

EC – ASBESTOS¹

(DS135)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	Canada	TBT Annex 1.1	Establishment of Panel	25 November 1998
			Circulation of Panel Report	18 September 2000
Respondent	European Communities	GATT Arts. III:4, XX and XXIII:1(b)	Circulation of AB Report	12 March 2001
			Adoption	5 April 2001

1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: France's ban on asbestos (Decree No. 96-1133).
- Products at issue: Imported asbestos (and products containing asbestos) vs. certain domestic substitutes such as PVA, cellulose and glass ("PCG") fibres (and products containing such substitutes).

2. SUMMARY OF KEY PANEL/AB FINDINGS

- TBT Annex 1.1 ("technical regulation"): The Appellate Body, having rejected the Panel's approach of separating the measure into the ban and the exceptions, reversed the Panel and concluded that the ban as an "integrated whole" was a "technical regulation" as defined in Annex 1.1 and thus covered by the TBT Agreement, as (i) the products subject to the ban were identifiable by reference to their characteristics (i.e. any products containing asbestos) and (ii) compliance with the ban was mandatory. However, the Appellate Body did not complete the legal analysis of Canada's TBT claims as it did not have an "adequate basis" upon which to examine them.
- GATT Art. III:4 (national treatment): Having found insufficient the Panel's likeness analysis between asbestos and PCG fibres and between cement-based products containing asbestos and those containing PCG fibres, the Appellate Body reversed the Panel's findings that the products at issue were like and that the measure was inconsistent with Art. III:4. (The Appellate Body emphasized a competitive relationship between products as an important factor in determining likeness in the context of Art. III:4 (c.f. separate concurring opinion by one Appellate Body Member.) Then, having completed the like product analysis, the Appellate Body concluded that Canada had failed to demonstrate the likeness between either set of products, and, thus, to prove that the measure was inconsistent with Art. III:4.
- GATT Art. XX(b) (exceptions): Having agreed with the Panel that the measure "protects human life or health" and that "no reasonably available alternative measure" existed, the Appellate Body upheld the Panel's finding that the ban was justified as an exception under Art. XX(b). The Panel also found that the measure satisfied the conditions of the Art. XX chapeau, as the measure neither led to arbitrary or unjustifiable discrimination, nor constituted a disguised restriction on international trade.

3. OTHER ISSUES²

- Scope of non-violation claim (Art. XXIII:1(b)): The Appellate Body, rejecting the EC appeal, agreed with the Panel that Art. XXIII:1(b) (the non-violation provision) applied to the measure at issue, as (i) even a measure that conflicts with a substantive provision of the GATT falls within the scope of Art. XXIII:1(b); and (ii) a health measure justified under Art. XX also falls within the scope of Art. XXIII:1(b). The Panel, having applied Art. XXIII:1(b) to the measure at issue, ultimately rejected Canada's claim and found that the measure did not result in non-violation nullification or impairment under Art. XXIII:1(b), because Canada had had reason to anticipate a ban on asbestos. (Canada did not appeal the Panel's ultimate finding.)

¹ *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*

² Other issues addressed in this case: Appellate Body adoption of additional procedures to deal with *amicus curiae* submissions; (DSU Art. 11 (Art. XX(b))); separate concurring opinion by one Appellate Body Member; scope of GATT Art. III:4 (applicability to the import ban); consultation of experts (DSU Art. 13); order of examination between TBT and GATT claims.