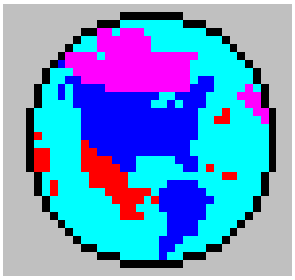
THE LAW OF REGIONAL ECONOMIC INTEGRATION IN THE AMERICAN HEMISPHERE



J.H.H. Weiler
University Professor, NYU
Joseph Straus Professor of Law and European Union Jean Monnet Chair,
NYU School of Law

AND

Sungjoon Cho
Assistant Professor of Law, Chicago-Kent College of Law,
Illinois Institute of Technology

Unit II

Non-Discrimination (Regulation)

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Guiding Questions

Reflect on the following questions while/after reading the material:

1. *Asbestos*
    a. *Does the import ban imposed on asbestos and asbestos products fall under GATT Art. XI or Art. III? Are you convinced by the Panel's finding?*
    b. *Why was France (the EU) dissatisfied with the ruling despite the victory?*
    c. *Is the Appellate Body's approach, taking account of the risk level, consistent with the theory of "aim and effects"? What if the criterion of distinction is not related to physical characteristics? Does the Appellate Body's approach take into account whether the measure achieves its aim?*
    d. *Consider the obiter dictum on "less favourable treatment" in para. 100 of the Appellate Body report. What point does the Appellate Body intend to express? Is this related to "aim and effects"?*

2. *Malt Beverages*
    a. *Is the panel's stance too generous? Could it be abused? Is it in line with the text of Art. III:2 and 4?*
    b. *What is the relevance, under the panel's approach, of disparate impacts on imports and domestic goods? How can one reconcile the findings in para. 5.73 and para. 5.19?*
    c. *In what regard is this different from the Appellate Body's hint in para. 100 in Asbestos?*

3. *Jurisprudential development*
    a. *Consider the Appellate Body's decisions of the two units on national treatment: what general concept has the Appellate Body developed?*
    b. *Is there convergence between Art. III:2 and 4? Is there an interpretative alternative?*

I. Legal Text

Chapter 3 (NAFTA)

Section A - National Treatment

Article 301: National Treatment

1. Each Party shall accord national treatment to the goods of another Party in accordance with Article III of the General Agreement on Tariffs and Trade (GATT), including its interpretative notes, and to this end Article III of the GATT and its interpretative notes, or any equivalent provision of a successor agreement to which all Parties are party, are incorporated into and made part of this Agreement.

2. The provisions of paragraph 1 regarding national treatment shall mean, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded by such state or province to any like, directly competitive or substitutable goods, as the case may be, of the Party of which it forms a part.

3. Paragraphs 1 and 2 do not apply to the measures set out in Annex 301.3.

Article III* (GATT 1994)

National Treatment on Internal Taxation and Regulation

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.*

Ad *Article III*

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 XX(GATT 1994)

General Exceptions

Subject to the requirement that such measures 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, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(*a*) necessary to protect public morals;

(*b*) necessary to protect human, animal or plant life or health;

(*c*) relating to the importations or exportations of gold or silver;

(*d*) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those

relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;

(*e*) relating to the products of prison labour;

(*f*) imposed for the protection of national treasures of artistic, historic or archaeological value;

(*g*) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

(*h*) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;*

(*i*) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods

when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; *Provided* that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;

(*j*) essential to the acquisition or distribution of products in general or local short supply; *Provided* that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960.

* * *

II. Malt Beverages (1992)

The Malt Beverages panel report dealt with numerous state measures in the U.S.A. relating to the marketing and taxation of alcoholic beverages. The following excerpts mainly relate to different treatment of beer according to its alcoholic content. The report is one of the two only GATT decisions, both from the first half of the nineties, to apply the national treatment obligation according to the "aim and effects" theory. In the assessment of likeness or afforded protection, this theory requires the consideration of the legislative purpose. In your reading of the Malt Beverages panel report reflect on the desirability of this alternative approach. Consider also the compatibility of the "aim and effects" approach with the wording of GATT Art. III and remember the statements of the panel and Appellate Body in the Japan – Alcohol dispute on that account.

http://www.wto.org/english/tratop_e/dispu_e/gt47ds_e.htm
16 March 1992

UNITED STATES - MEASURES AFFECTING
ALCOHOLIC AND MALT BEVERAGES

Report of the Panel adopted on 19 June 1992
(DS23/R - 39S/206)

(…)

2. FACTUAL ASPECTS

2.1 The current regulatory structure in the United States alcoholic beverages market arose from the repeal of the Eighteenth Amendment to the United States Constitution, which had established Prohibition. The Twenty-first Amendment to the United States Constitution, adopted in 1933, repeals the Eighteenth Amendment and furthermore provides that:

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Shortly thereafter, Congress enacted the Federal Alcohol Administration Act which requires, among other things, that all wholesalers obtain basic federal permits, and prohibits suppliers from having an interest in retail outlets and from engaging in many of the commercial practices that were associated with the "tied house" prior to Prohibition. In addition, the Federal government imposes excise taxes on alcoholic beverages.

2.2 Each state has independent legislative and regulatory authority, and, in response to the Twenty-first Amendment, each of the states has enacted laws governing the basis on which alcoholic beverages can be sold. In addition to regulating the sale and distribution of alcoholic beverages within their border for social welfare purposes, states impose excise taxes on alcoholic beverages. All states adopted a three tier system under which the production, wholesale distribution

and retail sale of alcohol are kept separate. Some states provide an exception to certain in-state breweries and wineries.

Products

2.3 The measures before the Panel apply to beer, wine and cider. Beer is defined under the 1991 United States Internal Revenue Code (Subpart D, s 5052, Subtitle E) as "beer, ale, porter, stout and other similar fermented beverages (including saké similar product) of any name or description containing one-half of one per cent or more of alcohol by volume, brewed or produced from malt, wholly or in part, or from any substitute thereof." Beer is classified under tariff item 2203.00.00 in the United States Tariff Schedule XX as "Beer made from malt" and the rate is bound at 1.6 cents a litre.

(…)

Beer Alcohol Content Restrictions

2.32 Certain states distinguish between beers with an alcohol content of 3.2 per cent by weight (4 per cent by volume) or lower and those with a higher alcohol content. A number of states restrict the location at which beer with over 3.2 per cent alcohol content may be sold, while not imposing the same restrictions on sales of beer at 3.2 per cent alcohol content or lower. In some states, labelling requirements are imposed on beer containing more than 3.2 per cent alcohol content which differentiate it from the lower alcohol content beer. Table 4 indicates the treatment of beer on the basis of its alcohol content in several states.

TABLE 4. BEER ALCOHOL CONTENT REQUIREMENTS

Alabama

Ale and/or malt or brewed beverages with an alcoholic content in excess of 5 per cent by volume are classified as liquors and all such beverages must be sold to the state liquor board or as authorized by the board. A liquor wholesale licensee may not sell liquor to retail licensees. A beer wholesaler (5 per cent alcohol by volume or less) may sell or distribute to all licensees authorized to sell beer and wine.

Colorado

Beer with an alcohol content of over 3.2 per cent by weight is classified as a "malt liquor", and may only be sold at retail in liquor stores or drugstores. A retail licensee under the Fermented Malt Beverages Act may sell beer (up to 3.2 per cent alcohol by weight). This license is separate and distinct from licenses issued in the Alcoholic Beverages Act for the sale of liquor in retail stores and drugstores. A retail liquor store licensee may sell only malt, vinous and spiritous liquors. The same licensed premise may not hold a licence for the sale of alcoholic beverages (over 3.2 per cent by weight) and a license for the sale of beer (3.2 per cent or less) at the same time.

Florida

Beer or malt beverages containing 3.2 per cent or less alcohol by weight may disclose on the label the accurate information about such alcoholic content.

Kansas

Beer with an alcohol content of over 3.2 per cent by weight is classified as an "alcoholic liquor" and must be sold at separate retail premises than beer under 3.2 per cent. Retail licenses for the sale of "alcoholic liquors" may be issued only for retail premises in incorporated cities, or in unincorporated cities in townships whose population exceeds 11,000. "Kansas strong" marking is required for beer over 3.2 per cent alcohol by weight. Beer of 3.2 per cent alcohol or less by weight must be labelled with a statement that the contents contain no more than 3.2 per cent alcohol by weight.

Minnesota

The regulation indicates that brewery and wholesalers' invoices of sale for malt beverages above 3.2 per cent alcohol must have the signature of the purchasing retail dealer, and the number of the retailer's identification card. [NOTE: The United States provided a letter from the Minnesota Department of Public Safety which states that this regulation is not enforced.] Any product that contains not more than 3.2 per cent alcohol by weight must be labelled as such. There is no alcohol content labelling requirement for beer containing more than 3.2 per cent alcohol by weight.

Missouri

Any holder of a Missouri license to sell intoxicating liquor may sell nonintoxicating beer (not more than 3.2 per cent alcohol by weight). A retail licensee holding a nonintoxicating beer license cannot hold another retail license on that same premise. A wholesaler holding a nonintoxicating beer license may also hold licenses to sell intoxicating beer.

Oklahoma

Beer is sold at retail in three different establishments. Beer over 3.2 per cent alcohol by weight is classified as intoxicating liquor and is sold for off-premises consumption only in packages under a package store license. Beer containing not more than 3.2% alcohol is classified as a nonintoxicating beverage and is sold for off-premises consumption only in packages at licensed retail stores. Both types of beer may be sold by the drink on draught or in bottles or cans for on-premise consumption at licensed establishments.

Oklahoma statutes indicates that no person shall attach to any container any label which in any manner indicates the alcoholic contents of said beverage or which carries any reference to the alcoholic strength of such beverage in excess of 3.2 per cent.

Oregon

Oregon breweries and wholesalers may sell malt beverages containing not more than 4 per cent alcohol by weight, in quantities of not less than 5 gallons to any unlicensed organization, lodge, picnic, party or private gathering.

Utah

Brewers may sell light beer (0.5-3.2 per cent alcohol by weight) to wholesalers or retailers but must sell heavy beer (over 3.2 per cent alcohol by weight) to the Utah authorities for sale in state stores and other state-authorized outlets. They are specifically excluded from selling heavy beer to any person within the state other than the State liquor authority.

3. MAIN ARGUMENTS

(…)

General Arguments

(…)

3.8 In particular, Canada asked the Panel to find that:

> (…)
>
> (k) restrictions on points of sale, distribution and labelling based on the alcohol content of beer above 3.2 per cent alcohol by volume maintained in the United States by the states of Alabama, Colorado, Florida, Kansas, Minnesota, Missouri, Oklahoma, Oregon, and Utah were inconsistent with Articles III:1 and III:4 of the General Agreement;
>
> (…)

3.9 Canada noted that the United States market for beer, (…) was an important one for its products and that the less favourable treatment offered to imported products as compared to United States domestic products had a significant effect on Canada's export performance and prospects. In spite of various barriers to trade, Canadian beer sales into the United States totalled approximately $200,000,000 annually which accounted for 90 per cent of Canadian exports of beer. (…) However, Canada had received strong expressions of concern from the Canadian beer industry that the competitive position of their products had been placed at a disadvantage. Canada cited the Panel on United States - Taxes on Petroleum and Certain Imported Substances (BISD 34S/136) (the "Superfund Panel") to the effect that, "a change in the competitive relationship ... must consequently be regarded ipso facto as a nullification or impairment of benefits accruing under the General Agreement" (paragraph 5.1.9).

3.10 The United States stated that with respect to the Panel's examination of state practices, it was important to bear in mind that each state had independent legislative and regulatory authority. Although categories of practices might be similar across states, each state's legislative and regulatory structure represented a specific response to the unique situation within that state. Thus, despite some general similarities, each state practice had unique aspects and had to be examined individually.

(…)

3.12 The United States further observed that the United States market accounted for over 90 per cent of Canadian exports of beer, an industry in which Canada was the fourth largest exporter in the world. Canada had not alleged that the federal and state practices about which it complained were targeted specifically against Canadian imports into the United States, so the effects of the allegedly discriminatory practices could be expected to be applicable to imports into the United States market

from all countries. However, examination of the recent import performance of Canadian beer into the United States market revealed that whereas Canadian beer shipments to the United States had declined, imports from other countries had increased, not only in quantity, but also in value. Because other imports had not been adversely affected, the United States argued that Canada's import problem must be related to something other than the purported United States market access barriers.

(…)

Beer Alcohol Content Restrictions

3.120 Canada observed that the states of **Alabama**, **Colorado**, **Florida**, **Kansas**, **Minnesota**, **Missouri**, **Oklahoma**, **Oregon** and **Utah** provided for differential treatment of beer based on its alcohol content with respect to distribution, points of sale and labelling. Beer with less than 3.2 per cent alcohol by weight was afforded more favourable treatment, although Canada argued that all beers were "like product" irrespective of their alcohol content. Canada also noted that the definition of beer found in the United States Internal Revenue Code distinguished between beer and de-alcoholized beer, the dividing line being 0.5 per cent alcohol by weight, and not between beers of differing alcoholic content. Similarly, there was one tariff line for beer in the Harmonized System and a separate tariff line for de-alcoholized beer. The 3.2 per cent level was entirely arbitrary, although Canada observed that major portion of the market for 3.2 per cent beers in these states was served by United States manufacturers. The restrictions based on beer alcohol content treated imported like product less favourably and afforded protection to the United States industry, contrary to Article III:1.

3.121 The United States argued that state measures which accorded differential treatment to beer containing not mote than 3.2 per cent alcohol by weight were not contrary to United States obligations under Article III:4. Article III:4 did not prohibit differential treatment between "like" products if it was not discriminatory, and did not prohibit different treatment when the products were not "like" products. The state measures at issue were non-discriminatory. United States-origin beer with an alcohol content of 3.2 per cent by weight or less was treated exactly the same as Canadian 3.2 per cent. Similarly, all beers with an alcohol content of more than 3.2 per cent by weight were treated the same.

(…)

3.123 The United States also argued that beer with an alcohol content of 3.2 per cent or less by weight need not be considered a product "like" beer with an alcohol content greater than 3.2 per cent by weight. Beer with an alcohol content of 3.2 per cent or less, including most so-called "light" beer, appealed to a distinct market segment in the United States specifically, those customers who enjoyed the taste of beer but preferred to consume a beverage with a lower alcoholic content, to maintain sobriety or to reduce caloric intake. Manufacturers specifically targeted this market segment in their advertising and marketing. In addition, states encouraged the consumption of 3.2 per cent beer over beer with a higher alcoholic content specifically for the purposes of protecting human life and health and upholding public morals.

3.124 Canada argued that appeal to a distinct market segment was not the determining factor of "like product". The Japan Alcoholic Beverages panel found that beverages with small differences in alcoholic content could still be like products. It further reasoned that:

> "Since consumer habits are variable in time and space and the aim of ... ensuring neutrality ... as regards competition between imported and domestic like products could not be achieved if differential taxes could be used to crystallize consumer preferences for domestic products ..."

Canada noted that measures which favoured 3.2 per cent beer operated to reinforce market segmentation and crystallized the consumer's preference for 3.2 per cent beer, discouraging direct competition between all types and brands of beer.

3.125 The United States argued, alternatively, that if the Panel were to determine that state measures which differentiated between beer with 3.2 per cent alcohol by weight or less and beer with greater than 3.2 per cent alcohol by weight were contrary to United States obligations under the GATT, such measures could be justified under Article XX, paragraphs (a) and (b). States had legitimate interests in protecting human life and health and public morals that necessitated measures to discourage the consumption of beer with an alcohol content greater than 3.2 per cent by weight. In choosing measures that applied equally and in a non-discriminatory manner to both domestic and imported beers, states had chosen measures that, if found to be inconsistent with United States obligations under the GATT, were the least restrictive measures they could reasonably be expected to employ. Such measures satisfied the standards necessary for invoking Article XX.

3.126 Canada argued that the United States had failed to establish that these measures were "necessary" to protect human life and public morals within the meaning of Article XX(a) and (b). These goals were not achieved by measures which merely discouraged the consumption of beer with over 3.2 per cent alcohol by weight. Canada noted that in the Supreme Court of the United States it had been concluded that consumption of sufficient quantities of 3.2 per cent beer could also result in drunkenness. Canada maintained that these measures reinforced the market share which domestic beer already had, thereby affording protection to domestic production contrary Article III:1, and that they were a disguised restriction on trade in the sense of the headnote to Article XX.

3.127 Canada observed that a number of states restricted the locations where beer over 3.2 per cent alcohol by weight could be sold compared to beer at 3.2 per cent. As shown in Table 4, in some instances beer greater than 3.2 per cent alcohol could not be sold by the same licensee or at the same outlet as "light" beer. In **Oklahoma**, for example, beer over 3.2 per cent alcohol by weight was classified as intoxicating liquor and was sold at retail for off-premise consumption only in packages under a "package" store license. Retail dealers who sold "non-intoxicating" beverages could sell these products in their original packages, or on draught, for consumption on or off the premises. Thus the draught beer market was denied to imported beer with higher alcoholic content.

3.128 Canada indicated that the states of **Florida**, **Kansas**, **Oklahoma** and **Minnesota** imposed labelling requirements on beer containing more than 3.2 per cent alcohol content which differentiated it from the lower alcohol content beer. For example, in **Kansas**, beer over 3.2 per cent by weight was required to be labelled as "Kansas strong", whereas no such labelling requirement was imposed on beer of lower alcohol content. In **Oklahoma**, on the other hand, the bottle label could not indicate the alcohol content if its contents was in excess of 3.2 per cent alcohol by weight. Canada provided specific citations with respect to these measures.

3.129 The United States provided a statement from the Florida Department of Business Regulation, the state agency with jurisdiction over the alcoholic beverage industry, which indicated that **Florida** did not prevent the identification of alcohol content on alcoholic beverages containing more than 3.2 per cent alcohol. The United States provided a statement from the Minnesota Department of Public Safety, the state agency with jurisdiction over the alcoholic beverage industry, which

indicated that the **Minnesota** labelling regulation with respect to the alcohol content of any beer product had been repealed. Furthermore the Minnesota requirement that brewery and wholesaler's invoices of sale for malt beverages above 3.2 per cent alcohol have the purchasing retail dealer's signature and identification card number was no longer enforced. The United States also observed that, contrary to Canada's assertions, in **Oklahoma**, beer over 3.2 per cent alcohol could be in draft form, as a draft keg was considered a retail container under Oklahoma law. The United States provided a statement from the Oklahoma Alcoholic Beverage Law Enforcement Commission, the state agency with jurisdiction over the alcoholic beverage industry, which indicated that this was the case.

3.130 The United States further argued that certain state measures with respect to beer alcohol content pre-dated the PPA. The **Oklahoma** statute concerning, inter alia, alcohol content label requirements, was enacted in 1947. It was amended in 1985; however, that amendment had no bearing on the labelling requirement about which Canada had complained. The statute imposed a mandatory requirement on all producers, and did not provide administrative authorities with any discretion to waive its application. The **Missouri** prohibitions against selling non-intoxicating beer and beer having an alcohol content above 3.2 per cent in the same premises and against the holder of a nonintoxicating beer license holding a license to sell beer over 3.2 per cent alcohol both dated from 1935 and were mandatory. The **Utah** provisions permitting in-state manufacturers to sell light beer directly to retailers dated from 1943, as had been indicated in paragraph 3.92 above. The United States arguments with respect to the Protocol of Provisional Application in paragraphs 3.81 and 3.83 above applied equally here.

3.131 With respect to **Oklahoma**, Canada noted that some of the provisions were not mandatory as they were definitions or did not make the issuance of a license mandatory. Furthermore, amendments subsequent to 1947 had increased the level of discrimination. The **Missouri** provisions with respect to alcoholic content were not mandatory in character. Canada recalled its arguments with respect to the **Utah** provisions in paragraph 3.93 above, and noted the applicability of its previous arguments with respect to the Protocol of Provisional Application.

(…)

5. FINDINGS

(…)

Beer Alcohol Content Requirements

5.70 The Panel then examined the claim by Canada that restrictions on points of sale, distribution and labelling based on the alcohol content of beer above 3.2 per cent by weight maintained by the states of **Colorado**, **Florida**, **Kansas**, **Minnesota**, **Missouri**, **Oklahoma** and **Utah**, and above 5 per cent by volume in **Alabama** and above 4 per cent by weight in **Oregon**, discriminated against imported beer and contravened Articles III:1 and III:4. The Panel recalled in this regard Canada's argument that all beer, whether containing an alcohol content of above or below the particular level set by these states (hereinafter referred to as "high alcohol beer" and "low alcohol beer", respectively) were like products within the meaning of Article III:4. Canada argued that the 3.2 per cent (or 5 per cent by volume or 4 per cent by weight) level were entirely arbitrary. According to Canada, restrictions as to the location at which high alcohol beer could be sold in the states of **Alabama**, **Colorado**, **Kansas**, **Missouri**, **Oklahoma**, **Oregon** and **Utah**, and differential labelling requirements imposed on such beer in the states of **Florida**, **Kansas**, **Minnesota** and **Oklahoma**,

discriminated against imported beer. The Panel further recalled the arguments of the United States that the beer alcohol content measures in the above-named states did not differentiate between imported and domestic beer or otherwise discriminate against imported beer; that low alcohol beer need not be considered a like product to high alcohol beer; that in any case such measures could be justified under Articles XX(a) and (b) as necessary to the protection of human life and health and public morals; and that certain of the state statutes in question were covered by the PPA.

5.71 The Panel began its examination of these beer alcohol content distinctions in the named states by considering whether, in the context of Article III:4, low alcohol beer and high alcohol beer should be considered "like products". The Panel recalled in this regard its earlier statement on like product determinations and considered that, in the context of Article III, it is essential that such determinations be made not only in the light of such criteria as the products' physical characteristics, but also in the light of the purpose of Article III, which is to ensure that internal taxes and regulations "not be applied to imported or domestic products so as to afford protection to domestic production". The purpose of Article III is not to harmonize the internal taxes and regulations of contracting parties, which differ from country to country. In light of these considerations, the Panel was of the view that the particular level at which the distinction between high alcohol and low alcohol beer is made in the various states does not affect its reasonings and findings.

5.72 The Panel recognized that the treatment of imported and domestic products as like products under Article III may have significant implications for the scope of obligations under the General Agreement and for the regulatory autonomy of contracting parties with respect to their internal tax laws and regulations: once products are designated as like products, a regulatory product differentiation, e.g. for standardization or environmental purposes, becomes inconsistent with Article III even if the regulation is not "applied ... so as afford protection to domestic production". In the view of the Panel, therefore, it is imperative that the like product determination in the context of Article III be made in such a way that it not unnecessarily infringe upon the regulatory authority and domestic policy options of contracting parties. The Panel recalled its earlier statement that a like product determination under Article III does not prejudge like product determinations made under other Articles of the General Agreement or in other legislative contexts.

5.73 The Panel recognized that on the basis of their physical characteristics, low alcohol beer and high alcohol beer are similar. It then proceeded to examine whether, in the context of Article III, this differentiation in treatment of low alcohol beer and high alcohol beer is such "as to afford protection to domestic production". The Panel first noted that both Canadian and United States beer manufacturers produce both high and low alcohol content beer. It then noted that the laws and regulations in question in the various states do not differentiate between imported and domestic beer as such, so that where a state law limits the points of sale of high alcohol content beer or maintains different labelling requirements for such beer, that law applies to all high alcohol content beer, regardless of its origin. The burdens resulting from these regulations thus do not fall more heavily on Canadian than on United States producers. The Panel also noted that although the market for the two types of beer overlaps, there is at the same time evidence of a certain degree of market differentiation and specialization: consumers who purchase low alcohol content beer may be unlikely to purchase beer with a higher alcohol content and vice-versa, and manufacturers target these different market segments in their advertising and marketing.

5.74 The Panel then turned to a consideration of the policy goals and legislative background of the laws regulating the alcohol content of beer. In this regard, the Panel recalled the United States argument that states encouraged the consumption of low alcohol beer over beer with a higher alcohol content specifically for the purposes of protecting human life and health and upholding public morals. The Panel also recalled the Canadian position that the legislative background of

laws regulating the alcohol content of beer showed that the federal and state legislatures were more concerned with raising tax revenue than with protecting human health and public morals. On the basis of the evidence submitted, the Panel noted that the relevant laws were passed against the background of the Temperance movement in the United States. It noted further that prior to the repeal of the Eighteenth Amendment of the United States Constitution authorizing Prohibition, amendments to the federal Volstead Act -- the Act which implemented the Eighteenth Amendment -- authorized the sale of low alcohol beer, and that the primary focus of the drafters of these amendments may have been the establishment of a brewing industry which could serve as a new source of tax revenue. However, irrespective of whether the policy background to the laws distinguishing alcohol content of beer was the protection of human health and public morals or the promotion of a new source of government revenue, both the statements of the parties and the legislative history suggest that the alcohol content of beer has not been singled out as a means of favouring domestic producers over foreign producers. The Panel recognized that the level at which the state measures distinguished between low and high alcohol content could arguably have been other than 3.2 per cent by weight. Indeed, as the Panel previously noted, Alabama and Oregon make the distinction at slightly different levels. However, there was no evidence submitted to the Panel that the choice of the particular level has the purpose or effect of affording protection to domestic production.

5.75 Thus, for the purposes of its examination under Article III, and in the context of the state legislation at issue in **Alabama**, **Colorado**, **Florida**, **Kansas**, **Minnesota**, **Missouri**, **Oklahoma**, **Oregon** and **Utah**, the Panel considered that low alcohol content beer and high alcohol content beer need not be considered as like products in terms of Article III:4. The Panel again emphasized that this determination is limited to this particular case and is not to be extended to other Articles or other legislative contexts.

5.76 The Panel then proceeded to examine whether the laws and regulations in the above-mentioned states affecting the alcohol content of beer are applied to imported or domestic beer so as to afford protection to domestic production in terms of Article III:1. In this context, the Panel recalled its finding in paragraph 5.74 regarding the alcohol content of beer and concluded that the evidence submitted to it does not indicate that the distinctions made in the various states with respect to the alcohol content of beer are applied so as to favour domestic producers over foreign producers. Accordingly, the Panel found that the restrictions on points of sale, distribution and labelling based on the alcohol content of beer maintained by the states of **Alabama**, **Colorado**, **Florida**, **Kansas**, **Minnesota**, **Missouri**, **Oklahoma**, **Oregon** and **Utah** are not inconsistent with Article III:1.

5.77 Having found that the two varieties of beer need not be considered as like products in terms of Article III:4 and the specific legislative contexts in the above-mentioned states, and that these laws and regulations affecting the alcohol content of beer are not applied to imported or domestic products so as to afford protection to domestic production in terms of Article III:1, the Panel considered that it need not examine the additional arguments of the parties in respect of the above-mentioned state requirements based on the alcohol content of beer.

(…)

6. CONCLUSIONS

6.1 On the basis of the findings set out above, the Panel concluded that:

(…)

(r) the beer alcohol content requirements maintained in the states of Alabama, Colorado, Florida, Kansas, Minnesota, Missouri, Oklahoma, Oregon and Utah are not inconsistent with either Article III:4 or Article III:1;

(…)

III. Asbestos (2001)

The measure at issue in this dispute is the French ban on the production and sale of asbestos and asbestos products. One important question in relation to Art. III is whether the analysis of likeness of asbestos and substitute products can take account of the health risk associated with the former. Pay particular attention to the reasoning with which the panel and the Appellate Body came to different results on that account. Also note the approach the panel takes to the condition of less favorable treatment and the Appellate Body's statement on this requirement.

WORLD TRADE ORGANIZATION

WT/DS135/R
18 September 2000
(00-3353)

EUROPEAN COMMUNITIES – MEASURES AFFECTING ASBESTOS AND ASBESTOS – CONTAINING PRODUCTS

Report of the Panel

To download the original report, visit http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm

(…)

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 asbestos1, implemented pursuant to the Labour Code and the Consumer Code2 (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.

(…)

*2. Main claims by the parties**4***

(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.5 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 Communities6 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.

(…)

B. Issues on which the panel had to take a position during the procedure

(…)

4. 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.7 Referring to the position taken by the Appellate Body in *United States – Import Prohibition of Certain Shrimp and Shrimp Products8*

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4 The full text of the claims by the parties can be found in section III.A above.
5 Hereinafter the "TBT Agreement".
6 Hereinafter the "EC".
7 See paras. 6.1-6.3 above.
8 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.

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 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.

(…)

E. Application of the GATT 1994 to the decree

1. Preliminary questions

(…)

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

(i) Question before the Panel[9]

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.

(ii) Analysis[10]

(…)

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

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9 The arguments of the parties are set out in detail in Section III above.
10 The arguments of the parties are set out in detail in Section III above.

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.11

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. (…)

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.

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.12 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

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11 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.
12 Le Nouveau Petit Robert, op. cit., p. 411.

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*.

(…)

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

(…)

2. Violation of Article III of the GATT 1994

(a) Arguments of the parties13

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.

(…)

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

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13 The arguments of the parties are set out in detail in Section III above.

(…)

8.107 Taking into account the rules governing the burden of proof14, 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.15

(…)

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

> (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.
>
> (…)

(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".16

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

15 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.

16 Op. cit., para. 18.

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"). (…)

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. (…)

(ii) Likeness of asbestos fibres and substitute 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. (…) 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. (…) Products may be considered like despite their differing impact on health. (…) 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 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.

(…)

8.122 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.17 Its purpose is to prevent internal measures from being applied in such a way as to protect domestic production.18 Article III:4 upholds this objective in respect of laws, regulations

17 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.
18 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

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.19 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.20 If such an approach was adopted, many products would never be like in respect of their nature, even if they had a similar use. (…) 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. (…) 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. (…)

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

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Panel *United States – Section 337 of the Tariff Act of 1930*, adopted on 7 November 1989, 36S/345, para. 5.10.

19 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".

20 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.

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.21

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.22

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.23

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).24 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 occasions25, 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.

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21 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 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.

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

23 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.

24 See the discussion on the concept of effectiveness, footnote 22 above.

25 See in particular *Argentina – Safeguards*, op. cit; *Brazil – Desiccated Coconut*, op. cit.

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*26 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.

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. (…)

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. (…)

8.136 We have already found above27 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. (…)

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. (…)

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 consider that it is up to the Panel to decide whether one of the criteria applicable to determining the "likeness" of the products concerned is relevant or not.28 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

26 See para. 8.112 above.
27 See para. 8.125 above.
28 See the Report of the Appellate Body in *Japan – Alcoholic Beverages*, op. cit., p. 24.

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 Council29 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.30

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

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29 Hereinafter "Harmonized System" or "HS".

30 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.

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.

(…)

8.147 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.

(…)

8.150 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[31]

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. (…) 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.

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31 The arguments of the parties are set out in detail in Section III above.

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 other32, 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 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 fibres33, 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.

(…)

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32 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.
33 See the Report of the Panel in *United States – Sections 301-310 of the Trade Act of 1974*, op. cit., para. 7.27.

WORLD TRADE ORGANIZATION

WT/DS135/AB/R
12 March 2001

(01-1157)

Original: English

EUROPEAN COMMUNITIES – MEASURES AFFECTING ASBESTOS AND ASBESTOS-CONTAINING PRODUCTS

AB-2000-11

Report of the Appellate Body

To download the original report, visit
<*http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm*>

(…)

III. Preliminary Procedural Matter

50. On 27 October 2000, we wrote to the parties and the third parties indicating that we were mindful that, in the proceedings before the Panel in this case, the Panel received five written submissions from non-governmental organizations, two of which the Panel decided to take into account. 34 In our letter, we recognized the possibility that we might receive submissions in this appeal from persons other than the parties and the third parties to this dispute, and stated that we were of the view that the fair and orderly conduct of this appeal could be facilitated by the adoption of appropriate procedures, for the purposes of this appeal only, pursuant to Rule 16(1) of the *Working Procedures*, to deal with any possible submissions received from such persons. (…)

51. On 7 November 2000, and after consultations among all seven Members of the Appellate Body, we adopted, pursuant to Rule 16(1) of the *Working Procedures*, an additional procedure, *for the purposes of this appeal only*, to deal with written submissions received from persons other than the parties and third parties to this dispute (the "Additional Procedure"). (…)

The Additional Procedure provided:

> In the interests of fairness and orderly procedure in the conduct of this appeal, the Division hearing this appeal has decided to adopt, pursuant to Rule 16(1) of the *Working Procedures for Appellate Review*, and after consultations with the parties and third parties to this dispute, the following additional procedure for purposes of this appeal only.
>
> 1. Any person, whether natural or legal, other than a party or a third party to this dispute, wishing to file a written brief with the Appellate Body, must apply for leave to file such a brief from the Appellate Body *by noon* on *Thursday, 16 November 2000*.
>
> 2. An application for leave to file such a written brief shall:
>
> (a) be made in writing, be dated and signed by the applicant, and include the address and other contact details of the applicant;
>
> (b) be in no case longer than three typed pages;
>
> (c) contain a description of the applicant, including a statement of the membership and legal status of the applicant, the general objectives pursued by the applicant, the nature of the activities of the applicant, and the sources of financing of the applicant;
>
> (d) specify the nature of the interest the applicant has in this appeal;

34Panel Report, paras. 6.1-6.4 and 8.12-8.14.

(e) identify the specific issues of law covered in the Panel Report and legal interpretations developed by the Panel that are the subject of this appeal, as set forth in the Notice of Appeal (WT/DS135/8) dated 23 October 2000, which the applicant intends to address in its written brief;

(f) state why it would be desirable, in the interests of achieving a satisfactory settlement of the matter at issue, in accordance with the rights and obligations of WTO Members under the DSU and the other covered agreements, for the Appellate Body to grant the applicant leave to file a written brief in this appeal; and indicate, in particular, in what way the applicant will make a contribution to the resolution of this dispute that is not likely to be repetitive of what has been already submitted by a party or third party to this dispute; and

(g) contain a statement disclosing whether the applicant has any relationship, direct or indirect, with any party or any third party to this dispute, as well as whether it has, or will, receive any assistance, financial or otherwise, from a party or a third party to this dispute in the preparation of its application for leave or its written brief.

3. The Appellate Body will review and consider each application for leave to file a written brief and will, without delay, render a decision whether to grant or deny such leave.

4. The grant of leave to file a brief by the Appellate Body does not imply that the Appellate Body will address, in its Report, the legal arguments made in such a brief.

5. Any person, other than a party or a third party to this dispute, granted leave to file a written brief with the Appellate Body, must file its brief with the Appellate Body Secretariat *by noon* on *Monday, 27 November 2000*.

6. A written brief filed with the Appellate Body by an applicant granted leave to file such a brief shall:

(a) be dated and signed by the person filing the brief;

(b) be concise and in no case longer than 20 typed pages, including any appendices; and

(c) set out a precise statement, strictly limited to legal arguments, supporting the applicant's legal position on the issues of law or legal

> interpretations in the Panel Report with respect to which the applicant has been granted leave to file a written brief.
>
> 7. An applicant granted leave shall, in addition to filing its written brief with the Appellate Body Secretariat, also serve a copy of its brief on all the parties and third parties to the dispute *by noon* on *Monday, 27 November 2000*.
>
> 8. The parties and the third parties to this dispute will be given a full and adequate opportunity by the Appellate Body to comment on and respond to any written brief filed with the Appellate Body by an applicant granted leave under this procedure. (original emphasis)

(…)

56. The Appellate Body received 11 applications for leave to file a written brief in this appeal within the time limits specified in paragraph 2 of the Additional Procedure. 35 We carefully reviewed and considered each of these applications in accordance with the Additional Procedure and, in each case, decided to deny leave to file a written brief. Each applicant was sent a copy of our decision denying its application for leave for failure to comply sufficiently with all the requirements set forth in paragraph 3 of the Additional Procedure.

(…)

IV. Issues Raised in this Appeal

58. This appeal raises the following issues:

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

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35Applications from the following persons were received by the Division within the deadline specified in the Additional Procedure for receipt of such applications: Professor Robert Lloyd Howse (United States); Occupational & Environmental Diseases Association (United Kingdom); American Public Health Association (United States); Centro de Estudios Comunitarios de la Universidad Nacional de Rosario (Argentina); Only Nature Endures (India); Korea Asbestos Association (Korea); International Council on Metals and the Environment and American Chemistry Council (United States); European Chemical Industry Council (Belgium); Australian Centre for Environmental Law at the Australian National University (Australia); Associate Professor Jan McDonald and Mr. Don Anton (Australia); and a joint application from Foundation for Environmental Law and Development (United Kingdom), Center for International Environmental Law (Switzerland), International Ban Asbestos Secretariat (United Kingdom), Ban Asbestos International and Virtual Network (France), Greenpeace International (The Netherlands), World Wide Fund for Nature, International (Switzerland), and Lutheran World Federation (Switzerland).

products containing chrysotile asbestos fibres are "like" cement-based products containing polyvinyl alcohol, cellulose and glass fibres;

(c) whether the Panel erred in finding that the measure at issue is "necessary to protect human … life or health" under Article XX(b) of the GATT 1994, and whether, in carrying out its examination under Article XX(b) of the GATT 1994, the Panel failed to make an objective assessment of the matter under Article 11 of the DSU; (…)

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

A. Background

84. In addressing Canada's claims under Article III:4 of the GATT 1994, the Panel examined whether two different sets of products are "like". 36 First, the Panel examined whether *chrysotile asbestos fibres* are "like" certain other fibres, namely *polyvinyl alcohol fibres ("PVA"), cellulose and glass fibres* (PVA, cellulose and glass fibres are all collectively referred to, in the remainder of this Report, as "PCG fibres"). The Panel concluded that chrysotile asbestos and PCG fibres are all "like products" under Article III:4. 37 The Panel next examined whether *cement-based products containing chrysotile asbestos fibres* are "like" *cement-based products containing one of the PCG fibres*. The Panel also concluded that all these cement-based products are "like". 38

85. In examining the "likeness" of these two sets of products, the Panel adopted an approach based on the Report of the Working Party on *Border Tax Adjustments*. 39 Under that approach, the Panel employed four general criteria in analyzing "likeness": (i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits; and, (iv) the tariff classification of the products. The Panel declined to apply "a criterion on the risk of a product", "neither in the criterion relating to the properties, nature and quality of the product, nor in the other likeness criteria …". 40

86. On appeal, the European Communities requests that we reverse the Panel's findings that the two sets of products examined by the Panel are "like products" under Article III:4 of the GATT 1994, and requests, in consequence, that we reverse the Panel's finding that the measure is inconsistent with Article III:4 of the GATT 1994. The European Communities contends that the Panel erred in its interpretation and application of the concept of "like products", in particular, in excluding from its analysis consideration of the health risks associated with chrysotile asbestos fibres. According to the European Communities, in this case, Article III:4 calls for an analysis of the health objective of the regulatory distinction made in the measure between asbestos fibres, and between products containing asbestos fibres, and all other products. The European Communities argues that, under Article III:4, products should not be regarded as "like" unless the

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36The Panel's approach is set forth in para. 8.111 of the Panel Report.

37Panel Report, para. 8.144.

38*Ibid*., para. 8.150.

39Working Party Report, *Border Tax Adjustments*, adopted 2 December 1970, BISD 18S/97.

40Panel Report, paras. 8.130 and 8.132.

regulatory distinction drawn between them "entails [a] shift in the competitive opportunities" in favour of domestic products. 41

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

87. Article III:4 of the GATT 1994 reads, in relevant part:

> The products of the territory of any Member imported into the territory of any other Member shall be accorded treatment no less favourable than that accorded to *like products* of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. … (emphasis added)

(…)

89. It follows that, while the meaning attributed to the term "like products" in other provisions of the GATT 1994, or in other covered agreements, may be relevant context in interpreting Article III:4 of the GATT 1994, the interpretation of "like products" in Article III:4 need not be identical, in all respects, to those other meanings.

90. Bearing these considerations in mind, we turn now to the ordinary meaning of the word "like" in the term "like products" in Article III:4. According to one dictionary, "like" means:

> Having the same characteristics or qualities as some other … thing; of approximately identical shape, size, etc., with something else; similar. 42

91. This meaning suggests that "like" products are products that share a number of identical or similar characteristics or qualities. The reference to "similar" as a synonym of "like" also echoes the language of the French version of Article III:4, "*produits similaires*", and the Spanish version, "*productos similares*", which, together with the English version, are equally authentic. 43

92. However, as we have previously observed, "dictionary meanings leave many interpretive questions open." 44 In particular, this definition does not resolve three issues of interpretation. First, this dictionary definition of "like" does not indicate *which characteristics or qualities are important* in assessing the "likeness" of products under Article III:4. (…) Second, this dictionary definition provides no guidance in determining the *degree or extent to which products must share qualities or characteristics* in order to be "like products" under Article III:4. (…) Thus, in the abstract, the term "like" can encompass a spectrum of differing degrees of "likeness" or "similarity". Third, this dictionary definition of "like" does not indicate *from whose*

41European Communities' other appellant's submission, para. 45.

42*The New Shorter Oxford English Dictionary*, Lesley Brown (ed.) (Clarendon Press, 1993), Vol. I, p. 1588.

43*WTO Agreement*, final, authenticating clause. See, also, Article 33(1) of the *Vienna Convention of the Law of the Treaties*, done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679.

44Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, para. 153.

perspective "likeness" should be judged. For instance, ultimate consumers may have a view about the "likeness" of two products that is very different from that of the inventors or producers of those products.

93. To begin to resolve these issues, we turn to the relevant context of Article III:4 of the GATT 1994. In that respect, we observe that Article III:2 of the GATT 1994, which deals with the internal tax treatment of imported and domestic products, prevents Members, through its first sentence, from imposing internal taxes on imported products "in excess of those applied … to *like* domestic products." (emphasis added) (…) As we have previously said, the "general principle" set forth in Article III:1 "informs" the rest of Article III and acts "as a guide to understanding and interpreting the specific obligations contained" in the other paragraphs of Article III, including paragraph 4. 45 Thus, in our view, Article III:1 has particular contextual significance in interpreting Article III:4, as it sets forth the "general principle" pursued by that provision. Accordingly, in interpreting the term "like products" in Article III:4, we must turn, first, to the "general principle" in Article III:1, rather than to the term "like products" in Article III:2.

94. In addition, we observe that, although the obligations in Articles III:2 and III:4 both apply to "like products", the text of Article III:2 differs in one important respect from the text of Article III:4. Article III:2 contains *two separate* sentences, each imposing *distinct* obligations: the first lays down obligations in respect of "like products", while the second lays down obligations in respect of "directly competitive or substitutable" products. 46 By contrast, Article III:4 applies only to "like products" and does not include a provision equivalent to the second sentence of Article III:2. We note that, in this dispute, the Panel did not examine, at all, the significance of this textual difference between paragraphs 2 and 4 of Article III.

95. For us, this textual difference between paragraphs 2 and 4 of Article III has considerable implications for the meaning of the term "like products" in these two provisions. In *Japan – Alcoholic Beverages*, we concluded, in construing Article III:2, that the two separate obligations in the two sentences of Article III:2 must be interpreted in a harmonious manner that gives meaning to *both* sentences in that provision. (…) We said in *Japan – Alcoholic Beverages*:

> Because the second sentence of Article III:2 provides for a separate and distinctive consideration of the protective aspect of a measure in examining its application to a broader category of products that are not "like products" as contemplated by the first sentence, we agree with the Panel that the first sentence of Article III:2 must be construed narrowly so as not to condemn measures that its strict terms are not meant to condemn. Consequently, we agree with the Panel also that the definition of "like products" in Article III:2, first sentence, should be construed narrowly. 47

96. (…) Therefore, the harmony that we have attributed to the two sentences of Article III:2 need not and, indeed, cannot be replicated in interpreting Article III:4. Thus, we conclude that, given

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45*Ibid*.

46The meaning of the second sentence of Article III:2 is elaborated upon in the Interpretative Note to that provision. This note indicates that the second sentence of Article III:2 applies to "directly competitive or substitutable product[s]".

47*Supra*, footnote 58, at 112 and 113.

the textual difference between Articles III:2 and III:4, the "accordion" of "likeness" stretches in a different way in Article III:4.

97. We have previously described the "general principle" articulated in Article III:1 as follows:

> The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. More specifically, the purpose of Article III "is to ensure that internal measures 'not be applied to imported and domestic products so as to afford protection to domestic production'". Toward this end, Article III obliges Members of the WTO to provide *equality of competitive conditions for imported products in relation to domestic products* . … Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products. … 48 (emphasis added)

98. As we have said, although this "general principle" is not explicitly invoked in Article III:4, nevertheless, it "informs" that provision. 49 Therefore, the term "like product" in Article III:4 must be interpreted to give proper scope and meaning to this principle. (…) This interpretation must, therefore, reflect that, in endeavouring to ensure "equality of competitive conditions", the "general principle" in Article III seeks to prevent Members from applying internal taxes and regulations in a manner which affects the competitive relationship, in the marketplace, *between the domestic and imported products involved*, "so as to afford protection to domestic production."

99. As products that are in a competitive relationship in the marketplace could be affected through treatment of *imports* "less favourable" than the treatment accorded to *domestic* products, it follows that the word "like" in Article III:4 is to be interpreted to apply to products that are in such a competitive relationship. Thus, a determination of "likeness" under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products. In saying this, we are mindful that there is a spectrum of degrees of "competitiveness" or "substitutability" of products in the marketplace, and that it is difficult, if not impossible, in the abstract, to indicate precisely where on this spectrum the word "like" in Article III:4 of the GATT 1994 falls. (…) However, we recognize that the relationship between these two provisions is important, because there is no sharp distinction between fiscal regulation, covered by Article III:2, and non-fiscal regulation, covered by Article III:4. (…) In view of this different language, and although we need not rule, and do not rule, on the precise product scope of Article III:4, we do conclude that the product scope of Article III:4, although broader than the *first* sentence of Article III:2, is certainly *not* broader than the *combined* product scope of the *two* sentences of Article III:2 of the GATT 1994.

100. (…) Thus, even if two products are "like", that does not mean that a measure is inconsistent with Article III:4. A complaining Member must still establish that the measure accords to the group of "like" *imported* products "less favourable treatment" than it accords to the group of "like" *domestic* products. The term "less favourable treatment" expresses the general principle, in Article III:1, that internal regulations "should not be applied … so as to afford protection to domestic production". If there is "less favourable treatment" of the group of "like" imported products, there is, conversely, "protection" of the group of "like" domestic products. (…) In this case, we do not examine further the interpretation of the term "treatment no less favourable" in

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48Appellate Body Report, *Japan – Alcoholic Beverages*, *supra*, footnote 58, at 109 and 110.

49*Ibid*., at 111.

Article III:4, as the Panel's findings on this issue have not been appealed or, indeed, argued before us.

C. *Examining the "Likeness" of Products under Article III:4 of the GATT 1994*
(…)

2. Chrysotile and PCG fibres

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

110. We must next examine more closely the Panel's treatment of the four individual criteria. We see the first criterion, "properties, nature and quality", as intended to cover the physical qualities and characteristics of the products. In analyzing the "properties" of the products, the Panel said that, "because of its physical and chemical characteristics, *asbestos is a unique product*." 50 (emphasis added) The Panel expressly acknowledged that, based on physical properties alone, "[i]t could … be concluded that [the fibres] are *not* like products." 51 (emphasis added) However, to overcome that fact, the Panel adopted a "market access" approach to this first criterion. 52 Thus, in the course of its examination of "*properties*", the Panel went on to rely on "*end-uses*" – the second criterion – and on the fact that, in a "small number" of cases, the products have the "same applications" and can "replace" each other. 53 The Panel then stated:

> We therefore conclude that, taking into account the properties criterion, chrysotile fibres are like PVA, cellulose and glass fibres. 54

111. We believe that physical properties deserve a separate examination that should not be confused with the examination of end-uses. Although not decisive, the extent to which products share common physical properties may be a useful indicator of "likeness". (…) We are also concerned that it will be difficult for a panel to draw the appropriate conclusions from the evidence examined under each criterion if a panel's approach does not clearly address each criterion separately, but rather entwines different, and distinct, elements of the analysis along the way.

112. In addition, we do not share the Panel's conviction that when two products can be used for the same end-use, their "*properties* are then *equivalent*, if not identical." 55 (emphasis added)

50Panel Report, para. 8.123.

51*Ibid*., para. 8.121.

52*Ibid*., paras. 8.122 and 8.124.

53*Ibid*., paras. 8.123 and 8.125.

54*Ibid*., para. 8.126.

55*Ibid*., para. 8.125.

Products with quite different physical properties may, in some situations, be capable of performing similar or identical end-uses. (…) Thus, the physical "uniqueness" of asbestos that the Panel noted does not change depending on the particular use that is made of asbestos.

(…)

114. Panels must examine fully the physical properties of products. In particular, panels must examine those physical properties of products that are likely to influence the competitive relationship between products in the marketplace. In the case of chrysotile asbestos fibres, their molecular structure, chemical composition, and fibrillation capacity are important because the microscopic particles and filaments of chrysotile asbestos fibres are carcinogenic in humans, following inhalation. (…) This carcinogenicity, or toxicity, constitutes, as we see it, a defining aspect of the physical properties of chrysotile asbestos fibres. The evidence indicates that PCG fibres, in contrast, do not share these properties, at least to the same extent. 56 We do not see how this highly significant physical difference *cannot* be a consideration in examining the physical properties of a product as part of a determination of "likeness" under Article III:4 of the GATT 1994.

115. We do not agree with the Panel that considering evidence relating to the health risks associated with a product, under Article III:4, nullifies the effect of Article XX(b) of the GATT 1994. Article XX(b) allows a Member to "adopt and enforce" a measure, *inter alia*, necessary to protect human life or health, even though that measure is inconsistent with another provision of the GATT 1994. Article III:4 and Article XX(b) are distinct and independent provisions of the GATT 1994 each to be interpreted on its own. (…) We note, in this regard, that, different inquiries occur under these two very different Articles. Under Article III:4, evidence relating to health risks may be relevant in assessing the *competitive relationship in the marketplace* between allegedly "like" products. The same, or similar, evidence serves a different purpose under Article XX(b), namely, that of assessing whether a *Member* has a sufficient basis for "adopting or enforcing" a WTO-inconsistent measure on the grounds of human health.

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

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

118. We consider this to be especially so in cases where the evidence relating to properties establishes that the products at issue are physically quite different. In such cases, in order to overcome this indication that products are *not* "like", a higher burden is placed on complaining Members to establish that, despite the pronounced physical differences, there is a competitive relationship between the products such that *all* of the evidence, taken together, demonstrates that

56Panel Report, para. 8.220.

the products are "like" under Article III:4 of the GATT 1994. In this case, where it is clear that the fibres have very different properties, in particular, because chrysotile is a known carcinogen, a very heavy burden is placed on Canada to show, under the second and third criteria, that the chrysotile asbestos and PCG fibres are in such a competitive relationship.

119. With this in mind, we turn to the Panel's evaluation of the second criterion, end-uses. The Panel's evaluation of this criterion is far from comprehensive. First, as we have said, the Panel entwined its analysis of "end-uses" with its analysis of "physical properties" and, in purporting to examine "end-uses" as a distinct criterion, essentially referred to its analysis of "properties". 57 This makes it difficult to assess precisely how the Panel evaluated the end-uses criterion. Second, the Panel's analysis of end-uses is based on a "small number of applications" for which the products are substitutable. Indeed, the Panel stated that "[i]t suffices that, for a *given utilization*, the properties are the same to the extent that one product can replace the other." 58 (emphasis added) Although we agree that it is certainly relevant that products have similar end-uses for a "small number of … applications", or even for a "given utilization", we think that a panel must also examine the other, *different* end-uses for products. 59 It is only by forming a complete picture of the various end-uses of a product that a panel can assess the significance of the fact that products share a limited number of end-uses. In this case, the Panel did not provide such a complete picture of the various end-uses of the different fibres. The Panel did not explain, or elaborate in any way on, the "small number of … applications" for which the various fibres have similar end-uses. Nor did the Panel examine the end-uses for these products which were not similar. In these circumstances, we believe that the Panel did not adequately examine the evidence relating to end-uses.

(…)

122. In this case especially, we are also persuaded that evidence relating to consumers' tastes and habits would establish that the health risks associated with chrysotile asbestos fibres influence consumers' behaviour with respect to the different fibres at issue. 60 We observe that, as regards *chrysotile asbestos and PCG fibres*, the consumer of the fibres is a *manufacturer* who incorporates the fibres into another product, such as cement-based products or brake linings. We do not wish to speculate on what the evidence regarding these consumers would have indicated; rather, we wish to highlight that consumers' tastes and habits regarding *fibres*, even in the case of commercial parties, such as manufacturers, are very likely to be shaped by the health risks associated with a product which is known to be highly carcinogenic. 61 A manufacturer cannot, for instance, ignore the preferences of the ultimate consumer of its products. If the risks posed by a particular product are sufficiently great, the ultimate consumer may simply cease to buy that product. This would, undoubtedly, affect a manufacturer's decisions in the marketplace. (…)

123. (…) We, (…), do not accept Canada's contention that, in markets where normal conditions of competition have been disturbed by regulatory or fiscal barriers, consumers' tastes and habits

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57Panel Report, para. 8.136.

58*Ibid*., para. 8.124.

59*Ibid*., paras. 8.124 and 8.125.

60We have already noted the health risks associated with chrysotile asbestos fibres in our consideration of properties (*supra*, para. 114).

61We recognize that consumers' reactions to products posing a risk to human health vary considerably depending on the product, and on the consumer. Some dangerous products, such as tobacco, are widely used, despite the known health risks. The influence known dangers have on consumers' tastes and habits is, therefore, unlikely to be uniform or entirely predictable.

cease to be relevant. In such situations, a Member may submit evidence of latent, or suppressed, consumer demand in that market, or it may submit evidence of substitutability from some relevant third market. In making this point, we do not wish to be taken to suggest that there *is* latent demand for chrysotile asbestos fibres. Our point is simply that the existence of the measure does not render consumers' tastes and habits irrelevant, as Canada contends.

(…)

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

(…)

Optional Reading

Robert Howse & Donald Regan, *The Product/Process Distinction - An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy*, 11 EUR. J. INT'L L (2000).