



Foundation for  
International  
Environmental  
Law and  
Development

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Appellate Body  
World Trade Organisation  
Centre William Rappard  
Rue de Lausanne 154  
CH-1211 Geneva 21  
Switzerland

**European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (AB-2000-11): Submission of Written Brief by Non-Parties**

Honourable Members,

The Foundation for International Environmental Law and Development (FIELD), on its behalf and on behalf of the organisations listed below (together, the Applicants), respectfully requests the Appellate Body to consider the enclosed written brief in its deliberations and recommendations in this dispute.<sup>1</sup>

**I. Our Concerns**

The Applicants are a coalition of not-for-profit organisations that promote the protection of populations around the world from health and environmental risks, including asbestos-related diseases. As part of our work, we work with individuals and governments to develop and implement health and environmental measures. We advise and represent people and communities, particularly in developing countries, whose health, environmental and sustainable development concerns are inadequately represented in international fora. In particular, we are concerned to see global trade rules applied in a manner that gives appropriate deference to national and local decisions aimed at protecting human health and the environment in accordance with international standards. The success of our respective missions to foster the best care for people and the environment is crucially affected by the decisions of trade bodies such as the World Trade Organisation (WTO). As such, we have a direct and immediate interest in the outcome of this dispute. Moreover, we have specialised legal expertise that will facilitate a comprehensive analysis of the legal issues and assist the Appellate Body in reaching a satisfactory settlement of this matter.

Asbestos is a deadly carcinogen that continues to place millions of lives at risk. Despite international acknowledgement of its known dangers to human health, prohibitions on the use, sale and trade of asbestos have been implemented in only a handful of countries. People continue to be exposed to asbestos, often ignorant of its presence, risks and fatal impact. France has taken what we commonly urge is an appropriate measure to protect its workers and consumers from exposure to a highly toxic material. The measure is for the protection of the health of France's population, not its domestic industry. Accordingly, we believe that the Panel reached the right result in upholding the French ban on asbestos. However, as explained in detail in the enclosed brief, the Panel made certain errors of law with respect to the meaning of 'like product' under Article III (National Treatment) of the GATT 1994 and subsequent errors under Articles XX (Exceptions) and XXIII:1(b) (Non-Violation). If left uncorrected, the Panel's analysis could 'chill' legitimate national regulation of health and the environment. The unwarranted interpretation of international trade rules must not be allowed to undermine our efforts to promote the protection of health and the environment in a sustainable manner.

## II. Nature of Our Request

The nature of the Applicants' request to the Appellate Body to consider the enclosed brief is twofold. First, our request for consideration of the enclosed brief is made with reference to the Additional Procedure.<sup>2</sup> Secondly, we request the Appellate Body to exercise its authority to accept and consider *amicus curiae* briefs where it is 'pertinent and useful' to do so.<sup>3</sup> Each of these is discussed below.

### A. Additional Procedure

As persons not party to the dispute, the Applicants filed a request for leave to file a written submission with the Appellate Body in accordance with the Additional Procedure before 12 noon on 16 November 2000 (Application for Leave). In preparing the Application for Leave, we were careful to comply with the requirements for submissions. In particular, we sought to satisfy each of the seven requirements in paragraph 3 of the Additional Procedure, including: the specification of our interest in the dispute; the identification of the issues of law that we proposed to address; the explanation of how our submission would contribute to the resolution of this dispute in a manner that was not repetitive of the submissions from the parties and third parties to the dispute; and confirmation that we had received no financial support from any of the parties in preparing our submission.

Despite your letter dated 16 November 2000 informing us that our Application for Leave had been denied for failure to comply with paragraph 3 of the Additional Procedure, we continue to feel that we met each of the requirements. Accordingly, we are taking this opportunity to demonstrate in full, with the enclosed brief, what we were unable to demonstrate to the Appellate Body's satisfaction in the Application for Leave.

The Applicants would like to emphasise at the outset that we welcomed the adoption of the Additional Procedure by the Appellate Body. We consider that its adoption was a valid exercise of the Appellate Body's authority and a significant advance towards improving the external transparency of the WTO dispute settlement system. However, we have serious concerns about the manner in which the Appellate Body administered the Additional Procedure which we believe should be addressed when adopting similar procedures in future disputes. The validity of the Additional Procedure and our concerns about its administration are discussed below.

#### (i) *Appellate Body's Authority to Issue the Additional Procedure*

The Additional Procedure was validly adopted by the Appellate Body in accordance with Rule 16(1) of the Working Procedures.<sup>4</sup> Rule 16(1) provides that the Appellate Body may adopt an appropriate procedure for the purposes of a specific appeal, provided that it is not inconsistent with the DSU, the other covered WTO agreements and the Working Procedures.

It was appropriate for the Appellate Body to adopt a procedure under Rule 16(1) of the Working Procedures to manage the receipt of non-party submissions. Both the Panel and the Appellate Body had received submissions from non-parties and the Appellate Body could reasonably expect to receive further submissions in light of the demonstrated public interest in the dispute. In view of the broader community's concerns about WTO legitimacy and accountability, it is in the interest of WTO Members to provide an avenue for the participation of non-government organisations through good faith submissions of *amicus curiae* briefs.

The Additional Procedure is consistent with the WTO agreements. The authority of the General Council to consult and co-operate with non-governmental organisations under Article V.2 of the *Agreement Establishing the World Trade Organisation* (WTO Agreement) is not an exclusive authority. It is also within the authority of panels and the Appellate Body to consider and solicit submissions and information from non-parties, including non-government organisations.<sup>5</sup> In creating an avenue for receiving information from non-parties in a transparent and orderly manner, the Additional Procedure implemented the legal authority of the Appellate Body without upsetting the constitutional balance between the WTO's dispute settlement procedures and the authority of the General Council.

Moreover, the Additional Procedure does not prejudice WTO Members' right to participate in disputes, nor does it extend greater rights to non-Members. All WTO Members with a substantial interest in a dispute are entitled to participate in dispute settlement procedures as third parties pursuant to Article 10 of the DSU. WTO Members that have an interest in a dispute that arises after a panel's decision are at liberty to make written submissions to the Appellate Body which may be considered where it is 'pertinent and useful' to do so.<sup>6</sup> In addition, in this case, such WTO Members could have made an application under the Additional Procedure.<sup>7</sup> Alternatively, such WTO Members may choose to express their views on the Appellate Body report during the adoption procedure prescribed by Article 17.14 of the DSU. As WTO Members, their submissions and views will always carry unique relevance that distinguishes them from the views of non-Members and of civil society.

In receiving *amicus curiae* briefs in the past and in adopting the Additional Procedure, the Appellate Body Members acknowledge that there may be perspectives and expertise among civil society representatives that can enhance their analysis of legal issues arising out of a panel decision. This dispute concerns a carcinogenic substance that has caused millions of deaths and injury to people around the world. The perspective of people directly affected by the product at issue in this case is highly relevant to the analysis of legal issues.

Formal procedures can be helpful in establishing appropriate parameters to ensure fair and consistent decisions with respect to the acceptance and consideration of non-party submissions from unrepresented members of the global community. The Additional Procedure applied to persons regardless of nationality, however, it specified restrictions that would ensure that only a limited number of persons would qualify to make a written submission. Accordingly, it did not open the 'floodgates' to submissions from all members of civil society. Nor should it be perceived as putting developing countries at a further disadvantage in the WTO dispute settlement procedures. For our own part, the Applicants represent the public interests of people from around the world, including those in developing countries. We have organisational missions that promote the interests of developing countries and their equal participation in intergovernmental institutions. If handled in a transparent manner, submissions from non-government organisations under formal procedures such as the Additional Procedure can give a voice to marginalised members of the international community from both developed and developing countries. Appropriately regulated submissions from non-government organisations can facilitate the full and fair participation of all affected constituencies in the global trading system.<sup>8</sup>

#### **(ii) *Appellate Body's Administration of the Additional Procedure***

As noted above, the Appellate Body informed the Applicants by letter dated 16 November 2000 that their Application for Leave had been denied for failure to comply with paragraph 3 of the Additional Procedure. In response to a letter from the Applicants dated 21 November 2000 requesting reasons for the denial of their request, the Appellate Body again informed the Applicants by a standard-form letter dated 27 November 2000 that they had failed to comply with paragraph 3 of the Additional Procedure. The Appellate Body's letter also responded to a request that had not been made by the Applicants.

On the basis of the Appellate Body's limited communication, the Applicants could not determine which of the specific provisions in paragraph 3 had not been satisfied in the Application for Leave. The Appellate Body provided no adequate explanation for its refusal or information which would guide the Applicants in making similar applications in the future. In addition, the short time in which a response was provided and the standardised nature of the response suggests that it had not been possible for the Appellate Body to give due consideration to the request.

Having validly adopted the Additional Procedure and having thereby established a procedure by which non-parties could seek permission to submit written briefs, the Members of the Appellate Body gave rise to legitimate expectations among interested civil society groups that

their requests would be given due consideration and that adequate reasons would be provided for any decision to reject their requests.

Due process has been recognised by the Appellate Body as applying to panels' procedures<sup>9</sup> and as being implicit in certain provisions of the GATT.<sup>10</sup> The Appellate Body has expressly noted that a party to a WTO appeal is 'always entitled to its full measure of due process'<sup>11</sup> and that WTO Members themselves are bound to administer domestic procedures in accordance with standards of basic fairness and due process.<sup>12</sup> This consistent respect for due process heightens the expectation that the Appellate Body will administer its own procedures in a transparent and reasonable manner.<sup>13</sup> The expectation of fairness and due process extends not only to parties to the dispute but to any person engaged in the dispute settlement process, including persons invited to apply for leave to submit a written submission in accordance with the Additional Procedure.

The Applicants are aware that some WTO Members had expressed concern about the adoption of the Additional Procedure which culminated in a special meeting of the General Council on 22 November 2000. As indicated above, the Applicants believe that the Appellate Body did not overstep its authority when it adopted the Additional Procedure. It is a separate issue that, once adopted, the procedure should have been carried out in a fair and transparent manner. The independence of the Appellate Body is crucial in maintaining trust and confidence of the WTO Members and of the wider community in the dispute settlement procedure. It is imperative that the Appellate Body maintains its neutrality through just implementation of its procedures.

## **B. Authority and Practice of the Appellate Body**

The Members of the Appellate Body have concluded that 'as long as [they] act consistently with the provisions of the DSU and the covered agreements, [they] have the legal authority to decide whether or not to accept and consider any information that [they] believe is pertinent and useful in an appeal'.<sup>14</sup> The Appellate Body's authority to consider *amicus curiae* submissions is not prejudiced by the Additional Procedure and it remains within its power to accept and take account of the legal arguments presented in the enclosed brief if it deems it 'pertinent and useful' to do so.

The Applicants consider the enclosed written brief to be 'pertinent and useful' in this appeal.

### **(i) Our Interest**

The Applicants are not-for-profit public interest groups deeply concerned about protecting human health from the proven hazards of asbestos fibres and products containing them. Our coalition includes organisations that work to reduce the public health risk facing people who live, work and die, knowingly and unknowingly in the presence of asbestos – a deadly carcinogen – by halting its use and production. Our respective activities are directed at developing laws to protect human health, safety and the environment and to promote an application of international trade law that is consistent with international health, safety and environmental standards. We also seek to ensure the participation of public interest organisations and the representation of their interests in law and policy-making on international trade and sustainable development. With a broad membership and the support of people from around the world, the Applicants represent the public interests of a coalition of natural and legal persons that transcend national boundaries, and includes the residents of the parties, the third parties, and of the states that are not parties to this dispute. As parties likely to be affected by the Appellate Body's decision, the Applicants have a direct interest in the resolution of this case.

### **(ii) Issues Addressed in the Brief**

The enclosed brief is 'pertinent and useful' in that it raises critical legal issues of public concern from an individual and non-governmental perspective that is distinct from that of the parties and third parties to this dispute. It examines the broader implications of this decision

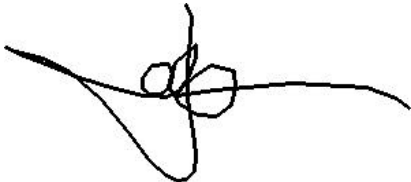
for development, health, human rights, the environment, and other facets of general welfare that looks beyond the immediate impact of the Panel's reasoning on the governments that are parties to this dispute to its impact on people around the world now and in the future. If left uncorrected, the Panel's wrongful 'like product' analysis under Article III and its erroneous interpretations of the GATT 1994 will be preserved as guidance to WTO Members as to how the trade rules should be applied. In those circumstances, governments challenging health and environmental standards would, in effect, be relieved of their responsibility to show a violation of Article III's anti-protectionist purpose. Regulators would be barred from distinguishing between products on the basis of legitimate and objective non-protectionist criteria without first justifying their actions under an Article XX exception. This amounts to an unacceptable reversal of the rules and evidentiary burdens in the GATT 1994.

As *amicus curiae*, the Applicants seek to provide solutions that reflect unique legal expertise relating to trade and sustainable development and, in particular, to the interface between the WTO and domestic regulatory issues. By virtue of past experience with *amicus curiae* submissions to the Appellate Body, the Applicants have a demonstrated capacity to seek solutions that balance the need to reconcile trade, environment and developmental perspectives within the overarching objectives of sustainable development.

The enclosed brief seeks to promote the long-term interests of society – in terms of safety, environmental protection and human rights – and to examine the broader, systemic implications of this decision for the multilateral trading system and its relationship with related legal systems. With concerns and interests that extend beyond those of the government parties, our legal analysis is inherently distinct from that of the parties. In deciding whether to accept our submission, it is not necessary to assess whether our legal arguments repeat or add to those of the parties. Without reviewing the parties' submissions or ours, that assessment cannot be made and the very nature of our broader concerns and interest should be a sufficient basis for the Appellate Body's decision to accept the enclosed brief.

In light of the above views and interests, we respectfully request the Appellate Body to accept the enclosed brief and to take the legal issues raised in it into account in its deliberations and recommendations in this dispute.

Respectfully submitted by



Jacob Werksman  
Acting Director  
Foundation for International Environmental Law and Development (FIELD)

And on behalf of:  
Ban Asbestos (International and Virtual) Network  
Greenpeace International  
International Ban Asbestos Secretariat  
World Wide Fund for Nature, International

Enc.

CC: Canada (Pierre Desmarais, Ottawa)  
European Communities (Louis Portero Sanchez, Brussels)  
Brazil (Andréa Watson, Geneva)  
United States (Dan Brinza, Geneva)  
Zimbabwe (Beatrice Mutetwe, Geneva)

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<sup>1</sup> *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Panel, 18 September 2000, WT/DS135/R (the “Panel Report”), as appealed by (i) Canada pursuant to its *Notification of An Appeal*, 23 October 2000, WT/DS135/8 and (ii) the European Communities or a third party.

<sup>2</sup> *Additional Procedure Adopted Under Rule 16(1) of the Working Procedures for Appellate Review AB-2000-11*, 8 November 2000, WT/DS135/9 (the “Additional Procedure”).

<sup>3</sup> *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, Report of the Appellate Body adopted 7 June 2000, WT/DS138/AB/R, ¶39 (“UK Steel”).

<sup>4</sup> *Working Procedures for Appellate Review*, 28 February 1997, WT/AB/WP/3 (the “Working Procedures”), drawn up pursuant to Article 17.9 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the “DSU”).

<sup>5</sup> *United States – Import Prohibition of Shrimp and Shrimp Products*, Report of the Appellate Body adopted 6 November 1998, WT/DS58/AB/R, ¶¶106-7 (“US – Shrimp”); *UK Steel*, ¶39; see discussion below fn.14 and accompanying text.

<sup>6</sup> *UK Steel*, ¶39; see discussion below fn.14 and accompanying text.

<sup>7</sup> The Additional Procedure applied to ‘[a]ny person, whether natural or legal, other than a party or a third party to this dispute’ (Additional Procedure, ¶2).

<sup>8</sup> It should be noted that, relying in part on conclusions of the Appellate Body, a North American Free Trade Agreement tribunal has recognised that there is legitimate public interest arising out of certain subject matter. The tribunal also found that its dispute settlement mechanism ‘could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive.’ See In the Matter of an Arbitration under Chapter 11 of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules, *Methanex Corporation v. United States of America*, Decision of the Tribunal on Petitions from Third Persons to Intervene as ‘Amicus Curiae’, 15 January 2001, ¶49, available at [http://www.iisd.org/trade/investment\\_regime.htm](http://www.iisd.org/trade/investment_regime.htm) (“Methanex”).

<sup>9</sup> *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Report of the Appellate Body adopted 25 September 1997, WT/DS27/AB/R, ¶144; *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, Report of the Appellate Body adopted 16 January 1998, WT/DS50/AB/R, ¶95; *Argentina – Certain Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, Report of the Appellate Body adopted 22 April 1998, WT/DS56/AB/R, ¶79; *Brazil – Measures Affecting Desiccated Coconut*, Report of the Appellate Body adopted 20 March 1997, WT/DS22/AB/R, p.15; *European Communities – Measures Affecting Meat and Meat Products (Hormones)*, Report of the Appellate Body adopted 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, ¶133.

<sup>10</sup> *United States – Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, Report of the Appellate Body adopted 25 February 1997, WT/DS24/AB/R, p.10.

<sup>11</sup> *US – Shrimp*, ¶97.

<sup>12</sup> *US – Shrimp*, ¶181 ff.

<sup>13</sup> Note that a NAFTA tribunal has acknowledged that ‘a blanket refusal [of amicus submissions] could do positive harm [to the dispute settlement mechanism].’ (*Methanex*, ¶49).

<sup>14</sup> *UK Steel*, ¶39.

**BEFORE THE WORLD TRADE ORGANISATION APPELLATE BODY**

**EUROPEAN COMMUNITIES - MEASURES AFFECTING ASBESTOS AND ASBESTOS-CONTAINING PRODUCTS  
(AB-2000-11)**

**Brief submitted to the Appellate Body by Non-Parties**

**Geneva, 6 February 2001**

With reference to the Additional Procedure Adopted Under Rule 16(1) of the Working Procedures for Appellate Review AB-2000-11 (WT/DS135/9) dated 8 November 2000, and the authority and practice of the Appellate Body, the Foundation for International Environmental Law and Development, on its behalf and on behalf of the other Applicants listed below, submits this written brief to the Appellate Body in (i) the appeal made by Canada pursuant to the *Notification of An Appeal by Canada* (WT/DS135/8) dated 23 October 2000 and (ii) any other appeal made by the European Communities or a third party alleging errors in the issues of law covered in the Report of the Panel (WT/DS135/R) dated 18 September 2000 and legal interpretations developed by the Panel.

Foundation for International Environmental Law and Development  
SOAS, University of London  
46-7 Russell Square, London WC1B 4JP, UK  
Tel: 44-20-7637-7950; Fax: 44-20-7637-7951  
Contacts: Jacob Werksman, Acting Director; Alice Palmer, Staff Lawyer

And:

Ban Asbestos (International and Virtual) Network  
Algues, 12 230 -Nant, France  
Tel : 33-1-4838-7673; Fax: 33-1-4838-8862  
Contacts: Annie Thébaud-Mony; Patrick Herman

Greenpeace International  
Keizersgracht 176, 1016 DW Amsterdam, NL  
Tel: 31-20-523-6228; Fax: 31-20-523-6200  
Contacts: Rémi Parmentier, Director of the Political and Science Department;  
Siubhan Leslie, Political Unit

International Ban Asbestos Secretariat  
PO Box 93, Stanmore, Middlesex, HA7 4GR, UK  
Tel: 44-20-8958-3887  
Contact: Laurie Kazan-Allen

World Wide Fund for Nature, International  
Ave Mt Blanc, CH-1196 Gland, CH  
Tel: 41-22-364-9002; Fax: 41-22-364-8219  
Contact: Aimée T. Gonzales, Senior Policy Advisor

## I. Executive Summary

1. The Applicants agree with the Panel's conclusion that the French Decree prohibiting the use, sale and trade of asbestos<sup>1</sup> does not violate the European Communities' WTO obligations.<sup>2</sup> We urge the Appellate Body not to reverse the central conclusion of the Panel Report. Chrysotile asbestos is a deadly substance that has killed and injured millions of people around the world. France should not be denied the right to protect its workers and consumers from exposure to this carcinogenic material through a non-protectionist measure.
2. Nevertheless, it is our respectful submission that, in reaching the correct conclusion in upholding the Decree, the Panel made certain errors of law in its application of customary rules of treaty interpretation of public international law under the Vienna Convention.<sup>3</sup> The Applicants submit that the Panel failed to interpret the GATT 1994<sup>4</sup> in accordance with the Vienna Convention in the following respects:
  - a) The Panel erred in its conclusion that chrysotile and alternative materials are 'like products' within the meaning of Article III:4 of the GATT 1994. In particular, the Panel erred in:
    - (i) failing to recognise that the toxicity of chrysotile is an objective and legitimate basis for a regulator and a consumer to distinguish between products pursuant to Article III of the GATT 1994. Toxicity is relevant to Article III's purpose of avoiding protectionism as it provides an objective non-protectionist basis for distinguishing one product from another;
    - (ii) failing to acknowledge chrysotile's carcinogenic character in its assessment of a product's properties, nature and quality, its end-uses in a given market and consumers' tastes and habits in the absence of the Decree, and in its selective consideration of tariff classifications. An examination of each of these typical 'like product' criteria reveals actual distinctions between chrysotile and other so-called alternative products. Combined with the toxic character of chrysotile, the typical 'like product' criteria demonstrate differences between chrysotile and substitute products;
    - (iii) concluding that consideration of toxicity for the purposes of defining 'like products' under Article III would not give full effect to each provision of the GATT 1994 because it would render the general exceptions under Article XX redundant. Article III requires an objective assessment of toxicity as an inherent aspect of the product as opposed to Article XX(b) which involves an examination of toxicity in terms of reasonable responses of national governments;
    - (iv) relieving Canada of the burden of proving that toxicity did not distinguish chrysotile from alternative products. In not considering toxicity under Article III, the European Communities was prematurely required to justify the measure under Article XX;
    - (v) failing to acknowledge that there was no product produced domestically within France that was 'like' chrysotile. Polyvinyl alcohol is not produced in

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<sup>1</sup> Decree No. 96-1133 of 24 December 1996, issued pursuant to the Labour Code and the Consumer Code (*décret no. 96-1133 relatif à l'interdiction de l'amiante, pris en application du code de travail et du code de la consommation*), *Official Journal of the French Republic* of 26 December 1996 (the "Decree"). The Decree entered into force on 1 January 1997.

<sup>2</sup> Report of the Panel, 18 September 2000, WT/DS135/R (the "Panel Report").

<sup>3</sup> 1969 *Vienna Convention on the Law of Treaties*, 11 UNTS 331; 8 ILM 679 (1969) (the "Vienna Convention") is recognised as describing customary rules of interpretation of public international law for the purposes of Article 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"). See *United States – Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body adopted 20 May 1996, WT/DS2/AB/R, pp.10-11 ("*US – Gasoline*"); *Japan – Taxes on Alcoholic Beverages*, Report of the Appellate Body adopted on 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, pp.6-7 ("*Japan – Alcoholic Beverages*").

<sup>4</sup> *Marrakesh Agreement Establishing the World Trade Organisation*, Annex 1A, *General Agreement on Tariffs and Trade 1994*, 15 December 1993, 33 ILM. 29 (1994) (the "GATT 1994").



- France and cellulose and glass are not typically produced and used in France as a substitute for chrysotile; and
- (vi) concluding that the Decree constituted *de jure* discrimination. A measure, like the Decree, that does not discriminate on the basis of the country of origin of a product cannot, by definition, constitute *de jure* discrimination.
- b) In the alternative, the Panel was correct to conclude that the Decree was justified under Article XX(b) as a measure to protect human health and life, however, it made some errors of law and statements in its analysis of that provision that warrant correction or clarification. Scientific evidence of risk is relevant to the question of whether a measure is ‘necessary’ but need not be considered to determine the threshold question of whether the measure falls within the category of measures covered under subparagraph (b). Moreover, it should be confirmed that the precautionary principle entitles regulators to act with precaution without have to meet a set threshold of scientific certainty.
- c) Having made its determination under Article XX, the Panel then erred in its consideration of Article XXIII:1(b) which should not be invoked where a determination has been made under an Article XX exception. WTO Members should not be required to defend the same measure twice under the GATT 1994. Moreover, it would be a perverse outcome if a government that is responsible for a health or environmental hazard in a foreign country should be entitled to seek compensation from its victim under Article XXIII:1(b).
- d) Finally, as a procedural matter, the Panel erred in law with respect to its consideration of *amicus curiae* briefs or information submitted by representatives of civil society. The Panel should have stated its reasons for not accepting two of the four submissions made before the interim review and it is not confined to considering only those submissions from civil society that were appended to the submissions of a party.
3. Each of the Panel’s erroneous interpretations of the law is considered in detail below. In essence, we believe that the Panel’s entire analysis is undermined at the outset by its misguided search for products on the French market that sufficiently resemble asbestos to support a claim that France is seeking to protect its domestic market rather than the health of its citizens. The Panel’s decision strips national regulators of their ability to develop policies and measures that have no protectionist purpose unless they can first justify their action under the limited Article XX exceptions. The Panel’s errors must be corrected for the purposes of this appeal and for future applications of the relevant GATT provisions.<sup>5</sup>

**II. The Panel erred in its conclusion that chrysotile fibres and chrysotile fibre products, on the one hand, and PVA, cellulose and glass fibres and fibro-cement products, on the other, are ‘like products’ within the meaning of Article III:4 of the GATT 1994 (Panel Report, ¶¶8.144, 8.150).**

4. Chrysotile fibres, also known as white asbestos, and products containing chrysotile are carcinogenic materials that are responsible for thousands of deaths and injuries each year worldwide. Chrysotile and chrysotile products differ from polyvinyl alcohol (PVA), cellulose and glass fibres and fibro-cement in their properties, nature and quality, end-uses in the French market, in consumers’ tastes and habits and in their toxicity. The tariff classifications for chrysotile and substitute fibres differ. None of these criteria is determinative. However, cumulatively, and in a context that seeks to avoid protectionism within the meaning of Article III:1, the Panel should have concluded that chrysotile fibres and products compared with PVA, cellulose and glass fibres and products are not ‘like products’ within the meaning of Article III:4 of the GATT 1994.
5. Each criterion and the considerations relevant to the ‘like product’ analysis are discussed below. In summary, it is our submission that the Panel’s approach goes beyond a misapplication of the law and a defiance of common sense. By denying the French Government’s ability to distinguish between products on the basis of known risks to its citizens, the Panel’s analysis would render any

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<sup>5</sup> Adopted panel reports provide guidance and legitimate expectations as to the application of the GATT 1994 *See Japan – Alcoholic Beverages*, p.10.

comparable government action *prima facie* illegal and systematically shift the burden of proof onto regulators to meet the GATT's narrowly drawn exceptions. The essence of the 'like product' criteria is to establish what products are 'like products' *in fact*. It is obvious that a product that can kill its users and totally unsuspecting bystanders is not 'like' other products. The 'like product' test was never intended to override plainly observable facts by virtue of creating legal fictions that make such facts irrelevant.

**II.A. The Panel erred in refusing to take into account the toxicity of chrysotile as an objective and legitimate basis for a regulator and a consumer to distinguish between products on the basis that it would render the other 'like product' criteria redundant (Panel Report, ¶¶8.131-2; see also ¶8.149).**

6. Toxicity is an objective and legitimate criterion for distinguishing between products. The consideration of toxicity does not render the other 'like product' criteria redundant. The characterisation of chrysotile as a carcinogenic material is recognised internationally.<sup>6</sup> The toxicity of chrysotile was acknowledged by both Canada and the EC (Panel Report, ¶ 8.187). Canada failed to prove that the toxicity of chrysotile is not a legitimate basis for regulators and consumers to distinguish between chrysotile and alternative materials.
7. The Panel correctly cited the relevant criteria for identifying 'like products' as: end-uses in a given market; consumers' tastes and habits; the product's properties, nature and quality; and tariff classification.<sup>7</sup> However, these criteria are not exhaustive and the 'like product' determination must be made on a case-by-case basis.<sup>8</sup> A case-by-case assessment, by definition, requires an examination of the meaning of 'like product' in the specific circumstances of each dispute and any number of criteria might be considered relevant in a given case. The evaluation of these criteria does not lead to an "arbitrary decision". Rather... it is a discretionary decision that must be made in considering the various characteristics of products in individual cases.<sup>9</sup> In the circumstances of this case, where a highly toxic material is at issue, the Panel should have taken toxicity into account in determining the meaning of 'like product'.
8. The term 'like product' in Article III:4 is informed by the overriding objective of avoiding protectionism set out in Article III:1.<sup>10</sup> In the abstract, it might be possible to imagine a regulator asserting the toxicity of an imported product as a means of protecting a domestic competitor. In those circumstances, the other 'like product' criteria – far from being redundant – will have special relevance in demonstrating protectionism. In this case, however, the carcinogenic

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<sup>6</sup> See International Agency for Research on Cancer *Monograph on the Evaluation of Carcinogenic Risk of Chemicals to Man – Asbestos*, 1977, Lyon, Vol.14 (recognised that all varieties of asbestos, including chrysotile, are carcinogenic and classified them as in group 1 (known carcinogens); International Labour Organisation, *Convention Concerning Safety in the Use of Asbestos* (Convention 162), adopted 24 June 1986, <http://www.ilo.org/public/english/protection/safework/cis/oshworld/ilostd/c162.htm>, Article 10 (recommended replacement of asbestos by other materials and total prohibition in some circumstances); World Health Organisation, *Chrysotile Asbestos Evaluated by Health Experts*, Press Release WHO/51/REV.1, 10 September 1986, <http://www.who.int/archives/inf-pr-1996/pr96-51.html> (recommended that asbestos, including chrysotile, should be replaced by safer substitutes); World Health Organisation, International Programme on Chemical Safety, *Environmental Health Criteria (203): Chrysotile Asbestos*, 1998 (recognised carcinogenic effects of chrysotile and reiterated calls for replacement of chrysotile).

<sup>7</sup> See *Report of the Working Party on Border Tax Adjustments*, adopted on 2 December 1970, BISD 18S/97 ("Border Tax Adjustments"); *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, 10 October 1987, Report of the Panel adopted on 10 November 1987, BISD 34S/83, 85, ¶5.6 ("Japan – Customs Duties"); *United States – Measures Affecting Alcoholic and Malt Beverages*, Report of the Panel adopted 19 June 1992, BISD 93S/206, ¶5.24 ("Malt Beverages"); *Japan – Alcoholic Beverages*, pp.12-13; *United States – Standards for Reformulated and Conventional Gasoline*, Report of the Panel adopted 20 May 1996, WT/DS2/R, ¶¶6.8-9 ("US – Gasoline Panel"); *Canada – Certain Measures Concerning Periodicals*, Report of the Appellate Body adopted 30 July 1997, WT/DS31/AB/R, p.15 ("Canada – Periodicals").

<sup>8</sup> See *Border Tax Adjustments; Japan – Customs Duties*, ¶5.6; *Malt Beverages*, ¶5.24; *Japan – Alcoholic Beverages*, p.14.

<sup>9</sup> See *Japan – Alcoholic Beverages*, p.12.

<sup>10</sup> *Ibid* p.10 ff; see below fn.13 and accompanying text.

characterisation of chrysotile combined with the differences in the other criteria discussed below, indicate that chrysotile is not 'like' PVA, cellulose and glass within the meaning of Article III:4. Toxicity is relevant to Article III's purpose of avoiding protectionism as it provides an objective non-protectionist basis for distinguishing one product from another. To find otherwise leads to unacceptable results. Regulators would not be permitted to distinguish between all cars that emit lead gas and cars that do not or all waste that is radioactive and waste that is not without first justifying the distinction under one of the limited exceptions under the GATT 1994.

**II.B. The Panel erred in finding that chrysotile has the same properties, nature and quality as PVA, cellulose and glass fibres on the basis that it is with a view to market access that the comparison between the products should be made (Panel Report, ¶¶8.122; 8.144).**

9. Chrysotile fibres and chrysotile-containing cement differ from PVA, cellulose and glass fibres and fibro-cement in their properties, nature and quality. The toxic properties, nature and quality of chrysotile distinguish it from harmless or less toxic alternative materials. The Panel erred by considering 'market access' rather than anti-protectionism as the main policy justification for Article III:4. In doing so, it incorrectly combined the 'like product' analysis with the assessment of the competitive impact of the measure.
10. When a Panel has found that a domestic and an imported product are indeed 'like' under Article III:4, it must then turn to an assessment of whether any difference in the treatment of those products undermines the conditions of competition between these products. The concept of 'market access' or 'competition' becomes relevant under Article III:4 only when the analysis advances to a consideration of 'treatment no less favourable'. As the Appellate Body has stated, '[a]ccording to "treatment no less favourable" means... according to *conditions of competition* no less favourable to the imported product than to the like domestic product.'<sup>11</sup> The trade ban in question will undeniably affect the conditions of competition between chrysotile and other building materials. This does not and should not change the obvious fact that these products are not 'like'. It also appears that the Panel has confused the relevance of competitive impact under Article III:2 with the 'like product' analysis under Article III:4. For reasons peculiar to Article III:2, a Panel must consider whether the imported and domestic products are 'directly competitive and substitutable' when examining a measure under Article III:2 second sentence.<sup>12</sup> Again, the competitive impact that is relevant to the legal interpretation under another section of the GATT 1994 should not play a part in the 'like product' analysis under Article III:4.
11. As a factual matter, the Panel observed that 'in purely physical terms', the parties agreed that chrysotile fibres and PVA, cellulose and glass fibres do not have the same nature or quality (Panel Report, ¶8.121). In addition, the Panel concluded that neither PVA, cellulose nor glass fibres combines 'all the properties and qualities of chrysotile itself' (Panel Report, ¶8.124). However, the avoidance of protectionism forms part of the context in which the meaning of 'like product' in Article III:4 is assessed.<sup>13</sup> Accordingly, it is with a view to avoiding protectionism – as opposed to 'market access' – that the properties, nature and quality of imported and domestic products should be evaluated.

**II.C. The Panel erred in finding that chrysotile fibres and chrysotile cement products, on the one hand, and PVA, cellulose or glass fibres and fibro-cement products on the other have the same end-uses in a given market (Panel Report, ¶8.136; see also ¶8.149).**

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<sup>11</sup> See *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*. Report of the Appellate Body adopted on 10 January 2001, WT/DS161/AB/R; WT/DS169/AB/R, ¶135 ("Korea – Beef") (emphasis in original).

<sup>12</sup> See *Japan – Alcoholic Beverages*, p.14.

<sup>13</sup> Consistent with the Vienna Convention, the ordinary meaning of 'like product' in Article III:4 shall be read in the context and in the light of the object and purpose of Article III and the GATT 1994 as a whole (Art 31(1) of the Vienna Convention; *Japan – Alcoholic Beverages*, p.11). In particular, Article III:4 and each of the other subparagraphs in Article III shall be read in the context of the introductory Article III:1 (*Japan – Alcoholic Beverages*, pp.11-12; see also *Malt Beverages*, ¶ 5.25) the broad purpose of which is 'to avoid protectionism in the application of internal tax and regulatory measures.' (*Japan – Alcoholic Beverages*, p.10).

12. The end-uses of chrysotile and chrysotile-containing products would be different from the end-uses of PVA, cellulose and glass and fibro-cement products in the French domestic market in the absence of the Decree. As a toxic material, chrysotile and products containing it would have limited end-uses in the French market.
13. Chrysotile is a form of asbestos that may be used in its raw form for a number of end-uses including in the manufacture of cement products and friction materials. PVA and cellulose may also be used in the manufacture of cement products and glass may be used in the production of friction materials. Chrysotile-containing cement products may be used in construction and chrysotile-containing friction materials may be used in the manufacture of component products. Cement products containing PVA and cellulose may also be used in construction and friction materials containing glass may be used in the manufacture of component products. However, these end-uses are not to be evaluated in the abstract; they must be examined in the context of a 'given market'. The 'given market' in this case is the French market in the absence of the Decree. Where a ban has been imposed, thereby eliminating the market, hypothetical imports have been considered for the purpose of an Article III assessment.<sup>14</sup> Similarly, hypothetical imports of chrysotile should be considered for the purposes of identifying end-uses in the French market and in comparing them to the end-uses of PVA, cellulose and glass.
14. The French market – comprising manufacturers, builders, engineers, designers, architects and persons acquiring or leasing properties – is well-informed of chrysotile's carcinogenic characterisation. The French market is aware of the liabilities, even assuming the absence of the Decree, associated with harm caused by chrysotile exposure. By Canada's own admission, the dangers of asbestos, including chrysotile, have made a significant impression on the French public.<sup>15</sup> Since 1977, international organisations have identified chrysotile as a known carcinogen and have recommended that it be replaced by other materials where possible.<sup>16</sup> A series of EC Directives implemented over the course of several decades has also limited asbestos use and sale.<sup>17</sup> On a hypothetical basis, it could be assumed that these combined factors would have resulted in a decline in market demand for chrysotile in the absence of the Decree. Carcinogenic chrysotile would be used only where it could not be replaced by another material. Accordingly, it could be concluded that the end-uses of chrysotile would not be the same as the end-uses of PVA, cellulose or glass fibres or fibro-cement in the French market in the absence of the Decree.

**II.D. The Panel erred in failing to give due consideration to consumers' tastes and habits in its assessment of whether chrysotile fibres are like PVA, cellulose or glass fibres (Panel Report,**

<sup>14</sup> See *Canada – Periodicals*, p.15.

<sup>15</sup> In its arguments before the Panel, Canada referred to 'heavy media coverage of diseases caused by uncontrolled use of asbestos in France', '[a]larmist campaigns that condemned all forms of asbestos' and 'public opinion' that had been 'badly shaken', Panel Report, ¶¶3.10; 3.26.

<sup>16</sup> See above, fn.5

<sup>17</sup> *Council Directive 67/548/EEC* of 27 June 1967 on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances OJ 196 16.8.1967 p.1 (as amended, classified all types of asbestos as category I carcinogens); *Council Directive 76/769/EEC* of 27 July 1976 on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations OJ L 262 27.9.1976 p.201 (as amended, recognised that asbestos and certain products can cause cancer and asbestosis and prohibited the marketing and sale of certain forms of asbestos); *Council Directive 83/477/EEC* of 19 September 1983 on the protection of workers from the risks related to exposure to asbestos at work (second individual Directive within the meaning of Article 8 of Directive 80/1107/EEC) OJ L 263, 24.9.1983 pp.25-32 (as amended, recognised that asbestos is harmful); *Council Directive 87/217/EEC* of 19 March 1987 on the prevention and reduction of environmental pollution by asbestos OJ L 85, 28.3.1987 p.40-45 (as amended, introduced controls on wastes containing asbestos); *Council Directive 90/394/EEC* of 28 June 1990 on the protection of workers from the risks related to exposure to carcinogens at work (Sixth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) OJ L 195, 26.7.1990 pp.1-7 (as amended, introduced the principle of substitution in the workplace (Article 4)); *Council Directive 91/689/EEC* of 12 December 1991 on hazardous waste OJ L 377, 31.12.1991 p. 20 – 27 (as amended, lists asbestos as hazardous waste) (replacing *Council Directive 78/319/EEC* of 20 March 1978 on toxic and dangerous waste OJ L 84, 31.3.1978 p. 43 (introduced measures to prevent and reduce environmental pollution, including control on wastes containing asbestos).

**¶8.139) and concluding that French consumers consider chrysotile-cement and fibro-cement products to be interchangeable (Panel Report, ¶8.146).**

15. As discussed in the context of end-use in a given market, the potential consumers of chrysotile and chrysotile-containing products in France are acutely aware of chrysotile's carcinogenic characterisation and the potential harm and liabilities associated with exposure to it.<sup>18</sup> French consumers would choose to use chrysotile only where there was no alternative. From the subjective perspective of consumers, a deadly material will not be considered 'like' a harmless or less toxic material.<sup>19</sup>
16. French consumers would not consider a toxic and non-toxic substance to be interchangeable. Accordingly, they would differentiate between chrysotile and alternative materials in their tastes and habits. The Panel was wrong to conclude otherwise.

**II.E. The Panel erred in concluding that it is necessary for a Panel to assess the situation at the time prior to the entry into force of the ban in the Decree in determining the tastes and habits of consumers (Panel Report, ¶8.139).**

17. As discussed above, where a market has been eliminated by the imposition of a ban, hypothetical imports may be considered in an analysis of Article III.<sup>20</sup> Accordingly, the Panel should have considered consumers' tastes and habits in the absence of the Decree, assessing the tastes and habits in the context of hypothetical imports of chrysotile.

**II.F. The Panel erred in its selective consideration of the tariff classification criterion and failing to give due consideration to the distinct tariff classification for asbestos (Panel Report, ¶¶8.143; 8.148).**

18. The Harmonised Commodity Description and Coding System developed by the World Customs Organisation classifies asbestos, which would include chrysotile, separately from PVA, cellulose and glass (Panel Report, ¶8.143). Asbestos cement and cellulose fibro-cement are classified together (Panel Report, ¶8.148). Although different or identical tariff classifications are not decisive indicators of whether products should be considered 'like', they are equally relevant to the 'like product' evaluation under Article III:4 and should be given equal consideration in the identification of 'like products'.
19. The Panel found that 'the fact that asbestos fibres are classified in their own [tariff] heading is [not] decisive in this case' (Panel Report, ¶8.143) but took note of the fact that 'the HS tariff classification (heading 68.11) is the same for articles of asbestos-cement, of cellulose-cement or the like.' (Panel Report, ¶8.148). The Panel erred in selectively considering the tariff classification criterion; it disregarded the weight of the criterion where it demonstrated the relevant products to be different and only took it into account where the classification for the products in question was the same.
20. Due weight should have been given to the tariff classification in both instances. Combined with the differences evident in the other criteria, the different classification for asbestos should have contributed to a finding that chrysotile is not like PVA, cellulose and glass. The single classification for asbestos cement and cellulose cement could tend towards a finding of likeness although the convincing weight of the other criteria would still justify a conclusion that the cement products are not 'like' under Article III:4.

**II.G. The Panel erred in its finding that consideration of toxicity for the purposes of Article III would render Article XX redundant (Panel Report, ¶8.130).**

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<sup>18</sup> See above, fn.15.

<sup>19</sup> It has been noted that 'the "likeness" of products must be examined taking into account not only objective criteria ... but also the more subjective consumers' viewpoint (such as consumption and use by consumers)' (*Japan – Customs Duties*, ¶5.7).

<sup>20</sup> See above, fn. 14 and accompanying text.

21. Consideration of toxicity in the interpretation of ‘like product’ would not make Article XX redundant. Each provision of a treaty must be interpreted to give effect and meaning to all of the treaty’s provisions.<sup>21</sup> Accordingly, the factual and legal analysis for the purposes of Article XX is distinct from that required of Article III.<sup>22</sup> An assessment of toxicity for the purposes of Article III is different from a consideration of toxicity in the context of what is ‘necessary’ to protect human, animal or plant life or health for the purposes of Article XX(b).
22. Toxicity is capable of objective assessment in determining the meaning of ‘like product’ under Article III:4. Chrysotile is known to be toxic – no party contested its carcinogenic characterisation (Panel Report, ¶8.187). Within the flexible matrix of ‘like product’ criteria, toxicity is an objective basis for distinguishing between products. An assessment of toxicity under Article XX is also relevant to the consideration of ‘necessary’ under subparagraph (b) and to the determination of what is ‘arbitrary or unjustifiable’ or ‘disguised’ under the introductory clauses of Article XX. In contrast to Article III, the consideration of toxicity in Article XX extends the examination beyond inherent aspects of the product to the reasonable responses of national governments to toxicity of the product.
23. The consideration of toxicity – in combination with other relevant criteria and factors – leads to a conclusion in this case that the products are not ‘like’. Accordingly, the measure in question is not inconsistent with Article III and it is not necessary to analyse the measure under Article XX. Nevertheless, Article XX continues to have meaning and effect in cases where the confluence of relevant factors in any given case lead to a different conclusion or where other substantive provisions of the GATT 1994, such as Article XI, are applied.

**II.H. In deferring the consideration of toxicity to Article XX, the Panel erred by relieving Canada of its burden of proving that toxicity is not an objective and legitimate basis for regulators and consumers to distinguish between chrysotile and alternative materials (Panel Report, ¶8.132).**

24. Under Article III, the complaining party – Canada – must demonstrate that toxicity is not a legitimate basis for treating chrysotile differently from alternative materials.<sup>23</sup> As discussed above, Canada must show that toxicity does not impact on end-uses in the French market, on consumers’ tastes and habits and that it does not make chrysotile’s properties, quality and nature different from alternative materials. By releasing Canada of its burden of proving that toxicity is not a basis for distinguishing between chrysotile and its alternatives, the Panel wrongfully passed the responsibility to the European Communities by making it defend the measure under Article XX.<sup>24</sup>

**II.I. The Panel erred in failing to recognise that the purpose of Article III in seeking to avoid protectionism could not be frustrated where there is no domestically-produced product.**

<sup>21</sup> See *US – Gasoline*, pp.14-15; *Japan – Alcoholic Beverages*, p.7.

<sup>22</sup> See *US – Gasoline*, pp.14-15; *United States – Import Prohibition of Shrimp and Shrimp Products*, Report of the Appellate Body adopted 6 November 1998, WT/ DS58/ AB/R, ¶120 (“*US – Shrimp*”) (the Appellate Body’s conclusions with respect to Article XX apply equally in reverse to the interpretation of Article III).

<sup>23</sup> The complaining party bears the burden of proving discrimination between ‘like products’ under Article III. See *Indonesia – Certain Measures Affecting the Automobile Industry*, Report of the Panel adopted 23 July 1998, WT/DS54/R; WT/DS55/R; WT/DS59/R; WT/DS64/R, ¶14.169; *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses*, Report of the Appellate Body adopted 23 May 1997, WT/DS33/AB/R, p.10 (“*US – Wool Shirts*”).

<sup>24</sup> The party claiming the benefit of the exception bears the burden of proving that the requirements of Article XX have been satisfied (*US – Wool Shirts*, pp.10-11; see also *US – Gasoline*, pp.14-15), with the burden with respect to the introductory clauses being heavier than that which is required with respect to provisional justification under the subparagraph (*US – Gasoline*, p.15; see also *United States – Section 337 of the Tariff Act of 1930*, Report of the Panel adopted 7 November 1989, BISD 36S/345, ¶5.27 (“*US – Section 337*”).

25. Where there is no domestically-produced product, there is no risk of protectionism under Article III.<sup>25</sup> PVA is not produced in France and cellulose and glass are produced in France primarily for use in products that are not substitutes for chrysotile (Panel Report, ¶¶3.19; 3.194). Accordingly, even if it were the case that PVA, cellulose and glass fibres were ‘like’ chrysotile, the Decree could not violate Article III which relies on a comparison between foreign and domestically-produced products.
26. In its analysis, the Appellate Body is limited to issues of law.<sup>26</sup> However, where questions of law are based on facts that are wrong, the legal conclusion is also wrong.<sup>27</sup> Accordingly, if the Appellate Body upholds the Panel’s conclusions with respect to ‘like product’, it should nevertheless find that the Decree is not inconsistent with Article III because the ‘like products’ are not produced domestically.

**II.J. The Panel erred in concluding that a measure that does not discriminate between products on the basis of their national origin amounts to *de jure* discrimination (Panel Report, ¶8.155).**

27. The Decree does not, *de jure*, treat imported chrysotile fibres and chrysotile-cement products less favourably than domestic PVA, cellulose or glass fibre and fibro-cement products. *De jure* discrimination requires express discrimination on the basis of country of origin. The Decree bans all forms of asbestos, subject to limited exceptions, regardless of their country of origin.<sup>28</sup> The Panel erred in basing its assessment of *de jure* discrimination on the products as opposed to their origin.
28. Previous panels and the Appellate Body have examined both *de jure* and *de facto* discrimination under Article III. *De jure* discrimination exists where the terms of the measure in question expressly discriminate between domestic and foreign ‘like products’ on the basis of their country of origin.<sup>29</sup> In contrast, *de facto* discrimination occurs where, despite being facially neutral as to the origin of the products covered, the measure amounts to treatment less favourable for foreign as compared with domestic ‘like products’.<sup>30</sup> The Decree does not identify products on the basis of their country of origin. Accordingly, the Decree does not constitute *de jure* discrimination. If asbestos were deemed to be like another domestic product, it would be capable of constituting only origin-neutral *de facto* discrimination.
29. The *de jure* and *de facto* distinction is relevant to the Article III:4 analysis at two stages. First with respect to the meaning of ‘like product’ and secondly, with respect to identifying ‘less favourable’ treatment. Consistent with jurisprudential opinion in jurisdictions considering analogous provisions to Article III, *de jure* discrimination could justify stretching the ‘like

<sup>25</sup> Article III:4 of the GATT 1994 provides that with respect to certain laws, regulations and requirements, imported products ‘shall be accorded treatment no less favourable than that accorded to like products of national origin’; Article III:4 is informed by Article III:1 which states Article III’s purpose as being the avoidance of protectionism. See *Japan – Alcoholic Beverages*, p.10 (discussed above fn.13).

<sup>26</sup> *The Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”)*, Article 17.6.

<sup>27</sup> See *Canada – Periodicals*, pp.15-16.

<sup>28</sup> For the protection of workers, the Decree prohibits the manufacture, processing, sale, import, placing on the domestic market and transfer of all varieties of asbestos fibres, regardless of whether these substances have been incorporated into other products. For the purpose of protecting consumers, the Decree prohibits the manufacture, import, domestic marketing, exportation, possession for sale, offer, sale and transfer of all varieties of asbestos fibres and products containing asbestos. Certain existing chrysotile-containing products are permitted in restricted circumstances (see Articles 1 and 2 of the Decree).

<sup>29</sup> See *Italian Discrimination against Imported Agricultural Machinery*, Report of the Panel adopted 23 October 1958, BISD 7S/60; *Taxes on Petroleum and Certain Imported Substances*, Report of the Panel adopted on 17 June 1987, BISD 34S/136; *US – Section 337*; *US – Gasoline*; *Korea–Beef*.

<sup>30</sup> See *Malt Beverages*; *United States – Taxes on Automobiles*, Unadopted Report of the Panel dated 11 October 1994, WT/DS31/R; *Japan – Alcoholic Beverages*; *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Report of the Appellate Body adopted 25 September 1997, WT/DS27/AB/R (“*EC – Bananas*”).

product' accordion to include a wider range of products.<sup>31</sup> *De facto* discrimination – by its nature more difficult to identify – would warrant a narrower reading of 'like product', requiring the complaining party to bear a greater burden of proof with respect to origin-neutral measures.<sup>32</sup>

30. Similarly, in demonstrating treatment 'less favourable', the complaining party might also bear a greater burden of proof in the case of *de facto* discrimination. However, in light of our conclusion that chrysotile is not 'like' alternative materials, it was unnecessary for the Panel to determine whether the Decree afforded treatment to chrysotile products that is less favourable than that afforded to alternative materials.

### **III. In the alternative, the Panel was correct in its conclusion that the Decree is justified under Article XX of the GATT 1994 (Panel Report, ¶9.1).**

31. If the Appellate Body upholds the Panel's conclusions with respect to Article III:4, the Applicants would urge that it also uphold the Panel's finding that the Decree is justified under Article XX(b). In particular, we would ask the Appellate Body to confirm first, that the Decree is a measure necessary to protect human, animal or plant life or health under subparagraph (b) of Article XX and, secondly, that it does not constitute arbitrary or unjustifiable discrimination nor is it a disguised restriction on international trade within the meaning of the introductory clauses of Article XX.
32. We note, however, that the Panel made some errors of law in its Article XX analysis which should be corrected and we believe that it would provide helpful guidance if the Appellate Body were to clarify some of the basic principles as applied in the Panel Report.
33. The Panel's errors of law under Article XX and the points of clarification are discussed below.

### **III.A The Panel erred in law and made unclear statements in concluding that it was required to determine whether chrysotile poses a risk to human life or health under subparagraph (b) of Article XX (Panel Report, ¶8.170).**

34. A panel asked to analyse Article XX(b) must first decide a threshold question of whether the measure falls within the category of measures designed to protect human, animal or plant life or health. If the panel finds that a measure does fall within that category, it must then consider whether the measure is 'necessary' to protect human, animal or plant life or health.<sup>33</sup> This threshold question does not require the Panel to review any evidence of a scientific nature nor to carry out a risk assessment.
35. International consensus, evidenced by reliable documentation, as to chrysotile's carcinogenic character, is sufficient for the Panel to reach the threshold conclusion that the Decree is designed to protect human life or health within the meaning of subparagraph (b) of Article XX. The Decree regulates the use, sale and transfer of asbestos 'to protect' workers and consumers from exposure to asbestos, a cancer-causing material known to cause injury and death to humans. Chrysotile's carcinogenic rating is recognised in international documents and this was not disputed by the parties (Panel Report, ¶¶8.187-188).<sup>34</sup> The Panel erred in requiring the European Communities to present scientific evidence as to the risks associated with chrysotile to decide

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<sup>31</sup> In its guiding interpretation of 'like product', the Appellate Body has stated that: 'The concept of "likeness" is a relative one that evokes the image of an accordion. The accordion of "likeness" stretches and squeezes in different places as different provisions of the WTO Agreement are applied.' (*Japan – Alcoholic Beverages*, p.13).

<sup>32</sup> See argument in *US – Section 337*, ¶3.18.

<sup>33</sup> In analysing other subparagraphs, the Appellate body has found that provisional justification under subparagraph (b) of Article XX requires a determination as to whether the relevant measure (i) concerns the protection of human, animal or plant life or health and (ii) is 'necessary' to protect human, animal or plant life or health. See *Korea – Beef*, ¶157; *US – Shrimp* ¶¶125ff.

<sup>34</sup> International and conventional and customary principles are relevant interpretative aids, see *US–Shrimp*, ¶¶130 ff and 154.



whether the Decree fell within the category of measures covered by subparagraph (b) (Panel Report, ¶8.184).

36. Having satisfied the threshold question, the Panel correctly proceeded to consider whether the Decree was ‘necessary’ under Article XX(b) (Panel Report, ¶8.195). The Panel properly found that Decree was ‘necessary’ because there are no alternative measures consistent or less consistent with the GATT 1994 which the European Communities could reasonably be expected to employ (Panel Report, ¶8.199).<sup>35</sup> Nevertheless, the Appellate Body should confirm that ‘sufficient scientific evidence’ (Panel Report, ¶8.182) to support a conclusion as to what is ‘necessary’ does not require the presentation of undisputed scientific evidence of a risk to human life or health. Even if the carcinogenic status of chrysotile had been contested by Canada, the precautionary principle demands significant deference to national decisions concerning the protection of human, animal or plant life or health.<sup>36</sup>
37. The Panel seeks to introduce a series of tests that would require a regulator to demonstrate it had ‘sufficient scientific evidence’ to ‘reasonably conclude’ that it had met each step of an Article XX analysis. In doing so, the Panel has transformed a simple threshold test concerning the measure’s policy objective into a scientific risk assessment for which there is no basis in the text of Article XX. The Panel’s recurring inquiry into the sufficiency of scientific evidence in the context of a dispute where the hazardous nature of the product is undisputed, implied too great a burden on the regulator. Science is not the sole arbiter of objective, non-discriminatory policymaking. The precautionary principle, which informs the interpretation of this and other aspects of the WTO Agreements, entitles regulators to act with precaution without having to meet a set threshold of scientific certainty.
38. Further, the Appellate Body should also note that, as correctly stated by the Panel, it is up to each WTO Member to decide the level of protection it wishes to provide (Panel Report, ¶8.171; see also ¶8.179). A determination that France could ‘reasonably be expected’ to employ alternative measures would have to have been made on the basis that the desired objective is, as determined by France, absolute protection as represented by a trade ban. To find for Canada, the Panel would have then been required to find that there are alternative measures that provide the same level of protection as a ban. In this case, Canada failed to show that controlled use provides absolute protection from exposure to chrysotile (Panel Report, ¶8.211) leading the Panel to conclude that the Decree was necessary to protect human health and life within the meaning of subparagraph (b) of Article XX.

**III.B. The Panel was correct to conclude that a lack of scientific certainty as to the harmful effects of substitute products does not prevent France from implementing measures with respect chrysotile (Panel Report, ¶8.221).**

39. Canada argued that as long as the risks associated with substitute products were unknown, France should not be permitted to legislate with respect to chrysotile (Panel Report, ¶8.220). The Panel correctly observed that ‘to make the adoption of health measures concerning a definite risk depend upon establishing with certainty a risk already assessed as being lower than that created by chrysotile would have the effect of preventing any possibility of legislating in the field of public health.’ (Panel Report, ¶8.221).
40. In support of the Panel’s conclusion, the Appellate Body should confirm that, where a product has the potential to do harm to human, animal or plant life or health, measures may be implemented with respect to that product without requiring a WTO Member to show that alternative products cause less harm.

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<sup>35</sup> An interpretation of ‘necessary’ may extend to an assessment of alternative measures consistent or less consistent with the GATT 1994 which the defending party could reasonably be expected to employ (*see US – Section 337*, ¶5.26; *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, Report of the Panel adopted on 7 November 1990, BISD 37S/200 (both applied by panel in *US – Gasoline Panel*, ¶6.24 and in *Korea – Beef*, ¶166).

<sup>36</sup> *See above*, fn. 34.

**IV. The Panel erred in entertaining Canada’s complaint with respect to Article XXIII:1(b) of the GATT 1994 (Panel Report, ¶8.262).**

41. The Panel’s consideration of Article XXIII:1(b) – the so-called non-violation clause - sets a dangerous procedural precedent that will encourage complainants to raise alternative arguments under Article XXIII:1(b) in an effort to seek compensation for measures found not to conflict with the GATT 1994.
42. WTO Members and past panels have considered that ‘the non-violation remedy should be approached with caution and should remain an exceptional remedy’.<sup>37</sup> Historically, the non-violation clause has been used to prevent tariff concessions under Article II of the GATT 1994 from being undermined by the use of subsidies.<sup>38</sup> However, with the introduction of a raft of WTO agreements covering subsidies and other measures that might threaten the integrity of market access commitments, commentators have agreed that the scope of Article XXIII:1(b) has been greatly reduced.<sup>39</sup> The Appellate Body has recognised in the past that meanings of terms and provisions in the GATT 1994 are not static but evolutionary.<sup>40</sup> Accordingly, the non-violation clause should be interpreted and applied with regard to the changing context and circumstances in which measures are taken.
43. Recognising that the scope of Article XXIII:1(b) should be confined, the Panel was wrong to scrutinise the Decree under the non-violation clause when it had already been found to have been justified under Article XX (Panel Report, ¶8.264). The non-violation clause should not be read as a catch-all provision. Rather, Article XXIII:1(b) should be used only as a safety net for measures not otherwise covered by the WTO agreements. If Article XX is to be read in accordance with the principle that all terms in a treaty shall be read to have meaning and effect,<sup>41</sup> it must be done on the basis that a determination under Article XX precludes a claim under XXIII:1(b). WTO Members should not be ‘tried twice’ under the GATT 1994 with respect to the same measure. To give WTO Members two opportunities to seek redress with respect to a single measure creates legal uncertainty for WTO Members. Accordingly, the non-violation clause should be considered by panels in only exceptional circumstances where the measure is not otherwise covered by the WTO agreements. Taking the unacceptable consequences of applying Article XXIII:1(b) to a measure that has been justified under the GATT 1994 to their extreme, a government could be found liable to pay compensation to the creator of a health hazard or the polluter of the environment in a foreign country. The ‘polluter pays principle’ should not be turned into a ‘pay the polluter principle’ through the inappropriate application of the non-violation clause.<sup>42</sup> A state that has violated its obligation under customary international law not to cause environmental damage in another state must not then be entitled to claim compensation from the damaged state under Article XXIII:1(b).<sup>43</sup>

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<sup>37</sup> See *Japan – Measures Affecting Consumer Photographic Film and Paper*, Report of the Panel adopted 22 April 1998, WT/DS44/R, ¶¶10.36-7 (“*Japan – Film Products*”).

<sup>38</sup> See *Japan – Film Products*, ¶¶10.35-6; *European Economic Community – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, Report of the Panel adopted on 25 January 1990, BISD 37S/86, ¶148.

<sup>39</sup> See P.J. Kuyper, “The Law of GATT as a Special Field of International Law: Ignorance, further refinement or self-contained system of international law?”, *GATT LAW* (1994), 247.

<sup>40</sup> See *US – Shrimp*, ¶130.

<sup>41</sup> See *US – Gasoline*, pp.14-15; *Japan – Alcoholic Beverages*, p.7.

<sup>42</sup> The international legal principle that polluters should bear the cost of their pollution is set out in Principle 16 of the United Nations Conference on Environment and Development, Rio Declaration on Environment and Development, adopted at Rio de Janeiro, 14 June 1992, 31 ILM. 874 (1992) (the “Rio Declaration”), is derived from other Principles in the Rio Declaration (e.g. Principle 7) and other international and regional instruments (e.g. 1972 OECD Council Recommendation on Guiding Principles Concerning the International Economic Aspects of Environmental Policies, C(72)128 (1972) 14 ILM (1975), European Communities, First Environmental Action Programme 1973-1976, OJ C 112, 20.12.1973).

<sup>43</sup> The customary international legal principle that states have a responsibility not to cause damage to the environment of other states is set out in Principle 21 of the Declaration of the United Nations Conference on the Human Environment, adopted at Stockholm, 16 June 1972, 11 ILM. 1416 (1972) and Principle 2 of the Rio Declaration.

**V. With respect to the four briefs received from non-parties before the completion of the interim review, the Panel erred in failing to give reasons for considering only those briefs that were appended to parties' submissions (Panel Report, ¶8.12).**

44. Consistent with principles of fairness and due process, the Panel should have provided reasons for its decision not to consider two of the four letters submitted before the interim review, including the information submitted by the Ban Asbestos Network dated 22 July 1999. Moreover, it is in the Panel's discretion to consider any information submitted by non-parties to a dispute, regardless of whether such information is appended to a party's submission.
45. The Appellate Body has often recognised that the dictates of due process apply to panels' procedures.<sup>44</sup> The expectation of fairness and due process extends not only to parties to the dispute but to any person engaged in the dispute settlement process, including non-parties submitting information to the Panel. Accordingly, the Panel should have given reasons for not accepting two of the four submissions made by non-parties before the interim review.
46. It should be noted that, in discharging their duty under Article 11 of the DSU to undertake an objective assessment of the facts, panels have a broad discretion to consider or reject information submitted to them by non-parties to the dispute, regardless of whether the information was requested by the Panel.<sup>45</sup> The Appellate Body has confirmed that Panels have 'ample and extensive authority' under the DSU to grant non-parties permission to file a statement or brief.<sup>46</sup> The Appellate Body should take this opportunity to confirm that the Panel's authority extends to all information submitted by non-parties and such information need not be appended to a party's submission.<sup>47</sup> Indeed, an objective assessment would be facilitated by a submission from a financially disinterested non-party whose analysis is independent and uncompromised by the parties' positions.

**VI. Conclusion**

47. As people dedicated to protecting workers and consumers around the world from exposure to asbestos, the Applicants implore the Appellate Body to endorse the outcome of the Panel Report in upholding the French prohibition of asbestos. In implementing the Decree, France has done what we hope all national governments will do to protect the lives and health of their citizens. France's good faith domestic action to protect its people must not be thwarted by an unwarranted construction of international trade rules.
48. As friends of the court, we appeal to you to have regard to our interests and concerns in making your determinations and recommendations in the settlement of this dispute.

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<sup>44</sup> See *EC – Bananas*, ¶144; *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, Report of the Appellate Body adopted 16 January 1998, WT/DS50/AB/R, ¶95; *Argentina – Certain Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, Report of the Appellate Body adopted 22 April 1998, WT/DS56/AB/R, ¶79; *Brazil – Measures Affecting Desiccated Coconut*, Report of the Appellate Body adopted 20 March 1997, WT/DS22/AB/R, p.15; *European Communities – Measures Affecting Meat and Meat Products (Hormones)*, Report of the Appellate Body adopted 13 February 1998, WT/DS26/AB/R; WT/DS48/AB/R, ¶133.

<sup>45</sup> See *US – Shrimp*, ¶¶106-108.

<sup>46</sup> See *US – Shrimp*, ¶¶106-107.

<sup>47</sup> In *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 by Canada*, Report of the Panel adopted on 20 March 2000, WT/DS18/RW, ¶¶7.8-9, the Panel accepted and took into account information submitted by 'Concerned Fishermen and Processors' and not appended to a party's submission; see also *European Communities – Anti-dumping Duties on Imports of Cotton-type Bed Linen from India*, Report of Panel (subject to appeal) dated 30 October 2000, WT/DS142/R, ¶6.1, fn.10 where a non-party submission not appended to a party's submission was accepted though the Panel concluded that it was not necessary to take it into account.