has many other end-uses. The criterion of end-use could not, by itself, invalidate the conclusion based on other criteria that these products are not like products within the meaning of Article III:4 of the GATT 1994.

8.135 The Panel notes that Canada limited its arguments to the use of chrysotile in cement products and, at the same time, to the use of PVA, cellulose and glass fibres in cement products.

8.136 We have already found above[101] that the respective properties of chrysotile fibres on the one hand and PVA, cellulose or glass fibres on the other allowed certain identical or at least similar end-uses. We do not therefore deem it necessary to elaborate this further, except to recall that, in our view, the fact that all the end-uses of these fibres are not like uses does not mean that the products are not like products.

Consumers' tastes and habits

8.137 As regards consumers' tastes and habits, Canada is of the view that manufacturers of chrysotile-cement or fibro-cement products are the consumers. The drop in chrysotile asbestos imports in 1996 and 1997 is a result of the Decree and not of a change in consumers' tastes and habits. It is thus inappropriate to consider this criterion. Canada agrees with the practice of panels cited by the EC[102], and asks the Panel not to take into account consumers' tastes and habits when determining the likeness of products in this case.

8.138 In the view of the EC, the consumers' tastes and habits criterion is not a priori relevant because the products concerned are not everyday consumer goods. It might nevertheless be interesting to analyse the consumers' perception of these products. Informed users will not choose asbestos after the competent international organizations have decided that it is a proven carcinogen.

8.139 We note first of all that the parties do not consider it useful or necessary for us to take this criterion into account. In our view, this is not in itself sufficient reason for us not to take it into account. We do not agree either, that, in view of Article III:4, there are reasons for excluding consideration of this criterion a priori.[103] We consider that it is up to the Panel to decide whether one

[101] See para. 8.125 above.

[102] These cases are cited in para. 3.446 above and in the corresponding footnotes.

[103] In the cases cited by the EC – to which Canada also refers – we do not find any legal reasons relating to Article III:4 to justify excluding the criterion of consumers' tastes and habits. In *Measures Affecting Alcoholic and Malt Beverages* (adopted on 19 June 1992, BISD 39S/206), para. 5.73, the panel indeed did not agree that low alcohol beer and high alcohol beer were like products on the basis of consumers' tastes and habits, but it did nevertheless use this criterion. In *EEC – Measures on Animal Feed Proteins* (adopted on

of the criteria applicable to determining the "likeness" of the products concerned is relevant or not.[104] What is important is to ensure that our analysis takes into account all the relevant elements. In this particular case, we note first of all that, when determining the tastes and habits of consumers, it is necessary to place oneself at the time prior to the entry into force of the ban in the Decree. Even if we do place ourselves prior to that date, however, it would be difficult to determine precisely what were the tastes and habits of consumers at that time. The groups of consumers to be taken into account are very varied and their tastes and habits based on an equally wide variety of considerations. Because this criterion would not provide clear results, the Panel considers that it is not relevant to take it into account in the special circumstances of this case.

8.140 We shall therefore refrain from taking a position on the impact of this criterion on the likeness of the products considered.

Tariff classification

8.141 As regards tariff classification, Canada recalls that the 107 six or eight-digit codes for chrysotile-cement products in the Harmonized Commodity Description and Coding System of the Customs Cooperation Council[105] are identical to the 107 codes for fibro-cement products.

8.142 The EC consider that the tariff classifications are different, whether for asbestos fibres and substitute fibres or for products containing asbestos and substitutes for asbestos. For example, in the Harmonized System, asbestos fibres are classified in their own heading.

8.143 We do not consider that the fact that asbestos fibres are classified in their own heading is decisive in this case. PVA, cellulose and glass fibres respectively are also classified in different tariff headings. We note, however, that such a classification reflects the difference in their nature, whether they are mineral or vegetable, artificial or natural. We have already found that this factor did not affect the fact that their properties and end-use are the same under certain circumstances.[106]

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14 March 1978, BISD 25S/49), para. 4.2, the panel did not exclude the applicability of consumers' tastes, noting:

> "[…] in this case, such factors as the number of products and tariff items carrying different duty rates and tariff bindings, the varying protein contents and the different vegetable, animal and synthetic origins of the protein products before the Panel – not all of which were subject to the EEC measures".

In view of the terms used by the panel in this case, it does not seem that the panel in principle rejected the relevance of consumers' tastes and habits. In *United States – Gasoline*, op. cit., even though the panel did not mention the criterion of consumers' tastes and habits in its conclusions in para. 6.9, in para. 6.8 it nonetheless recalled the applicability under Article III:4 of the criteria summarized by the Working Party in *Border Tax Adjustments*, op. cit., which include consumers' tastes and habits. We have not found any reason either to restrict the meaning of the word "consumers" solely to the end-consumers of chrysotile-cement products, i.e. individual consumers.

[104] See the Report of the Appellate Body in *Japan – Alcoholic Beverages*, op. cit., p. 24.

[105] Hereinafter "Harmonized System" or "HS".

[106] Asbestos in its natural state falls in heading 25.24. Polyvinyl alcohol falls in heading 39.05, cellulose in 39.12 and glass fibre in 70.19. We note that in *Japan – Alcoholic Beverages (1987)*, the Panel referred to the "Nomenclature of the Customs Cooperation Council (CCCN) for the classification of goods in customs tariffs". We also note that the Appellate Body in *Japan – Alcoholic Beverages* op. cit. p. 24 reaffirmed that that tariff classification, if sufficiently detailed, was a useful basis for confirming the likeness of products. We note that in this case the parties based themselves on the tariff classification in the Harmonized System, and not on tariff bindings, which the Appellate Body urges should be used with caution. We do not consider however, that the particular circumstances of this case justify that, when determining the likeness or absence of likeness of asbestos, PVA, cellulose and glass fibres, overriding significance should be attached to the fact that the products fall in different tariff headings of the HS.

Conclusion

8.144 Above we concluded that chrysotile fibres, on the one hand, and PVA, cellulose and glass fibres, on the other, are, in certain circumstances, similar in properties, nature and quality. We also concluded that these products have similar end-uses. From this it follows 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.

(iii) Likeness between products containing asbestos and certain other products

8.145 The Panel considers that many of the arguments put forward in relation to asbestos, PVA, cellulose and glass fibres are applicable *mutatis mutandis* to products containing those fibres. Thus, if a fibro-cement product, for example, a tile, is compared with a similar tile of chrysotile-cement, the only difference between the products concerned is the presence of either chrysotile or a substitute fibre in the tile, the product itself being a tile and the other component of the material being in both cases cement. It is the presence of chrysotile or some other fibre that gives the cement product its specific function: mechanical strength, resistance to heat, compression, etc.

8.146 Moreover, we note that, in Canada's opinion, chrysotile-cement and fibro-cement products are both industrial products which cannot be distinguished on the basis of their external appearance. From the standpoint of the tastes and habits of the French consumer, they are interchangeable. According to the EC, informed users would not use products containing asbestos after the international organizations had decided that asbestos was a proven carcinogen.

8.147 Consequently, we consider that in fact the likeness between a chrysotile-cement product and a fibro-cement product depends on two factors: (a) the nature of the product itself and (b) the presence of chrysotile fibres or of PVA, cellulose or glass fibres in the product.

8.148 Using the criteria adopted by the Panel and the Appellate Body in *Japan – Alcoholic Beverages*, we note, first of all, that the HS tariff classification (heading 68.11) is the same for articles of asbestos-cement, of cellulose fibro-cement or the like. This heading covers hardened articles consisting essentially of an intimate mixture of fibres (for example, asbestos, cellulose or other vegetable fibres, synthetic polymer or glass fibres) and cement or other hydraulic binders, the fibres acting as strengthening agents. Other products may fall into different tariff headings. However, many of the products mentioned by Canada appear to fall within this subdivision.[107]

8.149 We consider, moreover, that one of the EC's main arguments against the likeness between fibro-cement and chrysotile-cement products with respect to their properties, nature and quality and their end-use is based on the risk associated with the chrysotile which they contain. To the extent that in paragraph 8.132 we concluded that the "risk" criterion cannot be included among the criteria

[107] In fact, the HS Explanatory Notes describe the products that fall within heading 68.11 ("Articles of asbestos-cement, of cellulose fibro-cement or the like") as follows:

> "This heading covers hardened articles consisting essentially of an intimate mixture of fibres (for example, asbestos, cellulose or other vegetable fibres, synthetic polymer, glass or metallic fibres) and cement or other hydraulic binders, the fibres acting as strengthening agents. […]
>
> The heading includes sheets of all sizes and thicknesses, obtained as described above, and also articles made by cutting these sheets or by pressing, moulding or bending them before they have set, e.g., roofing, facing or partition sheets and tiles; sheets for making furniture; window sills; sign-plates, letters and numbers; barrier bars; corrugated sheets; reservoirs, troughs, basins, sinks; tubing joints; packing washers and joints; panels imitating carving; ridge tiles, gutters, window frames; flower-pots; ventilation or other tubing, cable conduits; chimney cowls, etc.
>
> All these articles may be coloured in the mass, varnished, printed, enamelled, decorated, drilled, filed, planed, smoothed, polished or otherwise worked; they may also be reinforced with metal, etc."

applicable to the determination of likeness under Article III:4, we do not consider it necessary to discuss the applicability of this criterion with respect to chrysotile-cement products. The same applies with respect to consumers' tastes and habits.

8.150 We therefore conclude that chrysotile-fibre products and fibro-cement products are like products within the meaning of Article III:4 of the GATT 1994.

(e) Less favourable treatment of Canadian products[108]

8.151 With respect to the existence of less favourable treatment, Canada argues that the Decree alters the conditions of competition between, on the one hand, substitute fibres and products containing them of French origin and, on the other hand, chrysotile fibre and products containing it from Canada. The Decree does not afford chrysotile fibre imported from Canada and products containing it effective equality of opportunities for imported products in respect of the application of laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products. Not only does the ban apply only to asbestos fibre and products containing it but it is applicable only if there are products like to chrysotile fibre or to the products containing it. Thus, the Decree imposes less favourable treatment in all cases where like products exist. Accordingly, the Decree constitutes *de jure* discrimination between chrysotile fibres and products containing them, on the one hand, and like products (PVA, cellulose or glass fibres and fibro-cement products containing them), on the other.

8.152 Canada also alleges de facto discrimination. The French PVA fibres industry is in better shape than ever. Moreover, it is not because France has imported a marginal additional quantity of Canadian cellulose fibres that the French domestic industry has not benefited from the ban. The Decree does indeed impose a choice on the French consumer who is now prevented from using chrysotile fibre or products containing it.

8.153 The EC maintain that the contested measure accords with the fundamental purpose of Article III, which is to prevent protectionism, and is not discriminatory, neither *de jure* nor de facto, inasmuch as it guarantees effective equality of opportunities for domestic and imported products. The context in which the Decree was adopted and its provisions show that the intention of the French authorities was in no way to protect domestic substitute products but to protect human health against the risks associated with asbestos. They also show that the Decree makes no distinction between imported and domestic products, whether it be a question of substitute or asbestos products, and that neither its object nor its effect is to protect domestic production. The Decree does not create any de facto discrimination, since in France most substitute products are imported from various third countries. Moreover, France has a negative trade balance in substitute products. The ban on the use of asbestos on public health grounds has required a painful changeover, in human and financial terms, including the loss of external outlets for French industry. Finally, the Decree is "neutral" in respect of the choices that businesses can make concerning replacement products.

8.154 We note that with regard to the establishment of the existence of less favourable treatment, it is first necessary to determine, as we have done, whether there is a likeness between the imported and the domestic products. Above, both with regard to chrysotile fibres, on the one hand, and PVA, cellulose and glass fibres, on the other[109], and with regard to products made of chrysotile-cement, on the one hand, and fibro-cement, on the other, we concluded that they were "like" within the meaning of Article III:4. With respect to the treatment of these products as compared with the like domestic

[108] The arguments of the parties are set out in detail in Section III above.

[109] We note, incidentally, that Canada has not made any allegation concerning the less favourable treatment of Canadian chrysotile fibres as compared with domestic chrysotile fibres. Accordingly, we shall not make any finding in this respect.

products, we note, first of all, that France does produce substitutes for chrysotile fibres and chrysotile-cement products. We next note that the terms of the Decree in themselves establish less favourable treatment for asbestos and products containing asbestos as compared with substitute fibres and products containing substitute fibres. Thus, paragraphs I and II of Article 1 of the Decree read as follows:

> "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, regardless of whether these substances have been incorporated into materials, products or devices.
>
> 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 transfer under any title whatsoever of all varieties of asbestos fibres or any product containing asbestos fibres shall be prohibited."

8.155 Inasmuch as the Decree does not place an identical ban on PVA, cellulose or glass fibre and fibro-cement products containing PVA, cellulose or glass fibres, we must conclude that *de jure* it treats imported chrysotile fibres and chrysotile-cement products less favourably than domestic PVA, cellulose or glass fibre and fibro-cement products.

8.156 Having established *de jure* discrimination on the basis of the Decree and, moreover, the European Communities not having submitted any evidence that might lead us to believe that the Decree is applied in such a way as not to introduce less favourable treatment for chrysotile fibres and chrysotile-cement products as compared with PVA, cellulose and glass fibres and fibro-cement products containing PVA, cellulose or glass fibres[110], we do not consider it necessary to determine whether there is any *de facto* discrimination between these products.

8.157 For these reasons, we conclude that the Decree applies to chrysotile and chrysotile-cement products a treatment less favourable than that which it applies to PVA, cellulose and glass fibres and products containing them, within the meaning of Article III:4.

(f) Conclusion

8.158 On the basis of the above, we find that the provisions of the Decree relating to the prohibiting of the marketing of chrysotile fibres and chrysotile-cement products violate Article III:4 of the GATT 1994.

3. Violation of Article XI of the GATT 1994

8.159 In the light of our observations on the applicability of Article III:4 of the GATT 1994 to the border measures imposed on chrysotile fibres and chrysotile-cement products and considering our findings with regard to the violation of Article III:4 by the Decree, we conclude that it is not necessary to examine the Canadian argument concerning the violation of Article XI:1 of the GATT 1994.

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[110] See the Report of the Panel in *United States – Sections 301-310 of the Trade Act of 1974*, op. cit., para. 7.27.

4. Applicability of Article XX of the GATT 1994

(a) Arguments of the parties[111]

8.160 The European Communities contend that the Decree falls under the exception provided in Article XX of the GATT 1994. Thus, the Decree is necessary to achieve the French Government's public health goals under Article XX(b) and is not applied in such a manner as to constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, within the meaning of the introductory clause of Article XX.

8.161 Canada notes that, in accordance with panel and Appellate Body practice, Article XX permits a limited and conditional exception from the obligations set out in the other Articles of the GATT and must be interpreted narrowly. Although the European Communities assert that they have the right to establish the level of protection they desire, in so doing they must comply with their obligations. In this connection, the Appellate Body has condemned abuse of rights under Article XX. Moreover, it is up to the European Communities to demonstrate that the Decree falls under Article XX(b).

8.162 The European Communities argue that asbestos fibres and products containing them are a proven hazard for human health. The risks linked to the use of these fibres are recognized both by scientists and international organizations. By prohibiting the marketing and use of asbestos and asbestos-containing products, the Decree seeks to halt the spread of these risks, in particular for people occasionally and often unwittingly exposed to asbestos, and thereby reduce the number of deaths among the French population. It is the only measure capable of preventing the spread of the risks due to asbestos exposure. According to the EC, the review in the light of Article XX cannot be allowed to undermine the health protection goal set by the Member concerned. Its sole purpose must be to assess whether the trade measure adopted is necessary to attain that goal. This test concerns the trade measure and not the level of protection set by the Member.

8.163 Canada considers that the only exposures that could be affected by the Decree are exposures to chrysotile encapsulated in high-density products. In order to determine whether there is an equally effective alternative that is less restrictive for international trade and that is capable of protecting human life or health just as effectively, the health risk can and must be examined. Otherwise any country could cite the risk – real or not – in support of a prohibition measure.

8.164 Canada is of the opinion that the current uses of chrysotile do not constitute a detectable risk to human health. According to Canada, the European Communities do not explain that the exposures of secondary users are essentially to friable materials, very often containing amphiboles, which are no longer marketed and have been in place for a long time. Contrary to what the EC appear to believe, controlled use substantially reduces exposure. As a result of pre-fabrication, pre-machining, the use of fittings and compliance with work standards, workers are not subjected to high levels of exposure, as the EC claim.

8.165 Canada considers that, inasmuch as the only risk associated with asbestos is that of the past use of amphiboles and the use of friable materials, the Decree, which prohibits the contemporary uses of chrysotile, is not "necessary" to protect human life or health from the risks associated with past uses of asbestos. A ban is not "necessary" because high-density chrysotile products do not pose any detectable risk. On the other hand, controlled use indisputably constitutes an alternative to a total ban that is significantly less restrictive for international trade.

[111] The arguments of the parties are set out in detail in Section III above.

(b) Approach adopted by the Panel and burden of proof

(i) Introductory remarks concerning the approach adopted by the Panel

8.166 At this stage, the Panel wishes to point out that, inasmuch as Article XX provides for a certain number of exceptions to the rules of the GATT 1994, it is necessary and sufficient to examine the applicability of these exceptions solely with regard to measures[112] and in relation to products for which a violation of another provision of the GATT has been identified. In the present case we have found that the Decree violates Article III:4 of the GATT 1994 as regards the treatment accorded to imported chrysotile asbestos fibres as compared with PVA, cellulose and glass fibres. We have also found a violation of Article III:4 with respect to the treatment of chrysotile-cement products as compared with fibro-cement products containing PVA, cellulose or glass fibres.

8.167 In accordance with the approach noted by the Panel in *United States – Gasoline*[113] and the Appellate Body in *United States – Import Prohibition of Certain Shrimp and Shrimp Products*[114], we will first examine whether the measure falls within the scope of paragraph (b) of Article XX, the provision expressly invoked by the European Communities.[115] If we decide that it does, we will consider whether, in its application, the Decree satisfies the conditions of the introductory clause of Article XX.

8.168 First of all, as regards Article XX(b), we find that the provisions of this paragraph relevant to the present case require that, subject to fulfilment of the conditions of the introductory clause of Article XX, nothing in the GATT 1994 shall be construed to prevent the adoption or enforcement by any Member of measures

> "(b) necessary to protect human … life or health"

8.169 The Panel notes that in *United States – Gasoline*, the Panel stipulated that with respect to Article XX(b), the party invoking that provision must prove:

> (a) That the policy in respect of the measures for which Article XX is invoked falls within the range of policies designed to protect human life or health; and
>
> (b) the inconsistent measures for which the exception is invoked are necessary to fulfil the policy objective.[116]

8.170 As regards subparagraph (a), we consider that, inasmuch as they include the notion of "protection", the words "policies designed to protect human life or health" imply the existence of a *health risk.* We must therefore determine, on the basis of the relevant rules of evidence, whether

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[112] See the Report of the Appellate Body in *United States – Gasoline*, op. cit., pp. 14-15 and 17-18. In the present case, it is the part of the Decree relating to the prohibiting of the placement on the French market of chrysotile asbestos and products containing it that has been found contrary to Article III:4 of the GATT 1994 (see paras. 8.155 and 8.158 above). It is this same "measure" that we shall examine in the light of Article XX(b).

[113] Op. cit., para. 6.20.

[114] Adopted 6 November 1998, WT/DS58/AB/R, paras. 118-122.

[115] In this connection, we note that it is not for the Panel to examine on its own initiative the exceptions for which Article XX provides unless they have been invoked (see Report of the Panel in *United States – Restrictions on Imports of Tuna*, DS21/R (unadopted), 3 September 1991, BISD 39S/155, para. 5.27, citing the Report of the Panel in *EEC – Regulation on Imports of Parts and Components*, adopted 16 May 1990, 37S/132, para. 5.11). However, it is only necessary to determine that the measure in question satisfies the conditions of one of the paragraphs of Article XX and the introductory clause of the same article for that measure to be justified under Article XX of the GATT 1994.

[116] Report of the Panel in *United States – Gasoline*, para. 6.20.

chrysotile-asbestos, in the various forms we have considered so far, poses a risk to human life or health.

8.171 This said, we note that the panel in *United States – Gasoline* also made clear that it did not have to examine the necessity of the policy goal.[117] In other words, we do not have to assess the choice made by France to protect its population against certain risks, nor the level of protection of public health that France wishes to achieve. We must simply determine if the French policy of prohibiting the use of chrysotile-asbestos falls within the range of policies designed to protect human life or health.

8.172 As regards the criterion of the *necessity* of the measure (subparagraph (b) of paragraph 8.169), we note that previous panels that had to assess the "necessity" of a measure under Article XX(b) appear to have done so solely in relation to the existence of other measures consistent or less inconsistent with the GATT in the light of the health objective pursued. Thus, in *Thailand – Cigarettes*, the Panel ruled that:

> "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".[118]

8.173 In this particular case, the public health objectives pursued by Thailand were confirmed by a WHO expert and accepted by the parties to the dispute. In the present case, Canada does not deny that France's goal, namely to protect the health of workers and consumers, is a public health objective, but it disputes the existence of a public health problem in relation to chrysotile. Thus, Canada denies that chrysotile fibre poses a public health risk in its applications because once in place chrysotile-cement does not release any fibres and because it is possible to work with chrysotile-cement products in a safe or controlled fashion.

8.174 For the Panel, the assessment of the necessity of a measure could be focused on the existence of other measures consistent or less inconsistent with the GATT 1994 if, as in previous cases, the parties were agreed on the *existence and extent of the health problem associated with chrysotile*. In this respect, we note that Canada does not dispute that chrysotile fibres in themselves pose health risks. However, Canada does not consider that any risk is posed by chrysotile enclosed in a matrix of high-density cement.

8.175 Consequently, inasmuch as the parties disagree on the extent of the health risk posed by chrysotile-cement products, we consider that our examination of the existence of a general health objective in the light of subparagraph (a) of paragraph 8.169 should include the question of the existence of a health problem in relation (i) to chrysotile fibres as such and (ii) to chrysotile-cement products.[119]

8.176 This being so, we shall have to take expressly into account the extent of the health problem in assessing the necessity of the measure. Thus, if we were to conclude that the health hazard

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[117] Ibid., para. 6.22. See also the Report of the Panel in *United States – Section 337*, op. cit., para. 5.26 and the Report of the Panel in *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, adopted on 7 November 1990, BISD 37S/200 (hereinafter "*Thailand – Cigarettes")*, para. 74.

[118] Op. cit., para. 75.

[119] Our approach does not affect the possibility of each Member determining what level of risk it wishes to assure. Guaranteeing a very low risk of exposure when the health risks are high might require strict measures, but when the health risk is low a very low level of exposure might be obtainable with less severe measures. This comment is made in full awareness of the fact that particularly serious risks can sometimes be neutralized by very simple means.

represented by chrysotile or chrysotile-cement was less than the EC allege, less vigorous measures might then be justified.[120]

(ii) Burden of proof

General considerations

8.177 With regard to the burden of proof, we refer, first of all, to our previous remarks concerning those cases in which a party invokes a defence.[121] We consider that the reasoning of the Appellate Body in *United States – Shirts and Blouses from India*[122] is applicable to Article XX, inasmuch as the invocation of that Article constitutes a "defence" in the sense in which that word is used in the above-mentioned report. It is therefore for the European Communities to submit in respect of this defence a prima facie case showing that the measure is justified. Of course, as the Appellate Body pointed out in *United States – Gasoline*, the burden on the European Communities could vary according to what has to be proved. It will then be for Canada to rebut that prima facie case, if established.

8.178 If we mention this working rule at this stage, it is because it could play a part in our assessment of the evidence submitted by the parties. Thus, the fact that a party invokes Article XX does not mean that it does not need to supply the evidence necessary to support its allegation. Similarly, it does not release the complaining party from having to supply sufficient arguments and evidence in response to the claims of the defending party. Moreover, we are of the opinion that it is not for the party invoking Article XX to prove that the arguments put forward in rebuttal by the complaining party are incorrect until the latter has backed them up with sufficient evidence.[123]

Considerations specific to the burden of proof as regards the scientific aspects

8.179 As pointed out above, three essential elements must be considered by the Panel when examining the justification of a measure in the light of Article XX(b): (a) the existence of a risk for human health; (b) the level of protection which the Member concerned wishes to achieve; and (c) the existence of other measures consistent or less inconsistent with the GATT 1994 and enabling the same objective of protecting public health to be obtained. The Panel considers that its examination of the scientific data should be exclusively concerned with points (a) and (c), inasmuch as it has long been established that Members are free to set the level of protection of their choice for their populations.[124]

8.180 The Panel has therefore had to determine how it should assess the existence of a health risk in relation to chrysotile and, more particularly, chrysotile-cement and the necessity of the measures in question. The Panel has examined the practice in relation to Article XX of the GATT 1994, but also in the context of other WTO Agreements in which scientific studies are invoked, mainly the

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[120] In this case, the justification for less severe measures would not be the existence of less inconsistent measures that meet the objectives originally set by the EC, but the fact that the risk was actually lower than the EC had estimated.

[121] See Section VIII.E.1(b) above.

[122] Op. cit., pp. 15-16:

"We acknowledge that several GATT 1947 and WTO panels have required such proof of a party invoking a defence such as those found in Article XX[122] or Article XI:2(c)(i)[122], to a claim of violation of a GATT obligation, such as those found in Articles I:1, II:1, III or XI:1. Articles XX and XI:2(c)(i) are limited exceptions from obligations under certain other provisions of the GATT 1994, not positive rules establishing obligations in themselves. They are in the nature of affirmative defences. It is only reasonable that the burden of establishing such a defence should rest on the party asserting it."

[123] See Report of the Appellate Body in *European Communities – Hormones*, op. cit., para. 104.

[124] See para. 8.171 above. See also the Report of the Appellate Body in *United States – Gasoline*, op. cit., p. 33.

Agreement on Sanitary and Phytosanitary Measures.[125] The Panel noted that the SPS Agreement contains more detailed provisions than Article XX with respect to the scientific justification of a sanitary or phytosanitary measure[126] and that these provisions have been the subject of clarifications by panels and by the Appellate Body.[127] However, it also noted that in the first dispute settlement proceedings initiated under the WTO Agreement concerning Article XX of the GATT 1994, the Appellate Body had not sought to extend the principles of the SPS Agreement to the examination of the measures for which Article XX(b) had been invoked or even to base itself on them, although the SPS Agreement was already in force.[128] The Panel preferred to confine itself to the provisions of the GATT 1994 and to the criteria defined by the practice relating to the application of Article XX.

8.181 In this context, in relation to the scientific information submitted by the parties and the experts, the Panel feels bound to point out that it is not its function to settle a scientific debate, not being composed of experts in the field of the possible human health risks posed by asbestos. Consequently, the Panel does not intend to set itself up as an arbiter of the opinions expressed by the scientific community.

8.182 Its role, taking into account the burden of proof, is to determine whether there is sufficient scientific evidence to conclude that there exists a risk for human life or health and that the measures taken by France are necessary in relation to the objectives pursued. The Panel therefore considers that it should base its conclusions with respect to the existence of a public health risk on the scientific evidence put forward by the parties and the comments of the experts consulted within the context of the present case. The opinions expressed by the experts we have consulted will help us to understand and evaluate the evidence submitted and the arguments advanced by the parties.[129] The same approach will be adopted with respect to the necessity of the measure concerned.

8.183 In proceeding with this exercise, the Panel will have to make a pragmatic assessment of the scientific situation and the measures available, as would the decision-makers responsible for the adoption of a health policy.[130] In this connection, it notes that the determination of the existence of other measures consistent or less inconsistent with the GATT largely depends on a scientific assessment of the risk.[131] In any event, this determination cannot be interpreted as restricting the freedom of Members to take certain measures rather than others under Article XX(b), in the absence of a measure that would be consistent or less inconsistent with the GATT 1994.

(c) Application of Article XX(b) of the GATT 1994 to the Decree

(i) "Protection of human life and health"

8.184 In accordance with the approach defined by the Panel in *United States – Gasoline*, we must first establish whether the policy in respect of the measure for which the provisions of Article XX(b) were invoked falls within the range of policies designed to protect human life or health. As we have

[125] Hereinafter the "SPS Agreement".

[126] See, in particular, Articles 2.2, 3 and 5 of the SPS Agreement.

[127] See, in particular, the Reports of the Panels and Appellate Body in *European Communities – Hormones*, op. cit.

[128] In *European Communities – Hormones*, op. cit., para. 115, the Appellate Body itself expressed its reluctance to adopt within the context of the SPS Agreement a standard of review not clearly rooted in the text of the SPS Agreement, for fear of disturbing the balance between the rights and obligations negotiated.

[129] Report of the Appellate Body in *Japan – Agricultural Products*, op. cit., para. 129. At this point, we recall that the experts were selected in consultation with the parties and that the latter did not challenge the appointment of any of them, although they reserved the right to comment on their statements. With respect to the various stages in the selection and consultation of the experts, see Section V.A and B.

[130] See Report of the Panel in *United States – Gasoline*, op. cit., para. 6.20.

[131] See paras. 8.173-176.

already pointed out, the use of the word "protection" implies the existence of a risk. Accordingly, we must begin by identifying a risk for public health. In the light of the comments of the panel in *United States – Gasoline* and our own remarks in paragraph 8.182, we must also take into account the fact that it is a public health policy that we have to assess.

8.185 First of all, we note that the EC argue that in prohibiting the placing on the market and use of asbestos and products containing it, the Decree seeks to halt the spread of the risks due to asbestos, particularly for those exposed occasionally and very often unwittingly to asbestos when working on asbestos-containing products. France considers that it can thereby reduce the number of deaths due to exposure to asbestos fibres among the French population, whether by asbestosis, lung cancer or mesothelioma.[132]

8.186 In principle, a policy that seeks to reduce exposure to a risk should fall within the range of policies designed to protect human life or health, insofar as a risk exists. According to the EC, the international scientific community appears to be generally of the opinion that chrysotile fibres as such are carcinogens. In this connection, we note the EC's argument that, since 1977, the International Agency for Research on Cancer (IARC) has classified chrysotile among the proven carcinogens.

8.187 Canada does not dispute that chrysotile asbestos causes lung cancer. However, Canada argues that the mechanism that could give rise to an increased risk of lung cancer has not yet been fully explained and that the link with chrysotile might only be indirect.[133] This risk depends on the intensity and duration of the exposure. On the other hand, according to Canada, there is a great deal of scientific evidence to support the thesis according to which chrysotile does not cause mesotheliomas.[134] In particular, the mesotheliomas linked to asbestos could be the result of exposure to low-density products containing amphiboles. It has not been established that, in their uses, chrysotile fibres pose the same risk as amphiboles, whose chemical composition, in particular, is different.

8.188 First of all, 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[136], even though the experts appear to acknowledge that chrysotile is less likely to cause mesotheliomas than amphiboles.[137] We also note that the experts confirmed that the types of cancer concerned had a mortality rate of close to 100 per cent.[138] 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[139], 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

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[132] With regard to the group of pathologies that asbestos can cause, see Dr. Henderson, para. 5.28.

[133] See Annex II, Canadian reply to the EC's question No. 4, para. 180.

[134] See Annex II, Canadian replies to the EC's questions nos. 1-4, paras. 175-181.

[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.

[136] See, in particular, Dr. Henderson, paras. 5.29 to 5.34; 5.142 to 5.165; Dr. Infante, paras. 5.267, 5.290-5.298; Dr. de Klerk, para. 5.288.

[137] See, for example, the ratios suggested by Dr. Henderson, paras. 5.103, 5.141, 5.415, 5.589 and his remarks, paras. 5.265-5.266; see also Dr. de Klerk, para. 5.264; Dr. Infante, paras. 5.267-5.268 and Annex VI, para. 19 of the transcript of the meeting with experts.

[138] Dr. Henderson, meeting with experts, Annex VI, para. 182.

[139] See the comments made by Dr. Henderson, paras. 5.153-5.157 concerning the link between fibrosis and lung cancer.

responsible for public health policy would find that there was not enough evidence of the existence of a public health risk.

8.189 We note, however, that Canada makes a distinction between chrysotile fibres and chrysotile encapsulated in a cement matrix. In fact, Canada challenges the Decree insofar as it prohibits, *inter alia*, the use of chrysotile-cement products. In this connection, we note that the experts consulted by the Panel agreed that the risks of fibres being dispersed due to the degradation of chrysotile-cement were limited. However, the experts acknowledged that working with non-friable products containing chrysotile might result in the dispersion of large quantities of fibres and that those fibres pose a definite health risk.[140] The experts also noted that even though the risk might be lower than for production or processing workers, it concerned a much larger group.[141]

8.190 In this respect, the Panel notes that the European Communities have stated that the Decree is intended, in particular, to protect categories of workers or consumers downstream of the asbestos mining or processing stage, whatever the frequency and level of their exposure. Canada considers that below a certain exposure threshold there is no detectable health risk. Accordingly, Canada believes that people only occasionally exposed are not running a detectable risk.

8.191 The data submitted to the Panel by the EC show that the use of tools not specifically designed to prevent the release of fibres[142], which cannot be excluded, especially in the case of DIY enthusiasts[143] or professionals who work only occasionally in an environment where asbestos is present, can result in an exposure in excess of the statutory limits under ISO 7337[144], which are themselves higher than those of the WHO (0.2 fibre/ml) or those applied by France before the ban (0.1 fibre/ml).[145] The Panel also notes the position of the experts consulted on this point. All agree that building workers now count among those most exposed to chrysotile fibres and hence to the risk of mesothelioma[146], but they also mention cases of mesothelioma in patients who had been only

[140] See the replies of the experts to the Panel's question 1.(b), paras. 5.196-5.209.

[141] See Dr. Henderson, paras. 5.176, 5.183; Dr. de Klerk, para. 5.185.

[142] In reply to a question by Canada (see Annex II, para. 167) the EC indicated that the question of the exposure associated with working intermittently with material such as chrysotile-cement had been analysed in the report of the *Institut national de la science et de la recherche medicale* (INSERM) entitled *Rapport sur les effets sur la santé des principaux types d'exposition à l'amiante* (Report of the health effects of the main types of exposure to asbestos, INSERM joint report, 1997, pp. 193-214. The EC appended to their first written submission to the Panel exposure values measured during such working (see *Note de présentation des orientations du Conseil supérieur de prévention des risques professionnels*, 3 July 1995). They also give the example of a roofing worker using a grinder in the open air to repair corrugated roof sheeting made of asbestos-cement and exposed to a peak level of 41f/ml. In this connection, the Panel also notes the reference by Dr. Henderson, in para. 5.199 above, to a study by Kamugai S, Nakachi S, Kurumatani N. *et al. Estimation of Asbestos Exposure Among Workers Repairing Asbestos Cement Pipes Used for Conduits*, Sangkyo Igaku 1993; 35.

[143] By "DIY enthusiast" (bricoleur) the Panel means someone who does small repair and renovation jobs (Le Nouveau Petit Robert (1994), p. 261) without engaging in these activities in a professional capacity.

[144] See International Organization for Standardization, ISO 7337 (1984).

[145] See Decree 96-98 of 7 February 1996. The European Communities, in para. 3.134, note, for example, that in the case of a handsaw application of the ISO standard leaves the worker exposed to a level 30 times in excess of the maximum limit of 0.1 f/ml. In this connection, the Panel notes that the experts agree that at least some of the fibres released during operations on products containing chrysotile present the same carcinogenicity as chrysotile fibres not incorporated in cement (see Dr. de Klerk, para. 5.220; Dr. Henderson, paras. 5.221-5.224; Dr. Infante, paras. 5.225–5.226).

[146] See *Full Public Report: Chrysotile Asbestos – Priority Existing Chemical No. 9*, National Industrial Chemicals Notification and Assessment Scheme (NICNAS), National Occupation Health and Safety Commission (NOHSC), Australia 1999 (hereinafter "NICNAS 99"), cited by Dr. Henderson, which shows that exposure is spreading. Originally confined to workers in the traditional industries, exposure to asbestos now extends to products and the domestic and external environment (see para. 5.179). Similar observations have

incidentally exposed, without any relation to their occupational activity.[147] The scientists consulted by the Panel also considered that the existence of a threshold below which exposure does not present any risks had not been established for any of the diseases attributable to chrysotile, except perhaps for asbestosis.[148]

8.192 The Panel took note of Canada's argument according to which there has been no study specifically concerned with the occupational sectors to which the EC refer.[149] It also notes that Canada disputes the relevance of the data of the studies of Charleston textile factory workers (United States)[150] as compared with the Canadian studies of Quebec asbestos sector miners and workers, which are said to show the limited impact of chrysotile on public health.[151] However, the scientific experts consulted stressed the relevance and quality of the Charleston study. On the other hand, doubts were expressed with regard to the reliability of certain exposure data in the studies carried out in occupational and non-occupational environments in Quebec and invoked by Canada.[152] Canada also refers to a study concerned with car brake maintenance.[153] We note that the scientists consulted drew attention to the limits of this study and produced statistical data which, on the contrary, confirmed the impact of chrysotile on mechanics exposed to that material in a car brake maintenance context.[154]

8.193 The Panel therefore considers that the evidence before it tends to show that handling chrysotile-cement products constitutes a risk to health rather than the opposite. Accordingly, a decision-maker responsible for taking public health measures might reasonably conclude that the presence of chrysotile-cement products posed a risk because of the risks involved in working with those products.

8.194 Accordingly, the Panel concludes that 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

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been made in the United Kingdom with regard to the patterns of exposure and the resultant diseases (para. 5.180).

[147] See the example of the fireman and the lecturer whose exposure was not connected with their occupations, given by Dr. Henderson, para. 250 of the transcript of the meeting with experts.

[148] See Dr. Henderson, para. 5.312. Concerning the opinion of the experts with regard to the absence of a threshold, see paras. 5.306 et seq. and, more particularly, Dr. Infante, para. 5.315.

[149] The absence of a study on the impact of chrysotile on building workers was confirmed by the scientists consulted by the Panel (see Dr. Infante, para. 137; Dr. Henderson, para. 140; Dr. Musk, para. 202 of the transcript of the meeting with experts, Annex VI). Concerning Canada's arguments and the comments of the experts, see the discussion of the relevance of the study of Charleston textile factory workers (hereinafter "Charleston study", see footnote 150) as compared with the study of Quebec asbestos mine and mill workers (hereinafter "Quebec workers study", see footnote 151), paras. 135–153 of the transcript of the meeting with experts, Annex VI.

[150] See, in particular, Dement J.M., Brown D.P., Okun A., *Follow-up Study of Chrysotile Asbestos Textile Workers: Cohort Mortality and Case-Control Analyses*, Am J Ind Med 1994; 26; Dement J. M., Brown D.P., *Lung Cancer Mortality among Asbestos Textile Workers: A Review and Update*, Ann Occup Hyg 1994; 38.

[151] See, in particular, McDonald A.D., Case B.W., Churg A., *et al.*, *Mesothelioma in Quebec Chrysotile Miners and Millers: Epidemiology and Aetiology*, Ann Occup Hyg 1997, 41. With respect to non-occupational situations, see Camus M., Siemiatycki J., Meek B., *Nonoccupational Exposure to Chrysotile Asbestos and the Risk of Lung Cancer*, New England Journal of Medicine 1998, 338.

[152] See the comments of Dr. Infante on the Quebec workers study by McDonald et al, para. 19 of the transcript of the meeting with experts, Annex VI, and those of Dr. Henderson, paras. 5.118 and 5.158–5.162 above.

[153] See Woitowitz H.J., Rödelsperger K., *Mesothelioma among Car Mechanics?* Ann Occup Hyg, 1994.

[154] See Dr. Henderson, paras. 59, 89 and 101 of the transcript of the meeting with experts, Annex VI. We note that Canada has not formulated a specific request with regard to friction products, such as car brakes, for example.

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 implemented by the Decree falls within the range of policies designed to protect human life or health. On the other hand, Canada has not succeeded in rebutting the presumption established on the basis of the evidence submitted by the EC and confirmed by the experts. The Panel concludes therefore that the French policy of prohibiting chrysotile asbestos falls within the range of policies designed to protect human life or health, within the meaning of Article XX(b) of the GATT 1994.

8.195 Accordingly, the Panel will now turn to the question of whether the measure is "necessary" within the meaning of Article XX(b).

(ii) "Necessary"

The ban on chrysotile asbestos in its various forms

8.196 According to the European Communities, the danger of inhaling asbestos at levels above 0.1 fibre/ml concerns not only the asbestos mining and processing sectors but, more especially, secondary (textile, building and automobile industry, for example), para-occupational (servicing, maintenance) and domestic (DIY) workers whom Canada mentions only in part or not at all. Even in production and processing, which in principle are easier to monitor, there are limits to the controlled or safe use of asbestos, which does not halt the spread of the risks. So-called "controlled" or "safe" use is *a fortiori* completely ineffective in cases of occasional exposure to asbestos. The 1997 INSERM report[155] indicates that the risk occurs mainly among those who work with materials containing asbestos. The encapsulation of asbestos in a matrix cannot be guaranteed to make asbestos-cement products harmless, inasmuch as any subsequent working of the product will release large numbers of carcinogenic fibres in the form of dust. Controlled use is impossible to implement where hundreds of thousands of people are involved in sectors as unregulated in terms of health as the building industry. The 1984 ISO standard is inadequate in relation to the French health objective. The EC also note that, once asbestos is on the market, there is no reasonable way of controlling its use and, in particular, of controlling the everyday operations that many people are likely to perform. Moreover, the numerous, particularly legal obstacles which confront the victims of current exposure seeking redress in the courts constitute an additional social justification for resorting to a total ban.

8.197 With regard to the test of necessity, Canada takes the same approach as in connection with Article 2.2 TBT[156], considering that in many respects the test of necessity is similar in the two provisions. According to Canada, the measure must not be an excessive or over-reaching means to achieve a legitimate end. The two factors to be considered are, on the one hand, the risks that the absence of a technical regulation would create and, on the other, the existence of a less trade-restrictive alternative measure that would make it possible to fulfil the stated objective. As far as the second test is concerned, Canada notes that the controlled use of asbestos fibres allows fulfilment of the French objective of protecting human health while authorizing certain safe or controlled uses of chrysotile and products containing it. As controlled use is a less trade-restrictive alternative based on scientific data and having international support, a total ban on asbestos is not necessary. Canada is of the opinion that, today, high-density non-friable products do not pose a detectable risk. The risks which existed in the past and in certain cases still exist today are associated with past uses, very often

[155] INSERM: *Rapport sur les effets sur la santé des principaux types d'exposition à l'amiante*, INSERM joint report, 1997. This report was submitted by the European Communities as one of the underpinnings of the measure adopted by France.

[156] See Canada's arguments, paras. 3.279 *et seq* above.

of amphiboles in friable materials. In Canada's view, the EC are trying to mislead the Panel by invoking the risks of the asbestos mining and processing industry, even though they have already recognized that controlled use is effective here in eliminating the risk. The EC also show bad faith in citing the risks for building maintenance workers and mechanics. The EC do not explain that these exposures are essentially to friable materials very often containing amphiboles with a high pathogenic potential. Controlled use is effective and can be accepted by professionals. According to the data of the *United States Occupational Safety & Health Administration* (OSHA), the institution of control measures lowers the average exposures of workers handling asbestos-cement pipes to 0.00253 f/ml and those of workers handling asbestos-cement sheets to 0.00727 f/ml. The average exposure of mechanics handling friction products is 0.00294 f/ml. Moreover, the use of pre-machined parts and fittings has been a big success. It reduces field activities and, at the same time, exposure rates.

8.198 We note that in *Thailand – Cigarettes* the Panel defined the test of necessity applicable 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."[157]

8.199 This test has been applied in other disputes[158], in order to apply the test defined in *Thailand – Cigarettes*, we must (a) establish *the scope* of the health policy objectives pursued by France and (b) consider the existence of measures consistent, or less inconsistent, with the GATT 1994.

8.200 First of all, we note that the risk due to chrysotile is important to the extent that, as confirmed in the previous section, it can generate lung cancers and mesotheliomas which are still difficult to cure or even incurable.[159] The populations potentially at risk in France are very numerous, since products containing chrysotile, in particular, chrysotile-cement, have many applications in industrial, commercial and residential buildings. The fields of activity concerned include building workers (several hundred thousand) and DIY enthusiasts[160] These are areas in which health controls are difficult to apply, as the comments of the experts have shown.[161]

8.201 The experts also confirmed that the intensive use of asbestos (in France, mainly chrysotile) over several decades has resulted in the risks of exposure being displaced from the mining and processing industry towards other sectors further downstream and, indeed, the general public.[162] In this context, the Panel finds that the European Communities have shown that a risk exists for a very broad sector of the French population.

8.202 The Panel notes that the exposure of these groups is generally lower. However, the experts confirm the position of the European Communities according to which it has not been possible to identify any threshold below which exposure to chrysotile would have no effect.[163] The experts are also agreed that the linear relationship model, which does not identify any minimum exposure

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[157] BISD 37S/200, para. 75.

[158] See, for example, the Report of the Panel in *United States – Section 337*, op. cit., para. 5.26, and the Report of the Panel in *United States – Gasoline*, op. cit., para. 6.24.

[159] See Dr. Henderson, para. 5.29 and the transcript of the meeting with experts, Annex VI, end of para. 182.

[160] See Dr. Infante, para. 5.183; Dr. de Klerk, para. 5.185.

[161] See Dr. Infante for the United States (para. 161 of the transcript of the meeting with experts); Dr. de Klerk and Dr. Henderson for Australia (paras. 222 and 225, respectively, of the transcript of the meeting with experts).

[162] See Dr. Henderson, paras. 5.174–5.181; Dr. Infante, paras. 5.182-5.183, 5.190.

[163] See Dr. Henderson, para. 5.312; Dr. Infante, paras. 5.313-5.315.

threshold, is appropriate for assessing the existence of a risk.[164] We find therefore that no minimum threshold of level of exposure or duration of exposure has been identified with regard to the risk of pathologies associated with chrysotile, except for asbestosis. Consequently, the possibility remains that low exposure over a fairly long period of time could lead to lung cancer or mesothelioma. Similarly, high-level exposure over a short period could also result in lung cancer or mesothelioma. These two possibilities were confirmed by the experts.[165] The Panel therefore concludes that even though some trades or the French population in general are only intermittently exposed to low levels of asbestos, a decision-maker responsible for public health policy might reasonably conclude that there was nevertheless a real risk for these categories.

8.203 In the light of the above, the Panel concludes that, in addition to the risk presented by low-density friable products, there is an undeniable public health risk in relation to the chrysotile contained in high-density chrysotile-cement products. This risk exists even at low or intermittent exposure levels and can affect a broad section of the population.

8.204 We also note that France's objective is to halt the spread of this risk which, considering the risk identified and its extent, could in principle justify strict measures. However, it is necessary to consider whether there is not, as Canada alleges, a measure that would be consistent, or less inconsistent, with the GATT 1994 and would allow the objective pursued by France to be achieved. Canada refers to the possibility of controlled use which consists in taking precautionary measures to restrict the release of fibres (use of special tools, high-density products and special methods of handling asbestos products) and protect the airways and in adopting methods of decontaminating equipment and work clothing. This controlled or safe use would be based on international standards.

8.205 We note that, according to the EC, controlled use does not work in certain occupational sectors such as those connected with building.[166] Moreover, if the international standards suggested by Canada (in particular, ISO 7337) were applied, the exposure rate would still be higher than the level of risk that France considers acceptable.[167] The EC also stress that the consistent or less inconsistent measures must be "technically and economically feasible."[168]

8.206 We note that the EC do not dispute that controlled use could constitute a measure consistent, or less inconsistent, with the GATT 1994. They nevertheless consider that it would not allow the public health objectives pursued by France to be achieved. Insofar as Canada refers solely to controlled or safe use as an alternative to outright prohibition, we will focus our attention on this possibility.[169] However, before continuing with our analysis of whether measures consistent, or less inconsistent, with the GATT are available in the present case, we consider it pertinent, in the light of the contradictory arguments put forward by the parties, to return to the question of the applicability of the feasibility test suggested by the EC.

8.207 We note that in *United States – Section 337*, the Panel stated that:

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[164] See Dr. de Klerk, para. 5.317; Dr. Henderson, para. 5.318; Dr. Infante, paras. 5.321-5.323; Dr. Musk, para. 5.324.

[165] See, for example, Dr. Infante, para. 5.304.

[166] See, in particular, Annex II, reply by the EC to Canada's question No. 6, para. 168

[167] See Annex II, reply by the EC to Canada's question No. 5, para. 167.

[168] The European Communities refer to Article 5.6 of the Agreement on the Application of Sanitary and Phytosanitary Measures. They consider that the principle incorporated in that provision should also be applied in the context of Article XX.

[169] In this respect, we note that the experts likewise did not mention any alternatives other than controlled use. Moreover, in the light of the approach defined by the Appellate Body in *Australia – Salmon*, op. cit. (see Section VIII E.1.(b) above), we consider that we do not need to ascertain whether other measures were possible.

> "A contracting party cannot justify a measure inconsistent with another GATT provision as 'necessary' in terms of Articles XX(d) if an alternative measure *which it could reasonably be expected to employ* and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions *is not reasonably available*, a contracting party is bound to use, *among the measures reasonably available to it*, that which entails the least degree of inconsistency with other GATT provisions."[170]

We therefore find that in order to determine whether a measure is necessary it is important to assess whether consistent or less inconsistent measures are *reasonably* available. The term "reasonably" has not been defined as such by the panels that have referred to it in the context of Article XX. It suggests, however, that the availability of a measure should not be examined theoretically or in absolute terms. Nevertheless, in the light of the reasoning of these panels, we find the word "reasonably" should not be interpreted loosely either. The fact that, administratively, one measure may be easier to implement than another does not mean that the other measure is not reasonably available.[171] We consider that the existence of a reasonably available measure must be assessed in the light of the economic and administrative realities facing the Member concerned but also by taking into account the fact that the State must provide itself with the means of implementing its policies. Thus, the Panel considers that it is legitimate to expect a country such as France with advanced labour legislation and specialized administrative services to deploy administrative resources proportionate to its public health objectives and to be prepared to incur the necessary expenditure.

8.208 After clarifying this point, we will now proceed to examine whether controlled use (a) is sufficiently effective in the light of France's health policy objectives and (b) whether it constitutes a reasonably available measure.

8.209 In relation to the first of these considerations, we note, first of all, that although controlled use is applied in some countries, such as the United States or Canada, and has also been applied by France, in general in certain sectors its efficacity still remains to be demonstrated. This is confirmed by a number of studies[172], as well as by the comments of the experts.[173] Thus, even though it seems possible to apply controlled use successfully upstream (mining and manufacturing) or downstream (removal and destruction) of product use, it would seem to be much less easy to apply it in the building sector, which is one of the areas more particularly targeted by the measures contained in the Decree. The Panel therefore concludes that, in view of the difficulties of application of controlled use, an official in charge of public health policy might reasonably consider that controlled use did not provide protection that was adequate in relation to the policy objectives.

8.210 Moreover, Canada refers to the existence of international standards for the protection of workers in contact with chrysotile.[174] First of all, we find that the international standards cover only the precautions to be taken if a worker has to handle asbestos. They contain neither a guarantee of free access for asbestos nor an incentive to use asbestos. On the contrary, the international conventions suggest that, as far as possible, asbestos should be replaced by less hazardous materials.[175] Next, we note that the levels of protection obtained by following international standards, whether it be the ISO standard or the WHO Convention, are lower than those established by France, including those applicable before the introduction of the Decree. Considering the high level of risk

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[170] Op. cit., para. 5.26.

[171] See *United States – Gasoline*, op. cit., paras. 6.26 to 6.28.

[172] See Peto *et al: Continuing Increase in Mesothelioma Mortality in Britain, The Lancet*, volume 345, 535-539 (1995). See also Dr. Henderson, citing EHC 203, paras. 5.365-5.368; Dr. Infante, paras. 5.351-5.352 and 5.369.

[173] See the comments of the experts on controlled use and its feasibility, paras. 5.335-5.373.

[174] See, for example, ISO 7337.

[175] See International Labour Organization, Geneva, Convention Concerning Safety in the Use of Asbestos (hereinafter "Convention 162", adopted on 24 June 1986).

identified, France's objective – which the Panel cannot question -[176] justifies the adoption of exposure ceilings lower than those for which the international conventions provide. We therefore find that controlled use based on international standards would not seem to make it possible to achieve the level of protection sought by France.

8.211 The Panel is aware that in some sectors controlled or safe use could be envisaged with greater certainty that it would prove effective. However, as confirmed by the experts[177], the circumstances of use must be controllable. These circumstances are extremely varied and we note that the safety measures that would make possible results at least equivalent to the exposure level (0.1 f/ml) applied by France before the ban (restrictions on the number of workers and working areas and total containment of the product) exceed the requirements of the international standards and considerably limit the number of industrial sectors that could apply them.[178] Even in these cases, according to one of the experts, the level of exposure is still high enough for there to be a significant residual risk of developing asbestos-related diseases.[179] According to another, it is not possible to guarantee that fibre concentrations will never exceed 0.1 f/ml.[180] In addition, we note that for the application of controlled use to satisfy France's public health objectives, mined or processed products should never be handled by anyone outside the mining and processing industries. If these products were subsequently to be handled by unprotected persons, the fact that they could be mined and processed and then destroyed using controlled use techniques would not be sufficient to meet those objectives. We therefore find that a decision-maker responsible for establishing a health policy might have reasonable doubts about the possibility of ensuring the achievement of France's health policy objectives by relying on controlled use, even in sectors which might lend themselves more readily to these practices.[181]

8.212 *A fortiori* and for the following reasons, we consider that controlled use is not a reasonably available alternative in all the other sectors in which workers may be exposed to chrysotile.

8.213 The Panel notes that Canada's arguments under Article III:4 are limited to chrysotile and chrysotile-cement products. In fact, chrysotile-cement is mainly used in the building sector. As the experts have confirmed, because of the mobility of the workers and their sometimes inadequate training, as well as the large number of sites and therefore of people liable to exposure, it is very difficult to impose on the building sector sophisticated occupational safety practices of the type that can be applied in sectors with smaller numbers of workers concentrated in well-defined areas.[182]

8.214 Moreover, while controlled use may seem difficult to apply in the building sector, it is even less feasible in the case of DIY enthusiasts or undeclared workers operating outside any proper framework or system of controls. France's objective is to halt the spread of the risks associated with chrysotile. At least as far as DIY enthusiasts are concerned, controlled use is not a reasonably available option. In this context, the fact that controlled use might be reasonably available in other

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[176] See *United States – Gasoline*, op. cit., para. 6.22. The Panel also notes that XX(b) does not impose the same constraints as Article 3.3 of the SPS Agreement on Members wishing to apply measures that involve a level of protection higher than that which would be obtained with measures based on the relevant international standards.

[177] Dr. Henderson, paras. 5.336-5.341.

[178] Ibid., paras. 5.337-5.339.

[179] Dr. Infante, para. 5.343 referring to an opinion given by the United States Occupational Safety and Health Administration (OSHA). See also Dr. Infante, paras. 5.358-5.362.

[180] Dr. Henderson, paras. 5.355-5.357.

[181] In any event, in the light of the opinion of one of the experts (Dr. Henderson, para 5.658 and footnote), the sectors in which effective controlled use is feasible appear to be extremely few and concern applications for which, at this stage, there are no chrysotile substitutes, an area in which the Decree provides for exceptions to the prohibition on the use of chrysotile.

[182] We note that the experts' comments relate to countries with a level of economic development equivalent to that of France and with similar administrative resources.

sectors is irrelevant. Here, we are concerned with a product that could be installed in people's homes, not one limited to a restricted use in areas in which only professionals would be required to work. Insofar as, once the products have been installed, it is impossible to guarantee that they will not be handled by someone who will not follow controlled use practices, it seems to us that a decision-maker responsible for adopting a health policy might well conclude that there was still a flaw in the health protection system if only controlled use measures were applied.[183]

8.215 Canada also points out that, even though their use might not be limited to occupational activities, some products will never be handled by unqualified people. The Panel notes, however, that, as it found in paragraphs 8.200-8.202 above, exposure to asbestos fibres is not restricted exclusively to workers or DIY enthusiasts. Others present while the work is going on, in some cases even spouses, could be directly or indirectly affected.[184] As one of the experts has shown, exposure to asbestos may be the result of pure chance.[185]

8.216 Moreover, the Panel notes that products containing chrysotile may remain in place for very long periods of time. Thus, every time they are handled, the handler could be exposed. The continued marketing of products containing chrysotile asbestos multiplies the situations in which workers are routinely exposed and exposes them to concentrations of asbestos which have already been related to pathologies in humans.[186] In other words, even if the exposure rates are very low, the multiplication of sources of exposure may lead to concentrations already found to have caused disease.

8.217 We therefore conclude that the European Communities have shown that controlled use is neither effective nor reasonably available, at least in the building sector and for DIY enthusiasts. Accordingly, controlled use does not constitute a reasonable alternative to the banning of chrysotile asbestos that might be chosen by a decision-maker responsible for developing public health measures, bearing in mind the objectives pursued by France.

Recourse to substitute fibres and products

8.218 Canada argues that France is creating a false sense of security by requiring chrysotile, whose effects are well known, to be replaced by products whose effects on health are uncertain.

8.219 The European Communities argue that the Decree does not recommend the indiscriminate use of substitute products. It leaves it to businesses to replace asbestos by whichever product they choose. In view of the procedure laid down in Article 2 of the Decree, the replacement of asbestos fibres by substitute fibres is the result of a reasonable and justified process.

8.220 The Panel notes, first of all, that the risk posed by chrysotile is recognized internationally[187], which in itself may justify the taking of measures to restrict its use. On the other hand, we find that the substitute fibres examined in the context of this case (PVA, cellulose and glass) are not classified by the WHO at the same level of risk as chrysotile. Moreover, the experts consulted by the Panel who commented in detail on the risks associated with the substitute fibres examined in the context of this case (PVA, cellulose and glass) and other fibres, (in particular aramid and ceramic) confirmed that

[183] See the experts' comments on this subject: Dr. de Klerk, para. 5.335; Dr. Henderson, para. 5.341; Dr. Infante, para 5.343.

[184] See the studies cited by Dr. Infante, para. 5.304.

[185] See the examples of the lecturer and the fireman mentioned by Dr. Henderson during the meeting with experts, para. 250, Annex VI.

[186] See Dr. Infante, para. 5.315.

[187] See IARC classification, op. cit.

these fibres did not present the same risk to health as chrysotile.[188] In particular, animal studies do not show the fibres in question to be carcinogenic.[189]

8.221 Canada's approach seems to be based on the fact that chrysotile can be used safely. As we have already concluded, this does not appear to be a reasonably available possibility, at least as far as building workers and DIY enthusiasts are concerned. If we were to follow Canada's reasoning, then substitute fibres could not be used until a degree of certainty equivalent to that which exists with respect to chrysotile had been established. In the opinion of the Panel, to make the adoption of health measures concerning a definite risk depend upon establishing with certainty a risk already assessed as being lower than that created by chrysotile would have the effect of preventing any possibility of legislating in the field of public health. In fact, it would mean waiting until scientific certainty, which is often difficult to achieve, had been established over the whole of a particular field before public health measures could be implemented.

Conclusion

8.222 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.

8.223 At this stage, we conclude that the Decree satisfies the conditions of Article XX(b) of the GATT 1994.

(d) Application of the introductory clause (chapeau) of Article XX of the GATT 1994 to the application of the Decree

(i) "Means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail"

8.224 With regard to the introductory clause of Article XX, the EC point out that it applies to the manner in which the measure is applied. In the present case there is nothing to support the contention that France acted "in bad faith" or in an "unreasonable", "improper" or "abusive" manner in exercising its right under Article XX(b). The ban is not a means of imposing arbitrary or unjustifiable discrimination between countries where the same conditions prevail. It covers products originating in any country, including France, where the same conditions prevail. The European Communities consider that, as the Decree does not meet the definition of discrimination laid down by the Appellate Body, it cannot be applied in such a manner as to constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.

8.225 Canada claims that it has already shown, in respect of Article III:4, that the initial Decree was discriminatory. The Decree is also arbitrary and unjustified because it is not motivated by the objective of protecting human life or health but rather by the desire to reassure a panicked population.

8.226 The Panel notes that under the first of the alternatives mentioned in the introductory clause of Article XX it is required to examine whether the *application* of the Decree constitutes a means of

[188] See Dr. de Klerk, paras. 5.375-5.377; Dr. Henderson, para. 5.385; Dr. Infante, para. 5.388.
[189] See Dr. Musk, para. 5.390.

arbitrary or unjustifiable discrimination between countries where the same conditions prevail.[190] The Panel considers that, within the context of this alternative, its first step should be to determine whether the measure is "discriminatory" in its application.[191] If the application of the measure is found to be discriminatory, it still remains to be seen whether it is *arbitrary* and/or *unjustifiable* between countries where the same conditions prevail. It is in this context, and not in the stage of the existence of discrimination – which is an objective fact, that we shall determine whether the measures falling within the particular exceptions of Article XX(b) – in this case the initial Decree as applied – have been applied reasonably, with due regard to both the legal duties of the party claiming the exception and the legal rights of the other parties concerned.[192]

8.227 The Panel also notes that, in *United States – Gasoline*, the Appellate Body stated that the word "discrimination" in the introductory clause of Article XX covers both discrimination between products from different supplier countries and discrimination between domestic and imported products. Finally, in the same case, the Appellate Body ruled that "the provisions of the chapeau [of Article XX] cannot logically refer to the same standard(s) by which a violation of a substantive rule has been determined to have occurred."[193] In other words, we cannot conclude that discrimination exists on the basis of the violation of Article III:4 identified above. This means that the less favourable treatment of asbestos as compared with substitute fibres identified by Canada is not relevant for establishing the existence of discrimination under Article XX. The question is therefore confined to the suppliers of asbestos, whether domestic or foreign. However, we understand that another form of discrimination, for example between supplier countries, not invoked by Canada as its principal argument, could be taken into consideration under the introductory clause of Article XX. It is on this dual basis that we shall examine whether the measure is being applied in a "discriminatory" manner.

8.228 The Panel notes that the European Communities consider the Decree to concern products originating in any country, including France, where the same conditions prevail. The text of the Decree as such appears to confirm this. Only the product in question is mentioned, without any reference to its origin. Even Articles 2 and 3, which concern the establishment and administration of exceptions, do not contain any expressly discriminatory provision. It should be borne in mind, however, that the introductory clause of Article XX concerns the application of the measure. It would therefore be possible for Canadian exports of chrysotile or products containing it to receive less favourable treatment than imports from other countries or French production with respect to the way in which the exceptions are administered by the French authorities. For example, the minister responsible might use the powers of notice under Article 3:III of the Decree to discriminate against an operator qualifying for an exception who imports chrysotile fibres from Canada. However, we note that Canada has not argued that this was or had been the case. Canada merely recalls that it has demonstrated the existence of discrimination under Article III:4. For the reasons set out above, we consider that this demonstration is not relevant in terms of the introductory clause of Article XX.

8.229 We therefore conclude that, although this is a heavier task than that involved in showing that an exception falling within one of the paragraphs of Article XX encompasses the measure at issue, the

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[190] See the Reports of the Appellate Body in *United States – Gasoline*, op. cit., p. 25, and *United States – Shrimp*, op. cit., para. 115.

[191] The Panel considers that what is prohibited by the introductory clause to Article XX is a particular form of discrimination (that which is arbitrary or unjustifiable between countries where the same conditions prevail) and not all forms of discrimination. If the measure is not discriminatory in general in its application, then *a fortiori* it cannot constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail. See also the Report of the Panel in *United States – Imports of Certain Automotive Spring Assemblies*, adopted on 26 May 1983, BISD 30S/107 (hereinafter "*United States – Automotive Springs*"), para. 55.

[192] Report of the Appellate Body in *United States – Gasoline*, op. cit., p. 22.

[193] Ibid.

EC have made a prima facie case for their argument that the Decree does not constitute, in its application, arbitrary or unjustifiable discrimination. We do not consider that Canada has rebutted the presumption established by the prima facie case made by the EC, according to which the Decree does not introduce discrimination.

8.230 In accordance with our approach, since discrimination has not been established in relation to the application of the Decree, there is no need to consider the question of its arbitrariness or unjustifiability.

(ii) "Disguised restriction on international trade"

8.231 According to the EC, the Decree does not constitute a "disguised restriction on international trade". The EC consider that the fact that the Decree is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination is proof enough that it is not being applied in a manner which constitutes a disguised restriction on international trade. In particular, the EC point out that the restriction was published, that many other Members of the WTO also apply restrictions on these products and that the restriction takes international standards as a base. Any other approach would imply that all legislation on asbestos and asbestos-containing products, in so far as it imposes restrictions, amounts to a "disguised restriction on international trade".

8.232 Canada considers that the Decree is a "disguised restriction on international trade". The Appellate Body has excluded a narrow reading of the term "disguised restriction". The fact that the measure was published does not prevent it from being a disguised restriction on international trade. The Decree is contrary to the introductory clause of Article XX in the sense that, under the cover of a public health decision, it favours the French national industry of substitute products for chrysotile and products containing it.

8.233 The Panel notes, first of all, that the actual scope of the words "disguised restriction on international trade" has not been clearly defined. Under the GATT 1947, panels seem mainly to have considered that a disguised restriction on international trade was a restriction that had not been taken in the form of a trade measure or had not been announced beforehand[194] or formed the subject of a publication, or even had not been the subject of an investigation.[195]

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[194] The Report of the Panel in *United States – Prohibition of Imports of Tuna and Tuna Products from Canada*, adopted on 22 February 1982, BISD 29S/91 (hereinafter "*United States – Tuna (1982)*"), states, in para. 4.8:

> "[The Panel] furthermore felt that the United States action should not be considered to be a disguised restriction on international trade, noting that the United States prohibition of imports of tuna and tuna products from Canada had been taken as a trade measure and publicly announced as such. The Panel therefore considered it appropriate to examine further the United States import prohibition of tuna and tuna produce from Canada in the light of the list of specific types of measures contained in Article XX and notably in Article XX(g)."

[195] The Report of the Panel in *United States – Automotive Springs*, op. cit., states in para. 56:

> "The Panel then considered whether or not the exclusion order was "applied in a manner which would constitute … a disguised restriction on international trade". The Panel noted that the preamble of Article XX made it clear that it was the application of the measure and not the measure itself that needed to be examined. Notice of the exclusion order was published in the Federal Register and the order was enforced by the United States customs at the border. The Panel also noted that the ITC proceedings in this particular case were directed against the importation of automotive spring assemblies produced in violation of a valid United States patent and that, before an exclusion order could be issued under Section 337, both the validity of the patent and its infringement by a foreign manufacturer had to be clearly established. Furthermore, the exclusion order would not prohibit the importation of automotive spring assemblies produced by any producer outside the United States who had a licence from Kuhlman Corporation to produce these goods. Consequently, the Panel found that

8.234 In *United States – Gasoline*, the Appellate Body considered "that concealed or unannounced restriction … in international trade does not exhaust the meaning of 'disguised restriction'." This seems to imply that a measure that was not published would not satisfy the requirements of the second proposition of the introductory clause of Article XX. We note that the Decree was published in the Official Journal of the French Republic on 26 December 1996 and entered into force on 1 January 1997. We also note that it applies unequivocally to international trade, since as far as asbestos is concerned both importation and exportation are prohibited. In this sense, the criteria developed in *United States – Tuna (1982)* and in *United States – Automotive Springs* have already been satisfied.

8.235 However, the remark made by the Appellate Body in *United States – Gasoline* also implies that the expression "disguised restriction on international trade" covers other requirements. In the same case, the Appellate Body mentions that "'disguised restriction' includes disguised *discrimination* in international trade". This appears to signify that the word "restriction" should not be given a narrow meaning. In paragraph 8.229 above, we found that the Decree did not constitute discrimination within the meaning of the first condition of the introductory clause of Article XX. We consider that our conclusion can also be used for determining whether the Decree constitutes a disguised restriction. In this respect, we note that in the above-mentioned case the Appellate Body considered that:

> "'disguised restriction', whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX. Put in a somewhat different manner, the kinds of considerations pertinent in deciding whether the application of a particular measure amounts to 'arbitrary or unjustifiable discrimination', may also be taken into account in determining the presence of a 'disguised restriction' on international trade. The fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX."[196]

8.236 Referring also to the remark made by the Appellate Body in the same case according to which "the provisions of the chapeau [of Article XX] cannot logically refer to the same standard(s) by which a violation of the substantive rule has been determined to have occurred", we consider that the key to understanding what is covered by "disguised restriction on international trade" is not so much the word "restriction", inasmuch as, in essence, any measure falling within Article XX is a restriction on international trade, but the word "disguised". In accordance with the approach defined in Article 31 of the Vienna Convention, we note that, as ordinarily understood, the verb "to disguise" implies an *intention*. Thus, "to disguise" (*déguiser*) means, in particular, "conceal beneath deceptive appearances, counterfeit", "alter so as to deceive", "misrepresent", "dissimulate".[197] Accordingly, a restriction which formally meets the requirements of Article XX(b) will constitute an abuse if such compliance is in fact only a disguise to conceal the pursuit of trade-restrictive objectives. However, as the Appellate Body acknowledged in *Japan – Alcoholic Beverages*, the aim of a measure may not be easily ascertained.[198] Nevertheless, we note that, in the same case, the Appellate Body suggested that the protective application of a measure can most often be discerned from its design, architecture and revealing structure.[199]

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the exclusion order had not been applied in a manner which constituted a disguised restriction on international trade."

[196] *United States – Gasoline*, op. cit., p. 25.

[197] Petit Larousse Illustré (1986), p. 292; Le Nouveau Petit Robert (1994), p. 572.

[198] Op. cit., p. 31.

[199] Ibid. Although this approach was developed in relation to Article III:4 of the GATT 1994, we see no reason why it should not be applicable in other circumstances where it is necessary to determine whether a measure is being applied for protective purposes.

8.237 It is on this basis that we shall analyse Canada's argument according to which the Decree favours the French domestic industry producing substitutes for chrysotile and chrysotile-containing products.[200] We have already found that the Decree was necessary to achieve a public health objective and did not, in its application, constitute arbitrary or unjustifiable discrimination. We recall that in *United States – Gasoline*, the Appellate Body considered that the kinds of considerations pertinent in deciding whether the application of a particular measure amounts to "arbitrary or unjustifiable discrimination" may also be taken into account in determining the presence of a "disguised restriction" on international trade. Since we have not identified discrimination, we consider it is unnecessary to determine whether we are faced with discrimination that might constitute a disguised restriction on international trade.

8.238 As far as the design, architecture and revealing structure of the Decree are concerned, we find nothing that might lead us to conclude that the Decree has protectionist objectives. Canada implicitly admits as much when it asserts that the Decree is a response of the French authorities to panicked public opinion and other health scares implicating officials and members of the government.[201] If this was the case, it seems difficult to reconcile the Decree being adopted in great haste with the idea that it was the result of a premeditated intention to protect French industry.

8.239 Admittedly, there is always the possibility that measures such as those contained in the Decree might have the effect of favouring the domestic substitute product manufacturers. This is a natural consequence of prohibiting a given product and in itself cannot justify the conclusion that the measure has a protectionist aim, as long as it remains within certain limits. In fact, the information made available to the Panel does not suggest that the import ban has benefited the French substitute fibre industry, to the detriment of third country producers, to such an extent as to lead to the conclusion that the Decree has been so applied as to constitute a disguised restriction on international trade.[202]

8.240 Consequently, we conclude that the Decree satisfies the conditions of the introductory clause of Article XX.

5. Conclusion

8.241 In the light of the above, the Panel concludes that the provisions of the Decree which violate Article III:4 of the GATT 1994 are justified under Article XX(b).

F. ALLEGATION OF NULLIFICATION OR IMPAIRMENT OF A BENEFIT UNDER ARTICLE XXIII:1(b) OF THE GATT 1994

1. Arguments of the parties[203]

8.242 Having determined that the Decree was justified in the light of Article XX(b) of the GATT 1994 and consistent in its application with the introductory provisions of that Article, we must now examine Canada's allegations and arguments based on Article XXIII:(b) of the GATT 1994.

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[200] In this respect, we consider the EC to have satisfied the burden of proof as regards the introductory clause of Article XX. We shall therefore treat Canada's argument as an attempt to rebut the presumption established in favour of the EC.

[201] See Canada's arguments, para. 3.27. Canada refers to a study entitled *L'amiante dans l'environnement, ses conséquences et son avenir*, Office parlementaire d'évaluation des choix scientifiques et technologiques, National Assembly No. 329/Senate No. 41, p. 57.

[202] See, in particular, the reply of the European Communities to the Panel's question No. 30, paras. 113-115, Annex II.

[203] The arguments of the parties are set out in detail in Section III above.

8.243 The main arguments of the parties with regard to the existence of non-violation nullification or impairment of a benefit (hereinafter "non-violation nullification") can be summarized as follows.

8.244 Canada considers that, in accordance with panel practice under the GATT 1947, as confirmed in *Japan – Measures Affecting Consumer Photographic Film and Paper*[204], three conditions must be met for a case of non-violation nullification: (i) the negotiation of a tariff concession; (ii) the subsequent adoption of a governmental measure that unfavourably disrupts conditions of competition between the imported product for which the concessions were granted and the like or directly competitive domestic products; and (iii) the fact that the adoption of the measure in question could not reasonably have been foreseen at the time of the tariff concession negotiations.

8.245 Canada considers that these three conditions are present in this case. Asbestos and many asbestos-containing products are subject to tariff concessions by France and the European Communities starting in 1947 and 1960-1961, respectively, as well as during the Uruguay Round negotiations. By establishing a total ban, the Decree disrupted the competitive relationship in the French market between, on the one hand, chrysotile asbestos fibre and products containing it and, on the other, like and competitive French products, thus creating a monopoly for substitute fibres. Finally, at the time the tariff concessions concerning asbestos were negotiated, Canada could not reasonably have foreseen that France was going to abandon its policy of controlled use and compromise the value of its commitments by implementing a total ban on chrysotile and any possible use thereof by means of a measure as excessive as the Decree. Furthermore, this measure was inconsistent with the type of regulatory intervention then in place and still in effect today concerning products equally harmful, if not more harmful, than chrysotile. Canada's expectations were that this type of measure would not be adopted unless there were exceptional circumstances, but there had been no new scientific developments that had changed anything in terms of managing the risks or the effects associated with chrysotile. Finally, Canada argues that it could not reasonably have expected that chrysotile would be banned in favour of substitute products without those products having been subjected to a rigorous process of examination to prove that their use satisfied the public health objectives invoked by France.

8.246 By way of a preliminary remark, the European Communities point out that in the context of a non-violation allegation the burden of proof is especially onerous as a result of, in particular, Article XXVI:1(a) of the Understanding. They also note that in *Japan – Film*, the Panel stated that Article XXIII:1(b) of the GATT 1994 should be approached with caution and that non-violation nullification or impairment of benefits should be treated as an exceptional concept.[205] The European Communities also claim that the rules on non-violation nullification or impairment apply only if the measure in question does not fall under other provisions of the GATT and that, while there may be "legitimate expectations" in connection with a purely commercial measure, there can be no such expectations with respect to a measure taken to protect human health and which can therefore be justified with regard to Article XX:(b) of the GATT 1994.

8.247 The European Communities maintain that Canada fails to demonstrate how the French measure could not reasonably have been anticipated. In substance, according to the European Communities, since 1977, chrysotile has been classified as a category I carcinogenic product by the WHO. Thus, when the tariff negotiations took place, Canada knew that there was a danger that the product under negotiation could at any time be prohibited by Members of the WTO, particularly if non-hazardous or less hazardous substitutes could be used. In 1986, ILO Convention 162 on asbestos stated that national legislation should provide wherever possible for the replacement of asbestos or of certain types of asbestos or products containing asbestos by other materials or products or the use of

[204] Adopted on 22 April 1998, WT/SD44/R, hereinafter "*Japan – Film*".
[205] Ibid., para. 10.36.

alternative technology, scientifically evaluated by the competent authority as harmless or less harmful. Since 1990, the European Communities, under Directive 90/394/EEC, has provided for the replacement of asbestos. This Directive recommends the principle of replacing a dangerous substance or process with a non-dangerous or less dangerous substance or process, where one exists. In 1983, WTO Members began to ban the use of asbestos, including chrysotile. Among EC Members, Austria banned chrysotile in 1990, followed by Finland and Italy in 1992, and Germany in 1993. Canada might have expected France to follow suit.

8.248 Furthermore, the European Communities assert that there are no provisions in the GATT or the TBT Agreement requiring consistency in the application of health measures against substances that pose a carcinogenic risk for human health. Accepting Canada's argument that it could not legitimately have anticipated the ban imposed by the Decree because France did not simultaneously ban other potentially dangerous substances (such as lead and copper) would be equivalent to preventing Members entirely from taking measures to protect human health on their territory.

8.249 Moreover, according to the European Communities, Canada cannot claim a legitimate expectation of "improved" market access with respect to a product which entails risks for human health when, as the facts show, the tendency is for exports to the industrialized countries to fall. Canada must give detailed reasons as to why it could legitimately have expected that France would not adopt measures restricting or eliminating the use of any asbestos product after the Uruguay Round negotiations, given the growing scientific evidence that all types of asbestos and asbestos-containing products are carcinogenic to humans.

8.250 The European Communities then argue that Canada fails to demonstrate how the Decree upsets the competitive relationship between asbestos and fibrous or non-fibrous substitute products. It has not established a "clear correlation" between the two. The issue is not whether equality of competitive conditions exists but whether the relative conditions of competition which existed between domestic and foreign products as a consequence of the relevant tariff concessions have been upset. The EC consider that the products for which the competitive conditions must be examined are those covered by the tariff concession. If a tariff concession is granted for asbestos, the competitive conditions to be examined are those concerning Canadian asbestos and French asbestos. It is irrelevant to compare chrysotile with French substitute products because such products cannot be considered in terms of the same relevant tariff concession.

8.251 Canada rejects the EC's claim that an examination of the impact of the Decree's effect on competitive conditions must be limited to Canadian asbestos and French asbestos. This approach is contradicted by two panel reports which have clearly established that Article XXIII:1(b) can be invoked in the case of a measure which upsets the competitive relationship between two non-identical products.[206]

2. Analysis by the Panel

(a) Preliminary issues

(i) Questions before the Panel

8.252 Article XXIII:1(b) of the GATT 1994 (Nullification or impairment) reads as follows:

[206] Canada refers to the Report of the Working Party on *Australian Subsidy on Ammonium Sulphate*, adopted on 3 April 1950, II/188 and to the Report of the Panel on Complaints in *Treatment by Germany of Imports of Sardines*, (hereinafter "*Germany – Sardines*"), adopted on 31 October 1952, BISD 1S/53.

> "1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of
>
> […]
>
> (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement,
>
> […]
>
> the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it."

8.253 The Panel notes, first of all, that the EC have put forward two arguments which, if well-founded, should lead us to conclude that Article XXIII:1(b) does not apply to the facts in this case. If we find that these arguments are not pertinent, we shall examine the substance of the Canadian complaint.

8.254 The EC's two arguments which could determine the applicability of Article XXIII:1(b) are as follows:

8.255 Firstly, the EC claim that the rules on non-violation nullification apply only if the measure in question does not fall under other provisions of the GATT 1994. Article XXIII:1(b) is applicable only if the Panel reaches the conclusion that the Decree is consistent with Article III of the GATT 1994. Otherwise there cannot be "non-violation". In the light of the introductory clause of Article XX of the GATT 1994, the European Communities conclude that if the French measure is considered "necessary" for the protection of human health by the Panel and hence if specific rules have been applied in this respect, the provisions of Article XXIII:1(b) of the GATT are inapplicable.

8.256 Canada replies that the cases *Uruguay – Recourse to Article XXIII*[207] and *United States – Trade Measures Affecting Nicaragua*[208] do not support the EC's interpretation. Moreover, inasmuch as Article 26:1(b) of the Understanding provides for the granting of compensation rather than the withdrawal of a measure, recourse in non-violation affects neither the adoption nor the application of the contested measure.

8.257 The EC's second argument is that while it is possible to have legitimate expectations in connection with a purely commercial measure, it is not possible to claim legitimate expectations with respect to a measure that is taken to protect human health and can therefore be justified, particularly in the light of Article XX(b) of the GATT 1994. The protection of human health is a fundamental duty and cannot be compromised or restricted by the concept of non-violation.

8.258 For Canada, the distinction made by the EC between measures of a purely commercial nature and measures which have health-protection related aspects has no basis either in the texts of the WTO Agreement or in case-law. A legitimate expectation does not in any way concern a particular measure adopted by a Member, but rather the opportunities for competition agreed during multilateral trade negotiations on a given product. The Community reasoning is also wrong because it does not concur with the preparatory work on the GATT 1947, which shows that the objective of Article XXIII:1(b) is to prevent abuse of the provisions of the General Agreement.

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[207] Adopted on 16 November 1962, BISD 11S/95.
[208] L/6053 (1986), unadopted.

8.259 The EC consider that Canada has taken a selective look at the preparatory documents. As the Appellate Body pointed out in the *United States – Shrimp* case, the conditions laid down in the chapeau of Article XX(b) are meant precisely to address situations in which a Member applies in bad faith and in an abusive manner the exceptions laid down in Article XX. There cannot be two sets of provisions which address the same problem twice.

(ii) The EC's argument according to which the rules on non-violation nullification apply only if the measure in question does not fall under other provisions of the GATT.

8.260 The EC seem to believe that the fact that a measure is "justified" on the basis of Article XX creates a legal situation different, on the one hand, from the situation in which the measure violates a provision of the GATT 1994 and, on the other, from the situation in which the measure does not fall under the provisions of the GATT 1994. In support of their position, the EC cite a passage from the Panel Report in *Japan – Film* which mentions that Article XXIII:1(b) provides "the means to redress government actions not otherwise regulated by GATT rules … ". The Communities also refer to the introductory clause of Article XX which states that "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures" necessary to protect human life or health.

8.261 The Panel recalls, first of all, that both the preamble to Article 26.1 of the Understanding and Article XXIII:1(b) use the words "measure, *whether or not it conflicts with the provisions* [of the particular agreement]" (emphasis added). To begin with, it should be noted that the wording of Article XXIII:1(b) shows unequivocally that this provision applies both in situations in which a measure conflicts and in situations in which it does not conflict with the provisions of the GATT 1994. Above, we found that the treatment accorded by the Decree to chrysotile asbestos fibres violated Article III:4 of the GATT 1994 as such, in as much as these products were like the substitute fibres mentioned by the parties and the treatment of products containing chrysotile asbestos and products containing the substitute fibres mentioned by the parties was discriminatory. Accordingly, the Decree *conflicts* with the provisions of Article III:4, in the sense in which that word is used in Article XXIII:1(b).[209] However, we note that the introductory clause of Article XX states that "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures" necessary to protect human life or health, which might suggest that a provision consistent with the requirements of Article XX no longer conflicts with Article III:4, because Article III:4 cannot be construed as preventing this kind of measure. However, whether a measure *justified* on the basis of Article XX of the GATT 1994 is considered still to be in conflict with Article III:4 or is considered no longer to conflict with Article III:4 because justified under Article XX, under the terms of Article XXIII:1(b) the latter continues to be applicable to it.

8.262 We also note, firstly, that the introductory clause to Article XX, to which the EC refer, concerns the *adoption or enforcement* of measures necessary to protect health. The application of Article XXIII:1(b) does not prevent either the adoption or the enforcement of the Decree concerned. Article 26:1(b) stipulates that even where a measure has been found to nullify or impair benefits under, or impede the attainment of objectives, of the GATT 1994 without violation thereof, there is no obligation to withdraw the measure. Accordingly, there is no contradiction between the invocation of Article XX and the application of Article XXIII:1(b). However, that Article must be applied in such a way as to protect the balance of rights and duties negotiated.[210] Accordingly, we do not consider that

[209] This remark is made without prejudice to Canada's allegations based on Article XXIII:1(a) (see Section VIII.A.2(a) above).

[210] See the Report of the Panel in *EEC – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-feed Proteins*, adopted on 25 January 1990, BISD 37S/86 (hereinafter "*EEC – Oilseeds*", para.148, where the Panel considered that:

the text of Article XXIII:1(b) or that of Article XX or, finally, that of Article 26.1 of the Understanding supports the EC's interpretation.

8.263 Secondly, we do not consider that the passage from the *Japan – Film* report cited by the EC supports its interpretation either. Admittedly, the words used by the panel, taken in isolation, might at first glance appear to confirm the EC's position, insofar as it refers to "government actions not otherwise *regulated* by GATT rules" (emphasis added). The use of the word "regulated" could signify that the field of application of Article XXIII:1(b) covered only situations in which no provision of the GATT was *applicable*. First of all, it is our opinion that the fact that a measure does not violate Article III:4 does not necessarily mean that the latter is not applicable to it. Article III:4 applies to any law, regulation or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution or use of imported products and like products of national origin. Consequently, even if the EC's interpretation were correct, it would not apply in the present case insofar as Article III:4 continues to be applicable to the Decree. Next, it should be noted that the panel in *Japan – Film* refers, in the footnote at the end of the sentence cited by the EEC [211], to the *EEC – Oilseeds* report which states, in particular, that:

> "the Panel noted that these provisions, as conceived by the drafters and applied by the CONTRACTING PARTIES, serve mainly to protect the balance of tariff concessions. [footnote omitted] The idea underlying them is that the improved competitive opportunities that can legitimately be expected from a tariff concession can be frustrated not only by measures proscribed by the General Agreement but also by measures consistent with that Agreement".[212]

8.264 We consider that a "measure which is not otherwise regulated by GATT rules", that is to say to which the GATT does not apply, is, *a fortiori*, "not in conflict" with the GATT within the meaning of Article XXIII:1(b) or "consistent" within the meaning of the *EEC – Oilseeds* report. Consequently, we find that the passage in the *Japan – Film* report cited by the EC, far from supporting their position, confirms the opinion according to which Article XXIII:1(b) applies to a measure whether it is consistent with the GATT because the GATT does not apply to it or is justified by Article XX.[213]

8.265 For these reasons, we do not allow the EC's first argument.

> "… the recognition of the legitimacy of an expectation relating to the use of production subsidies therefore in no way prevents a contracting party from using production subsidies consistently with the General Agreement, it merely delineates the scope of the protection of a negotiated balance of concessions."

We also note that the Appellate Body in *United States – Gasoline*, op. cit., p. 25, stated, with regard to the application of Article XX, that "the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the Party claiming the exception and the legal rights of the other Parties concerned".

[211] See *Japan – Film*, para. 10.50, footnote 1214.

[212] *EEC – Oilseeds*, op. cit., para. 144.

[213] In this connection, we note that in the context of the examination of a United States measure granted a waiver under Article XXV of the GATT 1947, the Panel in *United States – Restrictions on the Importation of Sugar and Sugar-containing Products applied under the 1955 Waiver and under the Headnote to the Schedule of Tariff Concessions*, adopted on 7 November 1990, BISD 37S/228, noted, in para.5.21, that:

> "… Article XXIII:1(b) applies whether or not the measure at issue conflicts with the General Agreement and that therefore, the question of whether a measure inconsistent with Article XI:1 remains inconsistent with the General Agreement even if covered by a waiver cannot, by itself, determine whether it nullifies or impairs benefits accruing under the General Agreement within the meaning of that provision".

(iii) The EC's argument according to which there cannot be a "legitimate expectation" in the case of a measure that concerns the protection of human health.

8.266 With regard to the EC's second argument, we note, first of all, that neither the text of Article XXIII:1(b) of the GATT 1994 nor that of Article 26:1 of the Understanding expressly incorporates the separation suggested by the EC between measures of a purely commercial nature and measures designed to protect human health. Although these articles require the existence of a *measure* – which neither of the Parties disputes - they do not distinguish between different *types* of measures. We have also found, on the basis of Article XX, that the application of the latter does not *a priori* exclude the application of Article XXIII:1(b).[214] We therefore find that the terms and the context of Article XXIII:1(b) do not support the interpretation proposed by the EC.

8.267 Canada cites the preparatory work on the GATT 1947. On the basis of Article 32 of the Vienna Convention, we consider that it is not necessary to have recourse to the preparatory work unless, in particular, the interpretation based on the criteria of Article 31 leaves the meaning of the terms ambiguous or obscure or leads to a manifestly absurd or unreasonable result. Such is not the case. However, recourse to the preparatory work also makes it possible to confirm the meaning resulting from the application of Article 31.

8.268 In this respect, we note that the EC consider that Canada's reading of the preparatory work is selective. According to them, the potential problems of abuse and bad faith to which Canada alludes are adequately covered by the chapeau of Article XX. For the EC, there cannot be two sets of provisions which address the same problem twice.

8.269 Although it is not necessary to take a position on the content of the preparatory work, we consider that the EC's argument tends to confuse two aspects: the first is abuse resulting from the application of a measure falling within one of the paragraphs of Article XX. If a measure necessary to protect human health is applied in a manner that conflicts with the provisions of the introductory clause of Article XX, the measure will still be in conflict with the provisions of the GATT whose violation Article XX is supposed to justify. This aspect is very different from the situation in which a measure is perfectly justified in itself in relation to the GATT (as in the case of a measure which satisfies all the conditions of Article XX), but which, viewed in a given context, could give rise to a situation of nullification or impairment of a benefit under a tariff concession.

8.270 It remains, however, for us to discuss the EC's argument to the effect that the fundamental duty to protect human health cannot be compromised or restricted by the concept of non-violation nullification. We must begin by acknowledging that all the cases examined by panels so far have concerned situations in which the measure adopted following the negotiation of a concession was purely commercial in nature, generally a subsidy, a tariff preference or a measure relating to product distribution.[215] Accordingly, we have no precedents to guide us. However, a preliminary remark,

[214] In this respect, we note that panel practice cannot be regarded as falling within Article 31.3(a) or (b) of the Vienna Convention (see Article 3.2 of the Understanding, Article IX: 2 of the Agreement Establishing the WTO and the Report of the Appellate Body in *Japan – Alcoholic Beverages*, op. cit., pp.13-5). Moreover, the GATT 1947 and WTO panels have never discussed the situation with respect to a measure designed to protect public health. All previous cases have concerned situations in which a measure of a purely commercial nature was adopted pursuant to the negotiation of a concession.

[215] Apart from *Japan – Film*, op. cit., the cases in which working parties or panels have examined the substance of complaints formulated under Article XXIII:1(b) are as follows: Working Party Report in *Australian Subsidy on Ammonium Sulphate*, adopted on 3 April 1950, BISD II/188, Panel Report in *Germany – Sardines*, op. cit.; *Uruguay – Recourse*, adopted on 16 November 1962, BISD 11S/95; Working Party Report in *European Communities – Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region ("EC – Citrus Products")*, GATT document L/5576, dated 7 February 1985 (unadopted); Panel Report in *EEC Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktail and*

similar to that made in paragraph 8.262 above, is called for. A finding based on Article XXIII:1(b) of the GATT 1994 and Article 26.1 of the Understanding never results in an obligation not to apply or to withdraw the measure in question. The Member concerned can only be asked to make "a mutually satisfactory adjustment". Article 26:1(b) also specifies that compensation may be part of a mutually satisfactory adjustment as final settlement of the dispute.[216] The Member adopting a public health protection measure is totally free to continue to apply the measure concerned as it stands while offering in exchange compensation for the benefits nullified or impaired.[217]

8.271 The Panel also considers, as did the panel in *Japan – Film*[218], that non-violation should be approached with caution and treated as an exceptional instrument of dispute settlement. It appears that Members which have negotiated a set of rights and obligations would only exceptionally expect to be challenged for actions not in contravention of those rights or obligations.

8.272 Moreover, the Panel is of the opinion that even if the justification of a measure by Article XX does not, in principle, make it impossible to invoke Article XXIII:1(b) in relation to the application of the measure justified, the situation of a measure falling under Article XX with respect to Article XXIII:1(b) cannot be quite the same as that of a measure consistent with another provision of the GATT 1994. This is because Article XX, which is headed "General Exceptions", is intended, in particular, to ensure the protection of public health or, as stated by the Appellate Body in *United States – Gasoline*, to "permit important State interests – including the protection of human health … to find expression".[219] The Panel considers that in accepting the WTO Agreement Members also accept *a priori*, through the introduction of these general exceptions, that Members will be able, at some point, to have recourse to these exceptions.[220] Moreover, Members have attached to the use of these exceptions a certain number of conditions contained either in paragraphs (a) to (j) or in the introductory clause of Article XX. These conditions have generally been narrowly interpreted.[221] The result is that

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Dried Grapes ("EEC – Canned Fruit"), GATT document L/5778, dated 20 February 1985 (unadopted); *Japan – Semi-Conductors*, report adopted on 4 May 1988, BISD 35S/116; *EEC – Oilseeds*, report adopted on 25 January 1990, BISD 37S/86; *United States – Agricultural Waiver*, adopted on 7 November 1990, BISD 37S/228.

[216] See Report of the Appellate Body in *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, adopted on 16 January 1998, WT/DS/50/AB/R (hereinafter "*India – Patents (United States)*", end of para. 41.

[217] See Report of the Panel in *EEC – Oilseeds*, op. cit., paras. 147-148.

[218] Op. cit., para. 10.36. Referring to the Report of the Panel in *EEC – Oilseeds*, footnote 1205, the Panel in *Japan – Film* noted the following:

> "In *EEC – Oilseeds*, the United States stated that it concurred in the proposition that non-violation nullification or impairment should remain an exceptional concept. Although this concept had been in the text of Article XXIII of the General Agreement from the outset, a cautious approach should continue to be taken in applying the concept. *EEC – Oilseeds*, BISD 37S/86, 118, para. 114. The EEC in that case stated that recourse to the "non-violation" concept under Article XXIII:1(b) should remain exceptional, since otherwise the trading world would be plunged into a state of precariousness and uncertainty. Ibid., para. 113."

[219] See the Report of the Appellate Body in *United States – Gasoline*, op. cit., p. 30. See also the Report of the Panel *Canada – Measures affecting exports of unprocessed herring and salmon*, op. cit., para. 4.6 and the Report of the Appellate Body in *United States – Gasoline*, op. cit., p. 18.

[220] In *Thailand – Cigarettes*, op. cit., para. 73, the panel considered that Article XX "clearly allowed contracting parties to give priority to human health over trade liberalization".

[221] See, in particular, *United States – Article 337*, op. cit., para. 5.9; *Canada – Foreign Investment Review Act*, adopted on 7 February 1984, BISD 30S/140, para. 5.20, and *United States – Prohibition of Imports of Tuna*, op. cit., para. 5.22.

(a) both the intended objective of these exceptions (pursuit of interests recognized *a priori* as being of greater importance than Members' commercial interests, since they can outweigh the latter) and

(b) the specific conditions that must be satisfied by Members invoking these exceptions

mean that, while recognizing that Article XXIII:1(b) applies to measures that fall under Article XX, we are justified in treating recourse to Article XIII:1(b) as particularly exceptional in relation to measures justified by Article XX(b).

8.273 All this leads the Panel to consider that, in practice, even if in a particular case a mutually satisfactory adjustment may be made under Article XXIII:1(b), in general, the risk of an effective increase in the cost of measures necessary to protect public health because of the applicability of Article XXIII:1(b) to measures justified under Article XX can only be very marginal. In fact, considering the criteria mentioned in the previous paragraph, very few measures of this kind could give rise to the application of Article XXIII:1(b).

8.274 For these reasons we do not subscribe to the interpretation proposed by the European Communities. Accordingly, we will continue our examination of the measure in the light of Article XIII:1(b) of the GATT 1994.

(b) Examination of the substantial aspects of Canada's arguments under Article XXIII:1(b) of the GATT 1994

(i) Burden of proof

8.275 The Panel has already discussed the question of the burden of proof in general in Section VIII.E.1(b) above. However, it is important, in the light of the arguments of the parties, to clarify the application of the burden of proof in the context of non-violation nullification or impairment of a benefit.

8.276 Where the application of Article XXIII:1(b) is concerned, Article 26.1(a) of the Understanding and panel practice in the context of the WTO Agreement and the GATT 1947 confirm that this is an exceptional course of action requiring the complaining party to carry the burden of presenting a detailed justification in support of its complaint. Thus, Article 26.1(a) stipulates that:

> "Where the provisions of paragraph 1(b) of Article XXIII of the GATT 1994 are applicable to a covered agreement, a panel or the Appellate Body may only make rulings and recommendations where a party to the dispute considers that any benefit accruing to it directly or indirectly under the relevant covered agreement is being nullified or impaired or the attainment of any objective of that Agreement is being impeded as a result of the application by a Member of any measure, whether or not it conflicts with the provisions of that Agreement. Where and to the extent that such party considers and the panel or the Appellate Body determines that a case concerns a measure that does not conflict with the provisions of a covered agreement to which the provisions of paragraph 1(b) of Article XXIII of the GATT 1994 are applicable, the procedures in this Understanding shall apply, subject to the following:
>
> (a) the complaining party shall present a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement;"

8.277 In *Japan – Film*, the Panel specified how the burden of proof should be applied in this context:

> "Consistent with the explicit terms of the DSU and established WTO/GATT jurisprudence, and recalling the Appellate Body ruling that 'precisely how much and precisely what kind of evidence will be required to establish … a presumption [that what is claimed is true] will necessarily vary from …

> provision to provision', we thus consider that the United States, with respect to its claim of non-violation nullification or impairment under Article XXIII:1(b), bears the burden of providing a detailed justification for its claim in order to establish a presumption that what is claimed is true. It will be for Japan to rebut any such presumption."[222]

8.278 We conclude that, with respect to its claims of non-violation, Canada bears the primary burden of presenting a detailed justification for its claims.[223]

8.279 Canada maintains that, when a complainant proves that it enjoys a tariff concession and the respondent subsequently adopts a measure that affects the value of this concession, the complainant benefits from the presumption that it could not reasonably anticipate that this concession would be nullified or otherwise impaired by this measure. In such circumstances, it is up to the respondent to prove that the complainant should have anticipated the possibility of such a measure being adopted. Canada refers to the Appellate Body report in *India – Patent (United States)*[224] and to the Panel report in *Japan – Film*.[225]

8.280 We do not consider that Canada has correctly interpreted the Panel report in *Japan – Film*. First of all, the presumption to which the Panel refers is that, if it is shown that a measure has been introduced after the conclusion of the tariff negotiations in question, then the complainant should not be considered as having anticipated that measure, which is only one of the tests applied by the Panel. Moreover, if the interpretation of the burden of proof suggested by Canada were followed, the obligation to present a detailed justification for which Article 26.1(a) provides might in certain cases be evaded. Accordingly, we do not follow the interpretation proposed by Canada but the rule laid down in *Japan – Film.*

8.281 Furthermore, in the light of our reasoning in paragraph 8.272 above, we consider that the special situation of measures justified under Article XX, insofar as they concern non-commercial interests whose importance has been recognized *a priori* by Members, requires special treatment. By creating the right to invoke exceptions in certain circumstances, Members have recognized *a priori* the possibility that the benefits they derive from certain concessions may eventually be nullified or impaired at some future time for reasons recognized as being of overriding importance. This situation is different from that in which a Member takes a measure of a commercial or economic nature such as, for example, a subsidy or a decision organizing a sector of its economy, from which it expects a purely economic benefit. In this latter case, the measure remains within the field of international trade. Moreover, the nature and importance of certain measures falling under Article XX can also justify their being taken at any time, which militates in favour of a stricter treatment of actions brought against them on the basis of Article XXIII:1(b).

8.282 Consequently, the Panel concludes that because of the importance conferred on them *a priori* by the GATT 1994, as compared with the rules governing international trade, situations that fall under Article XX justify a stricter burden of proof being applied in this context to the party invoking Article XXIII:1(b), particularly with regard to the existence of legitimate expectations and whether or not the initial Decree could be reasonably anticipated.

(ii) Examination of the conditions

8.283 As recalled by the Panel in *Japan – Film*, the text of Article XXIII:1(b) establishes three elements whose existence a complainant must prove in order to be able legitimately to invoke that provision, namely: (1) the application of a measure by a Member of the WTO; (2) the existence of a

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[222] *Japan – Film*, op. cit., para. 10.32.
[223] Previous Panels have not defined the precise scope of the concept of detailed justification.
[224] Op. cit., para. 41.
[225] Op. cit., para. 10.79.

benefit accruing under the applicable agreement; and (3) the nullification or impairment of a benefit as a result of the application of the measure.

8.284 The existence of a *measure* is not in dispute. In this particular case, the measure in question is Decree No. 96-1133 of 24 December 1996 which, moreover, forms the subject of a violation complaint on the part of Canada and which we have examined in this respect in previous sections. We also note that, apart from stressing that its objective is to protect human health, the European Communities do not claim that the nature of the measure (an import and marketing ban) is such that it is not covered by the definition of the term "measure" in Article XXIII:1(b). We therefore conclude that a "measure" exists.

8.285 With regard to the existence of a *benefit*, we note that the Panel in *Japan – Film* recalled that, with only one exception, in all the previous cases in which Article XXIII:1(b) was invoked the benefit claimed consisted in the legitimate expectation of improved market access opportunities resulting from the relevant tariff concessions. We first need to know what benefit Canada could legitimately have expected from the Community concessions on chrysotile asbestos. We note, however, that previous panels approached the question differently, insofar as they appear to have assumed the existence of a benefit in the form of improved market access opportunities and then considered whether a party could have had a *legitimate expectation* of a given benefit.

8.286 In the present context, there would be a certain logic in making a distinction between the concept of legitimate expectation of a benefit and that of the reasonable foreseeability of a measure.[226] In fact, it could be argued that, in the circumstances, Canada's expectations with regard to the benefits it could derive from the concession could not be as high as for a product that posed no known risk to health. In such a context, in which it might be argued that, at best, Canada could anticipate a gradual decline in its chrysotile exports, an "upsetting of the competitive relationship" as a result of the measure in question would seem to be more difficult to establish. The situation is not one in which more or less promising prospects of market access disappear, as in the previous cases considered, but of a market in decline, as confirmed by the trend in the amounts produced and the number of countries which, in the last 25 years, have restricted or banned the use of chrysotile[227] and by the increasing reliance on substitute products. In these circumstances, the Decree could not be considered to have *upset* the competitive relationship between chrysotile and products containing it, on the one hand, and substitute fibres and products containing them on the other.

8.287 However, as this element would be difficult to quantify and in the light of our reasoning in paragraphs 8.272 and 8.282 above, we consider it more appropriate to discuss the circumstances which led France to adopt a measure justified under Article XX in the context of the examination of the question of whether Canada could reasonably have anticipated the French measure. These elements seem to relate more particularly to the measure at issue. We will therefore now proceed to examine the criteria developed by previous panels.

8.288 According to the criteria developed in previous cases, (a) the Decree must have had the effect of upsetting the competitive relationship between Canadian asbestos and products containing it, on the one hand, and substitute fibres and products containing them, on the other, and (b) the Canadian

[226] See the approach followed in the Report of the Panel in *EEC – Canned Fruit*, op. cit., paras. 51 and 52. See also the Report of the Panel in *EEC Oilseeds*, op. cit., para. 144.

[227] See para. 3.22 in which the European Communities point out that world production of asbestos reached a peak of 5.2 million tonnes, since when production has steadily declined, falling to 1.92 million tonnes in 1997. With regard to the countries that have restricted or banned the use of asbestos, see the description given by the European Communities in paras. 3.31 *et seq.* above.

Government must not have been able reasonably to anticipate the Decree when it was negotiating the various tariff concessions covering the products concerned.[228]

8.289 At this stage, the Panel finds it appropriate to consider that in view of the type of measure in question the "upsetting of the competitive relationship" can be assumed. By its very nature, an import ban constitutes a denial of any opportunity for competition, whatever the import volume that existed before the introduction of the ban. We will therefore concentrate on the question of whether the measure could reasonably have been anticipated by the Canadian Government at the time that it was negotiating the various tariff concessions covering the products concerned.

8.290 With regard to the tariff concessions to be taken into account in assessing the "predictability" of the measure, the Panel notes that Canada refers expressly to the concessions made by France in 1947, by the European Economic Community in 1962 and by the European Communities at the end of the Uruguay Round.[229] Canada notes, in particular, that the concessions included in the 1962 Protocol have been renewed until now. The European Communities do not dispute the information submitted by Canada, but recall that the Panel in *Japan – Film* pointed out that the establishment of a case based on expectations from rounds concluded 18 or 30 years ago might be difficult. The EC consider that Canada should provide detailed explanations of why it could legitimately have expected that France would not adopt measures restricting the use of any asbestos product after the Uruguay Round negotiations, given the growing scientific evidence that all types of asbestos were carcinogenic to humans.

8.291 With regard to the factors to be taken into account determining whether the measure in question could reasonably have been anticipated, previous panels found that a number of elements were not relevant. We consider it necessary to assess their applicability in relation to the circumstances of the present case.

(a) First of all, we note that the reports in *Japan – Film* and *EEC – Oilseeds* concluded that a specific measure could not be considered foreseeable solely because it was consistent with or a continuation of a past general government policy. However, we note that, in contrast to the two cases mentioned above, France had already developed a specific policy in response to the health problems created by asbestos before the adoption of the Decree. This factor must certainly be taken into account in our analysis.[230]

(b) The Panel in *Japan – Film*, also concluded that it would not be appropriate to charge the United States with having reasonably anticipated all GATT-consistent measures. Consequently, we do not consider that Canada reasonably anticipated all GATT-consistent measures, or even possible measures justifiable under Article XX.

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[228] The Panel does not consider that the EC's argument based on a comparison between products corresponding to the same tariff line are relevant. The concept of competition is not limited to products that fall in the same tariff heading and was established in the earliest cases based on Article XXIII:1(b). See, in particular, the Report of the Working Party on *Australian Subsidy on Ammonium Sulphate*, adopted on 3 April 1950, II/188, para. 12, the Report of the Panel on Complaints in the case *Germany – Sardines*, op. cit., para. 16, and the Report of the Panel in *Japan – Film*, op. cit., para. 10.73.

[229] The concessions concerned do not seem to have been affected by the enlargement of the European Communities to include Austria, Finland and Sweden in 1996.

[230] In our opinion, there is a difference between, on the one hand, an import ban following upon a series of national measures gradually reinforcing, since 1977, the measures taken to protect public health against the effects of asbestos and, on the other, the relationship which the EC tried to establish in *EEC – Oilseeds* between the existence in 1962 of oil-seeds subsidies in certain member States of the European Communities and the development of a subsidy programme insulating oil-seed producers from competition from imports (see para. 149 of the panel report).

(c) Finally, insofar as the Decree postdates the most recent tariff negotiations, we could apply the presumption applied by the Panel in *Japan – Film*, according to which normally Canada should not be considered to have anticipated a measure introduced after the tariff concession had been negotiated. However, we do not consider such a presumption to be consistent with the standard of proof that we found to be applicable in paragraph 8.272 above in the case of an allegation of non-violation nullification concerning measures falling under Article XX of the GATT 1994.

Moreover, the circumstances of the present case seem to us to be different from the situation envisaged in *Japan – Film*. In that case, the measures in question concerned the organization of the Japanese domestic market. They were therefore economic measures of a kind that a third country might find surprising and, accordingly, difficult to anticipate. Here, it is a question of measures to protect public health under Article XX(b), that is to say, measures whose adoption is expressly envisaged by the GATT 1994. We therefore consider that the presumption applied in *Japan – Film* is not applicable to the present case.

8.292 Canada mentions, first of all, the concessions made by France in 1947 and by the EEC in 1962. However, we consider that in view of the time that elapsed between those concessions and the adoption of the Decree (between 50 and 35 years), Canada could not assume that, over such a long period, there would not be advances in medical knowledge with the risk that one day a product would be banned on health grounds. For this reason, too, we also consider that the presumption applied in *Japan – Film* cannot be applied to the concessions granted in 1947 and 1962. Any other interpretation would extend the scope of the concept of non-violation nullification well beyond that envisaged by the Panel in *Japan – Film*. On the contrary, it is for Canada to present detailed evidence showing why it could legitimately expect the 1947 and 1962 concessions not to be affected and could not reasonably anticipate that France might adopt measures restricting the use of all asbestos products 50 and 35 years, respectively, after the negotiation of the concessions concerned. In the present case, the burden of proof must be all the heavier inasmuch as the intervening period has been so long. Indeed, it is very difficult to anticipate what a Member will do in 50 years time. It would therefore be easy for a Member to establish that he could not reasonably anticipate the adoption of a measure if the burden of proof were not made heavier.

8.293 In the present case, we do not consider that Canada has provided a detailed explanation of why it could reasonably expect France not to adopt measures restricting the use of any asbestos product 50 and 35 years respectively, after the concessions concerned.

8.294 We therefore now turn to the question of whether, at the conclusion of the Uruguay Round, Canada could reasonably have expected France (a) not to adopt a measure restricting the use of asbestos and (b) not to do so by introducing a total ban.

8.295 As we have found (in paragraph 8.28), the presumption applied by the Panel in *Japan – Film* cannot be applied to the present case.[231] Unlike Canada, which claims that no recent scientific development could have made the measure foreseeable, we consider that there is evidence to show that regulations restricting the use of asbestos could have been anticipated. First of all, the hazardous nature of chrysotile has long been known. Thus, since 1977, chrysotile has been classified by the WHO as a category I carcinogen. In 1986, ILO Convention 162 required national legislators to make provision, whenever possible, for the replacement of asbestos or of certain types of asbestos or of products containing asbestos by other materials or products or the use of alternative technology,

[231] Even if it were applicable, we consider that the EC rebutted this presumption by their references to the systems established at international and Community level concerning the use of asbestos.

scientifically evaluated by the competent authority as harmless or less harmful. In 1990, the European Communities issued Directive 90/394/EEC providing for the replacement of asbestos. This Directive advocates the principle that a dangerous agent or procedure should be replaced by a harmless or less harmful agent or procedure insofar as one exists.

8.296 Moreover, in the light of the information submitted by the parties and the experts, we consider that the study of the diseases associated with the inhalation of asbestos is a field of science in which any possible conclusion would appear to be based on the observation of pathological cases day by day. In the Panel's opinion, the numerous constraints under which the scientists must work, such as the need to limit themselves to a given number of individuals, the establishment of the history of exposure and the period over which the health effects of asbestos develop, make the impact of these studies largely relative. It is the accumulation of data that gradually establishes scientific certainty. This impression is confirmed by the experts consulted by the Panel whose opinions are based on a large number of studies, including recent ones. Consequently, even supposing that there has been no major recent discovery, Canada cannot argue that it could not anticipate the adoption of a measure restricting the use of asbestos.

8.297 On the other hand, the accumulation of international and Community decisions concerning the use of asbestos, even if it did not necessarily make it certain that the use of asbestos would be banned by France, could not do other than create a *climate* which should have led Canada to anticipate a change in the attitude of the importing countries, especially in view of the long-established trend towards ever tighter restrictions on the use of asbestos. We also note that the use of chrysotile asbestos was banned by Members of the WTO well before it was banned by France. Admittedly, in *Japan – Film* the Panel considered that the adoption in other Members' markets of measures similar to the measures in question could not make the latter foreseeable. However, here again it was a question of commercial measures. We consider that in the present case the situation is different since it concerns public health and the competent international organizations have already taken a position on the question. The adoption, in an already restrictive context, of public health measures by other States, faced with a social and economic situation similar to that in France, creates an environment in which the adoption of similar measures by France, is no longer unforeseeable.

8.298 Moreover, as noted above, at the end of the Uruguay Round France already had in place a number of measures regulating the use of asbestos. These included, in particular, measures relating to the exposure of workers taken after asbestos was recognized as a carcinogen by the IARC (Decree 77-949 of 17 August 1977) and the adoption of ILO Convention 162, as well as for the purpose of implementing Community directives applicable. The Panel also notes that Decree 88-466 of 28 April 1988 on products containing asbestos had prohibited the use of chrysotile asbestos in the manufacture of certain products.[232]

8.299 In these circumstances, it is difficult for Canada to claim that it had legitimate expectations of maintaining or even developing its exports of chrysotile and products containing it. If there was any benefit for Canada, the Panel does not consider Canada to have presented a detailed justification to show that that benefit was anything other than precarious.

8.300 We thus conclude that at the conclusion of the Uruguay Round Canada could reasonably have anticipated that France might, in the short term, adopt more restrictive measures on the use of asbestos.

8.301 The question that remains to be decided is whether Canada could reasonably have anticipated the introduction of a *ban* on chrysotile asbestos by France. We consider that the scientific literature

[232] See Annex II, reply of the European Communities to the Panel's question No. 4 at the Second Meeting with the Parties, paras. 254 to 261.

and the international regulations, as well as Members' public policy[233], gave numerous indications such as to create a context in which Canada could not reasonably not have anticipated that sooner or later chrysotile would be banned by France. We also recall that the legitimacy of measures justified under Article XX justifies a stricter burden of proof on the party invoking Article XXIII:1(b). In the present case, Canada has not presented a detailed justification in support of its claim that it could not reasonably have anticipated that France would, in the light of developments in the scientific evidence and the choices made by other Members, also decide to apply a total ban on asbestos on its market in the short term.

8.302 We note Canada's argument according to which it could not reasonably have anticipated the adoption of the Decree by France insofar as France failed to display the necessary consistency in its approach to chrysotile and other hazardous products, such as lead and copper. We do not consider this a pertinent argument. Although it is true that lead and copper, like asbestos, are hazardous and that France has not yet taken any measure with respect to lead and copper, essentially this means that Canada cannot legitimately expect the lead market not to be the subject of some public health measure, even though France has not yet taken any such measure. It is our opinion that each Member is free to adopt the health policies it deems appropriate and to give each such policy the priority it deems necessary. To accept Canada's argument would not only conflict with that principle by requiring an "all or nothing" approach impossible to realize in practice but would considerably facilitate the task of a Member invoking Article XXIII:1(b) and required to prove the existence of a legitimate expectation. Thus, it would be sufficient to identify a product which had not yet been regulated even though it was recognized as being hazardous. There would then be no need to provide detailed evidence of the existence of non-violation nullification or impairment.

8.303 In the present case, we do not consider that Canada has presented a detailed justification of why it could legitimately have expected that France would not adopt measures restricting the use of any asbestos product in a context in which measures to limit the use of asbestos were being proposed at the international level and when countries at the same level of social and economic development as France had already banned the use of chrysotile asbestos by the end of the Uruguay Round.

(c) Conclusion

8.304 On the basis of the above, we conclude that Canada has not established the existence of nullification or impairment of a benefit within the meaning of Article XXIII:1(b) of the GATT 1994 as a result of the application of the measure in question.

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[233] The use of chrysotile was banned in Sweden and Denmark in 1986, in Austria in 1990, in the Netherlands in 1991, in Finland and Italy in 1992 and in Germany in 1993 (see para. 3.32 above). Directive 91/659/EEC of 3 December 1991, OJ 1991, L 363, p. 36, had banned the use of asbestos for fourteen specific categories of product (see para. 3.34 above).

IX. CONCLUSIONS

9.1 In the light of the above, the Panel concludes as follows:

(a) On the basis of its findings in Section VIII.D above, the Panel concludes that 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 Agreement. However, as Canada has not made any claim concerning the compatibility with the TBT Agreement of the part of the Decree relating to exceptions, the Panel refrains from reaching any conclusion with regard to the latter.

(b) On the basis of its findings in Section VIII.E.2 above, the Panel concludes that chrysotile asbestos fibres as such and fibres that can be substituted for them as such are like products within the meaning of Article III:4 of the GATT 1994. Similarly, the Panel concludes that the asbestos-cement products and the fibro-cement products for which sufficient information has been submitted to the Panel are like products within the meaning of Article III:4 of the GATT 1994.

(c) With respect to the products found to be like, the Panel concludes that the Decree violates Article III:4 of the GATT 1994.

(d) However, on the basis of its findings in Section VIII.E.4 above, the Panel concludes that the Decree, insofar as it introduces a treatment of these products that is discriminatory under Article III:4, is justified as such and in its implementation by the provisions of paragraph (b) and the introductory clause of Article XX of the GATT 1994.

(e) Finally, the Panel concludes, on the basis of its findings in Section VIII.F above, that Canada has not established that it suffered non-violation nullification or impairment of a benefit within the meaning of Article XXIII:1(b) of the GATT 1994.

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