

The WTO Impact on Internal Regulations—A Case Study of the Canada–EC Asbestos Dispute

ROBERT HOWSE and ELISABETH TUERK*

INTRODUCTION¹

THE WTO² is facing increasing criticism. This was highlighted during the third ministerial meeting in Seattle, where massive street protests disrupted the conduct of the conference. Apart from demonstrations, a series of groups used the Seattle ministerial meeting to articulate a range of views on the future of the trading system, in most cases far more subtle than a blanket or dogmatic rejection of globalisation or even the WTO. Non-governmental organisations and public policy-makers from all over the world met to analyse WTO policies

* The authors would like to thank staff of the disputing countries' delegations for making available parts of the written documentation and scientific background on the case. Robert Howse especially thanks Steve Pepa, Petros Mavroidis, Marco Bronckers, Bill Davey, Don Regan, Julie Soloway and Joseph Weiler for challenging discussions on some of these issues over the last couple of years, and Todd Carpunky, Yvan Fauchere, Gaetan Verhoessel and Robert Madelin and his team at DG Trade for more recent exchanges. We also thank Bob Hudec, Merit Janow and Gary Horlick for extremely helpful comments on an early draft (Bob has been enormously generous to us, providing extensive comments on several versions and engaging in multiple email exchanges on the key issues); we also benefited from the reactions of several of the participants at the conference at the European University Institute where the first draft was presented, especially Armin von Bogdandy, Piet Eeckhout, Joanne Scott, Gráinne de Búrca, and Ernst-Ulrich Petersmann. The discussion of the case on the Jean Monnet website has also been very helpful to us and we are grateful to Joseph Weiler for providing that forum for discussion. The views expressed in this chap. are the author's personal views and not those of CIEL.

¹ Because of length considerations and in order better to focus on those issues relevant for understanding the implications of WTO disciplines on domestic regulations, the authors decided to not canvass every aspect raised in the *Asbestos* case. Amongst the broad range of issues addressed in this dispute but nevertheless outside the scope of this chap. are questions relating to the panel's obligation under Art. 11 DSU (Dispute Settlement Understanding) the handling of *amicus curiae* briefs or the application of non-violation disputes for measures justified under a general exception. In order to facilitate understanding of the broader implications for internal regulatory autonomy, the authors have also finessed some technical arcania, for example while the panel and the AB (Appellate Body) conducted a separate analysis of fibres and asbestos-containing products under national treatment, we have treated the two analyses as the same because in the end the separation does not make a difference the basic conceptual and doctrinal questions we want to address here.

² Marrakesh Agreement Establishing the World Trade Organization (1994) 131 ILM 1125 (hereinafter WTO Agreement).

and their potential impacts. Amongst the most common criticisms was the WTO's alleged role in impeding national governments from granting adequate protection to the environment, or addressing consumer interests and national health and safety concerns.

Different understandings concerning the extent to which WTO rules constrain domestic regulatory autonomy have manifested themselves in recent high profile trade controversies. In the famous *Beef Hormones* case,³ the USA successfully challenged the EC's ban on beef injected with natural and synthetic growth hormones. The regulatory measure in question had been adopted in a response to European consumers' concerns about potential health effects of such hormones being present in foodstuffs. Similarly, in the case of genetically modified organisms (GMOs), where European consumers' reluctance towards genetically modified foods triggered the European institutions to adopt detailed regulations regarding risk assessment, release authorisation, subsequent monitoring and labelling of GMOs. The WTO consistency of this regulatory framework was repeatedly the subject of controversy in the TBT Committee.⁴ So far the European scheme has not been subject to dispute settlement at the WTO. While there have been few cases where domestic regulations on health, safety or the environment have been directly challenged and found in violation of WTO law,⁵ the WTO rules may already be having a chilling effect on the strengthening or development of such domestic regulatory schemes in other WTO members, thereby constraining or impeding democratic choices. If the WTO is to regain citizens' confidence, it has to prove its ability to balance the freedom of governments to pursue legitimate domestic objectives with the need to secure the benefits of trade liberalisation.

Given the economic experiences prior to the Second World War, the legal framework created by the founding fathers of the GATT⁶ focused on the elimination of discriminatory practices, either explicit border measures such as tariffs and quotas or domestic regulations and policies that discriminate against imports. Thus, the fundamental constraint on domestic regulations in the original GATT was that such regulations must not discriminate either against imports

³ Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R and WT/DS48/AB/R, 13 February 1998 (hereinafter *Hormones*). In fact, the Appellate Body decision in this case, unlike that of the panel, was respectful of domestic regulatory autonomy, upholding the panel on very narrow grounds.

⁴ Committee on Technical Barriers to Trade, established by Art. 13 of the TBT Agreement (Agreement on Technical Barriers to Trade), Annex 1 A to the WTO Agreement, Multilateral Agreements on Trade in Goods (hereinafter TBT Agreement).

⁵ Most of these cases, like the *Hormones* case, *supra* n. 3, have been in the food safety area, pursuant to the WTO SPS Agreement (Agreement on Sanitary and Phytosanitary Measures), Annex 1 A to the WTO Agreement, Multilateral Agreement on Trade in Goods (hereinafter SPS Agreement). For measures which could potentially fall under both the SPS and the TBT, the latter (TBT) defers to the SPS. (Art. 1.5 TBT). Given that the SPS deals predominantly with measures addressing food safety concerns, most other measures would therefore fall under TBT. (Annex A SPS establishes that the SPS covers measures to protect human, animal and plant health, from risks arising from pests and food borne diseases.)

⁶ The text of the original GATT 1947 (General Agreement on Tariffs and Trade) is now incorporated as GATT 94 into the WTO Agreement (hereinafter GATT 94).

or between different GATT member states (National Treatment⁷ and Most-Favoured Nation Treatment⁸ (MFN)). With the increasing success of the GATT in the elimination of discriminatory measures, attention eventually came to focus on non-facially discriminatory policies and regulations thought to have negative impacts on trade. Sometimes, the existence of different regulations in different countries might in itself increase the transaction costs of trade, requiring producers to adapt products to the regulatory environment in different national markets.

Also, and perhaps more importantly, protective discrimination might be hidden or structurally embedded in regulatory schemes that themselves do not explicitly contain nationality-based distinctions. For example, domestic regulations might require a particular technology on safety grounds to which domestic producers had already adapted their production, while a variety of technological approaches might in principle be possible to satisfy the regulatory concern at issue. Because of the possibility that countries might simply shift protectionism from explicit facially discriminatory measures, to regulatory schemes that were covertly or structurally discriminatory, the GATT jurisprudence evolved so as to encompass protective discrimination not reflected in explicit facial classifications on the basis of national origin, and in particularly the test of “like products” in the National Treatment obligation of the GATT, came to be interpreted in such a manner as to provide some scrutiny of non-nationality based regulatory distinctions, to ensure that those distinctions were not merely surrogates for (obviously illegal) nationality-based ones.⁹

Deciding on a case-by-case basis which non-nationality-based regulatory classifications represent *de facto* or hidden discrimination and which represent an innocuous disparate impact on trade, unrelated to protection, is a delicate and complex exercise. Here, casting the net too broadly might transform the WTO dispute settlement organs into a routine reviewing court for ordinary domestic regulations, placing undue limits on non-protectionist regulatory processes.¹⁰ On the other hand, a failure to consider seriously the possibility of *de facto*

⁷ Art. III GATT. For a superb account of the evolution of the non-discrimination norm in the GATT/WTO regime, see Robert Hudec, “GATT Constraints on National Regulation: Requiem for an ‘Aim and Effects’ Test” (1998) 32 *The International Lawyer* 623 (hereinafter, “Requiem”).

⁸ Art. I GATT

⁹ Panel Report, *United States—Section 337 of the Tariff Act of 1930*, BISD 36S (1990) (hereinafter *Section 337*); Panel Report, *Canada—Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, BISD 39S (1992) (hereinafter *Canada Beer*); Panel Report, *EEC—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS/27/ECU/GUA/HON/MEX/USA (hereinafter *Bananas Panel*); Appellate Body Report, *EEC—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, 25 September 1997 (hereinafter *Bananas AB*).

¹⁰ Of course, in such cases there might still be a possibility to justify the measure under one of the exception provisions of Art. XX, such as Art. XX (b), which refers to measures necessary, *inter alia*, for the protection of human life and health. But as Hudec points out, the kind of justificatory burden imposed in Art. XX assumes that a violation of the GATT has already occurred, and is designed to deal with measures, which are discriminatory, presumptively protective, and therefore which it seems entirely appropriate to expect members to have to justify in dispute settlement as in fact tailored to non-protectionist objectives. Hudec, “Requiem”, *supra* n. 7.

discrimination could undermine the integrity of disciplines on discriminatory measures generally, providing a ready means of cheating with impunity on those explicit commitments.

Such considerations resulted in the Uruguay Agreements on Sanitary and Phytosanitary Measures (SPS) and Technical Barriers to Trade (TBT). These Agreements contain a range of disciplines on the regulatory *processes* that generate domestic regulations, requiring the kind of transparency, coherence, and consistency in regulation that provides trading partners with assurances that protectionism is not embedded at some deep level in the regulatory process itself.¹¹ To the extent that these norms are followed, the need for case-by-case judgments under Article III should be obviated, or at least those judgments should be easier to make with legitimacy. As well, these Agreements seek to reduce gratuitous regulatory diversity, requiring or encouraging (in the case of SPS) the use of international standards as inputs¹² in the domestic regulatory process, where this is consistent with the attainment of the regulatory objectives of the member state. At the same time the SPS and TBT Agreements contain certain substantive criteria or tests, related to “inputs” or “outputs” of the regulatory process, which on some interpretations amount to a second guessing of democratic domestic choices about complex trade-offs between different regulatory objectives, different risks and different regulatory instruments, even in the case of facially non-discriminatory regulations, which have not been shown to be protectionist. Thus, the recent criticisms and worries that we have discussed above concerning the increasing intrusiveness of multilateral trade rules, and trade tribunals, into democratic domestic regulation.

The recent Canadian challenge to France’s ban on asbestos in construction materials provides a dramatic example of how WTO rules may be invoked to challenge domestic measures aimed at addressing serious health risks. Asbestos has been long known to be a deadly carcinogen, and France’s ban of the substance applied without discrimination to both domestically produced and imported asbestos. Yet Canada argued that the asbestos it exports is a “like

¹¹ At the first glance, such constraints of transparency, coherence, and consistency in regulation could be viewed as posing additional limitations and therefore harming democracy. However, by ensuring openness and transparency, such provisions should actually be able to enhance democratic deliberation, at least as long as they are not applied so as unduly to delay or constrain action in response to democratic will. Therefore a balance needs to be struck between democratic requirements of public justification and democratic requirements of effective action. See generally, R. Howse, “Democracy, Science and Free Trade: Risk Regulation on Trial at the World Trade Organization”, (2000) *University of Michigan Law Review*, 2329. On proceduralist understandings of WTO disciplines on domestic regulation see also the chap. by de Búrca and Scott in this volume.

¹² Thus, domestic regulations should be “based on” international standards (SPS 3.1 or TBT 2.4), which does not mean that the outputs of domestic regulation (the substantive regulations actually adopted) must be identical to the international standards, as the Appellate Body emphasised in *Hormones*, *supra* n. 3, paras. 160ff. Contrast this with the incorporation by reference into WTO law of international standards for international property protection in the Berne and Paris Conventions, where the standards themselves become by incorporation WTO law, binding on WTO members. Cf. TRIPs Agreement, Art. 2 (Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C to the WTO Agreement (hereinafter TRIPs Agreement)).

product” to substitute products used in construction, therefore deserving no less favourable treatment under the National Treatment standard in GATT (Article III:4). Canada also claimed that France has violated the obligation under the TBT Agreement to ensure that its regulations are the least restrictive of trade necessary to attain the legitimate regulatory objective in question, here the protection of human life and health (Article 2.2 TBT). Canada argued that used in a “safe” manner the kind of asbestos (chrysotile) that it exports does not present health risks. But should the complex choice of a simple ban over a regulatory scheme that attempts to control the behaviour of manufacturers and users really be second-guessed by a trade tribunal deciding at a great distance from the domestic regulatory process, and its democratic institutions?

In *Asbestos*, the panel accepted Canada’s claim that asbestos and non-asbestos substitutes were “like” products, despite the fact that the former was a proven, deadly carcinogen and the latter were not.¹³ This resulted in a finding that France had violated Article III:4 of the GATT, in providing less favourable treatment to asbestos imported from Canada than to like substitute products. However, the panel went on to find that this violation of Article III:4 was justified under Article XX(b) of the GATT as “necessary” for the protection of human health. With regard to Canada’s TBT claim, the panel accepted a rather bizarre argument from the EC that because the French measure constituted an outright ban of asbestos it did not fall within the definition of a technical regulation in the TBT Agreement. Therefore, the panel held, the TBT Agreement did not even apply to the measure.

For those concerned with the effects of the WTO on human health and related interests, the panel ruling was hardly a victory, despite the result of upholding the French ban. The notion that health considerations should be irrelevant in determining whether products are “like” for purposes of assessing domestic regulations appeared to speak volumes about the obtuseness of the WTO in regard to basic human interests. However, such a ruling could be understood as the logical outcome, or perhaps *reductio ad absurdum*, of the approach adopted by the Appellate Body to National Treatment in the case of internal tax measures, in cases such as *Japan—Alcohol* and *Canada—Periodicals* and *Chile—Alcohol*. In those cases, the Appellate Body appeared to reject the “aims and effects” approach to Article III, which considered whether the regulatory distinction between products is based on a non-protectionist regulatory purpose (such as protection of human health). Instead, the *Asbestos* panel apparently endorsed the approach of the panel in *Japan—Alcohol*, which was in examining “likeness”, to consider only factors that were probative of a competitive relationship between the imported and domestic product in the domestic market-place, including physical similarity, end uses, and consumer tastes and habits.¹⁴ These criteria

¹³ Panel Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS/135/R, 18 September 2000 (hereinafter “Panel Report”).

¹⁴ See the account of these developments in Hudec, “Requiem”, *supra* n. 7. See also Robert Howse and Donald Regan, “The Product/Process Distinction—An Illusory Basis for Disciplining

were as a matter of jurisprudence drawn from the *Border Tax Adjustment* working party,¹⁵ which predated the establishment of the WTO. A fourth criterion was also considered, customs classification, and added to the overall *Border Tax Adjustment* approach.

On such an approach, many legitimate regulatory measures will easily fall foul of Article III, even in the absence of any protectionism. And indeed, the *Asbestos* panel elsewhere in its ruling, actually made a finding that the French ban did not constitute protectionism. Thus, the panel, in developing the market-based approach to Article III apparently adopted by the Appellate Body in the Article III:2 (taxation) cases, interpreted Article III, not as guaranteeing against protectionism in internal regulations, but rather guaranteeing *market access*, subject to the ability of the defending member to provide a non-protectionist *justification* for its measure under one of the heads of Article XX. Indeed, the panel in fact pointed to the existence of Article XX as a reason for taking a market-based approach to Article III: if consideration of regulatory objectives such as health was part and parcel of Article III analysis, would not Article XX be redundant? The effect of such reasoning was to turn Article III into a positive duty on WTO members to justify all regulations that have a negative impact on market access for other WTO members, an outcome at odds with the text and structure of the GATT as it currently stands.

Upon appeal, the Appellate Body¹⁶ reversed the finding of the panel that considerations of health effects could not be taken into account in the analysis of whether two products are “like” under Article III:4. The AB affirmed the basic purpose of Article III as the discipline of protectionist measures, not market access as such. However, the Appellate Body also accepted the appropriateness of applying market-based criteria to likeness in a case such as *Asbestos*, rather than considering regulatory purposes such as protection of health. Thus, the error of the panel was not to have applied such criteria, but to have assumed that in so doing factors such as effects on health could be excluded from the analysis. Hence, in *Asbestos*, the physical differences between products that seemed most relevant to the AB were those that resulted in differential health impacts between asbestos and substitute products. The AB also noted that consumer tastes and habits must be *analysed* as part of the evidence that is relevant to likeness, and that health effects may well be an important basis for consumers to distinguish between products as “unlike”. Thus, the approach of the Appellate

‘Unilateralism’ in Trade Policy” (2000) 11 *European Journal of International Law* 249, 262–8, hereinafter “The Product/Process Distinction”; See also Marco Bronckers and Natalie McNelis, “Rethinking the ‘Like Product’ Definition in GATT 1994: Anti-Dumping and Environmental Protection” in Thomas Cottier and Petros Mavroidis (eds.), *Regulatory Barriers and the Principle of Non-Discrimination in Trade Law* (Ann Arbor, Mich.: University of Michigan Press, 2000), 343–85, hereinafter, “Rethinking the ‘Like Product’ Definition”.

¹⁵ Working Party Report, *Border Tax Adjustments*, 2 December 1970, BISD 18S/97 (hereinafter Working Party Report).

¹⁶ Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos—Containing Products*, WT/DS135/AB/R, 12 March 2001 (hereinafter Appellate Body Report).

Body was to introduce the fundamental human interests at stake not through an examination of regulatory purpose, but rather by making those interests relevant to an analysis of the competitive relationship between products in the market place. This approach did not satisfy one member of the division of the Appellate Body deciding this case, who in a concurring opinion expressed the view that concern by his brethren to preserve an economic approach to likeness analysis had impeded a clear statement of the key human value at stake in this case—the protection of human life and health.

However, the AB made another important statement in this case—it reminded its audience that a mere finding of “likeness” between two products does not oblige the regulating member to treat them identically in regulation. The complaining member must also demonstrate that the differences in regulation amount to “less favourable” treatment as between *domestic* and *imported* like products, each taken as a group. In making this statement, the AB recalled the anti-protectionist purpose of Article III and suggested that “less favourable treatment” is equivalent to protectionism. Thus, a finding of “likeness”, on market-based criteria, will not be dispositive of a finding of violation of Article III:4. In future cases, these dicta may have enormous significance—for example, in situations where the regulatory distinction is based on the process of production, even if the “products” (for instance, turtle-friendly and turtle-unfriendly shrimp) are found to be “like”, the regulatory distinction may still survive if it does not constitute less favourable treatment of imported than domestic “shrimp”. Thus, PPMs that apply equally to imported and domestic like “products”, will be consistent with Article III:4.

However, in reversing the panel on the issue of TBT applicability, the AB clearly indicated that in cases such as these, in the future, the interpretation of the TBT Agreement will be critical to the balance the WTO strikes between domestic regulatory autonomy and trade liberalisation. Understandably, the AB did not go on to complete the analysis and apply TBT in this case, since to do so it would not only have had to find additional facts, but also address itself to significant legal issues of first impression. What the AB did do, however, was to address Canada’s claims that the panel’s Article XX analysis was too lenient or permissive and to reject those claims even though from the perspective of judicial economy it certainly did not need even to consider Article XX (since the finding of an Article III:4 violation was reversed). Here, the AB seemed determined to make new jurisprudence, establishing an especially deferential approach to domestic regulation that addresses vital health interests.

ASBESTOS—THE WTO DISPUTE

It is widely recognised that asbestos is a highly toxic material, which poses a significant threat to human health. For example, exposure to chrysotile asbestos

may increase the risk for asbestosis, lung cancer,¹⁷ mesothelioma or pneumococcosis. These negative effects are also recognised by a recent study of the World Health Organisation (WHO).¹⁸ However, due to its characteristic features and intrinsic properties¹⁹ (fire-resistance), asbestos has found wide use in industrial and other commercial applications. For example, asbestos is used in brake linings and clutches or in the form of spun fibres for the production of insulating tissues or cords. Another major commercial application for asbestos is as a reinforcement material for cement, plastic or rubber. Especially before the Second World War, asbestos was widely used in many countries. Countries that have already during recent decades imported large quantities of asbestos, now need to limit to the largest extent possible the negative effect on human health of the already existing amount of imported asbestos. At the same time, domestic regulators aim towards eliminating this proven and internationally recognised threat to the health of future generations.²⁰ In the light of these circumstances France, which previously had imported lots of asbestos, issued Decree 96–1133²¹ which establishes a total ban on asbestos fibres and products containing asbestos fibres.²² Specifically, the French Decree prohibits the manufac-

¹⁷ Asbestos fibres have a very particular texture. The substance consists of bundles of small fibrils, one sticking to another. These fibrils separate very easily lengthways and then can form a cloud of very fine dust. This dust is often invisible but it can settle everywhere and penetrate very deep into the lungs. Extremely small fibres are particularly dangerous to health. The smaller the diameter of these fibrils, the easier it is to inhale such substance and, consequently, the higher the risk of cancer.

¹⁸ See the WHO's International Programme on Chemical Safety (IPCS), *Environmental Health Criteria 203—Chrysotile Asbestos* (1998) at paras. 144. This study recommends replacing asbestos by less harmful materials or technologies wherever possible. Already previously, the WHO acknowledged that there existed a link between the characteristics of asbestos and their danger to health. In 1977 the WHO classed asbestos (also chrysotile) as a category I substance, which are proven to be carcinogens. Little later, in 1986 the International Labour Organisation (ILO) followed the WHO and adopted Convention No 162, where it referred to the dangers arising from the occupational exposure to asbestos. See first written submission of the European Communities, to the WTO panel on *European Communities—Measures Concerning Asbestos and Products Containing Asbestos*, 21 May 1999 (hereinafter EC first submission) at paras. 346 and 351 ff. See also third party written submission of the United States to the WTO panel on *European Communities—Measures Affecting Asbestos and Products Containing Asbestos* (hereinafter US written submission) at para. 8 ff.

¹⁹ Asbestos is a mineral with exceptional physical and chemical properties. Specifically, this substance does not burn and is extremely resistant to other chemicals and to mechanical traction. So far no one has developed a natural or synthetic substitute, which has all these characteristic features of asbestos fibres. See EC first submission, *supra* n. 18, paras. 343 ff.

²⁰ See *ibid.*, 1.

²¹ Décret No. 96–1133 du 24/12/96 relatif à l'interdiction de l'amiante, pris en application du code du travail et du code de la consommation. <http://www.sante.gouv.fr/amiante/commaitre/reglementation/reglementation.htm>.

²² It is important to note that France is not the only country responding to these public health concerns arising out of the use of asbestos fibres. On the contrary, many other countries both within Europe and abroad have taken action on asbestos. Outside the European Union, such examples are Switzerland, New Zealand, the Czech Republic and Australia. Also within the European Union, several Member States have introduced national legislation to reduce the negative effects of asbestos. For example, Denmark and the UK in 1972 or Belgium, Germany, Finland and Italy, which all introduced an almost total ban on asbestos during the 1990s. Finally, since the 1980s there has also been legislative action on the European level. The most recent directive received a favourable vote on 4 May 1999. The draft version stipulates that a ban on chrysotile asbestos is to be implemented

ture, processing, import, placing on the domestic market, possession for sale, offering, sale or transfer on any ground of all varieties of asbestos fibres and any products containing asbestos fibres.²³

Article 2 of the Decree establishes an exception for existing products or material containing chrysotile asbestos. This exception is to be applied on a temporary basis, as long as there are no existing substitutes for chrysotile fibres. The use of substitute fibres is tied to two conditions. First, according to the state of art in science, such substitutes must pose smaller health risks to workers exposed to them. Secondly, the substitute has to offer all the technical safety guarantees, which were the original purpose of using asbestos. Decisions on the application of this exception are taken on a case-by-case basis, according to French administrative procedures. Due to the advances of scientific research on asbestos substitute fibres, the number of exceptions has been gradually decreasing. Also, the exceptions are applied on the assumption that, eventually, safer substitutes will be available on the market in virtually all cases, thus obviating the need to use asbestos at all in the longer term.

Already before 1998, Canada repeatedly challenged the French Decree in the TBT Committee and on 28 May 1998 Canada proceeded formally to request consultations with the European Communities.²⁴ According to Article 4.4 of the DSU²⁵ Canada alleged that the French ban severely damages Canada's economic interest, and in particular its profits from international trade in chrysotile asbestos. In Canada, asbestos is manufactured exclusively in Quebec. Partly for national unity reasons, but also because of the importance of support from Quebec to any political party in Canada that seeks to form a majority government, Quebec has frequently been the beneficiary of many industrial assistance and protective measures by the Canadian government; this trend has been exacerbated by persistently high unemployment rates in the province, which is home to many of Canada's "sunset" or troubled industries.

ARTICLE III—NATIONAL TREATMENT

Canada claimed that France's asbestos ban violated the National Treatment obligation in Article III:4 of the GATT, because it afforded less favourable

throughout the European Union by 1 January 2005 at the latest. The directive gives each Member State the freedom to choose the pace (and measures), which it deploys to achieve this harmonised position. For further information see EC first submission, *supra* n. 18, paras. 159 ff and paras. 185 ff.

²³ Note that the French Decree does not apply to asbestos as a waste. Therefore there were no issues concerning the Basel Convention on the International Transport of Hazardous Waste, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 22 March 1988 (1988) 27 ILM 859.

²⁴ Request for Consultations by Canada, *European Communities—Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/1, 3 June 1998.

²⁵ Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 to the WTO Agreement (hereinafter DSU).

treatment to imports of chrysotile fibres and chrysotile-cement products from Canada than to “like products”—substitute fibres and products—some of which are of EC origin.²⁶ Article III:4 reads as follows: “[t]he products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to *like products* of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase transportation, distribution or use . . .” (emphasis added). It is evident that under Article III:4 discrimination is forbidden only when occurring between imports and “like” domestic products. Consequently, the determination of what constitutes a “like” product, in interrelationship with the interpretation of what constitutes “less favourable treatment”, provides the basis for the decision as to whether a domestic regulation is consistent with the National Treatment obligation.²⁷

Despite being one of the GATT’s core concepts²⁸ nothing in Article III or any other GATT provision provides any definition for the term “like products”. In the 1970s, a GATT Working Party listed the basic factors which should be used when determining similarity of products, with respect to *taxation* measures; such measures are generally supposed to be neutral with respect to consumers’ choices in the market-place, given that their purpose is to raise revenue in a manner that does not distort individual market behaviour.²⁹ These criteria were “the

²⁶ Canada, Premier exposé écrit du Canada, au Groupe Spécial, *Communautés Européennes—Mesures Concernant L’amiante et les produits en contenant*, le 26 avril 1999; Canada, first written submission to the panel in *European Communities—Measures Affecting Asbestos and Products Containing Asbestos*, paras. 280 ff. (hereinafter Canada first submission), Canada, Deuxième exposé écrit du Canada au Groupe Spécial, *Communautés Européennes—Mesures Concernant L’amiante et les produits en contenant*, 30 juin 1999, Canada, second written submission to the panel in *European Communities—Measures Affecting Asbestos and Products Containing Asbestos*, submission paras. 319ff. (hereinafter Canada second submission).

²⁷ Art. III basically established two types of national treatment obligations. First there are those relating to taxation (Art. III:2) and secondly, there are those relating to various other, non-tax regulations (Art. III:4). With respect to the obligations established for taxation measures, Art. III:2 again distinguishes two situations. Read together with the interpretative note to Art. III:2, one could see two different standards, one applying to like products, another applying to directly competitive or substitutable products. For the latter, difference of treatment alone would not constitute a violation, one would also need proof that internal taxes were applied “so as to afford protection”.

²⁸ The notion of “like” is used some 16 times in the text of the GATT. Also other WTO Agreements, such as the TBT or the GATS, build on the concept of “likeness”. GATT panels have stated that this notion of “likeness” is undoubtedly open to quite distinct interpretations. Panel Report, *United States—Measures Affecting Alcoholic and Malt Beverages*, 19 June 1992, BISD 39S/206 (hereinafter *Malt Beverages*).

²⁹ Thus, where fiscal measures are sometimes used to affect behaviour (pollution taxes for example, where environmental standards are enforced through monetary charges or penalties attaching to the offending conduct) they are generally qualified as behavioural or Pigovian taxes, to distinguish them from typical neutral revenue-raising measures. These kinds of measures would normally not be considered as taxation measures within the meaning of Art. III:2. See Panel Report, *United States—Measures Affecting the Importation, Internal Sale and Use of Tobacco*, DS44/R, (1994) (hereinafter *US—Tobacco*). But for certain specific purposes, i.e. border tax adjustment, an earlier case, *Superfund*, had suggested that neutral fiscal measures and behavioural taxes should be treated the same. See Panel Report, *United States—Taxes on Petroleum and Certain Imported Substances*, BISD 34S, (1988) (hereinafter *Superfund*).

product's end-uses in a given market; consumers' tastes and habits, which change from country to country and the product's properties, nature and quality".³⁰ In the 1980s a panel on *Japanese liquor taxes*³¹ added another criterion, namely uniform classification in tariff nomenclatures. Finally, two WTO panels³² approached the question of likeness by examining whether there exists some commonality of end-uses and whether the products in question possess essentially the same physical characteristics. In recognition that where measures are being taken for non-fiscal reasons, such as environmental objectives, purely market criteria are inadequate to judge "likeness", panels interpreting Article III:4, as opposed to Article III:2, which deals with neutral fiscal measures, developed an approach termed "aims and effects".³³ This test evaluated whether, on the basis of all the evidence, protectionist intent or impact was evident in the regulatory scheme and its operation.

This approach recognised that the GATT should not be used to subject to scrutiny non-protective regulatory schemes for non-commercial objectives. Its disadvantage related to the difficulties surrounding an inquiry into protectionist "intent", largely replacing an inquiry into the meaning of "likeness" in relation to the objective purposes and structure of the regulatory scheme, with intuitive judgements about motivation. This risked collapsing the inquiry into "likeness" into a general judgement about protective discrimination, and thereby failing to give meaning to the ordinary meaning of the exact words in Article III:4.³⁴ Moreover, "aims and effects" spilled over into the analysis of fiscal measures under Article III:2, despite the adequacy of market-based criteria to deciding the issue of likeness in the case of measures not aimed at altering market behaviour for some non-commercial purpose.³⁵ Finally, in the *Japanese Alcohol* case the Appellate Body upheld the panel's focus on the objective market criteria in determining likeness for purposes of applying the national treatment obligations with respect to neutral fiscal measures. The Appellate Body, however, did not elaborate the implications of the rejection of "aims and effects" for Article III:4, merely stressing that the meaning of "likeness" in different provisions of the WTO Agreements would have to be considered in each case separately.³⁶

³⁰ Working Party Report, *supra* n. 15, para. 18.

³¹ Panel Report, *Japan—Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, 10 November 1987, BISD 34S/83, para. 5.6. (hereinafter *Japanese Alcohol* 1988). Besides the tariff heading criterion, the other two criteria were similar properties and end-uses.

³² Panel Report, *Japan—Taxes on Alcoholic Beverages*, 1996, WT/DS8/R, WT/DS10/R, WT/DS11/R, para. 6.22 (hereinafter *Japanese Beverages, Panel*). Similar, Panel Report, *Canada—Certain Measures Concerning Periodicals*, 1997, WT/DS31/R, para. 5.25 (hereinafter *Canada Periodicals, Panel*).

³³ See *Japanese Alcohol* (1988), *supra* n. 31, *Canada Beer*, *supra* n. 9, and *United-States—Taxation of Automobiles*, DS 31/R of 11 October 1994, unadopted (hereinafter *CAFE*).

³⁴ See Hudec, "Requiem", *supra* n. 7 on the textualist critique of "aims and effects".

³⁵ *Japanese Alcohol* (1988), *supra* n. 31.

³⁶ Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (hereinafter *Japanese Beverages AB*) 21. In a memorable quotation, the AB

However, in the later *Bananas* case, when interpreting the National Treatment provisions of the General Agreement on Trade in Services (GATS),³⁷ in respect of non-fiscal measures, the Appellate Body noted that in the *Japanese Alcohol* decision, it had “rejected the “aims and effects” theory with respect to Art. III:2”.³⁸ In dismissing the EC argument that an absence of protective intent in the licensing schemes rendered them consistent with the National Treatment obligation of GATS, the Appellate Body did not explicitly examine the meaning of “likeness”.³⁹ Based on the factual findings of the panel concerning the overwhelming discriminatory impact of the classifications in the scheme in question, the Appellate Body upheld the panel’s finding of *de facto* discrimination under GATS. However, the meaning of “likeness”, as distinguished from the overall issue of whether the GATS prohibited *de facto* discrimination, was not central to the issues of law appealed in this case, and it is understandable that the decision did not develop the implications of its analysis of the issue of *de facto* discrimination for the meaning of the concept of “likeness” under Article III:4 of the GATT, explicitly noting that in *Japan Alcohol*, its rejection of “aims and effects” was in respect of Article III:2. Thus, it remained an open issue how in light of the rejection of “aims and effects” with respect to Article III:2, likeness should now be understood with respect to Article III:4 of the GATT. One reason it was appropriate that the Appellate Body not expand on this matter in the *Bananas* case was that, whatever the claims of the EC in that case about non-protectionist intent, the scheme in question was a scheme of regulation for commercial or economic purposes, not for purposes external to the management of the market place itself, such as environment, health and safety, and so forth. Thus, this would have been an inappropriate case in which to consider the sensitive issue of how “likeness” should be dealt with in relation to regulatory autonomy as exercised in the service of fundamental non-economic values.⁴⁰

specifically notes that “The criteria in Border Tax Adjustments should be examined, but there can be no one precise and absolute definition of what is ‘like’. 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 Agreements are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term ‘like’ is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply”.

³⁷ General Agreement on Trade in Services, Annex 1 B to the WTO Agreement (hereinafter GATS).

³⁸ See *Bananas AB*, *supra* n. 9, para. 241.

³⁹ Note that the text of Art. XVII.2 GATS reads that National Treatment might be “either formally identical treatment or formally different treatment”. It thereby explicitly specifies that *de facto* discrimination is included in Art. XVII GATS. The above remarks of the Appellate Body are therefore strictly speaking *obiter dicta*.

⁴⁰ While preferences themselves for bananas could be understood in terms of development purposes as embodied in the Lomé Convention, the licensing schemes found to constitute *de facto* discrimination were rightly understood by the panel and Appellate Body not to be necessary and incidental to those development purposes.

In its submission in *Asbestos*, Canada alleged that asbestos and non-asbestos products were “like”,⁴¹ because of having the same product characteristics,⁴² end uses, and falling under the same tariff classification.⁴³ The Europeans countered all of the Canadians’ arguments on their own terms, claiming that the properties, nature and quality of asbestos fibres and substitute products and asbestos-containing products and substitute products are different,⁴⁴ and pointing also to differences with respect to tariff classification⁴⁵ and the end use.

The panel, in following the market-based approach to likeness approved by the AB in *Japan Alcohol* and subsequent cases, considered first of all the physical characteristics of asbestos and the substitute products. While, as the EC argued, there were indisputable physical differences between asbestos fibres and the substitutes, the panel rejected these physical differences as dispositive of *unlikeness*.⁴⁶ This was based on the notion that the physical differences did not matter to the functionality of the product, i.e. to its end use in construction, etc. Having found that the products had similar physical characteristics and end uses⁴⁷ (these two findings as noted being closely related), the panel did not find it necessary to examine consumer tastes and habits.⁴⁸ It did turn its mind to the differences in customs classification for the two products, but in light of its findings on physical characteristics and end uses, the panel did not find the difference in customs classification to be “decisive”.⁴⁹

⁴¹ Note that one of the main points of controversy was which types of substances and products should be compared. Canada suggests comparing (Canadian) chrysotile and chrysotile cement on the one hand with French “like products” such as substitute fibres (PVA fibres, cellulose and glass) and fibre cement on the other. (See Canada first submission, *supra* n. 26, paras. 295 ff, 305ff and 310 ff.) The EC argue that the relevant comparison should be between the following products: first, domestic asbestos fibres and imported asbestos fibres (both prohibited but may be granted a temporary derogation on the same terms); secondly, domestic products containing asbestos fibres and imported products containing asbestos fibres (both prohibited but may be granted a temporary derogation on the same terms); thirdly, substitute domestic products and substitute imported products (both permitted) (see European first submission, *supra* n. 18, paras. 324 ff). The USA used a similar line of argumentation and stated that Canada failed to make the correct product comparison in order to determine whether the relevant products are like products under Art. III. 4. According to the USA the relevant products to compare were the following (1) asbestos must be compared to substitute fibres and (2) products containing asbestos must be compared to products that do not contain asbestos but which perform the same function. (See US written submission, *supra* n. 18, para. 39.)

⁴² See Canada first submission, *supra* n. 26, paras. 310 and 317 ff referring to “properties, quality and nature of the product”.

⁴³ For the importance of tariff headings, see first Canadian submission, *supra* n. 26, in paras. 333 ff. Note that in its first submission Canada also refers to consumer tastes and habits (para. 325), whilst in its second submission, it specifically dismisses this point and refers only to the products’ end use (paras. 329 ff), tariff heading (para. 336 ff) and properties, nature and qualities (para. 341 ff).

⁴⁴ EC first submission, *supra* n. 18, paras. 342 ff.

⁴⁵ *Ibid.*, paras. 358 ff.

⁴⁶ Panel Report, *supra* n. 13, para. 8.126.

⁴⁷ *Ibid.*, para. 8.136.

⁴⁸ *Ibid.*, para. 8.140.

⁴⁹ *Ibid.*, para. 8.143.

The panel categorically rejected the EC argument that in a case such as that the health risk from the product should be taken into account in the analysis of likeness and should indeed be decisive.⁵⁰ The panel suggested that were health considerations to be taken into account in determining whether products were “like” under Article III:4, the exception with respect to health in Article XX(b) of the GATT would be rendered redundant.⁵¹ Here, the panel appeared to be taking to the extreme the implication of the market-based approach to likeness favoured by the AB in *Japan Alcohol* and subsequent cases. In *Japan Alcohol*, the Appellate Body had been careful to qualify its endorsement of the market-based approach in *Border Tax Adjustment* as understood by the panel in *Japan Alcohol*—it noted that the market-based criteria in *Border Tax Adjustment* were not *exhaustive* of the factors that, in a given case, might be relevant in assessing “likeness” and it also noted that the approach to “like products” in one legal provision of the GATT might be different from in the case of another legal provision. Thus, the door remained open to the panel in *Asbestos* to consider an additional criterion—the regulatory objective of protecting health—as relevant or indeed decisive in assessing whether the products were “like”.

In its cross-appeal, the EC argued that the panel had erred in law in refusing to consider health effects as a separate criterion in determining whether asbestos and the substitute were “like” products.⁵²

The disposition by the Appellate Body of the EC cross-appeal on Article III:4 is, to say the least, complex. This disposition has three separate parts to it: (1) an elaboration of the general approach to the interpretation of the treaty language in Article III:4; (2) findings of error of law by the panel; (3) “completing the analysis”, where the AB goes on to apply Article III:4 correctly to the facts of the case, picking up at the point where the panel began to err in law.

In outlining the general approach to the interpretation of Article III:4, the AB places fundamental emphasis on Article III:1 as stating the general purpose that animates Article III as a whole. That principle, according to the AB, quoting its own words in *Japan–Alcohol*, “is to avoid protectionism in the application of internal tax and regulatory measures”.⁵³ Thus, the meaning of “like product” must be informed by the anti-protectionism principle of Article III:1. In order for protectionism to be possible, the regulations challenged under Article III:4 must, in the first instance, address imported and domestic products that are in a competitive relationship. Thus, the inquiry into “likeness” in Article III:4 is about whether there is the kind of competitive relationship between the imported product and domestic products that *could* lead to a conclusion of protectionism, *if* the result of the regulatory treatment were that the imported product was treated less favourably. It is, then, not enough that there be *some*

⁵⁰ EC first submission, *supra* n. 18, paras. 8.127 ff.

⁵¹ *Ibid.*, para. 8.130.

⁵² Other Appellant’s Submission by the European Communities pursuant to Rule 23 of the Working Procedures for Appellate Review, Geneva, 21 November 2000, paras. 50 ff.

⁵³ Appellate Body Report, *supra* n. 17, para. 97.

competitive relationship between the imported product and domestic products, rather the issue of likeness is one that includes the “kind” of competitive relationship. Already here, the AB is distinguishing its approach from that of the *panel* in *Japan–Alcohol*, making it clear that what is at stake is a contextual and qualitative judgement about competitive relationships, not merely the economic analysis of cross-elasticity of demand between two groups of products. Such an assessment must be made on a case-by-case basis, informed by the general principle of anti-protectionism, which informs all of Article III.

Once a competitive relationship has been established of the degree and kind relevant to Article III:4, then the second step of the analysis comes into play. Only where the differential treatment of the “like” products amounts to “less favourable treatment” of the group of imported products in relation to the group of like domestic products will there be a violation of Article III:4. In fact, the AB goes out of its way to emphasise that “a Member may draw distinctions between products which have been found to be ‘like’, without for this reason alone, according to the group of ‘like’ *imported* products ‘less favourable treatment’ than that accorded to the group of ‘like’ *domestic* products”.⁵⁴ The AB also emphasises that less favourable treatment does not mean just *any* kind of worse treatment—“less favourable treatment” is a concept informed by the anti-protectionist principle in Article III:1. Thus a judgement of “less favourable treatment” implies, “conversely”, a conclusion of “protection”.

As the AB noted, it did not need to apply the concept of “less favourable treatment” to the facts in *Asbestos*, since it reversed the panel’s ruling that the products were “like”, therefore obviating the second step of the analysis. However, this statement of the approach to less favourable treatment is a very important one. First of all, the AB has made it clear that even where *products* are in a close enough competitive relationship to be considered “like”, members of that class or group of “like” products may still be distinguished in regulation, provided that the result is not less favourable treatment, understood as protection of domestic production. This in effect blunts, without explicitly repudiating, the product/process distinction—the much criticised idea, found in the unadopted *Tuna/Dolphin* panels, that process-based trade restrictions can never be considered as internal regulations consistent with the National Treatment standard of Article III.⁵⁵ Even if products that have different process and production

⁵⁴ *Ibid.*, para. 100. The AB already touched on this point in the *Korea–Beef* case, para 135, see Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, 11 December 2000 (hereinafter *Korea–Beef* Appellate Body Report).

⁵⁵ See Howse and Regan, “The Product/Process Distinction”, *supra* n. 14. Some observers have interpreted the statement in para.100 in a different way, namely as simply restating the proposition of the *Section 337* case, *supra* n. 9, that where there is facially discriminatory treatment of domestic and imported products, nevertheless this may still be consistent with Art. III:4—namely where, although domestic products and imports are governed by different rules or regimes, there is nevertheless no less favourable treatment for imports. If this statement is interpreted this way however the next sentence in para. 100 appears to reverse another proposition of the *Section 337* case, i.e. that in cases where there is differential treatment of imports and domestic products, every instance of the

methods are considered to be “like” under Article III:4 (which, as will be discussed below, they need not always be), regulatory distinctions may be made between them, on *any* grounds, provided the result is *non-protectionist*. Thus, for example, were all “shrimp” considered to be “like” regardless of whether they were turtle-friendly or not, i.e. whether or not caught in a manner that did not result in undue levels of turtle mortality, this would not *necessarily* mean that a regulation that required that all shrimp sold in the USA be turtle-friendly was inconsistent with Article III:4. One would have to consider whether the design and structure of the scheme resulted in less favourable treatment of imported shrimp as a group than domestic shrimp as a group, i.e. did the requirement result in protection of domestic production? The differential impact of such a requirement on imported shrimp *might* alter the competitive relationship between domestic and imported shrimp so as to protect domestic production if, for instance, foreign producers of shrimp faced costs of adapting their fishing practices that domestic shrimp producers did not. However, as the AB emphasises, the comparison is between the group of imports as a whole and the group of domestic products as a whole. Just because one particular foreign producer of shrimp faced a differential burden from the regulation in comparison to one particular domestic producer, a finding of “less favourable treatment” would not be justified.

The AB’s emphatic statement about the crucial second step in Article III:4 National Treatment analysis must be borne in mind in considering its approach to the first step of ascertaining whether products are “like”; the AB admits that there is no one approach to likeness that will be appropriate in all cases, and that “likeness” is a matter of judgement—qualitative as well as quantitative. This case-by-case approach may not seem to provide much assurance against a panel casting the net so wide, as it were, that legitimate non-protectionist regulatory distinctions are put into question. But the *second step* of Article III:4 analysis provides a safeguard against that possibility, by requiring the complaining member to establish that the regulatory distinction in question results in

differential treatment must result in treatment no less favourable. This is because the next sentence in para. 100 emphasises that the comparison is between the treatment of the group of like imported products and the group of like domestic products. The AB cannot be reasonably interpreted as intending to overturn such an established jurisprudential principle of the GATT, not even citing or discussing the *Section 337* (*supra* n. 9) panel here. In fact, while in *Section 337* the issue is when facially differential treatment of imports may nevertheless be “no less favourable”, in para. 100 the issue is whether a non-national-origin based regulatory distinction between like products nevertheless constitutes less favourable treatment of imports, i.e. protection. From the point of view of discerning protection in respect of origin-neutral regulatory distinctions, the fact that some imported product or other gets worse treated than some domestic product or other is not probative and may be quite misleading. This may be an innocent or purely accidental disparate impact. To determine whether an origin-neutral regulatory distinction is protective, we have to discern whether there is a connection between the design and structure of the scheme itself and less favourable treatment of imports—the issue is systemically less favourable treatment of imports, and therefore the proper framework for assessment is the structure and design of the scheme as it impacts on the treatment of the group of like imported products as a whole relative to the group of like domestic products as a whole.

protection of domestic production. Thus, while, as we shall see, the AB has taken great pains to continue to distance itself from aims and effects analysis with respect to likeness, it has in effect brought “aims and effects” back in at the second stage of considering whether there is “less favourable treatment”.⁵⁶

This brings us to the general remarks of the AB concerning likeness of products in Article III:4. The AB first of all recalls the *Border Tax Adjustment* criteria, with the addition of customs classification as the fourth criterion, as one approach that has been developed to likeness under Article III.⁵⁷ However, the AB also states that the criteria in question “are neither a treaty-mandated nor a closed list of criteria that will determine the legal characterization of products”.⁵⁸ Indeed, a panel *must* examine all the “pertinent evidence” of likeness or unlikeness, regardless of whether that evidence goes to the kinds of “potentially shared characteristics” identified in the *Border Tax Adjustment* criteria. This last statement is significantly stronger than the caveat in *Japan—Alcohol* that other criteria may be relevant in certain cases—it actually limits the discretion of the panel, which must weigh all the evidence in *every* case, including evidence that does not go to the potential shared characteristics identified in the *Border Tax Adjustment* criteria. At the same time, the AB notes that because the likeness inquiry is about competitive relationships between products, it is necessary for a panel always to *take into account* evidence that goes to the competitive relationship in its analysis of likeness.

⁵⁶ This is especially evident when we recall the AB’s suggestion in para. 100 of the interchangeability or of equivalence of the notion of “less favourable treatment” with the general notion in Art. III:1 that measures not be applied so as to afford protection to domestic production. In interpreting that concept with respect to National Treatment in taxation under the second sentence of Art. III:2, into which it is explicitly incorporated by virtue of an Interpretive Note to Art. III, the AB has indicated the primary importance of examining the structure and design of the regulatory scheme in order to make a judgement on objective factors as whether the measure is protective and asserted the irrelevance of protectionist intent to that enterprise, *Japan—Alcohol AB*, *supra* n. 36. In the subsequent case of *Canada—Periodicals*, however, the AB did not exclude consideration of evidence such as legislative history and ministerial statements, that apparently went to protectionist intent: Appellate Body Report, *Canada—Certain Measures Concerning Periodicals*, 30 June 1997, WT/DS31/AB/R (hereinafter *Canada Periodicals*, AB). Recently, in *Chile—Alcohol*, the AB held it was appropriate to “relate the observable structural features of the measure with its declared purposes”: Appellate Body Report, *Chile—Taxes on Alcoholic Beverages*, 13 December 1999, WT/DS87/AB/R, para. 72. These are not inconsistent rulings—an inquiry into the structure and design of the scheme may well be decisive with respect to whether it is protective, obviating the need for making sensitive judgements about intent, but this does not mean that in other cases evidence of intentional protection may well be relevant. Not all findings that a measure is *structurally* protective imply a cryptic judgement of protectionist animus: domestic regulators or legislators may have designed a measure without turning their minds at all to the possibility of a systematically unfavourable effect on imports. This might happen because of un- or under-representation of importer or foreign producer interests, or surrogate domestic interests, in the regulatory process—that could indicate protection at the deeper level of regulatory and political structure. But the measures themselves may lack any direct protectionist animus. Cf. Hudec, “Requiem”, *supra* n. 7, 634.

⁵⁷ We will refer to all four criteria hereinafter as the *Border Tax Adjustment* criteria.

⁵⁸ Appellate Body Report, *supra* n. 16, para. 102.

It is apparent that, here, the AB is engaged in a very subtle balancing act in articulating its approach to “likeness”. The AB makes it very clear that a panel cannot simply revert to an “aims and effects”-type analysis as conclusive of “likeness” or “unlikeness”; the panel must *always* examine competitive relationships in the market-place. At the same time, the AB goes out of its way to emphasise that there may be cases where it will be inappropriate to leave matters at that, and raises the possibility that in those cases the evidence that tips the balance may well be evidence that does *not* go into the market-based criteria articulated in *Border Tax Adjustment*. Otherwise, why make it obligatory in all cases to consider such evidence, if it exists?

Now the AB goes on to the second part of its consideration of National Treatment, the correction of the panel’s errors of law. The panel erred in not considering and weighing all the evidence, and this error relates to the error of not considering *all* four of the *Border Tax Adjustment* criteria explicitly and separately. First of all, the panel focused exclusively on assumptions about end uses of the products in coming to the conclusion that differences in physical characteristics between asbestos and the substitute products were not of a kind and degree to make these products “unlike”. According to the AB, the analysis of physical characteristics should be made separately from an inquiry into end uses. Physical differences between asbestos fibres and substitute products “are “important” because the microscopic particles and filaments of chrysotile asbestos fibres are carcinogenic to humans, following inhalation”.⁵⁹ The failure of the panel to find that such differences were “important” stemmed partly from its error of law in conflating analysis of physical characteristics with end uses. But it also stemmed from the panel’s error in concluding that health effects are irrelevant in analysing likeness under Article III:4. The panel took the view that, were health considerations to enter into the application of the National Treatment standard in Article III, then the health exception in Article XX would be redundant. The AB however considered that consideration of health effects under Article III:4 is a very different kind of inquiry from that under Article XX. Under Article III:4 the issue is how health effects impact on the competitive relationship of products in the market-place, whereas under Article XX the issue is whether a member has a sufficient basis for a adopting or enforcing a WTO-inconsistent measure on grounds of human health.⁶⁰

In addition, the panel committed a further error when it went on to examine end uses as a separate criterion. In concluding that the evidence of end uses sustained a conclusion of “likeness” between asbestos and the substitutes, the panel left matters at pointing out a small number of similar end uses of the two products, while failing to examine evidence of a wide range of dissimilar non-overlapping functions.

⁵⁹ Appellate Body Report, *supra* n. 16, para. 114.

⁶⁰ *Ibid.*, para. 115.

More importantly still, the panel erred in failing to consider at all the evidence of consumer tastes and habits, the third criterion that it was required to consider separately. Here the AB comes closest to taking judicial notice of human health as a fundamental value: “[i]n this case especially, we are also persuaded that evidence relating to consumers’ tastes and habits would establish that the health risks associated with chrysotile asbestos fibres influence consumers’ behavior with respect to the different fibres at issue”.⁶¹ While acknowledging that the initial consumers of the products are industrial users, the AB notes: “[a] manufacturer cannot, for instance, ignore the preferences of the ultimate consumer of its products. If the risks posed by a particular product are sufficiently great, the ultimate consumer may simply cease to buy that product. This would, undoubtedly, affect a manufacturer’s decisions in the marketplace. Moreover, in the case of products posing risks to human health, it is likely that the manufacturer’s decisions will be influenced by other factors, such as potential civil liability that might flow from marketing products posing a health risk to the ultimate consumer, or the additional costs associated with safety procedures required to use such products in the manufacturing process”.⁶²

For the AB then, the test from the perspective of consumer tastes and habits is whether the products would be substitutable and in a competitive relationship in an *idealised* market-place, one where consumers have full information, and where, at least through tort liability, negative externalities have already to some extent been internalised. As the AB emphasises, the fact of an imperfect market-place does not mean that evidence cannot be found that is probative of how consumers *would* behave with respect to the two products in an *idealised* market-place.⁶³ Indeed, to support the intuitions of the AB here, in the case of asbestos, the evidence of the social costs from the health risks of this substance is such that one would almost certainly expect that, in an idealised market-place where those costs were internalised, asbestos and asbestos products would be very unlikely to be cost competitive. This sort of analysis of consumer tastes and behaviour brings into the picture the kinds of regulatory interests which had under the GATT been taken into account through the “aims and effects” test. It is just that those interests are taken into account here by adopting not the perspective of the regulator as such, but the perspective of consumer behaviour in an idealised market-place. But note that part of the picture of this idealised market-place is a liability rule that makes manufacturers responsible for the health risks posed by their products; such a rule may well be premised not only on

⁶¹ *Ibid.*, para. 122.

⁶² *Ibid.*, para. 122.

⁶³ A very similar approach is taken in Bronckers and McNelis, “Rethinking the “Like Product” Definition”, *supra* n. 15. According to Bronckers and McNelis, for physically like products to be characterised as “unlike” on the basis of consumer tastes and habits, it would be necessary for “consumers as a whole (rather than specific interest groups)” to distinguish between the products (at 375). We do not understand why this should be the case—competing firms in the market-place often differentiate their products to appeal to sub-groups of consumers, and those differentiations may change competitive relationships substantially.

assumptions about the efficient allocation of risk, but also on judgements about the fair, or just, distribution of risk in a society. It is thus quite possible that this particular conception of the idealised market-place embodies a conception not only of regulation as the “efficient” correction of market failure but also of a just allocation of liability rules and/or property rights.

The final part of the AB’s discussion of National Treatment in *Asbestos* consists in completing the analysis—i.e. applying the legal interpretation of Article III:4 as corrected to the facts. Having found that the panel did not err in law in choosing to adopt the *Border Tax Adjustment* approach to likeness, the AB does not undo that choice. The AB first turns to the consideration of physical characteristics. It comes to the conclusion that asbestos and the substitutes are “very different” physically because of the health significance of the differences. Yet the AB does not explain *why* health effects should in this instance be decisive in evaluating whether physical differences are significant enough to point to a conclusion of unlikeness. The AB might have pointed to its speculations about consumer tastes and habits. But if the panel was wrong to conflate an inquiry into physical characteristics with an investigation of end-uses, would not the AB have made a similar error, in evaluating the significance of physical differences through the lenses of the third criterion of consumer tastes and habits? As the AB stated earlier in its examination of Article III:4, one of the questions not answered by any dictionary definition of likeness is “from whose perspective” the significance of differences and similarities is to be evaluated. Of course, one answer is the regulator’s perspective, an answer that in some form or other leads back to “aims and effects”, an outcome unacceptable to the AB. Another answer is the consumer’s perspective. But that leaves it mysterious why an analysis of physical characteristics would be *logically prior* to a consideration of consumer tastes and habits, much less distinct from it.

In any case, the physical properties of the products having been determined to be “very different”, on the basis of health considerations, the AB suggests that this amounts to a preliminary or tentative finding of “unlikeness”, which Canada has a high burden to bear in reversing, through demonstrating that despite significant physical differences the products are in a sufficiently close competitive relationship, when the other factors are analysed. Here, with respect to end uses, since there was no evidence on the record of the *extent* of non-overlapping, separate end uses for the products relative to similar end uses, the AB concluded that “we cannot determine the significance of the fact that chrysotile asbestos and PCG fibres share a small number of similar end-uses”.⁶⁴

Two readings are possible concerning what the AB was saying here. The first reading is that it is saying that it is impossible to apply at all the second criterion of end uses due to a defect in the factual record of the panel. If this is so, then the AB should not be completing the analysis.⁶⁵ Because on the AB’s own theory of

⁶⁴ Appellate Body Report, *supra* n. 16, para. 137.

⁶⁵ Thus, in *Canada—Periodicals*, *supra* n. 56, where there was inadequate factual analysis in the panel report, the AB held that it could not go ahead and complete the analysis of “likeness”.

“likeness” a panel must make a separate and thorough analysis of all four criteria if it adopts the *Border Tax Adjustment* approach. If the factual record as it stood did not permit such an analysis of the second criterion, then the AB could not, on its own terms, go on to apply adequately the *Border Tax Adjustment* approach to “likeness”.

The alternative reading of what the AB is doing here is that it uses this criterion to present evidence of the *comparative* importance of similar as opposed to different or non-overlapping end uses. On this reading, the AB would be holding that a member, in order to make a *prima facie* case of likeness, has to provide evidence of likeness (similar end uses) but also evidence of unlikeness (different or non-overlapping end uses) and show at least the preliminary plausibility that the former evidence outweighs or is more probative than the latter. On the one hand, this view of the burden of proof is consistent with the AB’s view that the inquiry into likeness is *inherently* a relative or comparative inquiry, entailing an appreciation of kind and degree of similarity; thus even a *prima facie* case of likeness would need to probe degree or extent, which obviously involves comparing the evidence of likeness against all evidence, including that of unlikeness. On the other hand, it seems more intuitively plausible that in an adversarial process, where the complainant provides *some* credible evidence of likeness, it establishes a *prima facie* case, such that one would normally expect that the defending party would now have to muster equal or greater credible evidence of *unlikeness*. Thus, this alternative reading raises difficult issues about the burden of proof. But it does exonerate the AB from a straightforward error of completing the analysis on the basis of an inadequate panel factual record.

In the case of consumer tastes and habits, the third criterion, the panel held that since Canada had presented no evidence at all on consumer tastes and habits, it could not overcome the tentative or preliminary characterisation of the products as “like” based on physical characteristics.⁶⁶ However, the reason that Canada presented no evidence, the AB noted, was its legal position that the criterion was irrelevant. Here an *error in law*, corrected only upon appeal by the AB, resulted in an inadequate factual record. Was this a reasonable basis on which to conclude that Canada had not met its burden of proof? Or should the AB instead have simply concluded that the factual record was inadequate, and refused to complete the analysis? On balance, we are of the view that the AB acted appropriately. In failing to provide evidence on consumer tastes and habits, Canada was taking an ordinary litigation risk—the risk that if the panel were to disagree with its view that this criterion was irrelevant in the circumstances, it would lose the opportunity to argue in the alternative as it were that consumer tastes and habits did point to a finding of likeness or at least did not detract from such a finding based on physical similarities and end uses.

⁶⁶ Appellate Body Report, *supra* n. 16, para. 139.

There is, arguably, a more general inconsistency between the way in which the AB completed the analysis and the overall approach to Article III:4 it elaborated in the first part of its discussion of Article III:4. In that part, it suggested that what a panel should do is to consider all the evidence of likeness on the basis of the *Border Tax Adjustment* criteria, and indeed also consider any evidence that does not go *into* the characteristics addressed by those criteria, and then make an overall judgement about whether the products are “like” or not. But, when completing the analysis, the AB appears to privilege the investigation of physical differences as of special and prior importance, such that where that analysis points to a finding of unlikeness, the evidence on the other criteria must be virtually overwhelming to justify an overall, definitive judgement that the products are “like”. Given that, in this case, the physical differences are significant in terms of a very fundamental human value, health, the approach does not seem unjustified. But the AB seems to adopt it as a rule of thumb for all cases, regardless of context. Nevertheless, it is important to note the AB does not affirm the converse. That is the AB does *not* say that, where the analysis of physical characteristics points towards *likeness*, the burden of establishing *unlikeness* on the basis of *other* criteria and evidence is especially heavy. Thus, whatever the merits of the AB’s prioritisation of physical characteristics, the AB is not deploying that prioritisation in such a way as to reinforce the notion that products cannot normally be unlike once it has been established that they are physically “like”.

What then is one to make of the overall ruling of the AB with respect to Article III:4? One way of understanding this ruling is that it navigates between two “constituencies” both of which are important to the legitimacy of the Appellate Body on the WTO rules and institutions more generally.⁶⁷ The first constituency is that of the officials (delegates, secretariat employees, etc.) who are the day-to-day guardians of the trading system—these people may be inclined to look for clear, economic guidelines in the application of trade law, and may tend to view “market access” as the main objective of the entire system, subject to certain defined and limited “exceptions”. The second constituency is that comprised of the groups and individuals whose interests and values are habitually given short shrift when translated into trade rules and legal interpretation by the middle-level officials. Some of these groups see the only answer to this problem as structural—a roll back of globalisation. Yet there are other groups within the second constituency, such as those who filed applications for leave to submit *amicus* briefs in *Asbestos*, who see change within the system as at least part of the solution, including more sensitive interpretations of WTO law.

⁶⁷ Here we have been inspired by recent work by Joseph Weiler on the distinction between internal and external legitimacy of the WTO. See Joseph H.H. Weiler, “The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement”, Harvard Jean Monnet Working Paper 9/00, available at www.jeanmonnetprogram.org. Assessing the first 5 years of AB rulings, Weiler observes that the AB has practised a legitimisation strategy with “a keen eye on balancing internal and external legitimacy”(at 16).

The *Asbestos* ruling navigates with agility between these two constituencies. It gives to the first constituency an “economic” framework for the application of Article III:4, which is continuous with the recent jurisprudence on National Treatment in taxation. At the same time, it corrects for the narrowness of perspective of the panel, signaling that within the “economic” framework for the analysis of likeness, broader human interests and values such as health must be taken into account. In addition, the AB has maintained two additional safety valves against interpretations of likeness under Article III:4, that threaten the legitimacy of the system by giving inadequate attention to human values and interests of a non-economic nature, in the narrow sense. The first is in the notion that the “economic” framework is not necessarily decisive with regard to likeness in all cases, and evidence that cannot be assimilated to the characteristics important in that framework must be taken into account (even if the AB did not speculate on what such cases might be about). The second safety valve resides in the importance of establishing “less favourable treatment”, i.e. protection of domestic production, in order to prove a violation of Article III:4. To the extent that “less favourable treatment” means treatment that is protectionist in aims and effects, this second step in Article III:4 analysis creates the kind of safe harbour for non-protectionist domestic regulations that had been the central intent behind the now repudiated “aims and effects” test. The Member of the AB division who, in his concurring opinion, expressed the view that the AB should have stated outright that carcinogenic asbestos is not “like” non-carcinogenic substitutes clearly, at some point, balked at this balancing act. He could not accept that the concern to preserve the “economic” approach to “likeness” in Article III:4 justifies the failure to make a strong and unambiguous statement that, in a case like this, health effects simply *trump* other considerations or factors that might be in play in assessing “likeness”.

Yet, in fairness to the approach of the other two members of the division, the balance they struck is not an unprincipled compromise between interest groups. The WTO system cannot function without the support of the middle-level officials, whether delegates or Secretariat members, who oil its wheels on a daily basis. As recent events have shown, its future development can also be brought to a halt if it has no legitimacy with the broad range of interests that typically feel left out of outcomes produced by the first constituency. There is, at present, no effective political leadership to mediate these constituencies or get them to talk to one another, and the AB is arguably the only functional institution within the multilateral trading system that can articulate the outlines of an overlapping consensus. Given this predicament, the AB’s approach to Article III:4 is understandable.

Some may argue that in playing this kind of role the AB has gone to the opposite extreme of its initial approach of sticking to the treaty text. However, the AB is careful to note in its ruling that the treaty text cannot resolve in any kind of straightforward positivistic way the issue of “likeness” in Article III:4. Thus, the Appellate Body has been compelled to find a legitimate solution in the

absence of an agreed approach in the treaty text itself. Under such circumstances, it has understandably resorted to techniques of adjudication described by Cass Sunstein in the US domestic context, somewhat misleading perhaps, as “judicial minimalism”.⁶⁸ These are techniques that Sunstein argues are appropriate in cases where a court must decide a complex matter on which people feel deeply, but also on which the relevant constituencies are deeply divided on the level of principle. The Court must find an outcome in the individual case before it that does not represent a choice between the ultimate values that are contested in any simple or straightforward way. It will thus craft a decision that leaves many things undecided or under-decided; which resolves issues not through reference to high general principles but to narrow factors such as burdens of proof and issues specific to the facts of the case; it will be uninclined to evolve the law in bold steps, by overtly replacing one kind of doctrinal framework with another. This kind of decision people may be able to live with, despite deep divisions among them about the general principles or norms at stake. And based on discussion about the Article III:4 analysis to date among various commentators, the AB may well have succeeded in this respect—for while the first constituency, though puzzled by certain details, sees a further development of the market-based approach,⁶⁹ the second constituency sees a greater sensitivity to basic human interests, and the legitimacy of governmental action to protect them.

APPLICATION OF THE TBT AGREEMENT TO THE ASBESTOS DISPUTE

In the panel proceedings the EC made the unusual argument that because the French measure was an outright ban it was not a technical regulation within the meaning of the TBT Agreement, and therefore the Agreement did not apply. The definition of a “technical regulation” is: “a Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method”.⁷⁰ The EC argued that a measure banning a product cannot be equated with a measure that specifies the product’s characteristics. The panel agreed with the EC’s reasoning and held that the TBT Agreement did not apply to the measure in question. In order to characterise the measure as a

⁶⁸ C. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge, MA: Harvard University Press, 1999).

⁶⁹ See certain of the comments on the ruling posted to the Jean Monnet Discussion Forum, www.jeanmonnet.org, and see the statement by several NGOs reacting to the decision: “NGOs welcome WTO Green Light to French Ban on Asbestos but remain skeptical about the WTO Dispute Settlement Process”, Joint Position Statement by Greenpeace International, IBAS (International Ban Asbestos Secretariat), FIELD (Foundation for International Environmental Law and Development) and WWF (World Wide Fund for Nature, International), March 2001, www.field.org.uk.

⁷⁰ Annex I:1 TBT Agreement.

straightforward ban, the panel had to accept the EC view that the part of the decree banning asbestos and the part providing for certain limited exceptions were, in essence, two separate measures. The panel's finding that TBT did not apply was also intertwined with its finding that the measure in question was a violation of Article III:4. It regarded Article XX as the appropriate context for considering whether the ban was justified on health grounds.

The Appellate Body reversed the panel's finding that the TBT Agreement did not apply. First of all, it held that the part of the decree establishing a ban and the part providing limited exceptions had to be considered as a unified whole, not two separate measures. The AB rightly observed that the exceptions would have no legal meaning unless they operated in conjunction with a general prohibition. Secondly, the AB rejected the notion that, because the decree banned asbestos as such, it did not describe the characteristics of a product, within the meaning of the TBT Agreement. The AB noted that the French decree did not simply ban asbestos in its natural state—it banned asbestos in products. Thus, the decree did describe a characteristic of products, namely that they be free of asbestos. As the AB clearly understood, one could hardly make the applicability of the TBT Agreement depend on semantic distinctions such as whether a member creates a list of every product and then describes a characteristic of that product as the absence of asbestos rather than simply prohibiting asbestos as a characteristic of any and all products: “there may be perfectly sound administrative reasons for formulating a ‘technical regulation’ in a way that does *not* expressly identify products by name, but simply makes them identifiable—for instance, through the ‘characteristic’ that is the subject of regulation”.⁷¹ In addition to being based on empty semantics, the EC claim that the TBT Agreement does not apply to a general ban on a toxic substance in products was at odds with one of the basic purposes of the TBT Agreement, stated in the Preamble to the Agreement, namely “to ensure technical regulations and standards, . . . do not create unnecessary obstacles to trade”. On the EC reading of TBT, a member could undermine this objective of TBT by simply choosing the most trade restrictive instrument of all—a general ban—and thereby avoiding any scrutiny of whether its policy instrument is an “unnecessary obstacle to trade”. By adopting the most restrictive policy instrument one avoids any inquiry about whether less restrictive alternatives might be available! The panel, at least, found the TBT Agreement non-applicable on the assumption that there would be a requirement of Article XX justification; but the EC claim was utterly egregious, since the EC was also of course arguing that there was no violation of Article III:4.

Having found that the TBT Agreement did apply, the AB decided not to “complete the analysis” given that it would have to deal with so many issues of first impression not adjudicated by the panel below, with the very real possibility that applying the relevant TBT provisions would also require a different or

⁷¹ Appellate Body Report, *supra* n. 16, para. 70.

more extensive factual record.⁷² However, the AB did provide an important clue to how it understood the relationship between the TBT Agreement and GATT, which we will explore in the section of this chapter that follows.

THE RELATIONSHIP BETWEEN TBT AND GATT

There are several possible views concerning the relationship between TBT and GATT. One is that the TBT Agreement should be considered as a *lex specialis* to the general obligations and rights in Articles III and XX of the GATT. This would mean that, if a measure fell within the definition of a technical regulation in the TBT Agreement, its legality would be considered under that Agreement, to the exclusion of Articles III and XX of GATT. A second view is that a complainant may choose to bring a claim under *either* GATT or TBT but not both. A third view is that the obligations and rights in GATT and TBT operate concurrently, and both may apply to a single dispute, provided of course the measure falls within the ambit of some provision or provisions in both Agreements. This third view is basically consistent with the way in which, to date, panels and the Appellate Body have understood the relationship between GATT and other WTO treaties.⁷³

Thus, it is not surprising that, in *Asbestos*, the Appellate Body should appear to endorse the third view, remarking that (for those measures that fall within its ambit) the TBT Agreement imposes obligations on members that seem to be *different* from, and *additional* to, the obligations imposed on members under GATT 1994.⁷⁴ Although the AB does not expand on why it takes this position on TBT, such a position in our estimation is structurally sound, and an appropriate understanding of both the GATT and the TBT Agreement, and their interrelationship. At first glance, both GATT Articles III/XX and the TBT Agreement appear to deal with the justification of domestic regulatory measures as related to legitimate (non-protectionist) objectives and as the least trade-restrictive alternative reasonably available. Thus, it is tempting to conclude that, with respect to technical regulations, the TBT Agreement simply provides a more fine-tuned set of tests or criteria for achieving the same objectives as GATT Articles III/XX.

However, there are fundamental structural differences.⁷⁵ The first difference relates to the anti-protection principle, which is central to the manner in which the GATT/WTO system interacts with the domestic regulatory state. The struc-

⁷² *Ibid.*, paras. 78–83.

⁷³ See *Bananas panel*, paras. 7.285. ff; and *Bananas AB*, *supra* n. 9, paras. 217. ff; see also *Canada—Periodicals AB*, *supra* n. 56, 19; see also Panel Report, *Indonesia—Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS64/R, 1998 (hereinafter *Indonesian Autos*). See also Davey and Zdouc, “The Triangle of TRIPs, GATT, and GATS” in *World Trade Forum* (University of Michigan Press).

⁷⁴ Appellate Body Report, *supra* n. 16, para. 80, original emphasis.

⁷⁵ See Hudec, “Requiem”, *supra* n. 7.

ture represented by Articles III/XX preserves a wide field of regulatory autonomy for domestic polities (at least if correctly interpreted), by requiring that a member has to justify its public policies before the WTO tribunal (i.e. under XX) only *if* they have been found to be inconsistent with the anti-protection principle (i.e. under Article III). Thus, as the AB emphasises in *Asbestos*, even if a measure draws a regulatory distinction between products that have been determined to be “like”, there will still not be a violation of Article III:4, unless that distinction results in less favourable treatment of the group of like imported products relative to the group of like domestic products, i.e. unless the regulatory distinction results in *protection* of domestic production.⁷⁶ It is the judicious application of the anti-protection norm that, in important respects, provides assurances against the WTO Dispute Settlement Body becoming the menacing, autocratic global government that it is feared to be by many of the system’s critics. In the last analysis, if the complaining member cannot prove on balance of probabilities that my internal regulation protects domestic production, the WTO dispute settlement organs do not get to second-guess my sovereign regulatory choices under Article XX.⁷⁷

Now, when we turn to the TBT Agreement, we see a quite different juridical structure. First of all, the obligations in the TBT Agreement apply even to non-discriminatory technical regulations. Secondly, many of the obligations in the TBT Agreement are of a “due process” character, ensuring transparency and integrity in the regulatory process.⁷⁸ Indeed, more generally, many features of the TBT Agreement would appear incomprehensible, but for an appreciation of its overall focus on regulatory processes. For example, the TBT Agreement contains MFN and National Treatment obligations⁷⁹; these provisions would be superfluous and inexplicable in the TBT Agreement, if that Agreement were focused on the substance of regulations themselves, for already in Articles I and III:4 of the GATT there are essential identical MFN and National Treatment obligations that apply to “laws, regulations, and requirements”. However, as is indicated in the heading of Article 2 of the TBT Agreement as a whole, the MFN and National Treatment provisions there, like the other provisions of Article 2, are with a view to ensuring certain characteristics of the regulatory *process*, namely the stages of the regulatory process concerning, respectively, the “Preparation, Adoption, and Application” of technical regulations. Thus, where the concern about the regulatory process actually entails in the TBT Agreement some elements of judgement concerning the substance of regulations themselves, namely, whether a member’s measure is the least trade restrictive

⁷⁶ Appellate Body Report, *supra* n. 16, para. 100.

⁷⁷ A further hedge against this possibility is the sensitive interpretation of Art. XX, which we explore in the next section of this chap. However, as Hudec notes, Art. XX places a substantial justificatory burden on the defending member, a burden that does not seem to sit well in the case of measures that have not been found to constitute protective discrimination, but merely have *some* kind of restrictive impact on trade: Hudec, “Requiem”, *supra* n. 7.

⁷⁸ E.g. Art. 2.7 of the TBT Agreement establishes transparency requirements.

⁷⁹ Art. 2.1 TBT Agreement.

available (Article 2.2), it is the *challenging member* who must prove, on the balance of probabilities, that the regulating state has *failed to ensure in the regulatory process* that its measure is the least restrictive of trade. This contrasts with the character of the least restrictive means test applied under those heads of Article XX of the GATT that invoke the notion that a member's measure must be "necessary" for a stated permissible objective, where the substance of regulations must be justified by the defendant, because protection has already been determined to exist (i.e. a violation of Article III or some other provision of the GATT, for example those dealing with discriminatory border measures, for example Article XI). It is true that this burden of proof has been somewhat modified by the notion, prominent in certain cases, that once the complainant has established a "presumption" of violation, the burden shifts to the defending member.⁸⁰ However, there is no discovery available in WTO dispute settlement, so where the *complainant* cannot be expected in the first instance to have access to information that would normally allow it to make its claim, for instance detailed information about the internal workings of the defending member's regulatory processes, the burden may be shifted to the defendant once the complainant has gone as far as the tribunal thinks it *can* reasonably be expected to go in establishing its case on balance of probabilities, without being able to compel the production of evidence by the defendant.

Now, if TBT were to *replace* Articles III/XX of the GATT as a comprehensive legal regime in the case of technical regulations, the balance between market access and regulatory autonomy struck by the anti-protection principle would be undermined. On the one hand, the right created, in effect, by Articles III/XX to require that a member provide a justification before the dispute settlement organs for *protective* policies would be lost—once a *prima facie* case of protective discrimination is made out, it seems unreasonable to require the complainant to show that the policies are *not* justified as the least trade restrictive alternative. On the other hand, there is the risk that the balance could easily be tipped the other way, if the panels and Appellate Body were to understand Article 2.2 of the TBT Agreement as playing the kind of role of strict scrutiny of substantive regulatory outcomes that Article XX plays, at least where the applicable paragraph in Article XX indicates a "necessity" test. That is, even non-protective measures could lead to a strict standard of scrutiny under Article 2.2, thus allowing the WTO dispute settlement organs to second-guess policy outcomes for which there is not even a *prima facie* case of protective discrimination.

If these are the dangers in viewing TBT as a replacement regime for Articles III/XX, how then are we instead to apply the two regimes concurrently, while making sense of both differences and similarities in language and concepts as between the two? The answer lies in some of the complexities and sensitivities involved in applying the anti-protection principle in non-facially discriminatory

⁸⁰ See also Appellate Body Report, *United States—Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R (hereinafter *US Shirts and Blouses*).

measures that nevertheless have a disparate impact on trade. If a panel were only to find a violation of Article III where a protectionist intent could clearly be established behind such measures, many cases of hidden protectionism would not be caught, and this would undermine the durability of the non-discrimination norm as a reasonable balance between market access rights and regulatory autonomy (thus, the rejection of this version of “aims and effects”). If, instead, a panel were to find violation of Article III every time there was an impact or effect on trade from a regulatory distinction not based on market criteria such as those emphasised by the panel in *Japanese Alcohol*,⁸¹ a huge range of non-protectionist regulations would be subject to strict scrutiny under Article XX, opening up a serious threat to regulatory autonomy.

We have already explored how, through its interpretation of “likeness” and “less favourable treatment”, the AB has attempted in *Asbestos* to provide a range of safeguards against this latter danger. However, it is clear that determining whether products are “like” and whether there is “less favourable treatment”, i.e. protection of domestic products, entails sensitive case-by-case judgements concerning the regulatory scheme, its design, the way that distinctions are drawn within it and the relationship of those distinctions to the operation of the market-place. Such judgements can be made with greater confidence and precision if one can have the window into the regulatory process itself that TBT disciplines should provide. One can have greater confidence that the distinctions in a regulatory scheme are in fact non-protectionist, by requiring certain things about the regulatory process that itself generates those distinctions—transparency, coherence and consistency, use of international standards as “inputs”, ensuring at each step of the process that the measures adopted are not more trade restrictive than necessary, given the kind of risk at issue (admittedly in this last case there is some substantive element, as the treaty text suggests that it is appropriate to analyse the results of the process in order to assess whether the obligation to “ensure” has been fulfilled). If a member has fulfilled its obligations under TBT, we can have some assurance that any non-national-origin-based regulatory distinctions that have a trade impact are, nevertheless, non-protectionist. Thus, once the complainant has failed to establish a violation of TBT, it should be well-nigh impossible for it to sustain a claim that Article III:4 is violated. Similarly, a complainant who brings a claim with respect to a technical regulation under Article III, while not making any claim of a TBT violation, will risk the panel being relatively deferential to the defending member’s regulatory choices. If the complainant has not sought to impugn the regulatory process itself under TBT, it cannot object to the panel affording considerable deference to non-national-origin-based regulatory distinctions in the scheme, questioned by the complainant. The implication of this is that where

⁸¹ It will be recalled that the Appellate Body in *Japanese Alcohol* emphasised that criteria for likeness including these market-based criteria, but that the list was open-ended, with the relevant criteria depending on context, including presumably the regulatory context: *AB Japanese Alcohol*, *supra* n. 36, 21.

a regulatory scheme does not explicitly discriminate against imports, these claims will normally be brought as TBT claims. A related implication is that if, in the case of such a claim, a member happens to invoke both Article III and TBT, the panel should normally proceed in the first instance with the TBT analysis, which gives it an insight into the regulatory process. Only where the scheme provides explicit differential treatment of imports and domestic products, i.e. contains facial distinctions between products on the basis of national origin (domestic or foreign) would the panel commence with Article III:4. If, in the case of non-origin-based regulatory distinctions, there is a violation of TBT, the panel may have a view of the regulatory process that will make it more likely that an Article III:4 violation will be found, i.e. that the distinctions in question result in less favourable treatment or impacts in the sense of protection of domestic production. Of course, for reasons of judicial economy, the panel may decide, having found the measures in violation of the TBT, not to proceed to consider Article III. On the other hand, as already suggested, if the regulatory process *is* in conformity with TBT requirements, it is highly implausible that the non-national-origin regulatory distinctions generated by that process could be impugned under Article III. Of course, there will be cases where claims concerning non-facially-origin-discriminatory measures *will* be litigated under Article III, these being cases where the measure in question is not a technical regulation within the meaning of TBT (and does not fall under SPS either). But because of the broad definition of technical regulation in the TBT Agreement, most claims that are related to regulatory schemes with non-commercial or non-fiscal purposes will not be decided under Article III.

In the case of measures that do contain facial national-origin-based distinctions, a complainant may well wish to make an Article III claim, as such measures are almost certain to constitute violations of Article III, therefore placing the onus of justification on the defendant, if indeed some purpose stated under Article XX can be invoked. (Of course, as the panel stated in the *Section 337* case, it is possible that even a scheme that discriminates facially on the basis of national origin could, in certain circumstances, nevertheless “provide no less favourable” treatment to imports; however, such a facial distinction between domestic and imported products probably should suffice to make a *prima facie* case of “less favourable treatment”, which would then have to be rebutted by the *defendant*, who must show that while imports are treated differently there is no protection of domestic production involved in such differentiation. But see the AB ruling in *Korea-Beef*, para. 157.) In the case of facial discrimination, however, the complainant may still wish to bring a TBT claim. Even if the defendant can justify its measures under Article XX, it may still be in violation of some specific provisions of the TBT Agreement. Of course, in the case of Article 2.2, if the defendant has borne the burden of proof to show that its measures are the least trade restrictive alternative under Article XX, it is hard to imagine how the complainant could establish a violation of Article 2.2, especially since Article 2.2 requires not that the measures be the least

trade restrictive reasonably available, but only the least trade restrictive taking into account the risks that the measure address. Thus, a panel would normally consider the Article 2.2 claim *res judicata* having found that the measure is the least trade restrictive reasonably available for the purpose in question. This would normally suggest the logic of the panel first considering Articles III and XX of GATT before going on to adjudicate the TBT claims. Also, since in order to bear the burden of proof for justification, which it is only reasonable for it to do given that one is dealing with a facially discriminatory measure, the defendant will be bringing forward a great deal of information about its regulatory scheme, this will obviate the difficulty the complainant normally faces under TBT of obtaining the information to prove a violation on a balance of probabilities without the ability to compel disclosure of evidence by the defendant, and thus in turn obviate the need to corrupt or modify burden of proof through the notion of shifting presumptions. Then, after the Article XX analysis, the panel can go on to consider any TBT claims not *res judicata* in consequence of that analysis. Of course, if the defendant is unsuccessful under Article XX, the panel may, on judicial economy grounds, decide not to proceed to the TBT claims, as the measure has already been found in violation of a WTO treaty.

THE ASBESTOS DISPUTE AND THE OPERATIVE PROVISIONS OF
THE TBT AGREEMENT

We have argued above that, in many respects, the TBT Agreement can be seen as a response to the delicate task of adjudicating claims about *de facto* discrimination in regulations with non-commercial or non-fiscal rationales. The TBT Agreement focuses largely on the regulatory process and its inputs, which involves necessarily *some* examination of the substantive regulatory choices of democratic polities, but avoids WTO tribunals sitting in *de novo* review of non-facially discriminatory policies, against which there is no general presumption in WTO law (unlike facially discriminatory trade restricting measures). The Preamble to the TBT Agreement reflects in a number of its provisions this view of the Agreement. Thus the Members recognise that “no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement”. This provision can make sense only if nothing *per se* in the TBT Agreement prevents a member from choosing its appropriate level of protection. Otherwise, the provision would have the following, (il)logical structure: no country shall be prevented from doing x, provided it does not do x.

More generally, this crucial provision in the Preamble states the view that the provisions of the TBT Agreement represent a set of specific and limited qualifications to members' general presumed right to regulate as they see fit for the purposes in question—or, to put it the other way round, the Agreement does not set up a general presumption against such regulations as trade barriers, which must then be scrutinised to see if they fit within certain exceptions. The provisions of the TBT Agreement must, then, not be interpreted so broadly as to nullify or fundamentally frustrate the core right to regulate as recognised in the Preamble—they merely place some conditions or qualifications on the exercise of that right.

Article 2.2 is perhaps the provision of the TBT Agreement that most clearly brings into the assessment of a member's regulatory process an element of judgement or scrutiny of its substantive regulatory outcomes. The first sentence of Article 2.2 states an obligation of members with respect to the regulatory process: they must “ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade” (emphasis added). The second sentence indicates that this obligation to “ensure” is to be judged against the substantive results of the regulatory process. It reads: “[f]or this purpose technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create”. After stating a list of legitimate objectives that is non-exhaustive the provision closes with the following sentence: “[i]n assessing such risks relevant elements of consideration are, *inter alia*, available scientific and technical information, related processing technology or intended end-uses of products”. These various qualifications on the substantive criterion that regulations be the least trade restrictive necessary, distinguish the TBT Agreement sharply from the strict scrutiny regime established by Art. XX of the GATT for presumptively discriminatory measures, at least with respect to measures concerned with human life and health (Art. XX (b)).⁸² The qualifications remind us that the substantive criterion is with a view, not so much to justifying the measures themselves (being presumptively legitimate, they do not require a justification), but to evaluating the regulatory process that has produced the measures. Thus, the obligation to ensure the least

⁸² Note that not all of the heads in Art. XX require a “necessity test” as developed by the panel in *Thai Cigarette* for Art. XX (b) which reads, “necessary to protect human, animal or plant life or health”: *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, BISD 34S (hereinafter *Thai Cigarette*). Other cases addressed Art. XX (g) which deals with measures “relating to the conservation of exhaustible natural resources”. In *Reformulated Gasoline*, the Appellate Body stated for a measure to qualify as “relating to” within the meaning of Art. XX (g), the measures had to exhibit a “substantial relationship” with the conservation of natural resources. See Appellate Body Report in *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2, 20 May 1996 (hereinafter *Reformulated Gasoline*), 21. In *Shrimp/Turtle*, the Appellate Body stated that the US measure exhibited a “means/ends relationship” with the legitimate policy of conserving an exhaustible and endangered species. See Appellate Body Report, *United States—Import Prohibition of Certain Shrimps and Shrimp Products*, 6 November 1998 (hereinafter *Shrimp/Turtle*) para. 135.

trade-restrictiveness of regulations is relative to the kinds of risks that would arise in the absence of the regulations. Deliberation about the choice of regulatory instrument can be a costly and time-consuming process. How far a member should be expected to go in exhausting all the regulatory alternatives to find the least trade-restrictive alternative is logically related to the kind of risk it is dealing with. Where what is at stake is a well-established risk to human life itself (as we will argue, this is exactly the case with asbestos), a member may be expected to act rapidly, rely on the scientific *acquis* to a large extent, tending towards the more obviously effective and enforceable kinds of regulatory tools, as opposed to the more sophisticated and speculative ones. This suggests the concept of the Precautionary Principle, as articulated by the Appellate Body in *Hormones*: “responsible, representative governments commonly act from perspectives of prudence and precaution where risks of *irreversible, e.g. life-terminating, damage to human health* are concerned”⁸³ (emphasis added). While, as the AB has noted in *Asbestos*, TBT obligations are “different” from those in GATT,⁸⁴ nevertheless it is significant that in its Article XX analysis, not needing to decide the case at bar, the AB considered that the value at stake in the case of *Asbestos* “is both vital and important in the highest degree”.⁸⁵

In its submissions to the panel, Canada claimed that France’s measure was not rationally related to the objective of protecting health and life, as well as that it is not the least trade restrictive available to fulfill the objective.⁸⁶ As the EC suggested in its reply brief, there was, however, no textual basis in Article 2.2 for separately assessing whether a measure is rationally related to its objective. In fact, Canada’s arguments about the lack of rational basis for the French ban were essentially identical to its arguments that it is not the least trade-restrictive measure available to fulfill the objective in question.

Canada’s first argument was that France had acted on the basis of the historical information about the risks posed by asbestos, and this historical information did not isolate the particular kind of asbestos fibre exported by Canada, chrysotile. According to Canada the health risks that had materialised in the past are in large measure due to the use of asbestos fibres other than chrysotile, which (according to Canada) is in fact safe when used in an appropriate manner.

Given the overwhelming evidence of the serious risks to life and health posed by exposure to asbestos in general, should the TBT Agreement be interpreted as requiring that France, in order to ensure that its measure is the least restrictive of trade available, attempt to undertake new empirical work, which aims to isolate the risks posed by chrysotile, in order to determine whether France could achieve its health objective while not banning this particular form of asbestos? Here, it is important to note that Article 2.2 explicitly lists among the relevant elements of consideration in assessing risk, “*available* scientific and technical

⁸³ See *Hormones* AB, *supra* n. 3, para. 124.

⁸⁴ Appellate Body Report, *supra* n. 16, para. 80.

⁸⁵ *Ibid.*, para. 172.

⁸⁶ Canada, first submission *supra* n. 26, paras. 201 ff.

information” (emphasis added). The TBT Agreement itself appears explicitly to endorse reliance on existing, available information in the assessment of risk. Even in interpreting Article XX, which has no such explicit reference to “available” information, the Appellate Body in *Asbestos* held that France could not be expected to adopt a less trade-restrictive alternative that was as yet unproven in effectiveness.⁸⁷

The *Asbestos* case is a good example of the wisdom of focusing on available information. It is true that the historical evidence of the serious risk to life and health from asbestos reflects data on exposure to many kinds of asbestos, especially those other than chrysotile. However, since the health risks from asbestos have typically taken a long time after exposure to manifest themselves, to do what Canada expects would entail a strategy of waiting until there is incontrovertible evidence that chrysotile alone poses the health risks in question, before banning its use. It seems to amount to a nullification of a member’s sovereign prerogative to protect the health and life of its citizens (which is also an *obligation* of most WTO states under international human rights law⁸⁸), if it had to wait until a significant number of its citizens became sick or died from exposure to chrysotile in particular, before banning this substance.

In fact, chrysotile as a substance has the same basic properties as other types of asbestos. Canada’s argument that it is harmless really reduces to a claim that the way in which, today, chrysotile is encased in building materials and used in accordance with safe procedures renders it harmless.⁸⁹ Here, Canada was suggesting that the EC (France) had violated Article 2.2, because it could have attained its objective merely through requiring safe use of chrysotile, a less trade-restrictive alternative.

To what extent does Article 2.2 require a member to adopt a less restrictive alternative regardless of the costs and feasibility of that alternative? Unlike the parallel provision in the SPS Agreement, Article 5.6, and its footnote 3, Article 2.2 does not explicitly state that least restrictive means least restrictive measure “reasonable available taking into account technical and economic feasibility”. Yet such an explicit reference in Article 2.2 is not really necessary to capture the notion that regulatory costs of alternative policy alternatives should be taken into account. This is because Article 2.2 contains a much more general qualification on the notion of least restrictive alternative—that the alternative be least restrictive “taking into account the risks non-fulfillment would create”. As the Appellate Body clarified in *Hormones*, the notion of risk and risk assessment does not go only to the risks as they emerge under ideal or laboratory conditions, but risks that arise due to limits on the ability to control the way a

⁸⁷ Appellate Body Report, *supra* n. 16, para. 174.

⁸⁸ See right to life in civil and political covenants and WHO declaration on right to health.

⁸⁹ Canada first submission, *supra* n. 26, para. 73 ff: “*Effets sur la santé des principaux types d’exposition à l’amiante*,” Institut National de la Santé et de la recherche Médical, Paris, éditions (INSERM: Collection Expertises Collectives, 1997).

product is used.⁹⁰ This finding in *Hormones* applies *a fortiori* to the conception of assessing risks under Article 2.2, where the factors to be taken into account have pointedly been left-open-ended, “available scientific and technical information” being only one among them.⁹¹ The European Communities argue, in the *Asbestos* case, that there are significant obstacles to ensuring that chrysotile is “used” in such a way as to obviate serious risks to health and life. “Safe use” as understood by Canada applies only to the installation of components containing chrysotile in the construction process. Even if perfectly enforced, such protocols would not obviate the risks to maintenance workers, much less to do-it-yourself renovators. As the EC argues, devising a regulatory scheme that would protect these potential victims through behavioural protocols would be extremely difficult, at least relative to a straightforward ban on the substance. Here, again, it is worth noting that, for purposes of Art. XX, where the treaty text itself does not have the qualifying language “taking into account the risks non-fulfillment would create”, the AB accepted, based upon the facts found by the panel, that in circumstances such as these the alternative measure of controlled use could not be viewed as achieving France’s stated level of protection.⁹²

Of course, almost any alternative to a ban in most cases will present some significant regulatory challenges and costs. There is a limited number of producers and suppliers of asbestos within Europe and outside. Effectively enforcing the ban would not seem to be very difficult. But, it might be objected, if less-restrictive regulatory options to an outright ban are often going to have higher regulatory costs, would not taking those costs into account under Article 2.2 render the obligation to adopt the least trade-restrictive alternative largely

⁹⁰ See *Hormones* AB, *supra* n. 3, para. 187, reading that risks is also “the risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die”.

⁹¹ There are some who interpret the language “taking into account the risks non-fulfillment would create” as imposing an additional requirement on the defending Member, namely that the measure not only be the least restrictive of trade, but that it also be proportional, namely that the marginally greater risk of a less trade restrictive measure would need to be balanced against the degree to which the it is less trade restrictive. This is apparently the position of Hudec, “Requiem”, *supra* n. 7. However, this interpretation is inconsistent with the structure and purposes of the TBT Agreement. First of all, if a Member had to live with a measure that does not fully realise its policy objective, because that measure is much less trade restrictive than one that realises the objective fully, then a member’s fundamental right to determine its appropriate level of protection would be undermined, if not gutted. A member *could* not, in effect, set a level of protection that *required* a very high level of trade restrictiveness for its full realisation. This in turn would make the least restrictive means test in TBT much more intrusive of domestic sovereignty than the test in Art. XX(b), e.g., especially as interpreted by the AB in both *Korea-Beef* and *Asbestos* (see the discussion below at pages 321 ff). That result is obviously perverse, given that the TBT Agreement applies to measures that have not yet been found to be protective, whereas Art. XX will apply in these situations only where protective discrimination, and thus a violation of Art. III:4, has already been established. Our interpretation that the language concerning taking into account the risks non-fulfillment would create provides an additional margin of appreciation to domestic regulators is, by contrast, entirely consistent with the structural differences between the two Agreements, particularly the notion that many measures considered under TBT do not carry the presumption of protective discrimination, unlike Art. XX.

⁹² Appellate Body Report, *supra* n. 16, para. 174.

meaningless? Here, however, the language “taking into account the risks non-fulfillment will create” is very important. No risk management scheme will be so perfectly applied and enforced as to reduce risk to zero; thus, if the objective is zero risk then a ban will almost always be the least restrictive alternative (at least assuming relatively few enforcement problems with the ban itself). Thus, at one level, Canada may be justified in suggesting that the TBT Agreement does not allow a member to set its regulations according to the principle of reducing risk to zero,⁹³ for if so “the least restrictive alternative” obligation could be reduced to something largely meaningless. However, in some cases where risk *management*, at least any available at reasonable cost, is inadequate to prevent the risk materialising, the consequences may not be particularly grave or serious. In those cases, “taking into account the risks that non-fulfillment would create”, it might be reasonable for a member to adopt the risk management scheme, despite its imperfections, since those imperfections minimally impair its ability to protect the health and lives of its citizens.⁹⁴ In other situations, however, such as that in the *Asbestos* case, where imperfect control of the risk through risk management is likely to result in consequences as serious as life-threatening cancer, not to permit an outright ban as the “least restrictive measure” would impair the very ability of a member to exercise its prerogative (and fulfill its international human rights obligation) to protect the right to life of its citizens. Once interests of this kind of gravity are clearly seen to be at stake, a member need not be required to adopt a less restrictive policy instrument that provides less certain or perfect control of the risk, even by a small margin, despite the possibility that the less restrictive instrument would be *hugely* less restrictive of trade—there is no place for balancing or proportionality analysis. This is consistent with the recognition, in the Preamble to the TBT Agreement, that the provisions of the Agreement do not nullify the basic prerogative to protect the health and life of one’s citizens. This being said, a ban on asbestos, while being more restrictive of Canada’s trade in asbestos than a measure that banned asbestos only where it was proven that substitutes were less safe than asbestos, might not thereby be less restrictive of trade overall. Substitute fibres are also traded products. To establish trade-restrictiveness in this instance, Canada would have to show that there are barriers to trade in the substitute products, such that any reduction in asbestos trade would not be compensated for by increased trade in substitutes.

A further claim by Canada is that the substitutes for asbestos have not been proven safe—it might turn out that the health and safety objective is actually undermined by a ban on asbestos, if the substituted substances turn out to be harmful or more harmful than chrysotile asbestos itself. In effect, Canada is saying that a less restrictive alternative would be to require that asbestos

⁹³ Canada, second submission, *supra* n. 26, paras. 225ff.

⁹⁴ See the observation of the Appellate Body with respect to Art. XX in the *Korea-Beef* case, *infra* n. 99, para. 180

substitutes be used, only when it has been demonstrated that these are safe, or safer than asbestos itself.

The limits of *ex ante* risk prevention through prediction of risks based on testing and experimentation prior to sale in the market-place are, in the case of many risks, quite substantial. This is obviously the case with respect to carcinogenic risks, where it may take years of exposure to a substance before a cancer actually materialises. In the case of ingested substances, one means by which this problem is obviated is the exposure of laboratory animals to levels of the substance that are comparable to that which humans would have over a significant length of time. However, this is of course an imperfect substitute for actual historical epidemiological studies of human populations. Thus, regulation of carcinogenic risks generally displays a strong bias towards those risks that are already known or have materialised in actual use of the substance in the real world. Here, France has weighed the benefit of countering a massively documented risk against the cost of creating a hypothetical and unknown one (whatever risks might be created from the use of substitute fibres). Its decision reflects the heuristics of choice under uncertainty that underlie almost all risk regulation. In rejecting the version of its claim on this issue that Canada made in its Article XX submissions, the AB accepted that members have the right to act on the basis of available information concerning relative riskiness of products: “it seems to us perfectly legitimate for a Member to seek to halt the spread of a highly risky product while allowing the use of a less risky product in its place”.⁹⁵

This being said, France has attempted to craft its decree to take account of the possibility that substitute products may not always be less safe than asbestos—thus, there is an exception from the ban in cases where “*l’utilisation de produit de substitution ne présent pas, en l’état actuel des connaissances scientifiques, un risque moindre pour la santé des travailleurs*”.⁹⁶

Article 2.3 of the TBT Agreement states: “[t]echnical regulations shall not be maintained if the circumstances or objectives giving rise to their adoption no longer exist or if the changed circumstances or objectives can be addressed in a less trade-restrictive manner”. This provision reflects in part the realisation that, in regulating, members necessarily make use of the information available at the time they are formulating their regulations. So, if scientific information becomes available that substitute products are as risky or more so than asbestos, and it nevertheless continues to target asbestos only, France may be in violation of Article 2.3. However, the exception in the decree seems well designed to take into account possible developments in the scientific evidence concerning the relative risks posed by asbestos on the one hand and substitute fibres on the other. Taken together, Article 2.2 and 2.3 expresses a finely balanced notion of precaution: a member can base its regulations on the existing, actual evidence of risk, without waiting for a perfect or comprehensive understanding of the risks

⁹⁵ Appellate Body Report, *supra* n. 16, para. 168.

⁹⁶ Decree No 96–1133 of 24 December 1996, Art. 2: see *supra* n. 21.

at issue; on the other hand, when, in the future, there are relevant changes in circumstances, it must revisit its regulatory choices.

ARTICLE 2.4: THE OBLIGATION TO MAKE USE OF INTERNATIONAL
STANDARDS WHERE AVAILABLE

There is a wide range of areas where incompatible technical specifications exist merely by virtue of the historical development of individual national standards systems, and where the differences do not reflect underlying differences in values, attitudes towards risk, or policy priorities. One example that comes to the mind of any frequent traveller between North America and Europe is the size and shape of electrical plugs and phone jacks! One suspects that the persistence of such differences is due either to path dependency, or protectionism, or perhaps a bit of both. Here, as is recognised in the TBT Agreement, international standardisation, in harmonising these gratuitously incompatible requirements, can play an important role in eliminating unnecessary obstacles to trade. Thus Article 2.4 of the TBT Agreement requires the use of international standards “as a basis for” technical regulations, in cases where the use of those standards does not negatively affect the legitimate objectives that a member is seeking to achieve.

In the case of asbestos, there is widespread recognition by international organisations with standards development responsibilities in the areas of occupational health and safety (the International Labour Organisation) and health (the World Health Organisation) that asbestos exposure represents a grave health risk and that governments should take measures to eliminate such exposure. Thus ILO Convention No. 162 recommends, wherever possible, “[the] replacement of asbestos or of certain types of asbestos or products containing asbestos by other materials or products or the use of alternative technology, scientifically evaluated by the competent authority as harmless or less harmful”.⁹⁷ More specific to the kind of asbestos that Canada exports, the WHO communiqué states that consideration should be given to replacing chrysotile by harmless substitute materials wherever possible.

In banning the use of asbestos, except where there are no safer or technically feasible alternatives, the French decree seems to track very closely the approach to asbestos as a health risk taken by these international standards organisations. However, Canada claimed that the French ban is not consistent with international standards, because there are international standards that specify procedures for the manufacture and use of asbestos in a manner that minimises health risks.⁹⁸ But the existence of international standards to make the risk from

⁹⁷ ILO Convention No. 162 Art. 10 (a).

⁹⁸ Canada also claims that France is not following international standards, since the ILO Convention specifies that substitute materials must be scientifically verified as safe. However, France notes in its submission that substitute products must also be tested and their safety verified

asbestos as small as possible is entirely compatible with the basic approach of the international standards bodies that the use of asbestos should be discontinued as soon as possible, except where technically feasible, safer alternatives do not exist. There will remain situations where asbestos is still used, either because of the need for a phase-out period of some length to allow the relevant industries to adjust their practices, find alternatives, etc. or where there are not technically available, safer alternatives. In those situations, standards to make asbestos as safe as possible will play an important role in reducing the remaining health risk.

The EC sought to counter Canada's claim, however, by the argument that the declarations of international standards bodies in this area are merely statements about the risk from asbestos and do not amount to "standards" within the meaning of the TBT Agreement. The definition of "standard" in Annex I to the TBT Agreement is, however, quite broad, including "rules, guidelines, or characteristics for products or related processes and production methods", *inter alia*. It is difficult to understand how a recommendation to replace asbestos with safer materials whenever possible would not amount to a guideline for products, even if there were some question whether it could rise to the status of a "rule", given that there is some flexibility built into the recommendations in question.

ARTICLE XX (B)

In its notice of appeal, Canada also challenged the panel's ruling that, although a violation of Article III:4, the French ban was justified under the GATT's exception for measures to "protect human . . . life or health". Specifically, Canada argued that the panel had committed errors of law in its interpretation of Article XX (b), developing a too deferential and permissive reading of the GATT's general exception. The Appellate Body, having found that the French ban did not violate Article III: 4 GATT, could, for reasons of judicial economy, have decided not to rule on this issue. Nevertheless, it decided to address the Canadian claims, using this as an opportunity to clarify some important issues relating to Article XX (b), establishing a more deferential approach, sensitive to members' regulatory choices and domestic regulations that address vital health interests. In examining the panel's approach to Article XX (b), the AB adopted a two-step approach. In a first step, it addressed the question whether the French ban was indeed directed at the objectives cited in Article XX (b), notably in this case to protect human health. In a second step, it examined whether the measure

by national or international bodies: EC first submission, *supra* n. 18, paras. 249ff, 279 ff. France does not have a unified regulatory regime it appears for testing asbestos substitutes—but nor does the ILO Convention require this—it requires only that the substitute materials themselves be subject to verification for safety, which normally occurs within the standards regime applicable to the industry in question.

at issue was “necessary” to achieve the specific public policy goal, a level of protection against health risk. This approach is in line with previous decisions on measures falling under some of the individual subheadings of Article XX.⁹⁹

In its first step, when analysing whether the panel was right in concluding that the French ban fell within the category of measures embraced by Article XX (b) of the GATT 1994, the AB found that “the panel remained well within the bounds of its discretion in finding that chrysotile-cement products pose a risk to human life or health”.¹⁰⁰ For reaching its decision, the panel had to weigh evidence on whether the French ban was designed to *protect* health. It did this in line with *Thai Cigarette*, which had established that “the use of the word ‘protection’ implies the existence of a risk” and that this consequently meant that a panel had to begin its analysis “by identifying a risk for public health”.¹⁰¹ Thus, if there were no evidence that asbestos posed a risk to human health, then a ban on asbestos would not appear to be designed to protect health. In case of asbestos however, its deadly and carcinogenic characteristics are well and widely recognised, by the consulted scientists and by the relevant international bodies. This more than ample evidence on the dangers of asbestos allowed the panel to conclude that the measure was designed to protect health, and the Appellate Body upheld the panel’s finding on that.¹⁰²

However, neither the AB nor the panel said anything about *how much* evidence of health risks is needed to regard a measure as “for the protection of health”. Arguably, this risk requirement should be *de minimis*, i.e. the minimum needed to assert with some plausibility that the measure is directed towards the goal of protecting health. With respect to asbestos, the health aspect was, as noted, obvious. In other cases, panels may have to come to grips with measures that respond to less orthodox conceptions of “health”—for instance, conceptions that only “organic” food products are healthy, which are not underpinned by conventional scientific understandings, but reflect more holistic views of human health as implying harmony with natural processes. Here a panel should arguably defer to measures that are taken pursuant to such appreciations of the nature of human health, where the structure and design of the scheme are consistent with it being directed towards such a conception of health, as opposed to some other policy purpose. At the same time, it would obviously be appropri-

⁹⁹ E.g., in *Korea Beef*, the Appellate Body had stated that “[f]or a measure, otherwise inconsistent with GATT 1994, to be justified provisionally under paragraph (d) of Art. XX, two elements must be shown. First, the measure must be one designed to ‘secure compliance’ with laws or regulations that are not themselves inconsistent with some provisions of the GATT 1994. Second, the measure must be ‘necessary’ to secure such compliance”: (see Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, 11 December 2000 (hereinafter *Korea-Beef* Appellate Body Report) para. 157. The Appellate Body also took a similar approach in *Shrimp/Turtle*, where it first determined that sea turtles were “exhaustible natural resources” and then concluded that the US measure was “related to” the goal of conserving exhaustible natural resources as required by Art. XX (g): see *Shrimp/Turtle*, *supra* n. 82, para. 135.

¹⁰⁰ Appellate Body Report, *supra* n. 16, para. 162.

¹⁰¹ Panel Report, *supra* n. 13, para. 8.184.

¹⁰² Appellate Body Report, *supra* n. 16, para. 163.

ate, in considering the meaning of health, for the panel, pursuant to Article 31 of the Vienna Convention,¹⁰³ to consider definitions of the notion of health, and health risks, in international health law and policy, especially reflected in legal instruments and related policy statements of the World Health Organisation.

Having found that the French ban was a measure that protected human life or health within the meaning of Article XX(b), the panel went on to evaluate the “necessity” of the measure. Canada appealed the panel’s “necessity” analysis on four grounds,¹⁰⁴ but here again the AB upheld the panel’s findings, concluding that there was no “reasonably available alternative” to the prohibition of the French import ban and, therefore, that the French measure was “necessary to protect human health” within the meaning of Article XX (b). The AB’s reasoning is interesting for a series of aspects.

First, the AB made it very clear that it is each WTO member’s “right to determine the level of protection of health that [it] consider[s] appropriate in a given situation”.¹⁰⁵ France had decided that it wanted to “halt” the spread of asbestos-related health risk, and the AB accepted its goal of reducing these health risks to zero. Here, the AB rejected categorically the notion that a member’s right to determine its level of protection should be subject to considerations of proportionality. Thus, a member may choose zero risk as its goal even though, if it had chosen a slightly less ambitious goal, that goal could have been achieved with a vastly less trade-restrictive policy instrument. In effect, as long as it declares its goal as zero risk, a member can be fully justified in its choice of a highly trade-restrictive instrument that achieves 100 per cent reduction in risk, even where the member could achieve a 98 or 99 per cent reduction of risk through a policy instrument that was not trade-restrictive at all. This outcome respects the hierarchy of norms reflected in Article XX—health trumps liberal trade as a value, in the presence of any genuine conflict between the two.¹⁰⁶ However, one must consider this finding in tandem with a related finding, in *Korea-Beef*, that a member will not easily persuade the panel that its objective is zero risk if the policy instrument it chooses is structurally incapable of achieving that objective.¹⁰⁷

Another significant finding of the AB in addressing Canada’s claims on appeal in *Asbestos* is that a member may single out the elimination of one kind of health

¹⁰³ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, 8 ILM 679 (hereinafter Vienna Convention).

¹⁰⁴ Appellate Body Report, *supra* n. 16, para.165.

¹⁰⁵ *Ibid.*, para. 168.

¹⁰⁶ One of the clearest textual indicators of such a hierarchy is the general operative clause of Art. XX, stipulating that “Nothing in this Agreement shall prevent” measures for the purposes indicated in the various heads of Art. XX (emphasis added).

¹⁰⁷ “We think it is unlikely that Korea intended to establish a level of protection that *totally eliminates* fraud with respect to the origin of beef (domestic or foreign) sold by retailers. The total elimination of fraud would probably require a total ban of imports. Consequently we assume Korea intended to *reduce considerably* the number of cases of fraud occurring with respect to the origin of beef sold by retailers”: *Korea Beef*, *supra* n. 99, para. 178. As this passage indicates, and as the AB reiterates in *Asbestos*, the level of protection need not be articulated in quantitative terms.

risk as its objective, even if it chooses not to take regulatory action against certain other risks. Thus, France can have as an objective zero risk from asbestos, while not necessarily having such an objective with respect to the risks posed by substitute products. This approach accepts that there is a wide range of social, economic and cultural factors that may affect a member's level of protection, other than the gravity of the consequences from materialisation of the risk. The fact that in banning asbestos France is permitting the use of substitute products that may also pose some risk to health does not compromise its choice of zero risk as the level of protection against *asbestos*-related health risks. If France were prevented in those circumstances from making such a choice of level of protection, this would be to compromise what the AB rightly identifies as the entirely acceptable strategy of "seek[ing] to halt the spread of a highly risky product while allowing the use of a less risky product in place".¹⁰⁸ Moreover, France could set its level of protection, and respective approaches to asbestos-containing and substitute products based on *existing* scientific evidence of the relative risks of the two. Before seeking to eliminate the risk from asbestos, it was not required to investigate exhaustively the risks from the use of substitutes.

Having thus established France's chosen level of protection, the AB went on to consider the meaning of "necessary" in Article XX(b). Canada claimed that the ban on chrysotile asbestos was not "necessary", since a less trade-restrictive measure, a "safe use" regime, was available to achieve France's chosen level of protection. In considering Canada's claim, the AB, on the one hand, approved the test in the GATT *acquis* for necessity, namely whether there is a reasonably available alternative less restrictive of trade. On the other hand, the AB referred to its judgment in *Korea-Beef*, where certain refinements were introduced to that test.

In *Korea-Beef*, the AB had observed that while one meaning of "necessary" in ordinary language is "indispensable", this is not the only meaning.¹⁰⁹ One can coherently speak of it having been necessary to do something, without the very strong implication that no other choice was available at all. However, even this less strict notion of necessity is much closer to the idea of the action being indispensable than to the idea that it merely makes a contribution to the goal or objective in question.

The AB thus bifurcates the necessity test. There are situations where the claim may be that a measure is indispensable, i.e. the only available measure to achieve a member's chosen level of protection, and there are other situations in which a member may be able to justify its measure as "necessary" within the meaning of Article XX, even if the fit is not *that* close. In these latter situations, determining whether the admittedly not indispensable measure is nevertheless "necessary", "involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance

¹⁰⁸ Appellate Body Report, *supra* n. 16, para. 168.

¹⁰⁹ *Korea Beef*, *supra* n. 99, para. 161.

measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports”.¹¹⁰ Thus, the AB introduces an alternative, less strict proportionality test into those heads of Article XX, where the word “necessary” is found. What it is crucial to understand, however, is that the AB does not introduce proportionality as an *additional* requirement where the measure is indispensable—a measure that is indispensable for achieving a member’s chosen level of protection will be “necessary”, regardless of it being vastly more trade-restrictive than the next less trade restrictive alternative,¹¹¹ and regardless of whether the next less trade-restrictive alternative comes very close to achieving the member’s chosen level of protection. Thus, although it is introducing balancing or proportionality analysis into Article XX, the AB is nevertheless preserving the hierarchy of norms reflected in Article XX. In fact it is introducing balancing so as to provide members with an *additional* “margin of appreciation” in making regulatory choices to achieve the purposes stated in those provisions of Article XX that entail a necessity test.

In *Asbestos*, the AB has further refined the necessity test in Article XX. Since in *Asbestos*, France’s claim, logically enough, was that no measure other than a ban could achieve its chosen level of protection, namely zero asbestos-related risk, and the AB accepted that claim, this was a case where the measure was claimed to be, and was found to be, “indispensable”. Thus, the AB did not have to go on to engage in the kind of balancing that was discussed in *Korea-Beef*. What the AB did do however was to suggest that there may be differing levels of scrutiny applicable to the analysis of whether a measure is *indispensable*, depending on the importance of the objectives or interests it serves. Thus, it noted that a factor held to be of importance in *Korea-Beef* in conducting a proportionality analysis pursuant to the less strict branch of the necessity test, might be more generally relevant to the ease with which a panel is prepared to find a measure “necessary”. In other words, the importance of the values and interests at stake will also operate to determine the level of scrutiny when a panel is considering a claim that the measure is “indispensable” to achieve a member’s chosen level of protection.¹¹² Here, the AB went on to assert: “in this

¹¹⁰ *Ibid.*, para. 164.

¹¹¹ Here, it is important to be clear on the precise language in *Korea-Beef*, especially since the AB in para. 172 of *Asbestos* refers to balancing in *Korea-Beef* in a rather loose way that could mislead the reader into thinking it is going to go on to balance in *Asbestos*. The AB said in *Korea-Beef*: “in sum, determination of whether a measure, *which is not* ‘indispensable’, may be ‘necessary’ within the contemplation of Art. XX(d), involves in every case a process of weighing and balancing” (emphasis added).

¹¹² One frequent criticism of the AB rulings in *Gasoline* and *Shrimp/Turtle*, *supra* n. 82, which held that the language “relating to [exhaustible natural resources]” in Art. XX(g) implied a looser fit than the necessity language in Art. XX (b), was that the AB was actually saying, apparently perversely, that it is easier to justify protecting turtles or dolphins than protecting human lives. One could see the introduction of levels of scrutiny into the analysis of whether a measure is necessary under Art. XX, with especially deferential scrutiny for measures to protect human life from deadly

case, the objective pursued by the measure is the preservation of human life and health through the elimination, or reduction of the well-known, and life-threatening, health risks posed by asbestos fibres. The value pursued is both vital and important in the highest degree”.¹¹³

In judging the relative importance of various objectives contained in Article XX, the AB appears to be altering, or at least supplementing, the hierarchy of norms in the treaty. The intuitive appeal of the notion that health is a vitally important objective, and our annoyance at the way in which the panel was dismissive of health under Article III:4, should not blind us to the ramifications of the interpretive move the AB is making here. One appealing view of Article XX is that it deals with the potential tension between trade liberalisation and other values, through a series of provisions that scrutinise the relation of means to ends, rather than the value of the ends pursued themselves, provided those ends fall within a discrete head of Article XX. Does the AB really have the legitimacy to say to a society that, for instance, the pursuit of religious purity or piety is a less compelling objective than the protection of human health? Does it have the *bona fides* to make a determination that the rights of people count for more than the “rights” of animals? We would suggest that to remain consistent with its role as a treaty interpreter under Article 31 of the *Vienna Convention*, whenever the AB is hierarchising objectives within the heads of Article XX, it must do so following the hierarchies implicit or explicit in international law more generally. In defence of the Appellate Body, it had already cited a statements alluding to international health law and policy materials early in its judgment,¹¹⁴ which suggested wide international recognition of the gravity of France’s objective. This being said, the implications for democratic self-determination of the AB hierarchising objectives are attenuated, if only somewhat, by the fact that it is doing so in order to provide, in certain cases, a greater “margin of appreciation” to members.

How then does this greater “margin of appreciation” figure in the AB’s rejection of the Canadian claim that “safe use” is a reasonably available alternative measure? The AB makes several observations about this claim. The first is that “safe use” is not a well-tested alternative, the efficacy of which is already

risks, as an indirect answer to this criticism. Of course, the criticism is not in itself very well taken—it ignores that there is additional hurdle under Art. XX(g) that does not exist under Art. XX(b), namely that the measures must be taken in conjunction with restrictions on domestic consumption or production. See *Reformulated Gasoline*, *supra* n. 82.

¹¹³ An alternative interpretation of what the AB is doing here is that it is saying that there are some interests that are so vital that we simply ignore the distinction between “indispensable” and “necessary” in the looser sense, and simply proceed to the analysis of alternative measures, without balancing, but with a lower or relaxed level of scrutiny. The AB’s observation that “France could not reasonably be expected to employ *any* alternative measure if that measure would involve a continuation of the very risk that the Decree seeks to ‘halt’ ” indicates that no balancing or proportionality analysis is being undertaken here, whether because of the importance of the interest at stake or because this is in essence a claim for indispensibility within the meaning of *Korea-Beef*, *supra* n. 99, para. 174.

¹¹⁴ Appellate Body Report, *supra* n. 16, para. 114.

demonstrated; this is on the basis of the scientific record before the panel. The second is that there is some actual scientific evidence that available “safe use” procedures still leave some residual risk from asbestos. The third is that “safe use”, even if it did effectively protect against these risks in some contexts, would be particularly doubtful in other contexts, those such as do-it-yourself home renovations or the building industry, of the greatest importance to France. Here, the AB makes it clear that a member is under no obligation to attempt to achieve its level of protection using alternatives which lack certainty of effectiveness, before having recourse to a more, and indeed much more, trade-restrictive option. This clearly reverses the tendency, visible in the *Thai Cigarette* case for example, to have a member’s measure fail the necessity test if there is some hypothetical less trade-restrictive alternative available, which *may* or *might* be effective in the circumstances. In *Thai Cigarette*, the panel was considering a ban on foreign cigarettes by Thailand, which was concerned about the sophisticated techniques tobacco multinationals use to market such cigarettes among young people in particular, creating new generations of tobacco addicts. The panel determined that various kinds of regulation on the marketing and advertising activities of these multinationals were “reasonably available” less restrictive alternatives, despite evidence on the panel record from the World Health Organisation that it had proved impossible for developing countries, in a number of cases, to achieve their objectives by regulating multinationals in this manner. The corporations tended to find ways of circumventing such regulatory efforts. Applying the “margin of appreciation” in *Asbestos* to these facts, it seems almost certain that the Article XX(b) issue would have been decided the other way by the Appellate Body, as in *Thai Cigarette* the efficacy of the suggested alternatives certainly remained to be demonstrated, especially in the context in which they would be applied.

CONCLUSION

In *Asbestos*, the Appellate Body of the WTO has introduced many important refinements in the interpretation and application of key provisions of the GATT that address the relationship of WTO law to internal regulation. Overall, the consequence is to provide clearer and perhaps more ample assurances to regulators that non-protectionist domestic regulations for important policy purposes will not be significantly constrained by WTO law. This should enhance what Joseph Weiler calls the “external legitimacy” of the WTO.¹¹⁵ The AB has moved in this direction however in a manner also sensitive to what Weiler terms “internal legitimacy”. It has framed its interpretations within the evolving GATT/WTO *acquis*, and has avoided bold colours and strokes, as opposed to subtler tones and finishes. In so doing it has managed to paint a quite different

¹¹⁵ Weiler, *supra* n. 67.

picture from that characteristic of the panels in these matters, while acting with judicial caution. Perhaps, this was in part achievable because the facts of *Asbestos* raised few issues of high normative controversy—it was not a case that suggested or evoked a cultural or intellectual divide about the meaning of health or of science, or for example the appropriate limits of individual member state action to protect the environmental commons, or the balance between human rights as defined in the UN Covenants and trading rights as defined in the WTO. The AB wisely left it to others to speculate about the implications of its interpretive moves in *Asbestos* for such harder cases, giving itself ample room to craft a balance between internal and external legitimacy appropriate to the facts of those cases. At the same time, the overall direction in which it is moving is visible to all who have sharp (and unblinkerred) eyes.