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." Consequently, in this chapter we will first examine WTO cases that consider whether a measure falls within the list of measures covered by Article XX and then consider how the requirements of the chapeau have been interpreted.

SECTION 13.2 ARTICLE XX(B)— HEALTH MEASURES

Article XX(b) covers measures "necessary to protect human, animal or plant life or health". Two WTO agreements are related to Article XX(b). First, the Agreement on Sanitary and Phytosanitary Measures (the SPS Agreement) applies in general to measures taken to protect human, animal and plant life or health from certain specified risks. The SPS Agreement explicitly provides that measures conforming to its provisions "shall be presumed to be in accordance with * * * GATT 1994 * * *, in particular the provisions of Article XX(b)" (SPS art. 2(4)). Second, the Agreement on Technical Barriers to Trade (the TBT Agreement) applies to technical regulations and standards, which often have a safety or health basis, although the overlap with Article XX(b) is more limited than in the case of the SPS Agreement. The TBT Agreement does not specify how it relates to Article XX, which has lead to some interpretative uncertainties. These two agreements are analyzed in Chapter 14.

Our consideration of Article XX(b) starts with the Appellate Body's decision in the *Asbestos* case. Although the Appellate Body ruled that the products at issue were not like (see Section 12.4(A) supra), which meant that the EC had not violated any WTO rules, the Appellate Body examined the panel's conclusion that even though the measure violated Article III, it could be justified under Article XX(b).

EUROPEAN COMMUNITIES—MEASURES AFFECTING ASBESTOS AND ASBESTOS-CONTAINING PRODUCTS

WT/DS135/AB/R.
Appellate Body Report adopted April 5, 2001.

[The underlying facts of this case are set out in Section 12.4(A) supra.]

155. Under Article XX(b) of the GATT 1994, the Panel examined, first, whether the use of chrysotile-cement products poses a risk to human health and, second, whether the measure at issue is "necessary to protect human . . . life or health". * * *

* * *

157. On the issue of whether the use of chrysotile-cement products poses a risk to human health sufficient to enable the measure to fall

within the scope of application of the phrase "to protect human ... life or health" in Article XX(b), the Panel stated that it "considers that the evidence before it *tends to show* that handling chrysotile-cement products constitutes a risk to health rather than the opposite." (emphasis added) On the basis of this assessment of the evidence, the Panel concluded that:

> "the EC has made a prima facie case for the existence of a health risk in connection with the use of chrysotile, in particular as regards lung cancer and mesothelioma in the occupational sectors downstream of production and processing and for the public in general in relation to chrysotile-cement products. This prima facie case has not been rebutted by Canada. Moreover, the Panel considers that the comments by the experts confirm the health risk associated with exposure to chrysotile in its various uses. *The Panel therefore considers that the EC have shown that the policy of prohibiting chrysotile asbestos implemented by the Decree falls within the range of policies designed to protect human life or health*. ..." (emphasis added)

Thus, the Panel found that the measure falls within the category of measures embraced by Article XX(b) of the GATT 1994.

* * *

162. * * * [W]e have examined the seven factors on which Canada relies in asserting that the Panel erred in concluding that there exists a human health risk associated with the manipulation of chrysotile-cement products. We see Canada's appeal on this point as, in reality, a challenge to the Panel's assessment of the credibility and weight to be ascribed to the scientific evidence before it. Canada contests the conclusions that the Panel drew both from the evidence of the scientific experts and from scientific reports before it. As we have noted, we will interfere with the Panel's appreciation of the evidence only when we are "satisfied that the panel has *exceeded the bounds of its discretion*, as the trier of facts, in its appreciation of the evidence." (emphasis added) In this case, nothing suggests that the Panel exceeded the bounds of its lawful discretion. To the contrary, all four of the scientific experts consulted by the Panel concurred that chrysotile asbestos fibres, and chrysotile-cement products, constitute a risk to human health, and the Panel's conclusions on this point are faithful to the views expressed by the four scientists. In addition, the Panel noted that the carcinogenic nature of chrysotile asbestos fibres has been acknowledged since 1977 by international bodies, such as the International Agency for Research on Cancer and the World Health Organization. In these circumstances, we find that the Panel remained well within the bounds of its discretion in finding that chrysotile-cement products pose a risk to human life or health.

* * *

164. On the issue of whether the measure at issue is "necessary" to protect public health within the meaning of Article XX(b), the Panel stated:

> In the light of France's public health objectives as presented by the European Communities, the Panel concludes that the EC has made a prima facie case for the non-existence of a reasonably available alternative to the banning of chrysotile and chrysotile-cement products and recourse to substitute products. Canada has not rebutted the presumption established by the EC. We also consider that the EC's position is confirmed by the comments of the experts consulted in the course of this proceeding.

165. Canada argues that the Panel erred in applying the "necessity" test under Article XX(b) of the GATT 1994 "by stating that there is a high enough risk associated with the manipulation of chrysotile-cement products that it could in principle justify strict measures such as the Decree." Canada advances four arguments in support of this part of its appeal. First, Canada argues that the Panel erred in finding, on the basis of the scientific evidence before it, that chrysotile-cement products pose a risk to human health. Second, Canada contends that the Panel had an obligation to "quantify" itself the risk associated with chrysotile-cement products and that it could not simply "rely" on the "hypotheses" of the French authorities. Third, Canada asserts that the Panel erred by postulating that the level of protection of health inherent in the Decree is a halt to the spread of asbestos-related health risks. According to Canada, this "premise is false because it does not take into account the risk associated with the use of substitute products without a framework for controlled use." Fourth, and finally, Canada claims that the Panel erred in finding that "controlled use" is not a reasonably available alternative to the Decree.

166. With respect to Canada's first argument, we note simply that we have already dismissed Canada's contention that the evidence before the Panel did not support the Panel's findings. We are satisfied that the Panel had a more than sufficient basis to conclude that chrysotile-cement products do pose a significant risk to human life or health.

167. As for Canada's second argument, relating to "quantification" of the risk, we consider that, as with the *SPS Agreement*, there is no requirement under Article XX(b) of the GATT 1994 to *quantify*, as such, the risk to human life or health. A risk may be evaluated either in quantitative or qualitative terms. In this case, contrary to what is suggested by Canada, the Panel assessed the nature and the character of the risk posed by chrysotile-cement products. The Panel found, on the basis of the scientific evidence, that "no minimum threshold of level of exposure or duration of exposure has been identified with regard to the risk of pathologies associated with chrysotile, except for asbestosis." The pathologies which the Panel identified as being associated with chrysotile are of a very serious nature, namely lung cancer and mesothelioma, which is also a form of cancer. Therefore, we do not agree with Canada

that the Panel merely relied on the French authorities' "hypotheses" of the risk.

168. As to Canada's third argument, relating to the level of protection, we note that it is undisputed that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation. France has determined, and the Panel accepted, that the chosen level of health protection by France is a "halt" to the spread of *asbestos*-related health risks. By prohibiting all forms of amphibole asbestos, and by severely restricting the use of chrysotile asbestos, the measure at issue is clearly designed and apt to achieve that level of health protection. Our conclusion is not altered by the fact that PCG fibres might pose a risk to health. The scientific evidence before the Panel indicated that the risk posed by the PCG fibres is, in any case, *less* than the risk posed by chrysotile asbestos fibres, although that evidence did *not* indicate that the risk posed by PCG fibres is non-existent. Accordingly, it seems to us perfectly legitimate for a Member to seek to halt the spread of a highly risky product while allowing the use of a less risky product in its place. In short, we do not agree with Canada's third argument.

169. In its fourth argument, Canada asserts that the Panel erred in finding that "controlled use" is not a reasonably available alternative to the Decree. This last argument is based on Canada's assertion that, in *United States—Gasoline* [see Section 13.4], both we and the panel held that an alternative measure "can only be ruled out if it is shown to be impossible to implement." We understand Canada to mean by this that an alternative measure is only excluded as a "reasonably available" alternative if implementation of that measure is "impossible". We certainly agree with Canada that an alternative measure which is impossible to implement is not "reasonably available". But we do not agree with Canada's reading of either the panel report or our report in *United States—Gasoline*. In *United States—Gasoline*, the panel held, in essence, that an alternative measure did not cease to be "reasonably" available simply because the alternative measure involved *administrative difficulties* for a Member. The panel's findings on this point were not appealed, and, thus, we did not address this issue in that case.

170. Looking at this issue now, we believe that, in determining whether a suggested alternative measure is "reasonably available", several factors must be taken into account, besides the difficulty of implementation. In *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, the panel made the following observations on the applicable standard for evaluating whether a measure is "necessary" under Article XX(b):

> The import restrictions imposed by Thailand could be considered to be "necessary" in terms of Article XX(b) only if there were no alternative measure consistent with the General Agreement, or less

inconsistent with it, which Thailand could *reasonably be expected to employ to achieve its health policy objectives*.[1] (emphasis added)

171. In our Report in *Korea—Beef* [see Section 13.3], we addressed the issue of "necessity" under Article XX(d) of the GATT 1994. In that appeal, we found that the panel was correct in following the standard set forth by the panel in *United States—Section 337 of the Tariff Act of 1930*:

> It was clear to the Panel that a contracting party cannot justify a measure inconsistent with another GATT provision as "necessary" in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.[2]

172. We indicated in *Korea–Beef* that one aspect of the "weighing and balancing process ... comprehended in the determination of whether a WTO-consistent alternative measure" is reasonably available is the extent to which the alternative measure "contributes to the realization of the end pursued". In addition, we observed, in that case, that "[t]he more vital or important [the] common interests or values" pursued, the easier it would be to accept as "necessary" measures designed to achieve those ends. In this case, the objective pursued by the measure is the preservation of human life and health through the elimination, or reduction, of the well-known, and life-threatening, health risks posed by asbestos fibres. The value pursued is both vital and important in the highest degree. The remaining question, then, is whether there is an alternative measure that would achieve the same end and that is less restrictive of trade than a prohibition.

173. Canada asserts that "controlled use" represents a "reasonably available" measure that would serve the same end. The issue is, thus, whether France could reasonably be expected to employ "controlled use" practices to achieve its chosen level of health protection—a halt in the spread of asbestos-related health risks.

174. In our view, France could not reasonably be expected to employ *any* alternative measure if that measure would involve a continuation of the very risk that the Decree seeks to "halt". Such an alternative measure would, in effect, prevent France from achieving its chosen level of health protection. On the basis of the scientific evidence before it, the Panel found that, in general, the efficacy of "controlled use" remains to be demonstrated. Moreover, even in cases where "controlled use" practices are applied "with greater certainty", the scientific evi-

1. [original note 163] Adopted 20 February 1990, BISD 37S/200, para. 75.

2. [original note 165] Adopted 7 November 1989, BISD 36S/345, para. 5.26; we expressly affirmed this standard in our Report in *Korea–Beef*, para. 166.

dence suggests that the level of exposure can, in some circumstances, still be high enough for there to be a "significant residual risk of developing asbestos-related diseases." The Panel found too that the efficacy of "controlled use" is particularly doubtful for the building industry and for DIY [do-it-yourself] enthusiasts, which are the most important users of cement-based products containing chrysotile asbestos. Given these factual findings by the Panel, we believe that "controlled use" would not allow France to achieve its chosen level of health protection by halting the spread of asbestos-related health risks. "Controlled use" would, thus, not be an alternative measure that would achieve the end sought by France.

175. For these reasons, we uphold the Panel's finding * * * that the European Communities has demonstrated a *prima facie* case that there was no "reasonably available alternative" to the prohibition inherent in the Decree. As a result, we also uphold the Panel's conclusion * * * that the Decree is "necessary to protect human . . . life or health" within the meaning of Article XX(b) of the GATT 1994.

Notes and Questions

(1) Part of Canada's appeal of the panel's findings on Article XX(b) was cast as a failure by the panel to make an "objective assessment" of the evidence it had presented, as required by DSU article 11. In responding to that argument, the Appellate Body stated:

> 178. * * * [I]n the context of the SPS Agreement, we have said previously, in *European Communities—Hormones*, that "responsible and representative governments may act in good faith on the basis of what, at a given time, may be a divergent opinion coming from qualified and respected sources." (emphasis added) In justifying a measure under Article XX(b) of the GATT 1994, a Member may also rely, in good faith, on scientific sources which, at that time, may represent a divergent, but qualified and respected, opinion. A Member is not obliged, in setting health policy, automatically to follow what, at a given time, may constitute a majority scientific opinion. Therefore, a panel need not, necessarily, reach a decision under Article XX(b) of the GATT 1994 on the basis of the "preponderant" weight of the evidence.

The *Hormones* case is discussed in Chapter 14 infra. In light of this statement and the Appellate Body's foregoing analysis of Article XX(b), how would you characterize the extent of a WTO member's discretion in imposing health-related product measures? To what extent did the seriousness of the health threat play a role in the *Asbestos* decision? For example, would a decision by a member to "halt" a less significant, non-life threatening health risk be afforded the same deference in a determination of necessity? What factors should be taken into account in deciding this issue?

(2) The *Thai Cigarettes* case referred to by the Appellate Body in paragraph 170 above involved an attempt by Thailand to invoke Article XX(b) to defend discriminatory taxes it imposed on foreign cigarettes in violation of Article III:2. The panel in that case concluded that such measures were not necessary in that Thailand could accomplish its claimed