The World Trade Organization Appellate Body Report, European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, Mar. 12, 2001, WT/DS135/AB/R

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INTRODUCTION

Environmentalists across the world celebrated a victory in September 2000 when a World Trade Organization (WTO)[1] panel,[2] for the first time, found that a measure inconsistent with substantive obligations under the General Agreement on Tariffs and Trade (GATT)[3] was nonetheless justified under an environmental exception in GATT Article XX. Given the historical institutional bias of the WTO towards free trade—often at the expense of the environment[4]—the appeal of the *Asbestos* Panel

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1. *See* Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 (1995), 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement].

2. *See* WTO Panel Report on European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/R (Sept. 18, 2000), *at* http://www.wto.org [hereinafter Asbestos Panel Report].

3. *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194; General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 190, 33 I.L.M 1153 (1994) [hereinafter GATT] (the two agreements are identical on the articles discussed in this paper; Articles III, XX and XI).

4. *See generally The World Trade Organization and the Environment, at* http://environment.about.com/library/weekly/aa112199.htm (last visited Oct. 18, 2001) (discussing environmentalists' proposed changes to those WTO rules that conflict with international environmental agreements).

Report caused environmentalists to collectively hold their breath. With the issuance of the Appellate Body decision in March 2001, that trepidation appears well founded. While the decision of the *Asbestos* Panel Report was upheld, the Appellate Body chose not to rely on Article XX.[5] Deflecting the political momentum toward invoking the environmental exception, the Appellate Body relied instead on a judicious view that the substantive obligations of Article III:4 were not violated.[6]

This Article explains the Appellate Body's reluctance to invoke the environmental exception found in Article XX of GATT, why the *Asbestos* decision contrasts with other environmental cases previously litigated in the WTO, and why, nevertheless, this case is positive and important. Section I briefly describes the WTO and its Appellate Body process. Section II provides a brief description of Articles III:4 and XI, explains the environmental exception found in Article XX, and summarizes the GATT/WTO cases involving the environmental exception in Article XX (b) or (g). The factual background of the *Asbestos* case and Panel Report are explained in Section III. Section IV explores the surprising Appellate Body ruling on amici curiae briefs. Section V discusses and critiques the Appellate Body Report. Section VI evaluates the case's precedential value and discusses the implications of Asbestos for future WTO panel decisions.

I. AN OVERVIEW OF THE WTO AND ITS TRADE BARRIERS

The WTO has 140 members[7] that control over ninety percent of worldwide trade.[8] It is the only trade organization with a worldwide multilateral mandatory and binding dispute settlement mechanism.[9] To join the WTO, member states must

5. *See* WTO Appellate Body Report on European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R (Mar. 12, 2001), *at* http://www.wto.org [hereinafter Asbestos Appellate Body Report].

6. *See id.* para. 192 (citing to the Appellate Body's Findings and Conclusions).

7. The WTO in Brief, *at* http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr02_e.htm (last visited Oct. 5, 2001) [hereinafter The WTO in Brief]. As of July 26, 2001, there are 142 members of the WTO, and more than 30 observers are negotiating for membership. *Id.*

8. *Id.*

9. *See* David A. Gantz, *Introduction to the World Trade System and Trade Laws Protecting U.S. Business*, 18 WHITTIER L. REV. 289, 297 (1997); *see also* Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr.

agree to use the multilateral system administered by the organization to settle disputes rather than taking unilateral action.[10] The dispute resolution process begins with a consultation between the parties in dispute.[11] If the negotiations are unsuccessful, a panel is appointed to consult with the parties.[12] The panel issues a report to the Dispute Settlement Body,[13] which becomes the Body's ruling unless a consensus of WTO members vetoes it within sixty days.[14] Parties can request an appeal heard by three members of the Appellate Body.[15] Their decision can only be rejected by a consensus of the Dispute Settlement Body.[16]

With the *Asbestos* decision, the WTO once again found itself at the center of a contest between the environmental exception and free trade.[17] Recurring conflict surrounding WTO decisions stems from the different approaches of international environmental law and international trade law. While international trade law is based on the premise of free trade, international environmental law uses trade measures to enforce multilateral or unilateral decisions. The GATT makes it "illegal" for members to enact laws that limit free trade based on environmental concerns unless a GATT exception applies. In contrast, the International Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES Agreement) prohibits and limits trade in these species.[18] Unfortunately for environmentalists, the determining factor behind WTO decisions has historically been the premise of free trade.

Although its focus is free trade, the WTO is not by its nature anti-environment.[19] The WTO serves states by harmoniz-

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15, 1994, 1869 U.N.T.S. 401 (1995), 33 I.L.M. 1226 [hereinafter Understanding on Rules].

10. Trading into Future: The Introduction to the WTO, *at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp0_e.htm (last visited Oct. 18, 2001) [hereinafter Trading into Future].

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *See* Asbestos Panel Report, *supra* note 2, para. 3.40 (where the European Community, on behalf of France, claims its measure falls within the environmental exception).

18. *See* Convention on International Trade in Endangered Species of Wild Fauna and Flora, *opened for signature* Mar. 3. 1973, 993 U.N.T.S. 243 [hereinafter CITES].

19. Gregory C. Shaffer, *The World Trade Organization Under Challenge: De-*

ing international trade law through the WTO review process and administrative efforts.[20] In general, the wealthy industrialized WTO members are more interested in the environment than are the poorer developing countries. Wealthy WTO members are known to set the tone in the headquarters of the WTO in Geneva but are not pushing for any changes at the moment.[21] In fact, it is likely that the European Union (EU) would stand alone if it pushed for a revision of existing rules.[22] Both the EU and the United States fear that advocating new rules favoring the environment would result in confrontations with WTO members who are developing nations.[23] Developing countries constitute a majority of WTO members and have traditionally been against rewriting the WTO rules in order to clarify the environmental exceptions.[24] They fear that the industrialized members would utilize any clarified environmental rules to create trade barriers that would adversely affect their developing economies.[25] The WTO employs a consensus model for accepting decisions, increasing the ability of the majority of the developing countries to block stronger environmental regulations.[26] Therefore, they can both avoid stronger environmental regulations and also make it more difficult for any other agenda to pass if the wealthy nations do push for strengthening existing environmental regulations.

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mocracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters, 25 HARV. ENVTL. L. REV. 1, 6-7 (2001).

20. *See* The WTO in Brief, *supra* note 7.

21. *See* WWF, Sustainable Trade for a Living Planet, Reform the WTO, *at* http://www.panda.org/resources/publications/sustainability/wto_reform/reform2.htm l (last visited Oct. 18, 2001).

22. *See* KLAVS A. HOLM, ULRIK VESTERGAARD KNUDSEN AND KARSTEN VAGN NIELSEN, WTO OG DEN NYE HANDELSPOLITIK, JURIST-OG ØKONOMFORBUNDETS FORLAG 96 (1999) [hereinafter HANDELSPOLITIK].

23. *See id.* at 96.

24. Patricia Isela Hansen, *Transparency, Standards for Review, and the Use of Trade Measures to Protect the Global Environment,* 39 VA. J. INT'L L. 1017, 1036 (1999); *see, e.g., U.S. Signals It Will Not Seek Rewrite of WTO Rules for Environment,* 17 INSIDE U.S. TRADE, 19, 21 (1999).

25. *See, e.g.,* HANDELSPOLITIK, *supra* note 22, at 91; *see also U.S. Signals It Will Not Seek Rewrite of WTO Rules for Environment, supra* note 24, at 21.

26. *See* The WTO in Brief, *supra* note 7.

II. DESCRIPTION OF ARTICLES III:4 AND XI, THE ARTICLE XX EXCEPTIONS, AND PREVIOUS GATT/WTO PANEL REPORTS

A. IN SEARCH OF A VIOLATION

The first component of any WTO dispute is a violation of a trade act, usually a violation of the GATT. Trade barriers are likely to violate GATT Articles I, III or XI. The *Asbestos* decision focuses on Articles III and XI. Article III lays down the "National Treatment" principle, which means that domestic products and their imported counterparts—known as "like products"—are to be treated the same.[27] The key to finding a violation is a determination that products are "like products" under Article III:4.[28] Panels use the following general criteria to make a "like products" determination: 1) the properties, nature and quality of the products; 2) the end uses of the products; 3) consumers' tastes and habits; and 4) tariff classification.[29]

While Article III regulates a specific violation with domestic products, Article XI is a broader mandate. Article XI prohibits any kind of quantitative restrictions on imports.[30] Under Article XI, members cannot have quotas or total bans on imported or exported products.[31]

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27. See GATT, *supra* note 3.

28. *See, e.g.*, WTO Appellate Body Report on Japan—Taxes on Alcoholic Beverages, WT/DS8/AB/R,WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996), *at* http://www.wto.org (discussing whether Japanese sochu and vodka could be considered "like products" under Article III:2).

29. *See id.* at nn. 46, 58, 113; *see also* United States—Standards for Reformulated and Conventional Gasoline, Panel Report, Jan. 29, 1996, WT/DS2/R, para. 6.8 n. 15 [hereinafter Gasoline Panel Report].

30. GATT, *supra* note 3.

31. *See* WTO Appellate Body Report on EC Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R, WTDS/48/AB/R (Jan. 16, 1998), *at* http://www.wto.org [hereinafter EC Measures Concerning Meat]; *see also* WTO Panel Report on Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes, SD10/R-37S/200 (Oct. 5, 1990), *at* http://www.wto.org [hereinafter Cigarettes]; *see also* WTO Panel Report on United States—Restrictions on Import of Tuna, DS21/R - 39S/155 (not adopted Sept. 3, 1991), *at* http://www.wto.org [hereinafter Tuna I]; *see also* WTO Panel Report on United States—Restrictions on Imports of Tuna, DS29/R (not adopted June 16, 1994), *at* http://www.worldtradelaw.net/reports/gattpanels/tunadolphinII.pdf [hereinafter Tuna II]; *see also* WTO Appellate Body Report on United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (Oct. 12, 1998), *at* http://www.wto.org [hereinafter Shrimp].

B. AVOIDING SANCTIONS THROUGH AN EXCEPTION

Once it is established that a WTO member violated a substantive obligation under the GATT, the member can argue the measure falls within one of the exceptions in Article XX. In the *Asbestos* case, France invoked subsection (b), which says:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: . . . (b) necessary to protect human, animal or plant life or health[.][32]

When an Article XX exception, such as subsection (b), is invoked, the panel undertakes a specific analysis. The panel initially considers whether the policy falls within the range of policies of protecting the life and health of humans, animals, and plants.[33] This is an easy test to satisfy because the panels do not examine the necessity of the measure, merely whether it falls within a broad range of policies of protecting the life and health of humans, animals or plants.[34]

After a panel has concluded that a policy goal falls within the policy of subsection (b), the measure itself is reviewed under the "necessity" test.[35] The "necessity" test is not a test of whether the policy itself is necessary but whether the measure is necessary to achieve a policy goal. The test examines whether an alternative measure that is either consistent with the GATT or at least less inconsistent with the GATT can be found.[36]

Finally, the panel looks at whether the measure can be justified under the chapeau of Article XX. The chapeau analysis is performed as a last measure to ensure that the GATT exceptions are not misused.[37] The chapeau analysis is not a test that evaluates the measure itself; the analysis examines the manner

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32. GATT, *supra* note 3, art. XX(b).

33. *See, e.g.*, Tuna I, *supra* note 31, para. 5.25.

34. Tuna I, *supra* note 31, para. 5.25; *see* Cigarettes, *supra* note 31, para. 73 (finding smoking constitutes a serious risk to human health).

35. Tuna I, *supra* note 31, para. 5.27; *see* Note by Secretariat, GATT/WTO Dispute Settlement Practice Relating to Article XX, Paragraphs (b), (d) and (g) of GATT, WT/CTE/W/53/Rev.1, at 13-14 (Oct. 26, 1998) [hereinafter WTO Note].

36. *E.g.*, Cigarettes, *supra* note 31, para. 75.

37. *See, e.g.*, WTO Appellate Body Report on United States—Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, at 20-21 (Apr. 29, 1996), *at* http://www.wto.org [hereinafter Gasoline Appellate Body Report].

in which the measure is applied.[38] A panel will examine whether a measure unjustifiably discriminates, arbitrarily discriminates or is a disguised restriction on international trade.[39]

The invocation of an Article XX(b) exception has never been successful because most measures fail the "necessity" test.[40] That a panel has never found a measure to fall within the human health exception of subsection (b) has caused debate since the exhaustible resource exception in subsection (g) has been accepted twice.[41] Many commentators question whether WTO panels view human health as inferior to exhaustible resources, "unless mankind is itself an exhaustible natural resource."[42]

C. ILLUSTRATIVE GATT/WTO CASELAW ON ENVIRONMENTAL CLAIMS

The following cases illustrate the history of environmental conflicts in the GATT/WTO.

1. The Cigarettes Panel

The *Cigarettes* case involved a dispute between Thailand and the United States.[43] The United States filed a complaint against Thailand arguing that Thailand's restrictions on the importation and internal taxation of imported cigarettes were contrary to the GATT.[44] The *Cigarettes* Panel found Thailand's import restrictions inconsistent with GATT Article XI:1.[45] The *Cigarettes* Panel went on to analyze whether the measure could be justified under GATT Article XX(b) exception for human health.[46] It found measures more consistent with the GATT were available, making the measure not justified under GATT

38. Gasoline Appellate Body Report, *supra* note 37, at 22, 25.

39. *See, e.g.*, Shrimp, *supra* note 31, para. 159, 177, 184.

40. *See* Cigarettes, *supra* note 31, para. 81; *see also* Tuna I, *supra* note 31, para. 5.28; *see also* Tuna II *supra* note 31, para. 5.36-.37.

41. *See* Shrimp, *supra* note 31, para. 145 (accepting subsection (g) even though it failed the chapeau analysis); *see also* Gasoline Appellate Body Report, *supra* note 37, at 21.

42. Arthur E. Appleton, *Shrimp/Turtle: Untangling the Nets*, 2 J. INT'L. ECON. L. 477, 483 (1999).

43. Cigarettes, *supra* note 31.

44. *Id.* at 3.

45. *See id.* at 19 (indicating that the GATT Article XI:1 mandates that contracting parties to the General Agreement cannot institute or maintain import licenses that prohibit or restrict the importation of any product from any other contracting party).

46. *Id.* at 20.

Article XX(b).[47]

2. *Tuna I*

Tuna I arose from a dispute over a dolphin-friendly tuna fishing program enacted by the U.S. government.[48] The Mexican government brought the complaint because the United States enacted an embargo against tuna exported by Mexico.[49] The intent of the embargo was to encourage a boycott of tuna caught using methods unsafe to dolphins.[50] It consisted of both a primary nation embargo and an intermediary nation embargo.[51] The primary nation embargo targeted Mexico directly.[52] Moreover, the United States embargoed tuna from countries that purchased tuna from Mexico.[53] The *Tuna I* Panel concluded that both the primary and the intermediary embargoes were inconsistent with GATT Article XI.[54] The United States invoked Articles XX(b) and (g) exceptions for the primary embargo.[55] The *Tuna I* Panel concluded that the measure was not justified under subsection (b) because the United States did not demonstrate to the Panel that it had exhausted all options consistent with the GATT in its efforts to ensure safety for dolphins.[56] Furthermore, the Panel found that the embargo could not be supported by subsection (g) because this exception, which allowed trade restriction, could not be invoked for the purpose of limiting production or consumption that occurs outside of U.S. jurisdiction.[57]

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47. *See id.* at 21 (explaining that Thailand could have imposed laws affecting only the internal sale, transportation, and/or use of imported products to achieve its health policy objectives, provided such regulation did not treat imported products less favorably than like products of national origin).

48. Tuna I, *supra* note 31.

49. *Id.* at 3-4.

50. *Id.* at 2.

51. *Id.* at 2-5.

52. *Id.* at 2-4.

53. *Id.* at 4-5.

54. Tuna I, *supra* note 31, at 40.

55. *Id.* at 6.

56. *See id.* at 34-36 (finding that the US could have negotiated international cooperative arrangements in order to protect dolphins).

57. *See id.* at 36-37 (finding Article XX(g) was intended to permit contracting parties to restrict trade in order to limit production or consumption within their jurisdiction).

3. *Tuna II*

The Netherlands and the EEC later brought a complaint against the United States regarding the primary and intermediary embargoes of tuna.[58] Both complainants were directly restricted by the intermediary embargo, thus able to bring a charge,[59] and both were entitled to challenge the primary embargo.[60] This led to the *Tuna II* Panel report.[61] As in *Tuna I*, the *Tuna II* Panel held that both the primary and intermediary embargoes were inconsistent with GATT Article XI and neither embargo was justified under GATT Article XX (b) or (g).[62]

4. *The Gasoline Case*

The *Gasoline* Panel report was issued in 1996 after Brazil and Venezuela complained about the discriminatory standards for imported gasoline in the United States.[63] The United States established certain compositional and performance specifications for reformulated gasoline, and it also prohibited the dumping of fuel components into conventional gasoline that cause environmentally harmful emissions.[64] The *Gasoline* Panel held the gasoline program was inconsistent with Article III and could not be justified under Article XX(b) or (g).[65] The Appellate Body held that the measure did fall within Article XX(g), but failed to meet the requirements of the chapeau of Article XX.[66]

5. *The Shrimp Case*

In the *Shrimp* case, India, Malaysia, Pakistan and Thailand brought a complaint against the United States.[67] The Appellate Body held that the U.S. embargo of shrimp harvested with methods that harm the sea turtles was inconsistent with Article

58. Tuna II, *supra* note 31, at 7, 29.
59. *Id.* at 7.
60. *Id.* at 29. Although the primary embargo was not being applied to the Netherlands and the EEC, both were eligible to challenge the primary embargo as a way of protecting their expectations in competitive relationships with other countries. *Id.*
61. *See id.* at 1.
62. *Id.* at 57.
63. Gasoline Panel Report, *supra* note 29, at 1.
64. *Id.* at 2-3.
65. *Id.* at 46.
66. Gasoline Appellate Body Report, *supra* note 37, para. 27.
67. Shrimp, *supra* note 31, at 1.

XI.[68] Because the measure protected sea turtles, an exhaustible natural resource, with regulation that applied equally to domestic and foreign harvesting of shrimp, the *Shrimp* Appellate Body found the measure to fall within subsection (g).[69] Despite that, the shrimp embargo did not meet the requirements of the Article XX chapeau because the application of the measure produced arbitrary and unjustifiable discrimination between members of the WTO.[70]

III. THE ASBESTOS PANEL REPORT

A. FACTUAL BACKGROUND AND SUBSTANTIVE OBLIGATIONS

1. French Ban on Asbestos

In the most recent environmental conflict case, Canada challenged the French ban of asbestos and asbestos containing products by claiming the ban adversely affected trade of products containing asbestos fibers and was a violation of Article 2 of the Agreement on Technical Barriers to Trade (TBT agreement), Articles III, XI and Article XXIII: 1(b) of the GATT.[71] Before the partial ban was in effect, Canada exported 20,000-40,000 tons of chrysotile fibers to France each year, two-thirds of French imports of such products.[72]

Canada argued the products it exported containing asbestos and substitute products made in France were "like products" within the meaning of Article III:4 and the French were therefore discriminating against the Canadian products.[73] The *Asbestos* Panel examined three characteristics of the Canadian products and the corresponding French substitutes to determine whether France violated Article III:4: 1) end-uses; 2) consumers' tastes and habits; and 3) products' properties, nature and quality.[74] The *Asbestos* Panel agreed with Canada, holding that sub-

68. *Id.* at 76.
69. *Id.* at 46-55.
70. *Id.* at 75.
71. *See* Asbestos Panel Report, *supra* note 2, para. 3.8 (explaining that France passed a decree that included, with some exceptions, a ban on imports containing asbestos fibers).
72. *Id.* para. 3.8.
73. *Id.* para. 8.84.
74. *Id.* para. 8.112.

stitute fibers were "like products" because they had similar end uses.[75] In addition, the Panel compared asbestos-containing cement with substitute fiber-cement and found those to be "like products"[76] and thus held that France also violated Article III:4 with regard to these products.[77] The *Asbestos* Panel did not wish to assess whether the products were "like" for the purposes of risk,[78] stating that this particular test fell outside the scope of its usual test, and, if employed, would render the exception for human and animal health useless.[79]

Prior to the *Asbestos* decision, no panel had ever found any measure to fall within the Article XX exceptions. The *Asbestos* Panel went against precedent when it found the French ban of asbestos to both fall within subsection (b) and meet the requirements of the chapeau of Article XX.[80]

2. Threshold issue

The *Asbestos* Panel had to establish whether the asbestos ban fell within the policy of subsection (b) by creating a risk to public health.[81] As for the fibers not encapsulated, Canada did not dispute the carcinogenic effects of asbestos; it argued the causal link between chrysotile fibers might be indirect.[82] Canada also argued the risk to humans was de minimis because chrysotile fibers encapsulated in cement will not lead to exposure to carcinogenic agents.[83] After evaluating substantial amounts of expert testimony regarding the dangers to humans exposed to chrysotile fibers, the *Asbestos* Panel concluded the EU had shown chrysotile fibers to be dangerous and held a measure prohibiting all chrysotile fibers, including the encapsulated fibers, fell within the policy of subsection (b).[84]

75. *Id.* para. 8.125.
76. *Id.* para. 8.150.
77. *See* Asbestos Panel Report, *supra* note 2, para. 8.158.
78. *Id.* para. 8.132.
79. *Id.* para. 8.130.
80. *Id.* para. 8.241-.242.
81. *Id.* para. 8.184.
82. *Id.* para. 8.187.
83. *See* Asbestos Panel Report, *supra* note 2, para. 3.9, 8.189 (discussing Canada's argument that chrysotile fibers in an "inert matrix" such as cement, do not pose health risks).
84. *Id.* para. 8.188, 8.194.

3. Necessity

The *Asbestos* Panel next analyzed the "necessity" of the ban.[85] It analyzed this element by determining whether a "less inconsistent" measure was available.[86] The *Asbestos* Panel examined whether "controlled use," a potential alternative measure, was "(a) [ ] sufficiently effective in the light of France's health policy objectives and (b) whether it constitutes a reasonably available measure."[87] The Panel chose the test regarding "controlled use" because "controlled use" was a "less inconsistent" measure.[88] The Panel held "controlled use" was not an acceptable alternative to France's chosen regulation.[89] It found several problems connected with "controlled use." The *Asbestos* Panel characterized "controlled use" as a health risk even though not fully scientifically proven, commenting that effective health regulations cannot wait for scientists to agree on all matters.[90] The *Asbestos* Panel made it clear it would not second-guess the policy objective of France, even if France's standards were more stringent than the international standards in the area.[91]

4. Chapeau of Article XX

a. Arbitrary or Unjustifiable Discrimination

The final test was whether the measure fell within the chapeau of Article XX.[92] The *Asbestos* Panel noted that it was required to examine the application of the measure under the chapeau analysis.[93] The first step was to determine whether the measure constituted "arbitrary or unjustifiable discrimination" under Article XX.[94] The *Asbestos* Panel analyzed discrimination

85. *Id.* para. 8.195.
86. *Id.* para. 8.198-.199. *See also* Cigarettes, *supra* note 31, para. 75 (where the "less inconsistent" method was developed).
87. Asbestos Panel Report, *supra* note 2, para. 8.208.
88. *Id.* para. 8.204.
89. *Id.* para. 8.222.
90. *Id.* para. 8.221. *But cf.* EC Measures Concerning Meat, *supra* note 31, para. 173 (explaining that countries do not have total discretion in determining the levels of acceptable risk).
91. Asbestos Panel Report, *supra* note 2, para. 8.210.
92. *Id.* para. 8.223.
93. *Id.* para. 8.226.
94. *Id.* para. 8.223.

first.[95] It noted that the measure did not differentiate between supplier countries; instead, the measure flatly banned the product, regardless of where the product originated.[96] The *Asbestos* Panel observed that discrimination could happen if there was a way for French authorities to give favorable treatment to domestic products. Nevertheless, the Panel concluded there was no basis for holding the measure discriminatory in its application.[97] Canada did not argue the measure was discriminatory in its application; it merely demonstrated discrimination under "like products" analysis in Article III, which is not relevant in the Article XX discussion.[98]

Having concluded there was no basis upon which to find discrimination for purposes of Article XX, the Panel decided it was not necessary to address whether the measure constituted "arbitrary or unjustifiable discrimination."[99] It must be noted that while the *Asbestos* Panel breathed life into Article XX, it also sowed the seeds of its demise. By choosing to lecture Canada on the argument it could have made, rather than analyze the argument Canada actually chose to make, the *Asbestos* Panel has provided a formula for making a successful discrimination argument to defeat Article XX.

b. Disguised Restriction on International Trade

The next step under the chapeau analysis was to determine if there was a "disguised restriction on international trade."[100] The EC initiated this analysis by pointing out that the measure taken by France was published and thus was not disguised.[101] The *Asbestos* Panel opined that the important part of "disguised restriction on international trade" is the word "disguised" since the measure must already be classified as restricting trade in order to be considered under the exception.[102] The *Asbestos*

95. *Id.* para. 8.226.
96. *Id.* para. 8.228.
97. Asbestos Panel Report, *supra* note 2, para. 8.228.
98. *Id.*
99. *Id.* para. 8.230.
100. *Id.* para. 8.231-.239.
101. The measure was published, and the WTO received notification pursuant to the Agreement on Technical Barriers to Trade. Committee on Technical Barriers to Trade, Notification—France, G/TBT/Notif.97/55 (Feb. 21, 1997), *at* http://www.wto.org [hereinafter Notification]; *see* Agreement on Technical Barriers to Trade, WTO Agreement Annex 1A (Apr. 15, 1994), *at* http://www.wto.org [hereinafter TBT Agreement].
102. Asbestos Panel Report, *supra* note 2, para. 8.236.

Panel defined "disguised" as meaning to "conceal beneath deceptive appearances, counterfeit, alter so as to deceive."[103] Thus, if a measure meets the requirements of Article XX (b), it will only constitute abuse if: (1) its purpose is to restrict trade; and (2) this purpose is disguised.[104] The Panel suggested that examining the structure of the measure best performs the test of whether a measure is a "disguised restriction on international trade."[105] The Panel found no "disguised restriction on international trade" because it previously concluded there was no "discrimination" under Article XX.[106]

This decision was an important step for the WTO because both the requirements for the subsection (b) and the chapeau analysis of Article XX were met for the first time. The impact of the decision quickly changed when the *Asbestos* Appellate Body reviewed and significantly altered the *Asbestos* Panel's ruling.

IV. A STARTLING DECISION BEFORE THE APPELLATE BODY REPORT: A BAN ON AMICI CURIAE BRIEFS

Even before the issuance of its report, the *Asbestos* Appellate Body generated great controversy by enacting its own ban: a ban on amici curiae briefs by non-governmental organizations (NGOs).[107] This was an unexpected turn of events since the Appellate Body in the *Shrimp* case accepted NGO briefs attached as exhibits to the U.S. submission and one brief independently submitted by a group of NGOs.[108] In the *Asbestos* case, the Appellate Body chose not to review amici curiae briefs in making its decision.[109] After developing elaborate procedures for NGOs to apply for leave to file briefs, the *Asbestos* Appellate Body denied leave to all 11 NGOs[110] that complied with its procedural

103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* para. 8.237.
107. Asbestos Appellate Body Report, *supra* note 5, para. 56.
108. Shrimp,*supra* note 31, para. 83, 91, 110.
109. Asbestos Appellate Body Report, *supra* note 5, para. 50-56.
110. Asbestos Appellate Body Report, *supra* note 5, para. 57 n.32. The following people and organizations submitted amicus curiae briefs: Professor Robert Lloyd Howse (United States); Occupational & Environmental Diseases Association (United Kingdom); American Public Health Association (United States); Centro de Estudios Comunitarios de la Universidad Nacional de Rosario (Argentina); Only Nature Endures (India); Korea Asbestos Association (Korea); International Council on Metals and the Environment and American Chemistry Council (United States); European Chemical Industry Council (Belgium); Australian Centre for Environmental Law at

requirements. The *Asbestos* Appellate Body Report described the procedures for considering amici curiae participation, but curiously failed to explain why it exercised its discretion to refuse leave to all *amici curiae*.[111]

This interim ruling sparked a wave of protest by NGOs. Greenpeace Political Director, Remi Parmentier, responded by saying, "Obviously they have not learnt the lesson from Seattle."[112] The WTO Director General, Mike Moore, may have indirectly answered the question as to why the Appellate Body ruled as it did. In a speech to the European Parliament in April 2001, Moore said, "when people are free, they choose to set up political parties and seek power through elections. This is the true essence of civil society."[113] Moore's statement echoes the positivist notion that the will of the citizens is transformed into a higher-level will of the state.[114] Moore also recognized that NGOs sometimes have more members than the ruling party of a country.[115] Moore's opinion, which may or may not be inspired by influential WTO members, could explain the Appellate Body's refusal to accept the amici curiae briefs. Certainly, the *Asbestos* Appellate Body did not wish to disclose its reasons for the refusal, which could indicate a decision based on political pressure.

Panelists in the WTO are chosen based on their trade expertise, and their knowledge of environmental and heath concerns may be limited. The Appellate Body's decision not to accept amici curiae briefs is disturbing because the WTO is not required to conduct independent factual investigations or to refer matters to experts.[116] Had the *Asbestos* Appellate Body ac-

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the Australian National University (Australia); Associate Professor Jan McDonald and Mr. Don Anton (Australia); and a joint application from Foundation for Environmental Law and Development (United Kingdom); Center for International Environmental Law (Switzerland); International Ban Asbestos Secretariat (United Kingdom); Ban Asbestos International and Virtual Network (France); Greenpeace International (The Netherlands); World Wide Fund for Nature, International (Switzerland); and Lutheran World Federation (Switzerland). *Id.*

111. *Id.* para. 50-58.

112. Press Release, Greenpeace, A Court Without Friends: One Year after Seattle the WTO Slams the Door on NGOs, (Nov. 22, 2000), *at* http://www.ciel.org/Announce/asbstospr.html.

113. Mike Moore, Trade Development and Democracy: The Need for Reform of the WTO, European Parliament Seminar (Apr. 10, 2001), *at* http://www.wto.org/english/news_e/spmm_e/spmm57_e.html.

114. *See, e.g.*, Jianming Shen, *The Basis of International Law: Why Nations Observe*, 17 DICK. J. INT'L L. 287, 311-12 (1999).

115. Moore, *supra* note 113.

116. *See, e.g.*, Hansen, *supra* note 24, at 1045.

cepted *amici curiae* briefs, it could have used the information in environmental and health matters provided by experts in the briefs as additional information upon which to base its decision.

V. THE *ASBESTOS* APPELLATE BODY REPORT

A. A COMPLICATED ANALYSIS

The global community may experience great confusion due to the Appellate Body's decision. In both the U.S. and Canada, the media broke the news by stating that the French ban on asbestos was upheld on the basis of human health.[117] Even EU Trade Commissioner Pascal Lamy was quoted as saying the ruling showed "[l]egitimate health issues can be put above pure trade concerns."[118] Contrary to expectations, the *Asbestos* Appellate Body did not uphold the ban on the basis of the human health prong of the environmental exception. Instead, the Appellate Body found the measure consistent with Article III:4 once human health concerns were included in the analysis.[119] The Appellate Body found the measure as a whole consistent with the GATT and that the Article XX exception simply did not apply. The Appellate Body did uphold the Panel's analysis of the exception, perhaps to present a good environmental image.[120]

B. GATT ARTICLE III:4: LIKE PRODUCTS ANALYSIS

1. Criticism of the Asbestos Panel's Analysis

An important part of the *Asbestos* Appellate Body's decision is its analysis of Article III:4, which reversed the *Asbestos* Panel's Article III analysis.[121] The Appellate Body initially pointed out that the Panel did not analyze the element of risk

117. *WTO Upholds French Ban on Asbestos; Canadian Industry Disappointed,* Canoe (Mar. 12, 2001), *at* http://www.canoe.ca/MoneyEconomic/mar12_wtoasbestos_ap.html [hereinafter Canoe]; *Panel Upholds Import Ban on Asbestos,* NY TIMES, Mar. 13, 2001, at C2.

118. Canoe, *supra* note 117.

119. Asbestos Appellate Body Report, *supra* note 5, para. 113, 148.

120. *Id.* para. 175, 192.

121. *Id.* para. 192.

when comparing "like products."[122] The Appellate Body decided to analyze the term "like products" and stated it has done so at least twenty-four times in previous decisions.[123] It noted that products in a competitive relationship fall in the category of "like products."[124]

As for the specific test, the Appellate Body utilized the same test as the *Asbestos* Panel, the market-based approach to likeness with criteria of "physical properties," "end-uses," "consumers' tastes and habits," and "tariff classification."[125] The Appellate Body did not agree with the manner in which the Panel applied the test.[126] It found fault with the Panel's failure to compare the likeness of Canadian asbestos products and the French substitute products under each of the criteria.[127] The Appellate Body also noted that "physical properties," "end uses," "consumers' tastes and habits," and "tariff classification" are not the only criteria a panel can use to determine whether products should be characterized as "like."[128] These criteria simply provide a framework within which to analyze the likeness of products, and a panel must take all evidence into account before rendering a decision.[129]

2. *End Use and Physical Properties of Product*

The Appellate Body initiated its own analysis by comparing the physical properties of the Canadian asbestos products with the French substitute products, emphasizing the element must be examined without regard to "end use."[130] The Appellate Body declared, "Panels must examine fully the physical properties of products. In particular, panels must examine those physical properties of products that are likely to influence the competitive relationship between products in the marketplace."[131]

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122. *Id.* para. 85.
123. *Id.* para. 88 n.58.
124. *Id.* para. 99.
125. Asbestos Appellate Body Report, *supra* note 5, para. 110.
126. *Id.*
127. *See id.*(noting that after comparing only the likeness of the products in terms of end-use, the Panel concluded that the products could be characterized as "like").
128. *Id.* para. 101.
129. *Id.* para. 102.
130. *See id.* para. 110-11 (specifically rejecting the Panel's attempt to incorporate the end-use element to circumvent the difference between the physical properties of chrysotile fibers and PVA, cellulose and glass fibers).
131. Asbestos Appellate Body Report, *supra* note 5, para. 114.

The *Asbestos* Appellate Body Report specifically acknowledged that evidence related to health risk should be considered under the "physical properties" and "consumers' taste" analyses because the risk of a product may directly correlate to the physical properties of a product.[132] In this respect, the Appellate Body did not agree with the Panel's notion that including a risk assessment nullifies the exception in Article XX (b) because evaluation of "risk" under Article III:4 does not prevent a measure which is found inconsistent with Article III:4 from being justified under Article XX (b).[133] The Appellate Body then held that under the "physical properties" test, the asbestos and substitute fibers were not "like products" because substitute fibers were not dangerous.[134]

The Appellate Body commented that the analysis of "end-uses" and "consumers' tastes and habits" are particularly important under Article III because the provision is concerned with competitive relationships in the marketplace.[135] If the products are dissimilar in regard to their end uses and the extent to which consumers are willing to use the products to perform their intended functions, a country cannot make a restraint of trade complaint.[136] The Appellate Body determined that the Panel did not adequately analyze the "end-uses" criterion.[137] Specifically, the Panel did not sufficiently explain the number of applications for which the various fibers have similar end uses.[138] In addition, the Panel made no mention of the number of differing applications to which the products could be put.[139]

The Appellate Body indicated that in order to show a prima facie case of likeness, a WTO member cannot rely solely on evidence of similar end-uses.[140] Two other elements must be met before a case of likeness is supported. The member needs to

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132. *Id.* para. 113, 115.

133. *See id.* para. 115 (explaining that each provision is examined separately in regard to "risk").

134. *See id.* para. 114 (finding the substitute fibers were not toxic).

135. *Id.* para. 117.

136. *Id.*

137. *See* Asbestos Appellate Body Report, *supra* note 5, para. 119-20 (finding panel's analysis "far from comprehensive"). *Id.* para. 119.

138. *See id.* (noting that the Panel concluded that the products were "like" based on a small number of applications for which the products were substitutable).

139. *Id.* para. 119.

140. *See* 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: LEGAL AND CONSTITUTIONAL ASPECTS Article III-National Treatment, para. 21 (Grainne De Burca and Joanne Scott, Eds., forthcoming 2001).

provide evidence of unlikeness, based on different end-uses, and show that the number of similar applications outweighs the number of dissimilar applications.[141]

3. *Consumers' Tastes and Habits*

The *Asbestos* Panel declined to utilize the test "[b]ecause this criterion would not provide clear results."[142] Robert Howse explains the test as how consumers would react in an ideal marketplace where they have full information regarding all products.[143] The Appellate Body criticized the Panel's decision not to apply the test and explained that a health risk is an important factor both consumers and manufacturers consider in their purchasing decisions.[144]

4. *Tariff Classification*

The fourth criterion tested whether substitute fibers and asbestos belong in the same "tariff classification."[145] The Panel found that substitute fibers and asbestos fibers did not belong in the same "tariff classification."[146] Based on a lack of evidence and analysis by the Panel, the Appellate Body did not consider this last criterion.[147]

5. *Reversing the Decision*

In the Appellate Body's view, application of the four tests led to the conclusion that the products were not "like" products and thus reversed the findings of the Panel.[148] The only similarities the Appellate Body found were a few isolated circumstances in which the end-uses for the products were the same.[149]

The Appellate Body also analyzed whether cement contain-

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141. *See id.*
142. Asbestos Panel Report, *supra* note 2, para. 8.139.
143. *See* Howse & Tuerk at Article III-National Treatment, para. 17.
144. *See* Asbestos Appellate Body Report, *supra* note 5, at para. 120, 122. The Appellate Body noted that there are few situations in which the ultimate conclusion of a "likeness" analysis will be completely clear. *Id.* para. 120.
145. *See, e.g.,* Asbestos Appellate Body Report, *supra* note 5, para. 124.
146. *Id.*
147. *Id.*
148. *Id.* para. 132, 141.
149. *Id.* para. 125.

ing asbestos is a "like product" to cement containing substitute fiber using the same criteria as in the above analysis. It held that the test by the Panel was insufficient and reversed the finding that the two products were "like products."[150] The Appellate Body found that Canada had not established the basis for holding the products were "like products".[151]

Taken as a whole, the Appellate Body held that "Canada has not succeeded in establishing that the measure at issue is inconsistent with Article III:4 of the GATT 1994".[152] Thus, the French ban was not in violation of Article III:4 and accordingly was not in violation of any of the substantive obligations of the GATT.[153]

C. OTHER POTENTIAL VIOLATIONS OF SUBSTANTIVE OBLIGATIONS

Canada argued that France violated Article 2 of the TBT Agreement, GATT Articles III: 4 and XI, and GATT Article XXIII: 1(b) by nullifying or impairing one or several advantages accruing to Canada directly or indirectly under the WTO Agreement and impeding the attainment of an objective of the Agreement.[154] The Panel decided to analyze whether the French measure fell within the TBT Agreement first. If it did not fall within this agreement, it would turn to the GATT.[155] The Panel held that the French notification[156] to the Committee on TBT (in accordance with Article 2.9.2 of the TBT Agreement)[157] had no legal effect and was thus not an estoppel.[158] The decisive factor was, in the view of the Panel, whether the measure fell within the definition in Annex 1.1 of the TBT Agreement.[159] The Panel decided that the part of the French decree that prohibited the marketing of asbestos did not fall within the agreement,[160] whereas the exceptions to the decree did fall within the meaning

150. *Id.* para. 131-32.
151. Asbestos Appellate Body Report, *supra* note 5, para. 147.
152. *Id.* para. 148.
153. *Id.* para. 193.
154. Asbestos Panel Report, *supra* note 2, para. 1.2, 3.1- 3.2. Article XXIII:1(b) is not analyzed in this case note because none of the panels found it to be violated and it is outside the scope of the "normal" analysis of environmental measures.
155. *Id.* para. 8.17.
156. *See* Notification, *supra* note 101.
157. TBT Agreement, *supra* note 2, art. 2.9.2.
158. Asbestos Panel Report, *supra* note 2, para. 8.60.
159. *Id.* para. 8.28.
160. *Id.* para. 8.63.

of the agreement.[161] Howse describes this argument that a total ban falls outside the TBT Agreement as "bizarre."[162] The Panel saw no reason to pursue a TBT analysis since Canada did not make any special claim regarding the exceptions.[163] The Panel jumped over the analysis of the TBT Agreement, most likely because no case so far has involved an analysis of this very complicated agreement.

The Appellate Body also analyzed Canada's argument regarding the applicability of the TBT Agreement. It found that the measure could not be split up for the purposes of the TBT Agreement, but must be analyzed as a whole.[164] The Appellate Body then concluded that the measure taken as a whole did fall within the scope of the TBT Agreement.[165] It did not wish to make an analysis of it, however, due to the Panel's lack of findings under the agreement and the novelty of the legal interpretation of the agreement.[166] The exact outcome of a TBT Agreement analysis would have been is nearly impossible to tell because the Agreement has never been analyzed.

After the analysis of whether the TBT Agreement applied, the Panel turned to the Article III:4 analysis and found the French measure violated this Article.[167] Therefore, the Panel found it unnecessary to examine whether the measure was in violation of Article XI:1.[168] The Appellate Body held that Article III:4 was not violated, but did not address Article XI because it was not on appeal.[169] Thus, there was no finding of violations of any of the substantive obligations under the GATT.[170]

VI. THE *ASBESTOS* CASE IN PERSPECTIVE

A. POLICY MAKING

One may pose the question of whether the Appellate Body acted similarly to the U.S. Supreme Court and the ECJ in its

161. *Id.* para. 8.70.
162. *See* Howse & Tuerk at Introduction, para. 7.
163. Asbestos Panel Report, *supra* note 2, para. 8.72-.73.
164. Asbestos Appellate Body Report, *supra* note 5, para. 64.
165. *Id.* para. 75.
166. *Id.* para. 81-83.
167. Asbestos Panel Report, *supra* note 2, para. 8.73.
168. *Id.* para. 8.159.
169. Asbestos Appellate Body Report, *supra* note 5, para. 11-22.
170. *Id.* para. 148-55.

"policy making." The answer is yes. After it determined there was no violation of the substantive obligations under the GATT, the Article XX exception became totally irrelevant.[171] Even so, the Appellate Body obviously wished to demonstrate its sensitivity to the policy regarding internal human health regulations by upholding the Panel's analysis of the Article XX exception.

B. JUDICIAL ABSTENTION

The choice to not interpret Article XI and the TBT Agreement is probably not policy making, but merely a practical example of judicial abstention. There were no findings of fact regarding either issue by the Panel, so the Appellate Body was in a poor position to opine. An appellate body found itself in a similar situation in the decision on *Argentina—Safeguard Measures on Imports of Footwear*, where it also had to choose between two substantive obligations.[172] In this case, the Panel found Argentina to be in violation of the Agreement on Safeguards,[173] but found GATT Article XIX did not apply.[174] The Appellate Body held that both the Safeguards Agreement and GATT Article XIX applied, but found it unnecessary to make an Article XIX analysis after the measure in dispute was found to violate the Safeguards Agreement.[175] Similarly, in the decision on *Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products*, the Panel found no violation of Article XIX, but found a violation of the Safeguards Agreement.[176] The Appellate Body decided that Article XIX did apply, but refrained from interpreting it due to insufficient factual findings by the Panel.[177] Both *Argentina-Footwear* and *Korea Dairy* differ from the *Asbes-*

171. Asbestos Panel Report, *supra* note 2, para. 8.236. The Panel in the Asbestos case describes that in order to be considered under an exception, the measure needs to be in violation of one of the substantive obligations. *Id.*

172. Appellate Body Report on Argentina – Safeguard Measures on Imports of Footwear, WT/DS/121AB/R (Dec. 14, 1999), *at* http://www.wto.org/english/tratop_e/dispu_e/121abr.doc [hereinafter Argentine Footwear]. In this case, Argentina had passed a resolution placing certain safeguard measures on imports of footwear. *Id.*

173. Agreement of Safeguards, *at* http://www.wto.org/english/docs_e/legal_e/final_e.htm (the Agreement of Safeguards is a multilateral agreement that is binding on all WTO members).

174. Argentine Footwear, *supra* note 172, para. 9.

175. *Id.* para. 151.

176. Appellate Body Report on Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products, WT/DS98/AB/R (Dec. 14, 1999), *at* http://www.wto.org/english/tratop_e/dispu_e/98abr.doc [hereinafter Korea Dairy].

177. *Id.* para. 92.

tos case because they in fact found a violation of the substantive obligations. In *Asbestos*, the Panel did not find a violation of Article III, and Article XI was not analyzed. No violations were found of the substantive obligations—leaving a measure that severely hindered free trade to be in conformity with the GATT.

The *Asbestos* Panel erred considerably by finding a violation of Article III and not analyzing possible violations under Article XI. The Panel's decision rendered the Appellate Body helpless to find violations of the substantive obligations because the Panel had made no factual findings or analysis of Article XI, putting the Appellate Body in a poor position to complete any analysis. Further complicating the situation is the fact that an Appellate Body has yet to send a case back to the "lower court" i.e. the Panel for further review. In this case a further review of Article XI by the Panel would have likely resulted in a finding that the measure was in violation of Article XI, and then the Article XX(b) analysis could rightfully be made by the Appellate Body rather than merely in dicta.

C. HUMAN HEALTH

To understand the impact of the *Asbestos* case, one must place it in context with the environmental measures in previous GATT/WTO cases. The main difference between the *Asbestos* case and other GATT/WTO cases is that the French ban on asbestos protected human health. The Cigarettes case also protected human health, but the measure involved discrimination between domestic and foreign cigarettes and could, thus, not be accepted under Article XX (b).[178]

In *Asbestos*, by ruling that the French measure was not in violation of any substantive obligations, the Appellate Body did not need to address the Article XX (b) issue. The decision to uphold the Panel's Article XX (b) analysis was a signal to the WTO to recognize that human health is superior to exhaustible natural resources. The Appellate Body sent the signal by advising, "'[t]he more vital or important [the] common interest or values' pursued, the easier it would be to accept . . .[the necessity test]."[179]

178. *See* Cigarettes, *supra* note 31, para. 63, 75 –77, 81.
179. Asbestos Appellate Body Report, *supra* note 5, para. 172.

D. PRECEDENTIAL VALUE

The message runs deeper in the *Asbestos* case. The well-worn term "extraterritoriality" from the *Tuna* cases appears fresh and renewed.[180] When a country attempts to enforce a standard made within their territorial limits on imported products, that measure has "extraterritorial" effect if it requires changes in policies or methods of production within the territory of another country.[181] The *Asbestos* case signals WTO members that the Article XX exceptions can be accepted if they can explain trade measures in terms of protecting people, animals, plants or exhaustible natural resources within their own jurisdictional limits and without requiring others to change any policies or production methods. The new opening for Article XX exceptions makes it important to distinguish between measures with extraterritorial implications and cases with no extraterritorial implications. So far, the cases with extraterritorial implications are *Tuna I*, *Tuna II*, *Shrimp*, and, to some degree, *Gasoline*. The *Cigarettes* measure regulated human health within the territory of Thailand, the *Gasoline* measure regulated the pollution level from gasoline within the United States, and finally, the *Asbestos* case regulates human health within France.

The *Asbestos* case belongs to the category of internal measures. The *Asbestos* decision firmly expresses that if a WTO member wishes to have a certain level of protection within its territory, it must have scientific evidence describing the risk, design the measure to apply equally to imports and to national products, and apply the measure in a non-discriminatory manner in order to satisfy the chapeau analysis. The category of measures with extraterritorial implications faces much tougher scrutiny by the panels. The *Asbestos* case offers no relief for the cases falling in this category. Thus, the *Asbestos* case will not necessarily serve as an important precedent to the determination of future challenges of all types of environmental measures.

Two points must be made about the precedential effect of the *Asbestos* case in future Article XX cases. First, if the Appellate Body wanted to create a good image in the pro-environment community without authorizing trade barriers based on easy access to invocation of Article XX, a measure with such a limited scope was an ideal case to accept. Second, the positive discus-

180. *See* Tuna I, *supra* note 31, para. 5.26; *see also* Tuna II, *supra* note 31, para. 5.31.

181. Tuna II, *supra* note 31, para. 5.31.

sion of Article XX by the Appellate Body is devalued by the reality that is merely dicta. The mystery is why the Appellate Body did not state the obvious: A quantitative restriction is not in conformity with Article XI. Had the Appellate Body done this, then the favorable ruling on Article XX would have been promoted to the realm of full reliance and the precedential value would have risen accordingly.