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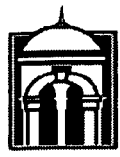

THE ASBESTOS CASE AT THE WORLD TRADE ORGANIZATION: THE TREATMENT OF PUBLIC HEALTH REGULATIONS UNDER THE GENERAL AGREEMENT OF TARIFFS AND TRADE 1994 AND THE AGREEMENT ON TECHNICAL BARRIERS TO TRADE

Irene McConnell[†]

I. INTRODUCTION

On January 1, 1997, French Decree No. 96-1133[1] banning the use of asbestos in France came into force. The Decree prohibits the use of all varieties of asbestos fibres and products containing asbestos fibres. Temporary exceptions to the prohibition are made for certain listed products containing chrysotile fibres (a particular type of asbestos fibre) and for used vehicles and agricultural and forestry machinery in circulation prior to the ban. The Decree is designed to protect the health of a broad section of the French population from the serious diseases linked to the inhalation of asbestos fibres — asbestosis, lung cancer, and cancer of the linings of the lung (mesothelioma). At risk are workers in the mining and processing sectors and in the textile, building and automobile industries as well as do-it-yourselfers and the general public who might be exposed to the numerous products containing asbestos fibres. These products include asbestos cement (used, for example, in pipes, roof tiles and cladding, partitions and false ceilings), insulation, and friction linings for brakes, clutches and engines. Substitutes for asbestos fibres exist in the form of fibres made of polyvinyl alcohol, cellulose and glass.

The French ban on asbestos presents a serious economic loss for Canada which mines and exports chrysotile asbestos. With an annual production of chrysotile valued at $225 million (Canadian), the chrysotile mining industry supports about 1,300 direct jobs and as many indirect jobs, while the processing industry provides about 1,500 jobs. In 1997, Canada

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[1] Decret No. 96-1133 du 24 Decembre 1996 relatif a l'interdiction de l'amiante, pris en application du code du travail et du code de la consummation, J.O., Dec. 26, 1996, p. 19126.

exported a total of 430,000 tonnes of chrysotile worldwide. Before the ban, Canada exported approximately 32,000 tonnes of chrysotile to France, most of which France used to manufacture chrysotile-cement products. Since the ban, exports to France have virtually disappeared.[2] The economic repercussions for Canada's chrysotile mining industry could extend beyond the lost sales to France to include losses in other markets. The European Commission is preparing legislation to prohibit asbestos in all fifteen European Union countries and Canada fears that developing countries might adopt similar prohibitions.

Canada challenged the legality of the French Decree at the World Trade Organization (WTO) on two grounds: as a technical regulation which violated certain rules in the Agreement on Technical Barriers to Trade (TBT Agreement)[3] and as a measure which violated the national treatment obligation and the prohibition against quantitative restrictions in the General Agreement on Tariffs and Trade 1994 (GATT 1994).[4] Canada also claimed, under Article XXIII 1(b) of the GATT 1994, that the application of the Decree nullified or impaired benefits it expected under the GATT. The European Communities, on behalf of the French government, argued that the Decree was not covered by the TBT Agreement or, in any case, that the Decree complied with the TBT Agreement. With regard to the GATT 1994, the European Communities argued that the Decree did not violate GATT rules or, if it did, that it could be justified as a measure necessary to protect human health and life.

This note examines the WTO Panel and Appellate Body Reports in the *Asbestos* case.[5] It focuses on those developments in the *Asbestos* case that have implications for the autonomy of WTO members to regulate for the protection of public health in the face of the rules they have agreed to under the GATT 1994 and the TBT Agreement. With respect to the TBT Agreement, this note examines two issues: the definition of a technical regulation which determines when a public health measure is subject to the

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[2] WTO Appellate Body Report, *European Communities-Measures Affecting Asbestos and Asbestos - Containing Products,* WT/DS135/R (Sept. 18, 2000), paras. 3.20, 3.23 [hereinafter *Asbestos Panel Report*].

[3] Agreement on Technical Barriers to Trade, Apr. 15, 1994, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND, LT/UR/A-1A/10 [hereinafter TBT Agreement].

[4] Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125 (1994) [hereinafter GATT 1994].

[5] *See Asbestos Panel Report, supra* note 2; *see also* WTO Appellate Body Report, *European Communities-Measures Affecting Asbestos and Asbestos-Containing Products,* WT/DS135/AB/R (Mar. 12, 2001), 40 I.L.M. 497 (2001) [hereinafter *Asbestos Appellate Body Report*].

disciplines of the TBT Agreement and the test for establishing when a technical regulation is an unnecessary obstacle to trade. As to the GATT 1994, the focus is on three issues: the determination of the "likeness" of products for the purpose of the national treatment rule, the test for establishing the necessity of a public health measure, and the cause of action available to an exporting country if a public health measure of the importing country has nullified or impaired benefits it expected to receive after reciprocal trade negotiations. The analysis pays particular attention to the devices that have been instituted in the GATT 1994 and the TBT Agreement to ensure, on the one hand, that access to global markets is maximized and, on the other hand, that legitimate public health regulations are allowed.

II. THE DECREE IS CHALLENGED UNDER THE AGREEMENT ON TECHNICAL BARRIERS TO TRADE

A. Is the Decree a Technical Regulation?

To address Canada's claims under the TBT Agreement, the Panel had to determine that the Decree was a "technical regulation." The TBT Agreement defines a technical regulation as a:

> Document which lays down product characteristics . . . including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product . . . .[6]

The Panel concluded that, under this definition, a technical regulation must set out the specific characteristics of products which allow them to be marketed in the regulating country.[7] Furthermore, the Panel suggested that a technical regulation must also identify products by name or perhaps by category or function.[8]

The Panel examined the structure of the Decree and ruled that it was not a technical regulation within the meaning of the TBT Agreement. The Panel concluded that the Decree consisted of two parts: a prohibition on the use of asbestos and asbestos products and exceptions to the prohibition. It ruled that the prohibition on asbestos was not a technical regulation, because it did not specify characteristics which would make a product marketable in France nor did it identify particular products.[9]

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[6]TBT Agreement, *supra* note 3, Annex 1.1.

[7]*Asbestos Panel Report*, *supra* note 2, para. 8.75.

[8]*Id.* paras. 8.38, 8.40.

[9]*Id.* paras. 8.39 - 8.41.

While the exceptions to the prohibition did fall within the definition of a technical regulation, because they identified characteristics of specified products which made them marketable in France, Canada's claims related solely to the prohibition (the part of the Decree ruled not to be a technical regulation) and were dismissed.

Canada appealed the Panel's findings before the Appellate Body where it argued, first, that the Decree should be treated as a single unified measure for the purpose of characterizing it as a technical regulation under the TBT Agreement and, secondly, that the Decree constituted a technical regulation as defined in the TBT Agreement.

The Appellate Body rejected the two-step approach that the Panel adopted for characterizing the Decree. It ruled that the Decree must be treated as an integrated whole, while recognizing that both prohibitive and permissive elements are essential to the structure of the measure: the Decree does not impose a total ban because exceptions are permitted, and the exceptions define the scope of the prohibition.[10] The Appellate Body noted that the definition of technical regulation in the TBT Agreement prescribed several requirements. First, a technical regulation must lay down, in the sense of set forth, stipulate or provide, product characteristics. Characteristics refers to the "'features,' 'qualities,' 'attributes' or other 'distinguishing mark'" of identifiable products without necessarily specifying or naming particular products (as the Panel had suggested was necessary). Secondly, product characteristics include features and qualities intrinsic to the product itself as well as related characteristics, such as those used to identify a product or to regulate the presentation and appearance of a product. Finally, characteristics may be prescribed affirmatively — by laying out the characteristics a product *must* possess — or negatively — by laying out the characteristics a product must *not* possess.[11]

The Appellate Body concluded that the French Decree, viewed as an integrated whole, constitutes a technical regulation. The Appellate Body expressed doubt, however, that a prohibition on asbestos fibres in their natural state is a technical regulation; a bare prohibition, without more, does not prescribe or impose any characteristics on asbestos fibres.[12] However, the Decree extends the prohibition to products containing asbestos fibres. This prohibition prescribes characteristics of products, albeit in a negative formulation, by requiring that all products *must not* contain asbestos fibres. And although the prohibition does not name

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[10] *Asbestos Appellate Body Report*, *supra* note 5, paras. 64, 73.

[11] *Id.* paras. 67-69.

[12] *Id.* para. 71.

specific products, the products are identifiable — those products containing asbestos are banned.[13]

The Appellate Body's ruling made the Decree subject to the TBT Agreement but it declined to address Canada's claims that the Decree violated several provisions of the TBT Agreement. The Appellate Body concluded that it had no basis for examining Canada's claims, citing as reasons for its conclusion the insufficiency of facts on the record, the absence of factual and legal findings by the Panel as well as the lack of jurisprudence on the TBT Agreement.[14]

III. THE DECREE IS CHALLENGED UNDER THE GATT 1994

A. *Does the Decree Violate the National Treatment Rule of the GATT 1994?*

Canada claimed that the Decree violated the GATT 1994 — the prohibition on asbestos was discriminatory contrary to the national treatment rule in Article III.4[15] and the prohibition against quantitative restrictions in Article XI.1.[16]

The Panel found that the prohibition on asbestos fibres and asbestos products violated the national treatment rule of Article III.4. The Decree banned all asbestos fibres and asbestos products while substitute fibres — polyvinyl alcohol, cellulose and glass (PCG fibres) — and products

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[13] *Id.* para. 72.

[14] *Id.* para. 78. Recently, a WTO Panel has handed down a Report interpreting Article 2.4 of the TBT Agreement. WTO Panel Report, *European Communities-Trade Description of Sardines*, WT/DS231/R (May 29, 2002). The European Communities have filed a Notice of Appeal. *See* WTO Panel Report, *European Communities-Trade Description of Sardines,* WT/DS231/11 & WT/DS231/12 (July 4, 2002).

[15] GATT 1994, supra note 4, art. III.4.

> The products of the territory of any contracting party imported into the territory of any other country 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.

Id.

[16] *Id.* art. XI.1.

> No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses 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.

Id.

containing PCG fibres were not banned. The result was that less favorable treatment was given to asbestos imports than to PCG fibres produced domestically.[17] Having found a violation of Article III.4, the Panel found it unnecessary to rule on the violation of Article XI.

In concluding that the prohibition on asbestos violated Article III.4, the Panel was required to find that chrysotile fibres and PCG fibres are "like products" and consequently, must be accorded national treatment. In determining "likeness," the Panel applied four criteria that previous GATT and WTO jurisprudence had established: the properties, nature and quality of the products; the products' end-uses in a given market; consumers' tastes and habits; and international tariff classification of products.[18] The Panel noted that, in purely physical terms, the products were not alike — none of them had the same physical structure or chemical composition.[19] However, the Panel stated that likeness is to be determined not by classifying products on a scientific basis, but rather by recognizing the commercial context of Article III, which is designed to discourage protectionist measures that provide an advantage for domestic products and reduce market access for foreign products.[20]

Against this commercial context, the Panel compared the characteristics of chrysotile fibres, on the one hand, and PCG fibres, on the other hand as well as their end uses. The Panel ruled that, to the extent that one product can replace another in a given market when they both have certain (but not necessarily all) end-uses in common, their properties are equivalent and therefore "like." Even though the end-uses for chrysotile fibres and PCG fibres were the same for only a small number of applications, the Panel concluded that asbestos and PCG fibres were alike.[21] The Panel did not find helpful or conclusive the two remaining criteria for determining likeness — consumers' tastes and habits and international tariff classification. Applying analogous reasoning and noting that individual cement-based products have the same tariff classification, regardless of the fibres' uses, the Panel concluded that

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[17] *Asbestos Panel Report*, *supra* note 2, paras. 8.154-8.155.

[18] *Id.* paras. 8.112-8.113. The first three criteria were originally identified in Working Party Report, Border Tax Adjustments, Dec. 2, 1970, GATT B.I.S.D. (18th Supp.) at 97. The fourth criterion, tariff classification, was not mentioned in the Border Tax Adjustments Report but was included by subsequent panels and by the Appellate Body. *Asbestos Appellate Body Report, supra* note 5, para. 73.

[19] *Asbestos Panel Report*, *supra* note 2, para. 8.121.

[20] *Id.* para. 8.122.

[21] *Id.* paras. 8.125-8.126.

products containing chrysotile fibres were like products containing PCG fibres.[22]

In its analysis of likeness, the Panel rejected risk to human health as a criterion for differentiating between chrysotile fibres and PCG fibres. The Panel reasoned that allowing risk to determine likeness would virtually foreclose the application of other criteria for determining likeness.[23] Furthermore, the structure of the GATT 1994 required considering risk under Article XX(b) (as evidence relevant to establishing the need to protect health) and not under Article III which is designed to discipline the trade effects of domestic regulation free from any mitigating factors such as risks to health.[24]

On appeal, the European Communites requested the Appellate Body to reverse the Panel's findings that the products at issue are like products. The European Communities argued, in particular, that the Panel had erred in excluding health risks in its determination of likeness.

The Appellate Body noted that, although the term "like products" appears in a number of GATT provisions, the term is not defined[25] and must derive its meaning on the basis of the rules for interpreting treaties.[26] These stipulate that a term is interpreted according to the ordinary meaning of the term in its context and in the light of the object and purpose of the treaty. The ordinary meaning, according to a dictionary definition cited by the Appellate Body, suggests that products are "like" when they "share a number of identical or similar characteristics."[27] This definition, however, fails to indicate which characteristics are important in determining likeness, to what degree these characteristics must be shared, and from whose perspective (the producer or consumer) likeness should be judged.[28]

To resolve these matters, the Appellate Body turned to the context of Article III.4, which it found in the general principle of non-protection set out in Article III.1. Article III is designed to avoid protectionism in the use of internal taxes and regulations by obliging WTO members to provide

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[22] *Id.* paras. 8.145-8.150.

[23] *Asbestos Panel Report, supra* note 2, para. 8.131.

[24] *Id.* para. 8.130.

[25] *Asbestos Appellate Body Report, supra* note 5, para. 88. The term "like product" appears not only in the GATT 1994 but also in other WTO agreements. The term may be defined in some cases, for example, in Article 2.6 of the Anti-Dumping Agreement but other agreements, such as the GATT 1994, do not define the term.

[26] Vienna Convention on the Law of Treaties, Jan. 27, 1980, art. 31, 1155 U.N.T.S. 331, 8 I.L.M. 679.

[27] *Asbestos Appellate Body Report, supra* note 5, para. 91.

[28] *Id.* para. 92.

equality of competitive conditions as between imported and domestic products.[29] Determining likeness becomes, essentially, a question of determining the nature and extent of the competitiveness or substitutability of products in the marketplace. The Appellate Body recognized that competitive relationships exist along a spectrum but declined to indicate, in the abstract, the point along the spectrum at which likeness is established. This point will vary from case to case and will require an element of discretionary judgement. [30]

The Appellate Body accepted the framework of the four criteria (physical properties, end-uses, consumers' tastes and habits, and tariff classification), which the Panel had used as a tool for determining likeness between chrysotile fibres and PCG fibres. It noted, however, that the framework is but a tool and that the criteria are not closed; in the final analysis, all relevant evidence must be considered on a case-by-case basis in determining likeness.[31] While accepting the usefulness of the framework, the Appellate Body ruled that the Panel had erred in its *application* of the four criteria.[32] It had rested its finding of likeness, essentially, on one criterion — the small number of shared end-uses; it had largely ignored differences in physical characteristics and in tariff classification and had considered no evidence of consumers' tastes and habits. The correct approach required considering the evidence relating to each criterion and then weighing all the evidence in making a final determination of likeness. In addition, the Panel had erred in excluding evidence of health risks posed by chrysotile and PCG fibres when it considered likeness.[33] Although risk need not be included as a separate criterion, evidence of risk is relevant in evaluating likeness under the existing criteria, particularly, physical characteristics and consumers' tastes and habits.[34] For example, the carcinogenicity of chrysotile fibres can influence the choices consumers make between chrysotile and PCG fibres.

On the issue of the likeness of chrysotile-cement products and PCG-cement products, the Appellate Body found similar errors in the Panel's analysis.[35] Accordingly, the Appellate Body reversed the Panel's findings of likeness and embarked on an independent analysis and application of the four criteria. In its analysis, the Appellate Body paid particular

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[29] *Id.* para. 98.

[30] *Id.* para. 99.

[31] *Id.* paras. 102, 133.

[32] *Id.* para. 109.

[33] *Asbestos Appellate Body Report, supra* note 5, paras. 114-115.

[34] *Id.* para. 113.

[35] *Id.* para. 127.

attention to how the criteria can determine the competitive relationship between chrysotile and PCG fibres in the marketplace and, hence, their likeness.

On the first criterion, the physical characteristics of a product, the Appellate Body noted the Panel's finding that chrysotile and PCG fibres are physically very different. In the case of chrysotile, its combination of molecular structure, chemical composition, and fibrillation capacity makes it carcinogenic. This carcinogenicity is a defining aspect of the physical properties of chrysotile fibres.[36] Moreover, the types of cancer chrysotile causes have a mortality rate of close to one hundred percent. In contrast, PCG fibres do not pose the same level of risk to human health. Given these significant physical differences, the Appellate Body noted that a high burden rested on Canada to present evidence, based on the remaining criteria, of such a degree of substitutability as to suggest that chrysotile and PCG fibres are "like products." Canada failed to produce such evidence. There was no evidence, apart from a small number of shared end-uses, that other possible end-uses might be shared; nor was there evidence of consumers' tastes and habits. Canada failed to overcome the inference, drawn from the different physical characteristics and the different tariff classification, that the products are not "like."

On the application of the first criterion to the likeness of cement-based products (those made with chrysotile fibres on the one hand and those made with PCG fibres on the other hand), the Appellate Body noted that the composition of these products appears to be similar, except that there is one important difference — one set of products contains a known carcinogen (chrysotile) and the other set does not.[37] Canada presented no evidence to indicate how this difference affected consumers' tastes and habits. Without this evidence, which might have spoken to potentially shared characteristics and their competitiveness or substitutability in the marketplace, no determination of likeness could be made.[38]

In the result, the Appellate Body reversed the Panel's finding of likeness and found that Canada had not satisfied its burden to prove likeness. Absent a finding of likeness, Canada could not succeed in its claim that the Decree violated the national treatment rule of Article III.4.

On the issue of determining likeness, one member of the Appellate Body made a separate statement — concurring in the result (the products are not like) but disagreeing with the analysis.[39] This member presented

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[36] *See id.* paras. 134-136.

[37] *Id.* para. 142.

[38] *Id.* para. 147.

[39] *See Asbestos Appellate Body Report, supra* note 5, paras. 149-154.

two submissions. The first focused on the centrality of the carcinogenicity of chrysotile in determining likeness. It was submitted that, once the Appellate Body had accepted evidence that the inhalation of chrysotile fibres poses a serious carcinogenic risk, it had ample basis for concluding definitively that chrysotile fibres are not like PCG fibres. Any evidence as to the competitive relationship between chrysotile and PCG fibres that might be reflected in similar end-uses and consumers' tastes and habits simply could not outweigh the evidence of carcinogenicity. The second submission cast doubt on the Appellate Body's decision to adopt a fundamentally economic interpretation of likeness for the purpose of Article III, one focused on examining the competitive relationship between products. Moreover, the *Asbestos* case was an unsatisfactory vehicle for ascribing a fundamental role to competitiveness in determining likeness because the parties to the dispute failed to provide the Appellate Body with sufficient evidence on which to make a ruling on a matter of "such importance and philosophical import."[40]

B. Is the Decree Justified as a Measure Necessary to Protect Health?

Because the Panel found that the French Decree violated the national treatment rule of Article III, the European Communities turned to Article XX(b) to justify the violation. There was no need for the European Communities to invoke Article XX(b) before the Appellate Body because the latter found the Decree to be consistent with the national treatment rule. However, Canada appealed the Panel's ruling on the issue of the necessity of the French Decree as a measure to protect health and the Appellate Body responded to Canada's points of appeal. Thus, the *Asbestos* case provides jurisprudence on Article XX(b) both from the Panel and, for the first time, from the Appellate Body.

Before the Panel, the European Communities argued that, if the Decree violated Article III, it was justified under Article XX(b) as a measure necessary to protect human life and health. The European Communities defended the ban on chrysotile on the basis that it is the only measure capable of halting the risks of cancer associated with the use of chrysotile products. Canada, in turn, argued that the ban could not be justified under Article XX(b) on two grounds: first chrysotile-cement products do not pose any detectable risk to health because the fibres are encapsulated and release no carcinogenic agents; and, secondly, regulating the safe or controlled use of chrysotile-cement products provides a less trade-restricting alternative to a ban on the use of asbestos.

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[40] *Id.* para. 154.

The Panel examined the Decree following the two-step analysis of Article XX prescribed by the Appellate Body, examining France's ban, first, for provisional justification under paragraph (b) as a measure necessary to protect human health and, secondly, for compliance with the prohibitions against unjustifiable or arbitrary discrimination and disguised restrictions on trade set out in the chapeau to Article XX.[41]

1. Protection of Human Life or Health

The Panel began its analysis of paragraph (b) by noting that the words "to protect human health" required the European Communities to establish a *prima face* case, on the balance of probabilities that chrysotile products pose a risk to human health.[42] The European Communities did so by presenting evidence that international bodies, such as the International Agency for Research on Cancer and the World Health Organization, have acknowledged since 1977, the carcinogenicity of chrysotile fibres when inhaled. Evidence showed that the types of cancers caused by chrysotile have a mortality rate of close to one hundred percent. Furthermore, risks of cancer exist even with incidental exposure to chrysotile, and medical science has been unable to establish a threshold below which exposure to chrysotile poses no carcinogenic risk. The Panel relied heavily on four scientific experts who testified that chrysotile-cement products pose a serious carcinogenic risk. On the basis of this evidence, the Panel concluded that chrysotile fibres, including those encased in a cement matrix, pose a health risk to those working with chrysotile products.[43] Accordingly, the French policy to ban chrysotile fell within the range of policies designed to protect human life within the meaning of paragraph (b).

Before the Appellate Body, Canada questioned the Panel's assessment of the credibility of and the weight to be given to the various elements of the scientific evidence on the risk posed by chrysotile products presented by the European Communities. The Appellate Body ruled that

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[41] GATT 1994, *supra* note 4, art. XX(b).

> 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: . . . (b) necessary to protect human, animal or plant life or health . . . .

Id.

[42] *Asbestos Panel Report, supra* note 2, para. 8.184.

[43] *Id.* paras. 8.193-8.194.

the Panel's reliance on the evidence from the international bodies and the four scientific experts showed that the Panel had remained well within the bounds of its discretion as a trier of facts. Furthermore, government authorities are permitted to take action on the basis of a qualified and respected divergent opinion and need not automatically follow a majority scientific opinion. The Appellate Body upheld the Panel's conclusion that the French ban on asbestos is a measure that protects human health or life.[44]

2. Necessity of the Asbestos Ban

To complete its examination of the ban on asbestos under paragraph (b), the Panel turned to the word "necessary" in the text and on the basis of two previous Panel reports,[45] reasoned that the necessity of the ban would be determined, first, by identifying the scope of the health policy objectives pursued by France and, secondly, by considering whether an alternative measure exists that is consistent or less inconsistent with the GATT.[46] As to the scope of the health policy objectives, the Panel noted that the numerous applications of chrysotile products expose a broad section of the French population to an undeniable health risk even at low or intermittent exposure levels. France had chosen to meet its objective to halt the spread of this serious risk with a serious measure — a prohibition on the use of asbestos. Although the high level of protection chosen by France could not be challenged *per se*, France was required to justify the level of protection offered by the ban by showing that no alternative measure existed that was reasonably available and would achieve the high level of protection it desired.[47] Canada argued that an alternative did exist in the form of regulating the safe or "controlled use" of chrysotile products based on international standards. Controlled use would require taking precautionary measures to restrict the release of fibres (through the use of special tools, high density products, and special methods for handling chrysotile products) and to decontaminate equipment and work clothing.

The Panel concluded that controlled use was not an alternative to the ban on asbestos.[48] First, controlled use would not allow France to achieve its goal to halt the spread of asbestos-related health risks. Although

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[44] *Id.* para. 163.

[45] Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes, WT/DS10/R, Nov. 7, 1990, GATT B.I.S.D. (37th Supp.) at 200, 30 I.L.M. 1122 (1991); United States-Section 337 of the Tariff Act of 1930, Nov. 7, 1989, GATT B.I.S.D. (36th Supp.) at 345 (1988-1989).

[46] *Asbestos Panel Report, supra* note 2, para. 8.199.

[47] *Id.* para. 8.208.

[48] *Id.* paras. 8.209-8.212.

controlled use might protect workers who mined, processed and removed chrysotile, it would not protect others who had been particularly targeted for protection by the ban. These include workers in the building sector, who are highly mobile, sometimes inadequately trained and dispersed over a large number of sites; do-it-yourselfers, who operate outside any proper system of controls; and others among the population, who are present at work sites and exposed to chrysotile fibres as a result of pure chance. Secondly, controlled use is not reasonably available as an alternative to a ban on the use of asbestos. Although France could be expected to make the necessary expenditures to implement controlled use, given its advanced labor legislation and specialized administrative capacity, it would be unreasonable to expect France to do so when the circumstances of controlled use are, as in this case, simply not controllable.

On appeal, Canada challenged the Panel's ruling on necessity. Canada argued that the Panel was required to quantify the health risks of chrysotile-cement products and not simply accept the "hypotheses" of risk presented by the French authorities.[49] The Appellate Body responded that risk can be assessed either quantitatively or qualitatively and that the Panel's (presumably qualitative) assessment adequately evaluated the nature and character of the risk: there is no threshold below which chrysotile does not pose a carcinogenic risk and the cancers caused by chrysotile are of an extremely serious nature.[50] Canada also questioned the legitimacy of choosing a level of protection that requires banning chrysotile while allowing the use of PCG fibres without a more extensive assessment of the health risks of the latter.[51] The Appellate Body observed that the Decree is clearly designed to meet the level of protection France has chosen — to halt the spread of asbestos-related health risks — by prohibiting all forms of asbestos and severely restricting the use of chrysotile asbestos. France was not to be constrained in achieving the level of protection it desired because PCG fibres might pose a health risk which, in any case, was a lesser risk than that posed by chrysotile fibres.[52] Finally, Canada argued that a suggested alternative was reasonably available unless the alternative proved impossible to implement; controlled use was not impossible to implement.[53] In responding to Canada's argument, the Appellate Body laid down several factors that must be considered in determining whether a suggested alternative is reasonably available: first,

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[49] *Asbestos Appellate Body Report, supra* note 5, para. 165.

[50] *Id.* para. 167.

[51] *Id.* para. 165.

[52] *Id.* para. 168.

[53] *Id.* para. 169.

the administrative difficulties in implementing the alternative; secondly, the extent to which the alternative measure contributes to the realization of the objective; thirdly, how vital or important are the common interests or values pursued — the higher these are the more likely it is that the measure chosen will be necessary; and fourthly, the degree to which alternative measures that would achieve the same objective are more or less trade-restrictive.[54]

Citing the Panel's findings on the shortcomings of controlled use, the Appellate Body concluded that controlled use would not eliminate asbestos-related health risks and would not allow France to achieve its chosen level of health protection.

3. Unjustifiable or Arbitrary Discrimination or Disguised Restriction on International Trade

Once provisional justification for the ban on asbestos had been established under paragraph (b), the Panel examined the ban for conformity with the conditions set out in the introductory clause of Article XX. The Panel found that there was no evidence that discrimination of the sort prohibited by Article XX — for example, unjustifiable or arbitrary discrimination between suppliers of asbestos fibres or products — existed on the face of the import ban or in its application. There was no evidence that French authorities adopted the Decree as a guise for concealing the pursuit of trade-restrictive objectives or with the objective of protecting the domestic production of PCG fibres. Indeed, the Panel accepted that the Decree was the response of French authorities to the "panicked public opinion" at the failure of French authorities in the past to protect the population from health risks.[55] The Panel's findings on the introductory clause were not appealed.

C. *Does the Decree Nullify or Impair Benefits under Article XXIII.1(b)?*

Before the Panel, Canada claimed that the French Decree nullified or impaired benefits it legitimately expected under the GATT 1994 — the benefits being improved market access for chrysotile asbestos resulting from tariff concessions made during negotiations in 1947 and 1962. Article XXIII.1(b) of the GATT 1994 offers a cause of action when any measure nullifies or impairs expected benefits, whether or not that measure conflicts with the provisions of the GATT 1994.[56] (Article XXIII.1(b) is

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[54] *Id.* para. 172.

[55] *Asbestos Panel Report, supra* note 2, para. 8.238

[56] The relevant parts of Article XXIII.1(b) read:

commonly referred to as providing for a cause of action on the grounds of "non-violation nullification and impairment.") The purpose of Article XXIII.1(b), according to earlier GATT Panels, is to encourage countries to make reciprocal tariff concessions by providing a remedy when a measure impairs benefits expected from the exchange of concessions.[57] This remedy, however, has always been regarded as exceptional and one to be exercised with caution.[58]

The European Communities argued, in response, that Canada could not claim legitimate expectations of benefits with respect to a measure taken to protect life or health. While legitimate expectations might exist for purely commercial measures, they could not exist for health measures which a country imposes as part of its fundamental duty to protect public health.[59] Both the Panel and the Appellate Body rejected this argument and allowed Canada to invoke Article XXIII.1(b) on the basis that the text of Article XXIII.1(b) allows a claim against "any measure" and cannot be read to exclude any categories of measures, such as those related to health.

Having allowed Canada to invoke Article XXIII.1(b), the Panel went on to consider the substance of Canada's claim. The Panel recognized that WTO Members have agreed, through Article XX, that the pursuit of certain interests, such as public health, are more important and can outweigh commercial interests.[60] However, the Panel noted that recourse to Article XXIII.1(b) does not prevent a country from *adopting* or *implementing* a public health measure under Article XX because there is no requirement for the country to withdraw the measure.[61] At the same

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

TBT Agreement, *supra* note 3.

[57] *Asbestos Appellate Body Report*, *supra* note 5, para. 185.

[58] *Id.* para. 186.

[59] *Asbestos Panel Report*, *supra* note 2, para. 8.257.

[60] *Id.* para. 8.272.

[61] *Id* para. 8.262. The Panel's reasoning is based on the introductory language of Article XX which states "nothing in this Agreement shall be construed to prevent the adoption or enforcement ... of measures ..." together with the consequences of a non-violation application of a measure as stated in Article 26.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes. GATT 1994, *supra* note 4. Article 26.1

time, the Panel recognized that recourse to Article XXIII.1(b) can compromise the effectiveness of pursuing public health objectives if the regulating country has to pay compensation for the level of benefits nullified or impaired by its public health measure.[62] To minimize eroding a member's right to use Article XX in the face of an Article XXIII.1(b) claim, the Panel imposed two limitations on its use. First, any increase in the cost of a public health measure resulting from a successful claim under Article XXIII.1(b) could only be "very marginal."[63] Secondly, the exceptional nature of an Article XXIII.1(b) claim imposes a stricter burden of proof on the claimant, particularly with respect to two matters: the existence of legitimate expectations of benefits and whether the measure challenged could be reasonably anticipated.[64]

Canada's claim under Article XXIII.1(b) turned on whether it could have reasonably expected, at the conclusion of the last round of tariff negotiations (1993 when the Uruguay Round ended), that France would not adopt a total ban on the use of asbestos.[65] According to the Panel, it was unreasonable for Canada to expect that France would not ban asbestos given the developments in the last 25 years. For example, accumulated scientific data had established the hazardous nature of chrysotile, the World Health Organization had classified chrysotile as a carcinogen, a Convention of the International Labour Organization required national lawmakers to provide for the replacement of asbestos with less hazardous substitutes, and several European countries had banned the use of asbestos. As a result, Canada failed to establish its claim for non-violation nullification and impairment.[66]

IV. COMMENTARY

Government regulation of products for public health purposes can create barriers to trade. Simply by their existence, product requirements will keep out of the marketplace those foreign goods which do not meet the importing country's requirements. Also, by their difference from one country to another, product requirements restrict trade by imposing increased costs of compliance on foreign producers: as foreign producers add production runs to meet different requirements in different markets,

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of the DSU provides for the granting of compensation rather than the withdrawal of a measure. *Id.*

[62] *Id.* paras. 8.270, 8.273. Compensation is available under DSU, Article 26.

[63] *Id.* para. 8.273.

[64] *Id.* para. 8.282.

[65] *Id.* para. 8.294.

[66] *Id.* paras. 8.295-8.298.

opportunities for saving costs from economies of scale are diminished. As the *Asbestos* case illustrates, WTO members have recognized the adverse effects that regulatory diversity can have on trade and have agreed to certain rules, under the GATT 1994 and the TBT Agreement, which impose constraints on their use of public health regulations. The *Asbestos* case provides jurisprudence on how some of these rules are to be interpreted and applied and some insight into the extent to which WTO members have constrained their authority to regulate for the purpose of protecting public health.

A. Treatment of Public Health Regulation under the TBT Agreement

1. Definition of Technical Barrier to Trade

The *Asbestos* case provided the first opportunity for the WTO to produce jurisprudence on the TBT Agreement. The jurisprudence is narrowly focused on interpreting the definition of "technical regulation" but even this narrow focus is useful because it delineates the scope of coverage of the TBT Agreement. As defined by the Appellate Body, a technical regulation is a document that includes some element which "lays down," in the sense of setting forth or stipulating a characteristic of a product, that is, some feature, quality or attribute of a product. Many product regulations will fall within this definition of a technical regulation, for it is difficult to regulate the use of a product without including some element which sets forth an attribute or feature or qualification of that product. As a result, many product regulations will be subject to the disciplines imposed in the TBT Agreement.

According to the Appellate Body, a ban on a product in its natural state is probably not a technical regulation because such a ban does not prescribe or impose any characteristics *on* a product.[67] Presumably, a product in its natural state simply exists and this existential quality is not imposed on it by regulation. However, the text of the definition refers to a document which lays down "product characteristics," that is, characteristics *of* a product. Arguably, a regulation can ban a product on the basis of its characteristics whether that ban applies to a product in its natural state or incorporated into another product. Thus, the French Decree can be viewed as a document which stipulates that a product (in this case, a fibre) which has particular characteristics (those of asbestos) cannot be marketed. Also included in the ban are products which *contain* asbestos, presumably because of the particular characteristics of asbestos. Thus, if asbestos fibres are banned on the basis of the characteristics of asbestos, it

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[67] *Asbestos Appellate Body Report*, *supra* note 5, para. 71.

should be of no import, for the purpose of the definition of technical regulation, whether the product is banned in its natural state or banned when it is contained in another product. If a ban on products in their natural state can fall within the definition of a technical regulation, the scope of coverage of the TBT Agreement is significantly increased. For example, as governments review the safety of products that have been allowed in the past, current science may dictate a ban on a product because of its characteristics whether in a natural state or incorporated into another product. Such a ban may well be subject to the rules of the TBT Agreement.

2. Unnecessary Obstacle to Trade

According to the Appellate Body, the TBT Agreement is a "specialized legal regime"[68] for measures that fall within the definition of technical regulations. Although the Appellate Body declined to apply this regime to the French Decree for the reasons noted above, it did state that the obligations under this regime appear to differ from and add to the obligations imposed under the GATT 1994. Thus, while there is some uncertainty as to how the obligations are to be interpreted and applied, a reading of the text leaves little doubt that obligations in addition to the GATT 1994 obligations are imposed in the TBT Agreement. Canada challenged the French Decree as contrary to the TBT Agreement with respect to four of these obligations: it was discriminatory contrary to the national treatment rule in Article 2.1; it was an unnecessary obstacle to trade contrary to Article 2.2; it was not based on an international standard as required in Article 2.4; and it was framed on the basis of descriptive characteristics rather than performance requirements contrary to Article 2.8.

To the extent that the French Decree is a technical regulation and can be challenged under the TBT Agreement and is also an internal measure subject to Article III of the GATT 1994, it must meet the national treatment rule set out in each of the agreements. Once the national treatment rule has been met under the GATT 1994, there is no requirement to justify the measure, for example, as a measure necessary to protect human health. Under the GATT 1994, justification is only needed if the measure violates the national treatment rule. The case is quite different under the TBT Agreement. A technical regulation must meet the requirements of the national treatment rule as set out in the TBT Agreement, and it must also meet a number of additional rules, including

[68] *Id.* para. 80.

the three which Canada claimed were not met in the case of the French Decree.

Arguably, the most onerous and far-reaching of the additional rules is found in the requirement in Article 2.2 of the TBT Agreement that technical regulations not create "unnecessary obstacles to trade." This rule is designed to catch non-discriminatory regulations which, nonetheless, restrict trade, simply because they exist or because they are different from those in other countries. The interpretation and application of this rule can have a significant impact on regulatory autonomy, for it makes a non-discriminatory regulation (which would be consistent with the GATT 1994) subject to the additional requirements of Article 2.2 of the TBT Agreement. Article 2.2 has not been the subject of GATT or WTO jurisprudence and as a result, its implications for the regulatory autonomy of national authorities have not been considered. This note, however, will suggest an interpretation of Article 2.2 and its implication for regulatory autonomy.

Article 2.2 requires members not to use technical regulations, either advertently or inadvertently, which create unnecessary obstacles to trade. The second sentence of Article 2.2 gives meaning to this requirement by stating that technical regulations "shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfillment would create." The third sentence identifies legitimate objectives to include "protection of human health or safety, animal or plant life or health, or the environment."[69] The fourth sentence states that, in assessing the risks created by not fulfilling the objective of protecting health, relevant elements are, among other things, "available scientific and technical information, related processing technology or intended end-uses of products."

Deciding whether a technical regulation is an unnecessary obstacle to trade requires, at a minimum, that the regulating country take account of certain risks – namely "the risks non-fulfillment would create." Both Canada and the European Communities argued before the Panel that this is a requirement to assess the risks *associated with the failure to adopt the technical regulation* in question.[70] This argument, however, is problematic. Although the text does not specify what "non-fulfillment" refers to, the context suggests that non-fulfillment refers to the *failure to fulfil an objective* and not the failure to adopt a technical regulation. Elsewhere in Article 2, the words "fulfill" and "fulfillment" are used in association with

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[69] Other legitimate objectives include "national security requirements" and "prevention of deceptive practices." TBT Agreement, *supra* note 3, art. 2.2.

[70] *See Asbestos Panel Report, supra* note 2, paras. 3.279, 3.290.

the word "objective."[71] The better interpretation is that Article 2.2 calls for an assessment of the risks posed by the use of a particular product if an objective sought by the regulating country is not achieved. In the case of the French Decree, there is a requirement for France to assess the risks to health posed by the use of asbestos products if its objective to halt the spread of asbestos-related diseases is not achieved. In addition, Article 2.2 identifies certain relevant elements to be considered in assessing the risks - namely, scientific and technical information, related processing technology or intended end-uses of the products. Thus, at a minimum, Article 2.2 makes explicit the requirement for an assessment of the risks that are created if the regulatory objective is not met together with the elements to be considered in that assessment.

Additionally, Article 2.2 requires that this assessment of risks be taken into account in determining whether a technical regulation is "not . . . more trade-restrictive than necessary to fulfil a legitimate objective."[72] This text suggests that the regulating country take account of the risks for two purposes. One purpose is to establish that the technical regulation is a measure designed to "fulfill a legitimate objective," in other words, that there is a rational connection between the technical regulation and the objective sought. A preliminary step would identify the objective sought as one which is "legitimate" within the meaning of Article 2.2. Then, the assessment would identify the risks that would be created if the objective were not fulfilled and a technical regulation would be designed to take those risks into account, that is, to avoid the risks identified. A technical regulation so designed would have a rational connection to the objective it was to fulfill. In the case of the French Decree, the assessment would identify the risks to health posed by asbestos products if the objective of halting the spread of asbestos-related diseases were not fulfilled. France would then design its technical regulation (in the case of the Decree, a ban on asbestos products) to avoid the risks identified in the assessment. One purpose of the assessment of risks is to provide a basis for establishing a rational connection between the objective sought (halting the spread of asbestos-related diseases) and the means (the technical regulation banning asbestos products) of fulfilling that objective.

The second purpose of the assessment of risks is to provide a basis for determining the degree of trade-restrictiveness allowed in a technical regulation. The text states that a technical regulation is to be no more

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[71] *See* TBT Agreement, *supra* note 3, art. 2.2, 2.4, 2.7.

[72] Joel P. Trachtman, *Trade and . . . Problems, Cost-Benefit Analysis and Subsidiary*, 9 EUR. J. INT'L L. 32 (1998), *at* http://www.ejil.org/journal/Vol9/No1/art3.html (last visited Sept. 30, 2002). Trachtman refers to this as a "curious phrase" added to the necessity test. *Id.*

trade-restrictive than is "necessary" to fulfill the objective sought. The word "necessary," in this context, refers to the degree of trade restrictiveness that is permitted in a technical regulation: it is to be as trade restrictive as necessary to fulfill the objective. In the context in which it is used, the word "necessary" does not invite an inquiry into the necessity for a particular objective or the particular level of protection sought. If the objective is legitimate within the meaning of Article 2.2, the level of protection is not called into issue. Nor does the word "necessary" invite an inquiry into the necessity of a particular technical regulation to fulfill the objective (as is the case under paragraph (b) of Article XX in the GATT 1994). The word "necessary" invites a determination of the degree of trade-restrictiveness that is required if the technical regulation is to fulfil the objective sought. The assessment of risks provides a mechanism for making this determination. The task for the regulating country is to find a technical regulation that is the least trade-restrictive and, at the same time, will permit the regulating country to avoid the risks identified in the assessment. The second purpose of the assessment of risks is to provide a tool for choosing between alternative technical regulations to find the one that avoids the risks identified in the assessment and that is the least trade-restrictive means of doing so. In the case of the French Decree, France need only choose the alternative suggested by Canada, the less trade-restrictive technical regulation prescribing controlled use, if controlled use avoids the risks posed by asbestos products as identified in the assessment.

In sum, Article 2.2 requires that the regulating country conduct an assessment of risks to health in accordance with the scientific and other objective elements set out in the last sentence of Article 2.2. The risk assessment will then be used for two purposes. One purpose is to establish that there is a rational connection between the technical regulation chosen and the legitimate objective sought. The second purpose is to identify the least trade-restrictive means that will (or, to use treaty language is "necessary") to achieve that objective. Thus, the risk assessment provides a mechanism for trading off two sets of values - the economic gains from increased trade, on the one hand, and protection from unhealthy products, on the other hand. It does so by providing a mechanism for establishing rationality between means and objective sought and for finding the least trade-restrictive means available for accomplishing the objective.

This approach to interpreting the requirements of the second sentence of Article 2.2 assures an importing country that, if its assessment of risks shows that an alternative measure creates risks of not fulfilling its public health objectives, the alternative measure will not be forced on it. At the same time, this approach provides protection for exporting countries that their traders will only be burdened by regulations which are supported by

an assessment of the risks (conducted in accordance with scientific and other objective elements) and are only as trade-restrictive as necessary to avoid the risks identified in the assessment. This approach gives effect to two of the objectives stated in the preamble to the TBT agreement. One objective assures the importing country that it will not be "prevented from taking measures necessary . . . for the protection of human, animal or plant life or health . . . at the levels it considers appropriate . . . ."[73] The second objective protects the traders of the exporting country with the assurance that technical regulations are not to "create unnecessary obstacles to international trade."[74]

For the reasons cited by the Appellate Body when it declined to examine the merits of Canada's claim that the French Decree violated Article 2.2, it would be premature to predict whether the Decree is indeed an unnecessary obstacle to trade. However, the European Communities offered risk assessments which established to the satisfaction of both the Panel and the Appellate Body that controlled use is not a measure that is reasonably available to meet the French goal of halting the risks of asbestos-related diseases for the purpose of the necessity test in Article XX(b) of the GATT 1994. This evidence may well have constituted a risk assessment that would have established, for the purpose of Article 2.2 of the TBT Agreement, that risks of not fulfilling the French objective could only be avoided by adopting the Decree prohibiting the use of asbestos fibres and products.

B. Treatment of Public Health Regulation under the GATT 1994

There are three significant developments in the jurisprudence on the GATT 1994 in the *Asbestos* case that have implications for the latitude that governments have to regulate to protect public health without violating their obligations under the GATT 1994; first, the interpretation given to the phrase "like products;" secondly, the test for necessity if a regulation which otherwise violates a GATT 1994 obligation can, nevertheless, be justified as a "measure *necessary* to protect human life or health;" and finally, the opportunity for compensation that GATT 1994 offers to the exporting country if it has suffered nullification or impairment of benefits resulting from the public health regulation.

1. Like Products

Determining the likeness of an import and a product of domestic origin is of vital importance when a complaint is made that the national

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[73] TBT Agreement, *supra* note 3, pmbl., para. 6. (emphasis added).

[74] *Id.* pmbl., para. 5.

treatment rule has been violated. Only imports which are "like" domestic products must be accorded national treatment with respect to internal taxes and regulations. For example, if a domestic automobile which produces no emissions of benzene, a chemical toxic to humans, is characterized as essentially "like" an imported automobile which emits large quantities of benzene, a ban on the sale of the polluting import would violate the national treatment rule.

GATT and WTO jurisprudence has recognized the substantial implications that result from categorizing products as "like" or "unlike" for the latitude available to WTO members to make regulatory distinctions between products. One GATT Panel explained the implications in this way:

> 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 . . . .[75]

This explanation reveals that the criteria and characteristics chosen to categorize products as like or unlike will determine, to a large extent, when national authorities can differentiate between imports and domestic products without offending the national treatment rule. Thus, the criteria used for determining likeness will play a significant role in determining whether distinctions drawn between imports and domestic products constitute legitimate regulatory activity under the national treatment rule.[76]

Prior to the *Asbestos* case, GATT and WTO jurisprudence had developed a framework of four criteria for evaluating evidence of likeness between products: these consisted of the properties, nature and quality of the products; the products' end-uses in a given market; consumers' tastes and habits; and international tariff classification of products. In the *Asbestos* case, the Appellate Body accepted this framework as useful for determining likeness. At the same time, the Appellate Body made it clear that this framework of four criteria was not closed - other criteria could be included and all criteria could accommodate new dimensions, such as the

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[75] *United States Measures Affecting Alcoholic and Malt Beverages*, June 19, 1992, 39 GATT B.I.S.D. (39th Supp.) at 279, para. 5.30 (1992).

[76] Robert Howse, *Democracy, Science, and Free Trade: Risk Regulation on Trial at the World Trade Organization*, 98 MICH. L. REV. 2329, 2332 n.5 (2000). *See* Trachtman, *supra* note 72, at 65-67.

consideration of the risks posed by the products at issue. This addition to the jurisprudence on likeness has the potential for increasing the scope for drawing permissible distinctions between products and consequently, increasing the range of legitimate regulations available for protecting public health.

For example, examining the properties, nature and quality of a product need not stop at examining the physical characteristics of that product but can include examining the consequences that flow from the physical characteristics. Such was the case when the Appellate Body considered that a defining characteristic of the physical structure and chemistry of chrysotile asbestos was its carcinogenicity. To give another example, a defining characteristic of wood treated under pressure by chromated copper arsenic may be the toxic effects that arsenic has on humans, plants and animals and may provide a legitimate means of differentiating pressure-treated wood from untreated wood for regulatory purposes. The Appellate Body's ruling that risk to health is a relevant characteristic for differentiating between products has increased the scope for legitimate regulatory activity by accepting externalities that flow from the characteristics of a product as a means of drawing legitimate distinctions between products.[77] The carcinogenic risk of chrysotile fibres on humans can be viewed as an externality that is not present in PCG fibres; similarly, the toxicity of chromated copper arsenic in pressure-treated wood is an externality that is not present in untreated wood.

The Appellate Body has decided determining likeness is fundamentally a question of examining the competitiveness or substitutability of products in the marketplace to ensure that regulations provide equality of competitive conditions between imports and domestic products. This ruling is troubling unless the marketplace is viewed as it actually exists in the real world and allowances are made for its limitations and failures.[78] Thus, competition in the marketplace should reflect not only the perspective of producers whose interest is to maximize sales but also the perspective of consumers whose interests are served when they can make informed decisions about the products offered for sale: however, not often is a buyer as knowledgeable about the safety of a product as the

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[77] Howse, *supra* note 76, at 2332 (differentiating products on the basis of environmental externalities as a legitimate regulatory activity is suggested by Howse).

[78] This "real world" approach was applied by the Appellate Body when it concluded that risk assessments should be conducted not just under controlled laboratory conditions but also in recognition of conditions that exist in the "real world." WTO Appellate Body, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R (Jan. 5, 1998), *available at* www.wto.org. For example, drugs may be carelessly treated and their abuse inadequately controlled.

producer.[79] Differentiating between products on the basis of the asymmetric information available to producer and consumer should be factored in when consumers' tastes and habits are examined for evidence of likeness.

The market may not operate efficiently or at all to provide goods that are not harmful to health. For example, the market may produce only one pesticide for agricultural products that is safe for human use over the long-term. If the price of the safe pesticide is double that of other pesticides (because production costs are double), consumers may shun the safe pesticide, particularly in the face of inadequate information on safety of the various pesticides. This deficiency in the market should be considered when determining the likeness of two pesticides: one that is safe for human use and the other that is safe only in restricted and controlled circumstances. This is a case where national authorities should not be constrained in making a regulatory distinction to permit the use of one and severely restrict or prohibit the use of the others because the market has produced only one pesticide that serves the public good. To allow such a regulatory distinction under the national treatment rule requires an acknowledgment of the limitations of the market and the corresponding need for regulatory activity.

If competitiveness and substitutability in the marketplace are to provide the context for applying criteria to evaluate the likeness of products, then the conditions of the marketplace as they exist in the real world must form the matrix in which likeness is examined. The Appellate Body's failure to take a broader view of the marketplace leaves it vulnerable to the criticism voiced by one of the members of the Appellate Body in the *Asbestos* case that the Appellate Body has not adequately considered the effects on regulatory autonomy of a fundamentally economic interpretation of likeness.

2. Necessary to Protect Health

As noted earlier, once a public health regulation has met the requirements of the national treatment rule of the GATT 1994, there is no further requirement to justify it, for example, as necessary to protect human health. That requirement only arises if the national treatment rule has been violated. Both the Panel and the Appellate Body made rulings on Article XX(b) which should provide guidance to members on what is required to justify a regulation as "necessary to protect human, animal or plant life or health." Although both GATT and WTO panels have

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[79] See Michael J. Trebilcock, *An Introduction to the Economic Approach to Law*, LAW AND ECON. 360, 364 (1994).

interpreted Article XX(b) in the past, the *Asbestos* case provided the first opportunity for the Appellate Body to consider Article XX(b).

Justification under Article XX(b) begins when the regulating country must present evidence to establish a *prima facie* case that there is a risk to health that requires a remedial measure. This assessment of risk must establish, as in the case of the TBT Agreement, that the risk exists, either on a quantitative or qualitative basis. The threshold for establishing that a risk exists appears to be rather low. Although the European Communities established that a *serious* health risk existed in the *Asbestos* case, both the Panel and Appellate Body suggested that a country justifying its regulation need only establish that the policy underlying the challenged measure falls within the range of policies covered in paragraph (b).[80] This threshold requirement resembles the rather loose rational connection test between means and ends found in Article 2.2 of the TBT Agreement. It appears that it is not necessary to establish that a serious risk exists nor is it necessary to conduct a risk assessment in accordance with specified requirements such as those set out in Article 2.2 of the TBT Agreement. Moreover, in assessing risk, national authorities are entitled to consider qualified divergent opinions and need not automatically adhere to the majority opinion.

Once risk has been established, the level of protection chosen by the regulating country to address that risk cannot be challenged *per se*. The regulating country, however, must justify the level of protection it has chosen by showing that no alternative measure, less restrictive of trade, is reasonably available to meet its desired level of protection. Alternative measures will be evaluated on the basis of factors suggested by the Appellate Body in the *Asbestos* case; these will be balanced to determine whether a less trade-restrictive alternative is reasonably available or, to use treaty language, whether the regulation chosen is "necessary" to achieve the public health objective.[81] The regulation chosen is likely to be considered "necessary" in situations where the common interests and values pursued are shown to be vital and important and the regulation makes a greater contribution to realizing the objectives, interests and values sought than does an alternative measure. A less trade-restrictive alternative will be considered "reasonably available" when it does not pose serious administrative difficulties in implementation and it meets the goals of the importing country and does so in a less trade-restrictive manner than the regulation chosen. The list of factors the Appellate Body lays

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[80] *Asbestos Panel Report, supra* note 2, para. 8.194; *see Asbestos Appellate Body Report, supra* note 5, para. 163.

[81] *Id.*

down for consideration suggests that there is to be a loose, informal process for comparing alternative measures by balancing the right that WTO members have to avail themselves of the exception available under Article XX (b) and their obligation not to abuse this right to cancel out the right of their trading partners to access foreign markets within the framework of the GATT 1994.

The necessity test, as formulated in the *Asbestos* case, accords deference to national authorities in their choice of public health objectives and the level of protection to achieve those objectives. The only constraint imposed on regulatory autonomy arises from the need to justify objectives and levels of protection by considering a number of factors to rule out the possibility that there is a less trade-restrictive measure available to achieve those objectives. On the basis of the text and its judicial interpretation in the *Asbestos* case, Article XX(b) calls for a balancing test to be used as a "trade-off" device between two sets of values - the economic gains from increased trade, on the one hand, and increased protection from unhealthy products, on the other hand.[82] This trade-off device consists of paying deference to the regulatory autonomy of national authorities to pursue public health objectives, while requiring in return a search for a less trade-restrictive measure that will not compromise the public health objectives rules.[83] There is some danger that the looseness afforded by balancing various factors could allow a panel to trade off an objective which, in their view, is not vital or important in favor of a less trade-restrictive measure which offers the benefits of increased trade. In such cases, a panel should carefully consider deferring to national authorities on the issue of the importance of a particular objective and not try to second-guess their policy decisions.[84]

3. Compensation for Nullification and Impairment

Once a country has justified a public health measure as necessary under Article XX(b), it may yet have to face a cause of action on the basis of non-violation nullification and impairment under Article XXIII.1(b). The *Asbestos* case has clearly established that a non-violation cause of action is available even when a measure has been justified under Article XX(b). Although justification under Article XX(b) is available as a right

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[82] *See* Trachtman, *supra* note 72 (suggesting balancing is one of several "trade-off" devices).

[83] WTO Appellate Body Report, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998), paras. 157, 159, 38 I.L.M. 118, 164-65 (1999) [hereinafter *Report of the Appellate Body*].

[84] John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, at IV.A (2000).

to WTO members[85] and operates to establish that the right has not been abused,[86] nonetheless, justification does not provide immunity from a non-violation claim. The Appellate Body found a textual basis in the language of Article XXIII.1(b) for its decision that justification under Article XX(b) does not provide immunity from non-violation claims: the text, interpreted according to its ordinary meaning, clearly provides that a non-violation claim is available as a result of the application of "any measure." Thus, any measure, including a public health measure, may be challenged on the basis of non-violation nullification and impairment.

The possibility of a claim for compensation under Article XXIII.1(b) does not *prevent* a country from regulating for public health purposes, as the Panel pointed out, but it may make it more costly to do so and consequently, may cast a regulatory chill on health policy decision-making. To minimize this result, the Panel imposed conditions on the use of this remedy so that it continues to be exceptional in nature, particularly in the case of measures justified as necessary to protect public health.

In taking this approach, the Panel struck a balance between competing rights so that one right does not cancel out another. On one hand is the right of the importing country to use Article XX(b) as a way of justifying the measure it has chosen to achieve its public health objectives. On the other hand is the right of the exporting country to rely on the benefits it had expected to receive after a round of negotiated reciprocal concessions. Both rights are preserved: the right to invoke Article XX(b) remains although somewhat impaired because the remedy in Article XXIII.1(b) can be invoked. However, the impairment of the right to invoke Article XX(b) is not serious because the remedy in Article XXIII.1(b) will continue to be treated as exceptional in nature with stringent conditions attached to its use.

V. CONCLUSION

The *Asbestos* case shows how the TBT Agreement and the GATT 1994 have implications for the autonomy of national authorities to make regulatory distinctions between products for the purpose of protecting public health. The TBT Agreement and the GATT 1994 both contain rules which establish mechanisms to help national authorities and dispute settlement panels decide which value is to take precedence: the economic benefits of freer trade or the enhanced protection of human health.

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[85] *Report of the Appellate Body*, *supra* note 83, paras. 157, 159.

[86] *Id.* para. 158.

With respect to the TBT Agreement, the *Asbestos* case clarifies the definition of "technical regulation" and, in so doing, provides useful guidance as to when the TBT Agreement applies. The definition, as expressed by the Appellate Body, suggests that a large number of product regulations will be subject to the rules of the TBT Agreement, in particular the rule that prohibits the use of regulations which create "unnecessary obstacles to trade." Determining whether a technical regulation is an unnecessary obstacle to trade is accomplished by requiring an assessment of risks, based on scientific and other objective factors, that would be created if the public health objective is not achieved. The risk assessment provides the mechanism for trading off two values important to WTO members: the economic benefits of increased trade and the desired level of public health protection. The risk assessment provides a means for determining, first, that a rational connection exists between a regulation that restricts trade (the means) and the public health objective sought (the end) and secondly, that the least trade-restrictive means available for achieving the desired objective has been chosen by the regulating country.

Under the GATT 1994, the principal tool for constraining regulatory autonomy is the national treatment rule. Once imports and products of domestic origin are determined to be "like products," according less favorable treatment to imports is inconsistent with the national treatment rule. Consequently, the process for determining likeness can have a significant impact on regulatory autonomy. The jurisprudence on likeness in the *Asbestos* case is somewhat ambiguous in its implications for regulatory autonomy. The Appellate Body may have increased the latitude for countries to create legitimate regulatory distinctions between products by ruling that the criteria for evaluating evidence of likeness are not limited to the framework of four criteria applied by the Panel. Furthermore, the criteria can accommodate new dimensions, such as risks to health that can be used to differentiate products. However, the focus on the competitive relationship between products in the marketplace as the matrix in which evidence of likeness will be evaluated may serve to limit the scope for regulatory distinctions unless the limitations of the market are recognized and accommodated when the criteria are applied.

Should it be necessary for the regulating country to invoke Article XX(b) to justify a measure that violates the national treatment rule, jurisprudence on paragraph (b) in the *Asbestos* case introduces a process designed to determine whether a trade rule (such as national treatment under Article III) or the public health exception to the trade rule (Article XX(b)) will win the day. The first step in the process requires the regulating country to establish that the measure it has taken falls within the range of policies covered in paragraph (b), that is, policies designed to

protect human health. This threshold requirement resembles the rather loose rational connection test between means and ends found in Article 2.2 of the TBT Agreement. Once a rational connection between means and ends is established, the issue becomes one of finding a less trade-restrictive alternative measure that achieves the level of protection sought and is reasonably available to the regulating country. The device for making this determination is the balancing of a number of factors to ensure that public health objectives of a vital and important nature will not be sacrificed to the economic benefits provided by increased trade in a harmful product.

Under both the TBT Agreement and the GATT 1994, deference is paid to the public health objectives sought and the levels of protection desired by national authorities. At the same time, justification for objectives and levels of protection must be offered in order to encourage WTO members to consider the trade effects of implementing public health measures. Deference and justification are both evident in the devices established for determining when the right to regulate for public health purposes will override the right to market access granted under WTO rules.