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## EC – Asbestos

### European Communities – Measures Affecting Asbestos and Asbestos-Containing Products\*

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#### 1 *EC – Asbestos as Watershed*

Some cases attain “landmark” status because they constitute a jurisprudential paradigm shift. Others attain such status because in them a decisor, usually a supreme jurisdiction, renders a definitive, “canonical,” ruling. Sometimes it is both reasons. Sometimes, rarely, it is neither. *EC – Asbestos* is such a rare case. It may well qualify as a landmark. It has, justifiably, attracted huge attention and, understandably, considerable controversy. Its reasoning, however, is so decidedly non-definitive that it is not, consequently, possible to say whether it represents a veritable paradigm shift or is just a badly reasoned case by the Appellate Body (AB), albeit with a non controversial result.

It is a rare, indeed unique, instance that embedded in the decision itself a Member of the Appellate Body Division which decided the case expresses “substantial doubt” as to the core reasoning of the decision.<sup>1</sup>

\* This study discusses the WTO Dispute Settlement dispute *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* (WT/DS135/R, September 18, 2000 and WT/DS135/AB/R, 12 March 2001). We are grateful for helpful discussions with Petros C. Mavroidis and the other Reporters of the project, and the comments provided by participants in the ALI meeting in Philadelphia, February 6–7, 2003.

<sup>1</sup> In Recital 154 of the AB decision, the anonymous Separate Opinion opines: “My second point is that the necessity or appropriateness of adopting a ‘fundamentally’ economic interpretation of the ‘likeness’ of products under Article III.4 GATT 1994 does not appear to me to be free from substantial doubt. Moreover, in future concrete contexts, the line between a ‘fundamentally’ and ‘exclusively’ economic view of ‘like products’ under Article III.4 may well prove very difficult, as a practical matter, to identify. It seems to me the better part of valour to reserve one’s opinion on such an important, indeed, philosophical matter, which may have unforeseeable implications, and to leave that matter for another appeal and another day, or perhaps other appeals and other days. I so reserve my opinion on this matter.”

And although the AB rejected the reasoning, not the final outcome, of the Panel's decision, the doctrinal implications of the rejection are not clear and continue to be contested.

The importance of *Asbestos* must initially be found in its factual matrix, a French Government Decree of 1966<sup>2</sup> providing, *inter alia*, in its first article as follows:

I. – For the purpose of protecting workers, . . . the manufacture, processing, sale, import, placing on the domestic market and transfer under any title whatsoever of all varieties of asbestos fibres shall be prohibited, regardless of whether these substances have been incorporated into materials, products or devices.

II. – For the purpose of protecting consumers, . . . the manufacture, import, domestic marketing, exportation, possession for sale, offer, sale and transfer under any title whatsoever of all varieties of asbestos fibres or product containing asbestos fibres shall be prohibited . . .

This is a most typical (arguably the most typical) kind of government measure in the field of consumer and workplace protection taken in Member Countries of rich or poor, North or South, West or East. *EC – Asbestos* thus affects the physiognomy, not the pathology, of government regulation and its entanglement with General Agreement on Tariffs and Trade (GATT) trade rules.

It is also a case that implicates what is arguably the most central of GATT disciplines: National Treatment in the field of Regulation (and, by implication, taxation). There was never a serious doubt as to the material outcome of this case: validation of the legality of the French measure (many suspect that the Canadian government could not have seriously believed the WTO would overturn a ban on asbestos, but that it needed the result as a matter of domestic politics.) Thus, this is not a case about outcomes but about reasoning: the proper way for regulators and adjudicators to think of the application of the most central of GATT disciplines to the most central of government regulatory activity.

It is our belief that the case does not settle this question definitively but is extremely important in putting the methodological question squarely back on the table. It is veritably a watershed case – the full significance of which will emerge in the light of subsequent jurisprudence. Our own methodology will be as follows. The outcome of *EC – Asbestos* is hardly in doubt here. It is, as noted, the framework of methodologies that should

<sup>2</sup> Décret no. 96–1133 relatif à l'interdiction de l'amiante, pris en application du code de travail et du code de la consommation, *Journal officiel*, December 26, 1996.

become the central discussion point regarding *EC – Asbestos*, for it will provide a normative yardstick with which both to evaluate the specific decision in this case and to prescribe future evolution. We shall therefore first expound three possible approaches that *EC – Asbestos* exemplifies for interpreting the ambit of the National Treatment provision in GATT as it applies to regulation. Although, following the case, our focus will be on regulation, one cannot fully grasp the issues in the case without extensive reference to the law and case law on taxation. The principal governing norm, Article III.4 GATT is part of a whole (Article III GATT) which situates taxation and regulation side by side under a common *chapeau*. We will then discuss, critically, the main findings by the Panel and the AB in the light of these approaches.

## 2 Three methodologies for dealing with regulation under GATT 1994

In order to structure the discussion of the adjudicating bodies' rulings in *EC – Asbestos*, we find it useful to distinguish between three possible methods of interpreting GATT 1994, as it applies to health (and other regulatory) measures. These three approaches – or methodologies – do not perhaps correspond exactly to the views put forth by any particular body or individual, but each seems to capture the essence of a distinguishable way of reasoning. It should be emphasized, however, that they are not meant to exhaust the set of possible interpretations. We believe that each of the three represents a reasonably coherent way of approaching the issues in *EC – Asbestos* and, in fact, we see traces of all three in the decision of the Panel and Appellate Body. One reason *EC – Asbestos* has attracted so much attention is precisely because it represents a methodological crossway. We will strive to present the three methodologies in a neutral fashion, even though we do not necessarily find all them equally attractive.

The essential textual matrix of the case in relation to which the three approaches will be examined is as follows:

Article III.1 GATT – the *chapeau* – applies both to taxation and regulation and provides as follows:

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

Article III.4 GATT applying specifically to regulation states:

4. 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.

Article III.2 GATT applying specifically to taxation affirms:

2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

An *ad* to Article III.2 GATT explicates:

A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed.

Finally, Article XX GATT provides as follows:

*General Exceptions*

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:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health[.]

All three methodologies share a premise as to the reach of GATT in this area: Members retain fiscal and regulatory autonomy under the GATT. But, in the exercise of their fiscal and regulatory autonomy they

may not violate the principle of National Treatment as expressed in the legal matrix outlined above.

The interpretation of Article III GATT as it applies to regulation hence hinges principally on the interpretation of three terms:

- *like*
- *so as to afford protection and*
- *treatment not less favorable.*

The three stylized approaches we are to define and discuss differ in their interpretations of these three terms and their relationship to Article XX GATT.

### 2.1 Methodology I: the “Objective” approach

As will be argued below, this is the methodology used essentially by the Panel in *EC – Asbestos*. We are not trying to summarize the decision of the Panel here, but to present as a matter of theory a methodology which in our view underlies the approach by the Panel. It has also been employed by various panels and the AB in other cases, notably in the area of taxation. The “Objective” approach may be synthesized in the following manner: as mentioned, members retain fiscal and regulatory autonomy. They may impose taxation or adopt regulation as an expression of their specific socio-economic preferences. These may, and usually will, differ from country to country. Violation of National Treatment takes place when their tax or regulatory regimes distort competition between imported and domestic products in favor of the latter. In the words of the AB in *Japan – Taxes on Alcoholic Beverages*:<sup>3</sup>

Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products. . . .  
Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products. . . .<sup>4</sup>

The distinguishing feature of the first methodology is to understand the problematic turn of phrase in Article III.1 GATT – *so as* – whereby domestic taxation and regulation

<sup>3</sup> WTO WT/DS88, 10, 11/AB/R, Oct 1996.

<sup>4</sup> AB Report, *Japan – Taxes on Alcoholic Beverages*, footnote 58, at 109 and 110.

. . . should not be applied to imported or domestic products so as to afford protection to domestic production . . .

as indicative of an *objective general prohibition*: taxation and regulation may not be applied in a way that *results* in protection being afforded to domestic production. This prohibition applies also to taxation and regulation which, on its face, is origin-neutral. Critically, the entire phrase “should not be applied to imported or domestic products so as to afford protection to domestic production” is understood in this methodology as applying to the result of the tax or regulatory regime – to its *effect* on the competitive relationship between domestic and imported products and not to the intention or purpose of the tax and regulatory regime.

On this approach, a regulatory (or tax) regime which was adopted with the explicit intention of distorting competition in favor of domestic production but which, owing, say, to the stupidity of the regulator did not have that effect, would not be in violation of Article III GATT. The contrary would be equally true: a regulatory regime adopted on an origin-neutral basis with no protectionist purpose at all, but which, nonetheless, happened to “. . . afford protection to domestic production” would fall under the prohibition imposed by Article III GATT.

Under this method even if the State adopted the regulatory or tax measure with non-protective reasons in mind, indeed, with other commendable reasons such as protection of consumers or the environment, *etcetera*, a regulatory or tax measure that had the effect of affording protection to domestic production by distorting the competitive relationship of an import in favor of domestic production could be retained only if justified in accordance with Article XX GATT.

Articles III.2 GATT and III.4 GATT on this reading set out the precise legal conditions which would trigger a legal violation of the general principle enunciated in the *chapeau* in the case of taxation and regulation respectively. Specifically, in relation to regulation,

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.

Two issues in particular require elucidation: which products are covered by the non-discrimination discipline? What conduct amounts to a violation of that discipline?

The first condition relates to the products – domestic and imported – to which the discipline applies. Article III.4 GATT speaks of “like” products. Article III.2.i GATT also refers to “like” products and Article III.2.ii GATT glossed by the *ad* note includes as a second category “directly competitive or substitutable products.”<sup>5</sup> Consequently, “likeness” in Article III.2 GATT

<sup>5</sup> Tantalizingly, the *ad* to Article III speaks of direct competition *or* substitutability. Could there be a situation where substitutable products would not be in competition with each other? A high degree of functional substitutability between two products should naturally contribute to a competitive relationship in the market. But, the competitive relationship is determined by the interaction of the demand and the supply side. Therefore, if firms are constrained in their capacity to increase production, there is not a very competitive relationship in the market, despite the fact that products are highly substitutable on the demand side. On the other hand, it seems less likely that a competitive situation would arise in a situation where products are rather poor substitutes.

We would also like to make a comment on the common argument that likeness should not be determined “in the market place.” It is argued that consumers may gradually change their consumption patterns habits through learning if imported products were to become substantially cheaper. For instance, after some time, kiwis are recognized by most consumers as a valid substitution to many other “juicy fruits” and find themselves in a competitive relationship with such fruit. But that might not be the case at the moment of introduction into the market. This argument has been invoked in case law in, for instance, *Korea – Alcoholic Beverages*, where the AB speaks of “latent demand” alluding to the situation where the very tax or regulatory regime under consideration would have shaped consumer preferences in a way that as an empirical matter two products which could (as evidenced in, say, some other market) be considered as objectively substitutable, do not appear to engender robust competition and thus would not be considered under the objective test as like. In some respects a similar phenomenon exists in relation to any new product, though functional similarity is much easier to communicate to potential consumers than taste.

This argument has an important grain of truth, but is at the same time a bit misleading. One has to distinguish between the notion that market competitiveness is what should ultimately determine likeness under Methodology I, and the practical question of *how* to determine this competitiveness. Heuristically, we may here distinguish between three types of situations with regard to the role of potential competition. In the first, the magnitude of the alleged discrimination is small, in the sense that the measure would not change prices, etc., in the market outside the range in which they normally vary. In this case, no fundamental problem stemming from potential competition seems to be involved. In the second type of situation the measure does shift prices, significantly outside the range where they normally vary. Here there is a problem, since we would have to “extrapolate” outside the range for which we have observations, and the further outside this range we go, the more uncertainty there is concerning the trustworthiness of the assessment. But, as far as we can see, there is no presumption that the errors we would make would be biased toward underestimating the degree of competitive relationship. A third type of situation would be one where some form of learning process is indeed involved. For instance, consumers may learn gradually about the characteristics of an imported product from their consumption of the product. Information obtained from a period of very high import prices, and low consumption, may then be of limited value to predict the consequences of a substantial reduction in the price of imported products, where consumers have learnt about the foreign product. In this third situation we can hardly rely on market data to determine

has been construed narrowly. The AB is emphatic in *EC – Asbestos* that the “like” products in Article III.4 GATT may not be the same as the “like” products in Article III.2 GATT and must be interpreted far more broadly. In fact, in order for Article III.4 GATT to successfully give expression to the general principle enunciated in the chapeau, “like” products in Article III.4 GATT must be understood as covering products which are competitive and/or substitutable even if in terms of their characteristics they may not be quite so like as products under the first sentence of Article III.2 GATT. Whilst there surely will be, according to the AB, some products whose degree of substitutability is so insignificant as to exclude them from the discipline of Article III.4 GATT, under the first approach, any appreciable degree of competition would bring the products within the purview of Article III.4 GATT.

Under Methodology I, “likeness” for the purposes of Article III.4 GATT is thus to be determined in the market place: it is only when products are in an appreciable (i.e. not *de-minimis*) competitive relationship that a less favorable treatment of an imported product can have the effect of protecting a domestic product. We will not deal here with the means for determining the existence of a competitive relationship in the market.

Once established that two products are in such a competitive relationship and are, thus, “like” products and subject to the discipline of Article III.4 GATT, the second legal condition relates to the conduct or content of the measure that will amount to a violation, by forbidding *less favorable treatment* of like imported products. Put differently, Article III.4 GATT gives specific expression (to use a term employed by the AB) to the general principle enunciated in III.1 GATT that regulation may not be applied *so as to afford protection* to domestic production by instructing that imported products “. . . shall be accorded treatment no less favourable . . . .”

It is important at this juncture to explore further the comparison of the “which” and “what” between Article III.2 GATT and III.4 GATT, since the construction of Article III.2 GATT could arguably provide some support for Methodology I.

the competitive relationship, since there is a presumption that data stemming from a period before learning would be biased toward undervaluing the degree of competitive rivalry. As a result, one may have to rely on evidence that does not directly stem from observations of the market in question. Note however, that the problem here is “only” one of empirically estimating the competitive relationship in the market. In particular, we have not questioned the basic premise that the competitive relationship – “the marketplace” – determines the degree of likeness. Hence, this is not an argument against the conceptual basis of the likeness definition, but about the possibility to use for instance standard econometrics to assess the competitive relationship.



As noted above, Article III.2 GATT provides two replies to the which question: the discipline of national treatment applies to “like products” *simpliciter* as well as products which are in “direct competition or are substitutable” even if not “like” in a narrow sense. According to the AB, “like products” in the sense of Article III.2 GATT has to be interpreted narrowly. The term would thus denote products which are very substitutable, in a high degree of competition and sharing physical and other characteristics. Products included under the second sentence of Article III.2 GATT may not share as many physical and other characteristics and the degree of substitutability and/or competition may not be quite as high.

What difference does it make? A critical one. Under the Methodology I, in the case of Article III.2 GATT “like” products, the trigger for violation is *any* taxation on the imported product in excess of that imposed on the like domestic product. Any taxation in excess would represent that: even the smallest difference would constitute a violation. Any taxation in excess would constitute a violation: whatever its intention and purpose.

In relation to the other broader category of products in Article III.2 GATT, this is arguably not the case. When products are “merely” in competition with each other but not amounting to “like” products, Article III.2 GATT contemplates the possibility of the imposition of a tax on the imported products in excess of the domestic one which does not constitute a violation. Instead, in relation to that category, the trigger will only be taxation which is inconsistent with the principles of Article III.1 GATT – notably “. . . so as to afford protection to domestic production.”

What is the logic of the text which tells us that when products are “like” – meaning very, very similar to each other – any excess tax, even the smallest, would affect the competitive relationship and hence constitute a violation, but when products are not so similar though in competition with each other or being substitutable, a small difference in tax even in excess may not affect the competitive relationship and hence not constitute a violation?

Arguably, it would not make sense to avoid a subjective-intention test for “like products” but to introduce, through the words “so as to afford protection”, such a test for products which are not “like” but are in competition with each other. Instead, it is more plausible on this reading to argue that the distinction turns on a different reasoning. It may have been thought that when products are not so similar and are only partially substitutable, a small difference in taxation would not affect consumer demand more than marginally and hence not affect the competitive relationship between products in any significant way. Only a difference in

tax which was sufficiently big to noticeably “afford protection” would be caught.

What is important is that this distinction may seem to give some support to the hermeneutics of the objective methodology—since one possible way of reading it is to say that, in relation to the broader category, only a difference in taxation which has the effect (e.g. by being big enough) to afford protection between products which are only partially in competition, will trigger a violation. This reading would it could be argued, constitutes another reason not to read purpose or intent into the phrase “. . . so as to afford protection” but to see it as indicating an objective state reflecting a tax or regulation which distorts competition whether intended or otherwise.

To conclude, under the Objective Methodology of Article III:

- Likeness measures the degree to which products are in actual or potential competition in the market place.
- The yardstick for determining whether “less favorable treatment” has been rendered does not take into account any rationale for differential treatment, such as differences in health impact, but only captures the effect of the measure.
- Such less favorable treatment to imported products is a necessary and sufficient requirement for the measure to be such so as to afford protection.

## 2.2 Methodology II: the “Effect and Purpose” approach<sup>6</sup>

The second approach to interpreting Article III GATT shares one important feature with Interpretation I: products must be in competition with each other for Article III.4 GATT to apply at all. And the measure in question, at least *ipso facto*, would have to give some advantage to the domestic product and so afford protection to domestic production. But these would be only necessary conditions, not sufficient ones for a finding of an Article III GATT violation. Methodology II maintains that any advantage given by origin-neutral regulation (or taxation) to domestic production must have been applied *with that purpose* to be illegal.

On this reading, the mutual promise among all members ex Article III GATT was not to refrain from any taxation or regulation which would

<sup>6</sup> We avoid “aims and effect” because that has attained a certain canonical meaning in doctrine from which we prefer to be unencumbered. Of course our Methodology II shares much with aims and effect.

merely have the effect of giving protection to domestic production, but to refrain from imposing such regulation or taxation with that purpose.

A hard version of Interpretation II would insist on detecting such purpose, almost as a “*mens rea*” test in the regulatory process. A weaker, arguably more workable and defensible, version, adopted by the United States in *Japan – Alcoholic Beverages II* would be more holistic:<sup>7</sup> the failure of the importing country to provide at the adjudicatory stage a plausible explanation to the measure producing the disparate impact, would create a presumption of bad purpose. We would refer to this as constructive purpose.

Applied to *EC – Asbestos*, this approach would result in a finding of no violation of Article III GATT since on the hard version it would be hard to impute bad purpose to the French measure. On the soft version, France could plausibly (and realistically) explain that its origin-neutral measure was not applied so as to afford protection to domestic production but so as to afford protection to consumers and workers. The case would not on this reading ever reach Article XX GATT.

It should be noted that under Methodology I, a State seeking to justify a measure that was on the face of it in violation of Article III GATT, would be subjected in almost all situations to the Least Restrictive Measure test – it would not be allowed to keep the measure in place, as written, if it could be shown that the objective sanctioned by Article XX GATT could be reasonably achieved in a manner which was less burdensome to trade. Under the Effect and Purpose methodology this examination is folded into the Article III GATT analysis. The non-choice by the State of readily available less restrictive measures would need to be justified unless the presumption of bad purpose were triggered.

To summarize, according to Methodology II:

- Likeness measures the degree to which products are in actual or potential competition in the market place.
- The yardstick for determining whether “less favorable treatment” has been rendered does not take into account any rationale for differential treatment, such as differences in health impact, but only captures the effect of the measure.
- For a measure to be caught by the “so as to afford protection requirement,” it is necessary that it *intentionally* provides such less favorable treatment (or that the State cannot give an adequate rational explanation for such treatment whereby intention will be implied).

<sup>7</sup> Submission of the United States of August 23, 1996 in the Appeal to *Japan – Taxes on Alcoholic Beverages II* (AB 1996–2).

The difference compared to Methodology I is hence the requirement of not only protective effect, but also such intent – actual or constructed. If the Purpose and Effect approach were to be applied in *EC – Asbestos*, the measure would most likely be accepted, since it would be found to lack protective intent.

### 2.3 Methodology III: the “Alternative Comparators” approach

Methodology II introduced one source of difference to Methodology I: the subjective requirement of purpose as a condition for illegality. Methodology III is a variation, but an important one, on Methodology II. Purpose is an important component also in Methodology III. But Methodology III takes a further step away from Methodology I, since it operates on a different trajectory of reasoning with regard to the determination of likeness.

Every determination of likeness for the purpose of determining the existence of discrimination embodies, explicitly or implicitly, a comparator. It also involves the exclusion of certain factors as illegitimate comparators. In the case of, say, sex or race discrimination, we take as the comparator the essential humanity of the subjects. In the light of that comparator men and women, or whites and blacks, or Jews and Gentiles, are held to be “like” and the norm of “like” treatment is triggered. Differently put, we exclude as comparator color of skin, or gender, or race and religion: as a matter of policy those are determined to be irrelevant comparators. If color of skin were a legitimate comparator, then for the purposes of that comparator whites and blacks would be “unlike” and could (and even should) be treated differently since treating the “unlike” in a like manner is equally discriminatory to treating the “like” in an unlike manner.

Under both Methodologies I and II, the implicit comparator is market functionality of the product. It is the comparator reflective of the vocabulary of substitutability, competition, consumer preference. Products are considered “like” and hence subject to the discipline of National Treatment because they meet similar needs of the consumer and consequently compete with each other in the eyes of the consumer on the market. Methodology I and II share the same conception of likeness deriving from the same market place comparator.

Methodologies I and II differ in the way they treat the plea of the State that the less favorable treatment accorded the imported product was in pursuance of a legitimate purpose. Under Methodology I such a plea of legitimate purpose will exculpate the overall illegality of the State measure if found to fall within the parameters of Article XX GATT. The State will

have been found to discriminate since two “like” products were treated in an unlike manner and thus Article III GATT was violated, but the discrimination will be considered justified in pursuance of an overriding other policy sanctioned under Article XX GATT.

Under Methodology II there is no finding of discrimination and thus of violation of Article III GATT since even though like products have been treated in an unlike manner, violation of Article III GATT is construed as considered to take place only when the less favorable treatment is imposed with the purpose – actual or constructed – of protecting domestic production.

Under Methodology III, the very comparator is put into question. The relevance of the functional comparator does not disappear altogether: the complaint establishing a *prima facie* violation and the requirement of the State to defend itself will be triggered on the basis of alleged discriminatory treatment of products in competition with each other. This is the unifying thread among all three methodologies. The functional market comparator is the default position. The response of the State would however be different in that it would challenge the very use of that comparator.

An illustration will serve to bring out the nuanced difference between the methodologies. In a famous tax case, Italy had a high tax on refined engine oil and a low tax on recycled engine oil. It did so for ecological reasons – to provide an economic incentive to recycle oil thus enhancing conservation and responsible disposal of used oil. From a market-functional perspective refined oil and recycled oil meet the very same needs of the consumer and are in competition with each other. Indeed, in their properties they are so similar, they are indistinguishable. The user can not, from its properties, tell the difference between refined and recycled oil. Taxing imported refined oil at a high rate and domestic recycled oil at a low rate would certainly amount to treating a functionally like imported product in a less favorable way.

Using Methodology I – Article III will have been held to have been violated, but the State may justify its measure under Article XX.g GATT. Under Methodology II, since the purpose of the tax was not to protect domestic production (even if this was its effect) but to protect the environment, no violation of Article III GATT will have taken place. Under Methodology III the two products are not considered like, because the implicit comparator of the measure is not market functionality but an alternative comparator – ecological efficiency: ecologically efficient products (such as recycled oil) are taxed at a low rate and ecologically inefficient products (refined oil) are taxed at a high rate. Under this

methodology, by employing an alternative comparator, refined oil and recycled oil simply do not come under the discipline of National Treatment and Article III GATT – any more than diamonds and oranges would.

Note that under Methodology III it is not the set of values of the adjudicator which determine the outcome. It is the choice of comparator by the regulating state. In this respect the role of the adjudicator under Methodology III is not radically different to his or her role under Methodology II: the adjudicator has to decide whether the State has made a convincing argument concerning the choice of comparator underlying the regulatory or tax distinction. Under Methodology II the adjudicator has to pronounce on the claimed purpose. Note too that under Methodology III once the comparator is defined, the test of less favorable treatment and so as to afford protection do not differ from Methodology I – they are market-based and look at effects of the measure on the competitive relationship between the like products (defined, however, according to the relevant comparator). Thus, crucially, even if the adjudicator accepts the claim of an alternative comparator, she can still find discrimination if, *by reference to the categories created by the alternative comparator (e.g. ecologically efficient and ecologically inefficient products)*, imported products are treated less favorably than domestic products.

Applied to asbestos, the comparator implicit in the French Decree is health risk or more specifically carcinogenic potential. The Decree, on this reading, differentiates (in origin-neutral fashion) between carcinogenic and cancer-risk-free products. By reference to the comparator of “carcinogenicity” the two products are simply unlike products and not caught by the discipline of national treatment and non-discrimination.

To summarize, the complaint is based on a claim that a “like” imported product, defined in market terms is treated less favorably than its domestic counterpart. If that is credibly alleged a *prima facie* violation is established and the regulating state is required to defend its action.

Under Methodology III:

- Likeness is defined by reference to the implicit or explicit comparator underlying the measure.
- A product is understood to be treated less favorably in the traditional way – with reference to the effect of the measure on the competitive relationship between the like products (defined, however, by the appropriate comparator).
- Protection is afforded when a like imported product (defined by the appropriate comparator) is treated less favorably.

#### 2.4 Reflections on the three methodologies: what's in the choice?

We do not here take position but are more concerned to explain the choices made by the adjudicating bodies of the GATT and WTO. The *EC – Asbestos* Panel certainly reflected a preference for Methodology I. By contrast, there is a conflict in the jurisprudence of the Appellate Body and it is possible to read as validating, in different cases, all three strands. *EC – Bananas III* was a clear affirmation of Methodology I. *Chile – Taxes on Alcoholic Beverages* has distinct language affirming some variant of Methodology II. *Japan – Alcoholic Beverages II* is the most tantalizing. It avoided the chance for a “full affirmation of purpose” as advocated in the United States Appeal. It rejected purpose for the interpretation of Article III.2 GATT first sentence but used language that could be read as consistent with purpose analysis for the second sentence of Article III.2 GATT.<sup>8</sup>

Although Methodology III has not featured, as such, in either literature or jurisprudence, there is a strand of reasoning in *Japan – Alcoholic Beverages II* which is not only consistent with it, but seems to employ it. The Appellate Body does, after all, accept that taxation by reference to the alcoholic content of a spirit, broken down even to very small differences, is a legitimate practice. Without stating so conceptually, they are allowing the State, in response to the allegation of *prima facie* violation based on the contention that products in competition with each other are treated differently (i.e. default comparator) to explain their tax regime by reference to an alternative comparator, namely alcoholic content. Had the tax steps followed in some coherent sense the logic of the alternative comparator – alcoholic content – Japan would not have been found to be in violation of Article III GATT even though the effect of the tax would be to affect competition between like products – highly suitable from the consumers' point of view.<sup>9</sup>

Instead of trying to argue which approach, hermeneutically or from a policy perspective, remains the “right” or “correct” approach, we would rather assess some of the arguments advocated for the different approaches.

One hermeneutic argument should be dispelled quickly enough, that to employ Methodology II (or III) would render Article XX GATT

<sup>8</sup> This raises a delicate issue: since “like products” in Article III.4 GATT is considered to cover more than “like products” in Article III.2 GATT, would this possible distinction drawn by the AB in *Japan Alcoholic Beverages II* indicate a similar bifurcated approach to Article III.4 GATT depending on the degree of likeness of the domestic and imported products?

<sup>9</sup> We are assuming that a difference of, say, one degree of alcoholic content is irrelevant to consumer preference.

redundant. Article XX GATT would retain its place in relation to other Articles of the GATT such as Article XI GATT as well as to those situations where there actually was purposeful discrimination under Article III GATT in the cases where, for example, the State employs non-origin-neutral regulations.

It is also often stated that one big difference between Methodology I and Methodology II concerns burden of proof. Formally, this would seem to be the case. Under Methodology I, once it is established that a violation of Article III GATT has taken place by reason of an imported product receiving less favorable treatment than a “like” domestic product (likeness objectively determined), the burden of justification falls on the defending State. It is usually thought that under Methodology II the burden on the complaining State would be much greater since not only would the complaining State have to prove likeness and less favorable treatment, but also bad purpose. Forensically we think this argument is often overstated. If one examines the American Appellate brief in *Japan – Alcoholic Beverages II* as a benchmark for the actual operationability of Methodology II, it would seem that in practice once less favorable treatment of the imported like product were established, there would be a presumption of protectionist purpose unless, very much in Article XX GATT fashion, the defending State did not justify its practice by reference to a legitimate purpose.

The differences between the two methodologies seem to rest elsewhere – both practically and conceptually. One alleged practical consequence would be the range of policies available to the State. Under Methodology I, this range would be limited to the policies of Article XX GATT. Under Methodology II (and Methodology III) other policies could be employed. In particular it may be thought that, given the great difficulty of amending the Agreements, it would be unwise to force States to lock themselves into a list of policies which may remain static for decades. In our view, from a practical point of view, this difference should not be overstated. Article XX GATT is broad and sufficiently open-textured to cater for most exigencies and the WTO decision-makers have shown themselves ready to adopt such dynamic hermeneutics in interpreting the provisions of Article XX. To the extent that Panels and the AB have resisted Methodology II (and III), it is not because they feared that actual policies unsanctioned by Article XX GATT would have to be validated under this methodology.

Two other considerations may have played a role in explaining the reluctance to move away from Methodology I. The first is the perception



by panels and the AB of their own legitimacy. The obsessive rhetorical (though not substantive) reliance of the AB on the plain and ordinary meaning of words is an indication of legitimacy anxiety by a new body in a new adjudicatory situation. The panels and the AB may simply feel more comfortable in legitimating State action which treats imported products less favorably when anchored in the explicit text of Article XX GATT than in the more abstract legitimation process ex Article III GATT.

We are not arguing that they are right in that perception: after all, the application of Methodology I by the Panel in *EC – Asbestos* which led to the characterization of the French health measure as a violation of the principal GATT discipline of National Treatment requiring justification under Article XX GATT may have been even more “delegitimizing” than application of Methodologies II or III. But this might be so only because the justification alleged by the State in this case was in a category which so squarely fell within the policies approved by Article XX GATT and the policy was so clearly perceived as applied in good faith and for good reasons. Change the facts just a little and the wish of panels and the AB to rest within the security of Article XX GATT may be more comprehensible.

They may also feel that to link the justification to Article XX GATT enhances (and is, thus, preferable) the *multilateral* dimension of the WTO whereas to employ the other Methodologies enhances the autonomy, sovereignty and “unilateral” dimension of the Agreement. One should not understate the significance of this factor. In a very large number of these cases the defendant belongs to the economically powerful, notably the US, the EC, Canada, etc. The more “objective” elements of Methodology I may appear to shackle these States more firmly as well as to “protect” the Panel and AB from the need to evaluate and contest their subjective assertions of purpose.

The strongest argument for the other Methodologies are not, in our view, of a crude pragmatic nature – i.e. leading to tangible different results but in the realms of concept and symbol. First there is something that comes under the concept of “naming and shaming.” It is wrong, it can be argued, to deal with the case of a State which adopts an origin neutral measure for a totally legitimate purpose, but which has the coincidental effect of giving an advantage to domestic production, as a violation of a non-discrimination provision requiring justification. Even if the result is the same, there is value in having cases dealt with in a correct normative context and in not diluting the notion of discrimination with activities which should not be so branded.

There is, it is also argued, a “truth”-based argument which goes beyond the lexical hermeneutics of the text of Article III GATT, namely that there can be no discussion of discrimination which does not imply, in some way and at some level, examination of purpose and an agreed comparator.

We may agree that there should be no discrimination between men and women, which means that we exclude gender as a relevant comparator for different treatment. But, assume that we want to write our laws in a way which would, say, take account of the fact that women, not men, fall pregnant. We might, in view of this fact, want to have special provisions in our labor code concerning leave, grounds of dismissal and the like which would, of course, treat men and women differently. One way would be to say that such laws were discriminatory but were exculpated by an overriding justification. Another way, perhaps with more conceptual coherence, would be to argue that for the purposes of childbirth men and women are not “like” and therefore treating them differently is not a matter of discrimination at all. The question is not which is the advisable policy (e.g. special laws to protect pregnant women against dismissal), but the understanding that what we are doing in relation to these issues is to discuss the legitimacy of alternative comparators, and/or the legitimacy of the purpose of the legislation which presumes a difference or results in a difference.

At an even deeper level, the difference between Methodologies I and II/III can go to the very symbolism of political identity. Methodology I – even if very solicitous to diverse socioeconomic choices in the construction of Article XX – establishes a normative hierarchy whereby the default norm is liberalized trade, and, for competing norms to prevail, they have to be justified. This is not a question of technical burden of proof. It is a question of constitutional identity, the way a society wants to understand its internal hierarchy of values. Methodologies II and III reverse that default. The default value is autonomy of political and moral identity which requires justification only if purposefully abused.

In our view the Agreements in general and Article III GATT specifically can be read in a way which would sustain either of these understandings. This, however, might lead us to yet another contingent reason why some prefer Methodology I. For the decisor, Methodology I does not involve a value judgment at the level of comparator – it takes as the only relevant comparator the competitive relationship in the market. This is akin to the adjudicatory comfort argument mentioned above when it comes to violation.

But there is yet another consideration. At the end of the day, the GATT norms are addressed principally to regulators. Very often they are addressed to the very same regulators which just yesteryear were responsible for articulating, implementing, and justifying protectionist regimes. It may be thought wise in such a circumstance, as a contingent matter, to aim for an “objective” regime determining both likeness (competitive relationship in the market place) and violation (less favorable treatment leading to a protective effect) precisely for the “naming and shaming” effect. This would serve as a means of habituating national regulators to take the regime of non-discrimination seriously; to have their hand slapped, so to speak, every time a regulation is made, or defended, which would treat competing imported products differently. One can envision, on this reading, that with time, with the internalization of the norms of equal treatment, a different approach may be adopted.

### 3 *EC – Asbestos in the light of the three methodologies*

We will now turn to a discussion of the Panel and AB reports in *EC – Asbestos*, from the perspective of the three approaches identified above.

#### 3.1 *The Panel report*

Generally speaking, the Panel in *EC – Asbestos* employed Methodology I. It found first that the products were “like” on a market-based test. Consequently the French measure violated Article III GATT since it had the effect of providing less favorable treatment to imported products and thus was such as to afford protection to the domestic producers. It then found that the measure was justified under Article XX.b GATT.

According to Methodology I, there would be an entire range of products, notably in the building and do-it-yourself sectors where different technologies would be used to give certain materials an insulating capacity, asbestos being one of such technologies. Accordingly, most of these products, from a functional point of view, would be appreciably substitutable and at least in partial competition with each other and, hence, caught within the definition of likeness ex Article III.4 GATT. The violative trigger would be easily pulled here since the effect of the State measure in question is not simply to burden the competing import but to exclude it entirely from the market place. The violation of Article III.4 GATT would thus be relatively easily established and the State would have to justify the

maintenance of such measures ex Article XX.b GATT – not a difficult task given the serious risk factor of asbestos.

### 3.2 *The AB report*

The AB report devotes considerable attention to the determination of whether asbestos products are “like” other products not affected by the French *Decret*. We believe that the essential points made by the AB are the following (the number in parenthesis refers to the respective recital):<sup>10</sup>

1. A determination of “likeness” under Article III.4 GATT is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products. (99)
2. The four criteria listed in the *Border Tax Adjustment* (BTA) dispute can be used to assess likeness, but do not constitute a closed list. (102)
3. The Panel did not correctly employ these criteria, since having adopted the BTA procedure, the Panel should have considered *all* four criteria separately. (109) Instead the Panel:
  - (i) confused the discussion of physical characteristics and end-uses; (111)
  - (ii) failed to take into account the physical differences between asbestos products and other products; (114)
  - (iii) did not provide a complete picture on differences in end-uses; (119)
  - (iv) did not appropriately consider differences in consumers’ tastes and habits; (120–21) and
  - (v) did not fully analyze the implication of different tariff classification. (124)
4. Health risk should in general be included in the determination of likeness. But in the case of asbestos products, this could be addressed when assessing physical properties and consumer perceptions. (113)
5. Panels must examine fully the physical properties of products, and in particular those that are likely to influence the competitive relationship in the marketplace. (114)
6. The carcinogenicity of asbestos products is a main factor making it physically different from substitute materials, and has to be taken into account when examining likeness. (114)

<sup>10</sup> We concentrate on the relationship between cement-based products containing chrysotile asbestos fibres and those containing PCG fibres.

7. Under Article III.4 GATT, evidence relating to health risks may be relevant in assessing the *competitive relationship in the marketplace* between allegedly “like” products. The same evidence should be used under Article XX.b GATT to assess whether there is sufficient basis for adopting or enforcing a WTO-inconsistent measure on the grounds of human health. (115)
8. The end-use and consumer habits and tastes criteria involve certain of the key elements relating to the competitive relationship between products. Evidence of this type is of particular importance under Article III GATT 1994, precisely because that provision is concerned with competitive relationships in the marketplace. If there is – or could be – *no* competitive relationship between products, it is not possible legally for a member through internal taxation or regulation, to protect domestic production. (117)
9. Had the Panel performed the analysis of consumers’ tastes and habits, it would have found that consumers did not view products as like. The reason is that consumers are in this case manufacturers, and “[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.” (122)
10. Employing the BTA approach, the AB finds that the products are physically different. A heavy burden is consequently placed on Canada to show a competitive relationship, in order to overcome a non-likeness finding. (136) Failing to provide such evidence, products are found to be not like, and the AB thus reverses the Panel’s finding that the products are like. (141)

### 3.2.1 Which interpretation did the AB employ?

By rejecting a finding of violation of Article III GATT, the AB in *Asbestos* seemed to be moving away from a robust version of Methodology I. In Recital 100 we even find the following statement:

[E]ven if two products are “like,” that does not mean that a measure is inconsistent with Article III:4. A complaining Member must still establish that the measure accords to the group of “like” *imported* products “less favourable treatment” than it accords to the group of “like” *domestic* products. The term “less favourable treatment” expresses the general principle, in Article III:1, that internal regulations “should not be applied . . . so as to afford protection to domestic production.” If there is “less favourable

treatment” of the group of “like” imported products, there is, conversely, “protection” of the group of “like” domestic products. However, 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.

This statement could indeed be a platform from which to embrace an intent test along the lines of Methodologies II or even III. Here comes the tantalizing phrase whereby a member *may draw distinctions between products which have been found to be like* without that resulting in less favorable treatment and hence violative of Article III GATT. What could the AB possibly have in mind? If, after all, from a market point of view the imported products are “like” the domestic products and are given less favorable treatment, how could that not amount to protection?

Let us go back in mind to the recycled-oil case: recycled oil and refined oil are, from a market point of view, like products. But, to use the language in Recital 100, drawing a distinction based on ecological efficiency between these two products which have been found to be like from a functional/market sense and taxing them or regulating them according to this distinction, would not, for this reason alone, accord the imported product less favorable treatment than that accorded the domestic product. This is not the rhetoric and reasoning of Methodology I, nor is it the rhetoric and reasoning of Methodology II (since under Methodology II there is a finding of less favorable treatment). Could it be that there is no less favorable treatment because in accordance with the distinction drawn by the State these are simply not like products? This would be the rhetoric and reasoning of Methodology III.

The language of “distinctions” is also consistent with our earlier reading of *Japan – Alcoholic Beverages II*. The fact that products are within a generic group – e.g. spirits – within which there is competition, does not mean that the State cannot draw distinctions on which tax differentiation may take place. In making these distinctions the State may employ alternative comparators. We already saw how products within the spirits group could be differentiated according to alcoholic content and taxed accordingly. One could easily imagine other scenarios: automobiles may constitute the general group of “like” products, but in constructing the tax regime the State may employ the alternative comparator of engine displacement or level of emission and tax accordingly. Reading the enigmatic Recital 100 in the light of the holding of the AB in *EC – Japan Alcoholic Beverages II*

would suggest that so long as there was a measure of coherence between the tax rate and the steps suggested by the alternative comparator employed in making these “distinctions,” there would not be a violation of Article III GATT.

However we may read Recital 100, in the rest of the report of the AB there is little else to indicate an endorsement of Methodologies II or III. The reason the AB reached a different result to that of the Panel was not because of a different methodology but because, within the parameters of Methodology I, it came to the conclusion that the two products were not like products. It arrived at this conclusion by looking at the health consideration not as a factor in determining the purpose of the measure, or the basis of the comparator, but as a means to determine, factually, whether there was a competitive relationship between the two products. Here is a typical quote:

Under Article III:4, evidence relating to health risks may be relevant in assessing the *competitive relationship in the marketplace* between allegedly “like” products. (emphasis in the original)

Weighing heavily in the AB’s finding of unlikeness was the fact that asbestos was a well-known carcinogenic, the presence of which would surely affect the competitive relationship in the marketplace.

The core of the AB’s reasoning with regard to likeness seems to be as follows:

1. The test for likeness is in the marketplace, since absent likeness there can be no protection. (99, 117)
2. The market view of likeness is not directly observable, so we instead have to rely on various indicators providing partial information about the relationship. The BTA list contains some possible indicators, all of which are informative of the relationship. (102)
3. It is well known that the products involved in the dispute are very different in their health impact, due to their different physical properties. (114, 136)
4. The end-use criterion is difficult to evaluate since it is not clear to what extent there is overlap in the use between asbestos-containing products and substitute products. (138)
5. The consumers’ habits and tastes criterion is also hard to employ, since no evidence is presented by Canada on this point. (139) However, the fact that the differences between products in riskiness are well known, combined with the economic incentives of buyers to take into account

- final consumers' aversion to dangerous products (122), suggest that products would indeed be found to be unlike from the buyers' point of view, if this analysis were to be performed.
6. With strong evidence on differences in risk, and with little or no evidence on end-uses and consumers' tastes and habits, one is led to conclude that products are not like in the marketplace.

In this circuitous and forced reading, this appears to be an endorsement of Methodology I even in the circumstances of *EC – Asbestos*. The AB extricated the WTO from the embarrassment of characterizing the legitimate policy of France as a violation of its core discipline of National Treatment. But, paradoxically, it reached that result by using the methodology which is most likely to produce again and again the conclusion of the Panel.

### 3.3 Concluding remarks

The outcome of *EC – Asbestos* is not at issue. Clearly the French measure to ban asbestos is justified under the Agreements. Methodologically, however, both legally and economically the case is not without serious problems.

Technically, and this is our first point, the case turned on burden of proof – Canada failed the burden necessary to establish likeness. That is an unsatisfactory basis for the decision. Should the result of the case have been different if Canada had simply provided evidence that *some* consumers would still buy the products, risk notwithstanding, and would maybe even comforted by the fact that in the age of Government regulation the absence of a prohibition gives some indication that “the Government” does not consider the product truly beyond a reasonable consumer choice?

An important link in the reasoning above, showing how the AB likeness criterion might be viewed as only concerning market relations, was that buyers in this market would take risk differences into account. This was based on a simplistic belief in the working of the market, according to which the buyers (who are not end-users) had to do this since they would otherwise lose customers.

We do not want to suggest that this knowledge on the preferences of the ultimate consumers would not be an important factor limiting the usage of asbestos products. But there are a number of arguments to suggest the potential for the exposure to asbestos to be higher than socially desirable. For instance, because of costly information one should not expect all final



consumers to be fully informed about all hazards. There are likely to be severe negative externalities associated with asbestos products, since final users of asbestos products may not care about the negative health impact of their use of asbestos-containing products for third parties. For instance, asbestos in the brakes of an auto may not cause much of a health hazard to the owner, but it contributes to the spreading of asbestos in the air.

Market failures are also likely to arise from fixed costs in litigation. For instance, the health damage from exposure to asbestos from a particular building might be limited, if it is a building in which most people spend a very limited time. But being exposed to asbestos in many such buildings may have severe negative consequences. But since each individual only suffers minor damage from any particular building, it might not pay to litigate. Or, the possibility of being sheltered by bankruptcy may adversely affect buyer behavior. For all these reasons one should expect that products containing asbestos are over-consumed relative to what would be socially efficient if the market were left unregulated. This is indeed precisely why government intervention is needed. It is the fact that buyers tend to treat the products as closer substitutes than they are from the government's point of view that motivates the regulation.

Was not the very fact that the products are considered substitutable and in competition with each other and that, at least to some degree, the risky product would be used, among the reasons which prompted the French government to institute the ban? If so, was it not a bit too emphatic to claim that there was no evidence of a competitive relationship in the marketplace? Moreover, in Recital 121 the AB criticizes the Panel for concluding that products are like without examining evidence on consumer habits and tastes, and with weak evidence on end-uses (119) which

. . . involve certain of the key elements relating to the competitive relationship between products . . . (117)

On the basis of the same material, the AB is able to conclude that products are *not* like. This determination comes as a result of the presumption for likeness created by physical differences, and Canada's unwillingness/inability to provide evidence on consumers' tastes and habits. While the latter obviously weakens Canada's case, it is hard to see how this can be taken as evidence of lack of likeness, rather than of the fact that the issue is unresolved. Once again we confront the systemic weakness of the Dispute Settlement Understanding which does not allow the AB to

remand a case back to the Panel for a new factual determination. But we doubt very much if the AB is truly serious about this point and whether it has not simply decided that in some essentialist sense, independently of the market, carcinogenic and non-carcinogenic products cannot be “like.”

Third, the logic of the AB reasoning may lead to the following very puzzling result: when a product has a well-known risk factor and the State regulates on that basis, there is no violation of Article III GATT. But imagine another product which is equally dangerous and where the State takes an identical regulation to protect consumers, the only difference being that in the second case the nature of the risk is less well known by the public. Should this fact alone determine that in the second case there was a violation of Article III GATT?

Fourth, would the AB’s reasoning allow France simply to tax the imported product more highly without violating Article III.2 GATT since the products have been determined not to be like products? Imagine such an occurrence resulting in a marketplace in which carcinogenic asbestos-containing products were sold alongside non-carcinogenic asbestos-free products at the same price. This could be the result of competitive market conditions, where the imported product yields a smaller profit because of the need to absorb the higher tax in order to remain price competitive. In such a case there would be no health impact of the measure, which would only serve as a revenue-generating tax on imports.<sup>11</sup> And yet, under the reasoning of *EC – Asbestos* it would be permitted.

Finally, although the AB reaches a result that differs from the Panel’s, it is in the same methodological ballpark. One cannot escape the feeling that although the surface language of the AB is concerned with the alleged preferences of consumers and the competitive relationship in the marketplace of the two products, the deep structure of its discourse is very different: the belief of the AB that it simply cannot be that under the WTO a State cannot accord different treatment to carcinogenic and non-carcinogenic products without being branded as violating the principle of National Treatment and having to justify itself ex Article XX GATT.

Caught up by some of the considerations discussed in our analysis of the three methods, the AB could not bring itself to say that the products are not “like” because the State may legitimately employ in its tax and regulatory regimes non-market comparators (such as health risk or ecological

<sup>11</sup> Since the definition of likeness under III.4 seems to overlap with the combined definition of likeness of III.2.

efficiency) or instead, that although the products were like products, the measure of the State itself according less favorable treatment to one over the other was not a violation of Article III GATT, since it was not applied with the purpose of affording protection to domestic production, but with the purpose of affording protection to would-be users of the product. It thus reverted to an attempt to push these other concepts into the straightjacket of market competition. The result is a decision that, while correct in terms of outcome, has added to the uncertainty concerning the method by which to determine the legality of domestic regulations under the WTO contract.