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International Decisions. European Communities -- Measures Affecting Asbestos and Asbestos- Containing Products

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INTERNATIONAL DECISIONS

EDITED BY BERNARD H. OXMAN

GATT—Technical Barriers to Trade Agreement—asbestos import ban—national treatment—like products—health measures—private-party submissions to WTO dispute settlement bodies

EUROPEAN COMMUNITIES—MEASURES AFFECTING ASBESTOS AND ASBESTOS-CONTAINING PRODUCTS. WTO Doc. WT/DS135/AB/R. At <http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm>.

World Trade Organization Appellate Body, March 12, 2001.

In *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, Canada challenged a French decree banning the importation of asbestos and products containing all forms of that substance. First before a panel¹ of the World Trade Organization's Dispute Settlement Body and subsequently before the Appellate Body,² Canada alleged violations of the national treatment obligation in Article III of GATT 1994,³ of the prohibition on quantitative restrictions in Article XI, and of the Agreement on Technical Barriers to Trade (TBT Agreement).⁴ France maintained that the embargo was justified by scientific evidence that exposure to asbestos can cause serious illnesses, including lung cancer, mesothelioma (another malignant illness with high mortality rates, for which the only known cause is exposure to asbestos), and asbestosis (a nonmalignant illness with symptoms similar to emphysema). The French measure allows a limited exception for products containing chrysotile asbestos, for which alternatives that present a lesser health risk are not available.

The WTO panel that initially considered the dispute determined that non-asbestos alternatives to asbestos and asbestos-containing products are "like products" within the meaning of Article III:4 of GATT 1994.⁵ It concluded that the French measure was justified, however, under the chapeau and paragraph (b) of Article XX as "necessary to protect human . . . life or health."⁶ It also found that the asbestos ban was not governed by the TBT

¹ European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, WTO Doc. WT/DS135/R (Sept. 18, 2000). Reports of the panels and Appellate Body, as well as other WTO dispute settlement documents, are available online at <http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm>.

² European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, WTO Doc. WT/DS135/AB/R (Mar. 12, 2001) [hereinafter Appellate Body report].

³ General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A [hereinafter GATT 1994], THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 21 (1994) [hereinafter RESULTS], reprinted in 33 ILM 1154 (1994).

⁴ Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, RESULTS, *supra* note 3, at 138, available at <http://www.wto.org/english/docs_e/legal_e/17-tbt.pdf> [hereinafter TBT Agreement].

⁵ Article III:4 of GATT 1994 provides:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

⁶ Article XX of GATT 1994, entitled "General Exceptions," provides, in relevant part:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a

Agreement⁷ because the ban is not a “technical regulation” within the meaning of that agreement. Canada appealed with respect to the panel’s interpretation of the TBT Agreement and the Article XX exception. The European Communities, on behalf of France, cross-appealed as to the Article III national treatment ruling.

The Appellate Body’s report upheld the panel’s result, but modified its reasoning. Most notably, the Appellate Body, after criticizing the panel’s analysis, concluded that alternatives that do not contain asbestos are not “like products”⁸ for the purposes of GATT Article III:4.

The panel had examined two different categories of products to determine whether they are “like” for the purposes of Article III:4: other fibers, such as polyvinyl alcohol, cellulose, and glass; and non-asbestos-containing products, such as cement containing one of these alternative fibers in place of asbestos. After noting that the instant dispute was the first in which it was called upon to address the meaning of “like products” in Article III:4, the Appellate Body observed that the numerous uses of that term elsewhere in WTO agreements could be helpful in interpreting the provision at issue in this dispute. The term “like products” is also, for example, used in Article III:2, which deals with internal taxes. Although there are textual differences between that provision and Article III:4, the Appellate Body noted that the general principle expressed in Article III:1—to avoid protectionism by ensuring the equality of competitive positions—is relevant to both. Consequently, the Appellate Body found that the scope of the two paragraphs is comparable. Moreover, a mere finding that one group of products is “like” another does not suffice to establish an inconsistency with Article III:4; there must also be less favorable treatment of imported products.⁹

The panel had applied a test for “likeness” derived from a 1970 GATT Working Party Report on Border Tax Adjustments.¹⁰ That test turns on four factors designed to evaluate the competitive relationships between and among products: the properties, nature, and qualities of the products; end uses of the products; consumers’ perceptions and behavior; and the tariff classification of the products. In applying this test, the panel stressed a market-access approach and found that asbestos and alternatives to it are “like products” because they have the same functions and can be interchanged from the point of view of performance. Similarly, end uses for both categories would be similar or identical. In light of this conclusion, the panel found it unnecessary to examine the third and fourth criteria, consumer preferences and tariff classifications. Significantly, the panel expressly declined to consider health risks as relevant to the “like product” determination.

The Appellate Body approved the test identified by the panel for determining “likeness,” but disagreed with the application of that standard. In reversing the panel’s conclusion that asbestos and alternatives to it are “like products,” the Appellate Body emphasized the necessity of examining all the evidence in context, including the need to scrutinize physical characteristics as distinct from end uses. Among those physical properties, “carcinogenicity, or toxicity, constitutes . . . a defining aspect of the physical properties of chrysotile asbestos fibres,”¹¹ by comparison with non-asbestos alternatives. The toxic character of the product is also relevant to the analysis of consumer preferences.

disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

....

(b) necessary to protect human, animal or plant life or health[.]

⁷ The TBT Agreement applies to “technical regulations,” defined in Annex I of the Agreement as a “document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory.”

⁸ See Appellate Body report, *supra* note 2, paras. 104–32.

⁹ “[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.” *Id.*, para. 100.

¹⁰ Dec. 2, 1970, GATT B.I.S.D. (18th Supp.) at 97 (1972).

¹¹ *Id.*, para. 114.

The Appellate Body observed that there is some overlap in the end uses for asbestos and its alternatives, but that there are also many uses for which substitution is not possible. Canada, considering consumer tastes and preferences to be irrelevant, had provided no evidence on this question and consequently failed to meet its burden of establishing "likeness." Moreover, the tariff classifications of asbestos and its alternatives are different. The Appellate Body performed a similar analysis for cement products containing asbestos, concluding that both the substance itself and products containing it are not "like products" by comparison with non-asbestos-containing alternatives.¹²

The Appellate Body upheld the panel's conclusion that the exception in Article XX(b) relating to "human life or health" would, in any event, justify the measure. In rejecting the arguments proposed by Canada, the Appellate Body observed that panels enjoy broad discretion in the evaluation of questions of scientific "fact." The Appellate Body dismissed Canada's argument that the risk presented by a carcinogen must be quantified.¹³ France's policy of substituting less risky alternatives for a highly toxic one was also upheld.

Canada had suggested that less burdensome measures similarly protective of public health, but relying on controlled use of asbestos, ought to be considered in determining whether the ban is "necessary" under Article XX(b). Based, in part, on the panel's factual findings that such alternatives would not fully eliminate asbestos-related risk as articulated in French public policy, the Appellate Body concluded that controlled use is not a reasonably available alternative. In response to Canada's argument that the panel should have articulated the credibility associated with different elements of scientific evidence, the Appellate Body noted that

a Member may . . . rely, in good faith, on scientific sources which, at that time, may represent a divergent, but qualified and respected, opinion. A member is not obliged, in setting health policy, automatically to follow what, at a given time, may constitute a majority scientific opinion. Therefore, a panel need not, necessarily, reach a decision under Article XX(b) of the GATT 1994 on the basis of the "preponderant" weight of the evidence.¹⁴

The panel had concluded that the TBT Agreement did not apply, because the challenged measure did not establish technical standards for a product. Under this analysis, measures adopted by WTO members would be subject to scrutiny if they establish product-performance requirements as conditions for market access, but not if they prohibit access altogether. The Appellate Body rejected this interpretation but nonetheless found that it could not complete the analysis because the panel, owing to its error on the point of law, had not developed sufficient facts.¹⁵

The panel had received five unsolicited written submissions from nongovernmental organizations (NGOs). Based on the Appellate Body's earlier jurisprudence,¹⁶ the panel took two into consideration. The Appellate Body, anticipating that it would receive similar submissions, adopted its own "Additional Procedure," for this appeal only, concerning such submissions.

¹² One of the three Appellate Body members hearing this appeal, not identified by name, made a concurring statement in which that member questioned the principally economic nature of the "likeness" test. In this member's view, at least in this case in which the evidence is overwhelming, the carcinogenicity of asbestos itself would be sufficient to support a determination that that substance and alternatives to it are not "like." *Id.*, paras. 149–54.

¹³ *Cf.* European Communities—Measures Concerning Meat and Meat Products (Hormones), WTO Doc. WT/DS26/AB/R & WT/DS48/AB/R, para. 194 (Jan. 16, 1998); *see generally* David A. Wirth, Case Report: European Communities—Measures Concerning Meat and Meat Products, 92 AJIL 755 (1998).

¹⁴ Appellate Body report, *supra* note 2, para. 178.

¹⁵ *Id.*, paras. 82, 83. The Appellate Body has no authority to remand a dispute to a panel if it cannot complete the analysis itself based on the panel proceedings. *See generally* Andreas F. Lowenfeld, *Remedies Along with Rights: Institutional Reform in the New GATT*, 88 AJIL 477, 484 (1994) (noting that lack of remand authority "is understandable given the tight time constraints for the review process, but I cannot think of any analogous limitation in any multilateral system of legal decision making").

¹⁶ *Cf.* United States—Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc. WT/DS58/AB/R (Oct. 12, 1998), *reprinted in* 38 ILM 118 (1999).

Except for parties and third parties (that is, WTO members not party to the dispute), any organization or person wishing to submit a written brief was required to apply for leave in advance. In evaluating an application to submit a written brief, the principal substantive test articulated by the Appellate Body was a showing of "what way the applicant will make a contribution to the resolution of this dispute that is not likely to be repetitive" of what has already been submitted.¹⁷

The Appellate Body received eleven timely applications from individuals and organizations such as chemical trade associations, environmental advocacy organizations, victims' groups, public health professional societies, church groups, and university professors. The Appellate Body denied them all "for failure to comply sufficiently with all the requirements" set out in the Additional Procedure.¹⁸

* * * *

This report breaks new ground both in clarifying the "like product" determination in the context of a national treatment analysis under GATT Article III and in defining the conditions under which nongovernmental actors can provide input into WTO dispute settlement proceedings. More generally, it is an important juncture in the evolving relationship between law and policy affecting trade, on the one hand, and the environment and public health, on the other.

Notwithstanding the outcome reached by the panel, environmental organizations severely criticized the panel's report because of its "like products" analysis, which excluded health and toxicity considerations.¹⁹ The Appellate Body's approach is probably somewhat more welcome, but only one of the three Appellate Body members hearing the appeal thought that health considerations alone would be sufficient to support the conclusion that asbestos and alternatives to it are not "like." Even that member underscored the unusually serious nature of the risks and the overwhelming strength of the evidence in support of asbestos's carcinogenicity.²⁰ Presumably this divergence of views as to the appropriate role of toxicity in the "like product" analysis is one of the reasons that, in its discussion of Article XX, the Appellate Body elaborated at length on the nature of the requisite standard scientific proof, a recurring and sometimes rancorous issue in WTO dispute settlement.²¹ In the end, however, the Appellate Body's treatment of the "like products" question has a context-dependent, split-the-difference character that may be difficult for national governments to apply to product regulation with any confidence as to the outcome in cases in which risks are less clearly established.²²

Another major concern addressed in the instant dispute concerns the development of processes for securing input from private parties into WTO dispute settlement proceedings, an issue that has featured prominently in public criticisms of that process and also in recent antiglobalization protests. As is the case with its analysis of "like products," the Appellate Body's treatment of amicus submissions is equivocal in its long-term implications.

¹⁷ Appellate Body report, *supra* note 2, para. 52. Cf. SUP. CT. R. 37.1 ("An amicus curiae brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An amicus curiae brief that does not serve this purpose burdens the Court, and its filing is not favored.")

¹⁸ Appellate Body report, *supra* note 2, para. 56.

¹⁹ See, e.g., Daniel Pruzin & Peter Menyasz, *Safety and Health Environmental Groups Criticize WTO Ruling on Asbestos Ban*, 17 Int'l Trade Rep. (BNA) 1432 (2000).

²⁰ See *supra* note 12. Separate opinions are unusual, if not previously unknown, in Appellate Body reports, a factor that itself tends to underscore the importance of the issue under consideration.

²¹ Appellate Body report, *supra* note 2, paras. 176–81.

²² Cf. Robert Howse & Elisabeth Tuerk, *The WTO Impact on Internal Regulations: A Case Study of the Canada-EC Asbestos Dispute*, in *THE EU AND THE WTO: CONSTITUTIONAL AND LEGAL ASPECTS* 283, 328 (Grainne de Burca and Joanne Scott eds., 2001) (praising Appellate Body for "acting with judicial caution" and for "giving itself ample room to craft a balance between internal and external legitimacy appropriate to the factors of [future] cases").

The Appellate Body's prior jurisprudence had established that panels have the discretion to accept unsolicited amicus submissions and that disputing state parties may append nongovernmental statements to their submissions to the Appellate Body.²³ Building on its earlier treatment of the generic question of participation by nonstate actors in WTO dispute settlement proceedings, the Appellate Body's Additional Procedure in this dispute was a modest, predictable, and logical next step. Nonetheless, after the Appellate Body announced that it would accept applications for leave to submit briefs by NGOs, the WTO General Council, at the request of Egypt, acting on behalf of an Informal Group of Developing Countries, held a special session on November 22, 2000, to discuss the additional procedures adopted by the Appellate Body in this case. With the notable exception of the United States, the comments from WTO member delegations were critical of the Appellate Body's new procedure and questioned the desirability and legality of nongovernmental submissions. The chair, reflecting the sense of the meeting, concluded that "the Appellate Body should exercise extreme caution in future cases until Members had considered what rules were needed."²⁴

Under the circumstances, the Appellate Body's rejection of every request for leave to submit an amicus brief, through a process crafted for that purpose and by its terms intended to be receptive to such submissions, is hardly surprising as a practical matter. The results of the General Council meeting, while not expressly characterized as such, seem to have been intended to influence the Appellate Body's procedural management of the instant dispute settlement proceeding, which was pending at the time and had not yet been resolved by the Appellate Body. If so, that effort was arguably successful, as demonstrated by the Appellate Body's rejection of every nongovernmental submission made to it. The General Council's criticism of the Additional Procedure in the instant case and the Appellate Body's apparent, if undocumented, reliance on that action raise long-term questions of the appropriate separation of rule-making and adjudicatory functions in a regime supposedly based on the rule of law. At a minimum, the broader question of the prerogatives of nonstate parties in WTO dispute settlement is now left in a highly uncertain state.

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International criminal procedure—scope of ICTY appellate review—eyewitness credibility—reasoned opinion by trial judges—adequacy of factual allegations in indictment

PROSECUTOR V. KUPREŠKIĆ. No. IT-95-16-A. At <<http://www.un.org/icty/ind-e.htm>>. International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, October 23, 2001.

In this unanimous appellate judgment, an international criminal tribunal for the first time ordered the release of defendants immediately after reversing their convictions. The case, decided by the International Criminal Tribunal for the Former Yugoslavia (ICTY), arose out of an attack in central Bosnia on April 16, 1993, in which Bosnian Croat forces killed more than one hundred Bosnian Muslim civilians, injured many others, and destroyed property, including two mosques. Count 1 of the amended indictment charged that from October 1992 until April 1993, six codefendants—including brothers Zoran and Mirjan Kupreškić and their cousin, Vlatko Kupreškić¹—had engaged in "planning, organising and implementing

²³ See generally David A. Wirth, *Some Reflections on Turtles, Tuna, Dolphin, and Shrimp*, 9 Y.B. INT'L ENVTL. L. 40, 46–47 (1998).

²⁴ See WTO Doc. WT/GC/M/60, para. 120 (Jan. 23, 2001), at <http://docsonline.wto.org/gen_home.asp> (minutes of WTO General Council meeting of Nov. 22, 2001).

¹ This case report limits discussion to the Kupreškićs, the three codefendants who were released on appeal. Another codefendant, charged solely under count 1, had been acquitted at trial. See *Prosecutor v. Kupreškić*, No. IT-95-16, Judgment, paras. 766–69 (Jan. 14, 2000) [hereinafter Kupreškić trial judgment]. The appeals chamber