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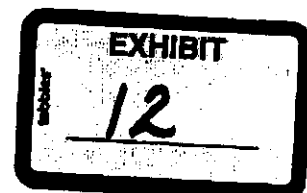
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**EUROPEAN COMMUNITIES –
MEASURES AFFECTING ASBESTOS AND ASBESTOS –
CONTAINING PRODUCTS**

Report of the Panel

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already pointed out, the use of the word "protection" implies the existence of a risk. Accordingly, we must begin by identifying a risk for public health. In the light of the comments of the panel in *United States – Gasoline* and our own remarks in paragraph 8.182, we must also take into account the fact that it is a public health policy that we have to assess.

8.185 First of all, we note that the EC argue that in prohibiting the placing on the market and use of asbestos and products containing it, the Decree seeks to halt the spread of the risks due to asbestos, particularly for those exposed occasionally and very often unwittingly to asbestos when working on asbestos-containing products. France considers that it can thereby reduce the number of deaths due to exposure to asbestos fibres among the French population, whether by asbestosis, lung cancer or mesothelioma.¹³²

8.186 In principle, a policy that seeks to reduce exposure to a risk should fall within the range of policies designed to protect human life or health, insofar as a risk exists. According to the EC, the international scientific community appears to be generally of the opinion that chrysotile fibres as such are carcinogens. In this connection, we note the EC's argument that, since 1977, the International Agency for Research on Cancer (IARC) has classified chrysotile among the proven carcinogens.

8.187 Canada does not dispute that chrysotile asbestos causes lung cancer. However, Canada argues that the mechanism that could give rise to an increased risk of lung cancer has not yet been fully explained and that the link with chrysotile might only be indirect.¹³³ This risk depends on the intensity and duration of the exposure. On the other hand, according to Canada, there is a great deal of scientific evidence to support the thesis according to which chrysotile does not cause mesotheliomas.¹³⁴ In particular, the mesotheliomas linked to asbestos could be the result of exposure to low-density products containing amphiboles. It has not been established that, in their uses, chrysotile fibres pose the same risk as amphiboles, whose chemical composition, in particular, is different.

8.188 First of all, we note that the carcinogenicity of chrysotile fibres has been acknowledged for some time by international bodies.¹³⁵ This carcinogenicity was confirmed by the experts consulted by the Panel, with respect to both lung cancers and mesotheliomas¹³⁶, even though the experts appear to acknowledge that chrysotile is less likely to cause mesotheliomas than amphiboles.¹³⁷ We also note that the experts confirmed that the types of cancer concerned had a mortality rate of close to 100 per cent.¹³⁸ We therefore consider that we have sufficient evidence that there is in fact a serious carcinogenic risk associated with the inhalation of chrysotile fibres. Moreover, in the light of the comments made by one of the experts¹³⁹, the doubts expressed by Canada with respect to the direct effects of chrysotile on mesotheliomas and lung cancers are not sufficient to conclude that an official

¹³² With regard to the group of pathologies that asbestos can cause, see Dr. Henderson, para. 5.28.

¹³³ See Annex II, Canadian reply to the EC's question No. 4, para. 180.

¹³⁴ See Annex II, Canadian replies to the EC's questions nos. 1-4, paras. 175-181.

¹³⁵ Since 1977 by the IARC (see *List of Agents Carcinogenic to Humans, Overall Evaluations of Carcinogenicity to Humans*, Monographs of the International Agency for Research on Cancer, Volumes 1-63), see also WHO, *IPCS Environmental Health Criteria (203) on Chrysotile*, Geneva (1998), cited in para. 5.584 above. On the development of knowledge of the risks associated with asbestos, see Dr. Henderson, para. 5.595.

¹³⁶ See, in particular, Dr. Henderson, paras. 5.29 to 5.34; 5.142 to 5.165; Dr. Infante, paras. 5.267, 5.290-5.298; Dr. de Klerk, para. 5.288.

¹³⁷ See, for example, the ratios suggested by Dr. Henderson, paras. 5.103, 5.141, 5.415, 5.589 and his remarks, paras. 5.265-5.266; see also Dr. de Klerk, para. 5.264; Dr. Infante, paras. 5.267-5.268 and Annex VI, para. 19 of the transcript of the meeting with experts.

¹³⁸ Dr. Henderson, meeting with experts, Annex VI, para. 182.

¹³⁹ See the comments made by Dr. Henderson, paras. 5.153-5.157 concerning the link between fibrosis and lung cancer.

responsible for public health policy would find that there was not enough evidence of the existence of a public health risk.

8.189 We note, however, that Canada makes a distinction between chrysotile fibres and chrysotile encapsulated in a cement matrix. In fact, Canada challenges the Decree insofar as it prohibits, *inter alia*, the use of chrysotile-cement products. In this connection, we note that the experts consulted by the Panel agreed that the risks of fibres being dispersed due to the degradation of chrysotile-cement were limited. However, the experts acknowledged that working with non-friable products containing chrysotile might result in the dispersion of large quantities of fibres and that those fibres pose a definite health risk.¹⁴⁰ The experts also noted that even though the risk might be lower than for production or processing workers, it concerned a much larger group.¹⁴¹

8.190 In this respect, the Panel notes that the European Communities have stated that the Decree is intended, in particular, to protect categories of workers or consumers downstream of the asbestos mining or processing stage, whatever the frequency and level of their exposure. Canada considers that below a certain exposure threshold there is no detectable health risk. Accordingly, Canada believes that people only occasionally exposed are not running a detectable risk.

8.191 The data submitted to the Panel by the EC show that the use of tools not specifically designed to prevent the release of fibres¹⁴², which cannot be excluded, especially in the case of DIY enthusiasts¹⁴³ or professionals who work only occasionally in an environment where asbestos is present, can result in an exposure in excess of the statutory limits under ISO 7337¹⁴⁴, which are themselves higher than those of the WHO (0.2 fibre/ml) or those applied by France before the ban (0.1 fibre/ml).¹⁴⁵ The Panel also notes the position of the experts consulted on this point. All agree that building workers now count among those most exposed to chrysotile fibres and hence to the risk of mesothelioma¹⁴⁶, but they also mention cases of mesothelioma in patients who had been only

¹⁴⁰ See the replies of the experts to the Panel's question 1.(b), paras. 5.196-5.209.

¹⁴¹ See Dr. Henderson, paras. 5.176, 5.183; Dr. de Klerk, para. 5.185.

¹⁴² In reply to a question by Canada (see Annex II, para. 167) the EC indicated that the question of the exposure associated with working intermittently with material such as chrysotile-cement had been analysed in the report of the *Institut national de la science et de la recherche médicale* (INSERM) entitled *Rapport sur les effets sur la santé des principaux types d'exposition à l'amiante* (Report of the health effects of the main types of exposure to asbestos, INSERM joint report, 1997, pp. 193-214. The EC appended to their first written submission to the Panel exposure values measured during such working (see *Note de présentation des orientations du Conseil supérieur de prévention des risques professionnels*, 3 July 1995). They also give the example of a roofing worker using a grinder in the open air to repair corrugated roof sheeting made of asbestos-cement and exposed to a peak level of 41f/ml. In this connection, the Panel also notes the reference by Dr. Henderson, in para. 5.199 above, to a study by Kamugai S, Nakachi S, Kurumatani N. *et al. Estimation of Asbestos Exposure Among Workers Repairing Asbestos Cement Pipes Used for Conduits*, Sangkyo Igaku 1993; 35.

¹⁴³ By "DIY enthusiast" (bricoleur) the Panel means someone who does small repair and renovation jobs (*Le Nouveau Petit Robert* (1994), p. 261) without engaging in these activities in a professional capacity.

¹⁴⁴ See International Organization for Standardization, ISO 7337 (1984).

¹⁴⁵ See Decree 96-98 of 7 February 1996. The European Communities, in para. 3.134, note, for example, that in the case of a handsaw application of the ISO standard leaves the worker exposed to a level 30 times in excess of the maximum limit of 0.1 f/ml. In this connection, the Panel notes that the experts agree that at least some of the fibres released during operations on products containing chrysotile present the same carcinogenicity as chrysotile fibres not incorporated in cement (see Dr. de Klerk, para. 5.220; Dr. Henderson, paras. 5.221-5.224; Dr. Infante, paras. 5.225-5.226).

¹⁴⁶ See *Full Public Report: Chrysotile Asbestos - Priority Existing Chemical No. 9*, National Industrial Chemicals Notification and Assessment Scheme (NICNAS), National Occupation Health and Safety Commission (NOHSC), Australia 1999 (hereinafter "NICNAS 99"), cited by Dr. Henderson, which shows that exposure is spreading. Originally confined to workers in the traditional industries, exposure to asbestos now extends to products and the domestic and external environment (see para. 5.179). Similar observations have

incidentally exposed, without any relation to their occupational activity.¹⁴⁷ The scientists consulted by the Panel also considered that the existence of a threshold below which exposure does not present any risks had not been established for any of the diseases attributable to chrysotile, except perhaps for asbestosis.¹⁴⁸

8.192 The Panel took note of Canada's argument according to which there has been no study specifically concerned with the occupational sectors to which the EC refer.¹⁴⁹ It also notes that Canada disputes the relevance of the data of the studies of Charleston textile factory workers (United States)¹⁵⁰ as compared with the Canadian studies of Quebec asbestos sector miners and workers, which are said to show the limited impact of chrysotile on public health.¹⁵¹ However, the scientific experts consulted stressed the relevance and quality of the Charleston study. On the other hand, doubts were expressed with regard to the reliability of certain exposure data in the studies carried out in occupational and non-occupational environments in Quebec and invoked by Canada.¹⁵² Canada also refers to a study concerned with car brake maintenance.¹⁵³ We note that the scientists consulted drew attention to the limits of this study and produced statistical data which, on the contrary, confirmed the impact of chrysotile on mechanics exposed to that material in a car brake maintenance context.¹⁵⁴

8.193 The Panel therefore considers that the evidence before it tends to show that handling chrysotile-cement products constitutes a risk to health rather than the opposite. Accordingly, a decision-maker responsible for taking public health measures might reasonably conclude that the presence of chrysotile-cement products posed a risk because of the risks involved in working with those products.

8.194 Accordingly, the Panel concludes 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

been made in the United Kingdom with regard to the patterns of exposure and the resultant diseases (para. 5.180).

¹⁴⁷ See the example of the fireman and the lecturer whose exposure was not connected with their occupations, given by Dr. Henderson, para. 250 of the transcript of the meeting with experts.

¹⁴⁸ See Dr. Henderson, para. 5.312. Concerning the opinion of the experts with regard to the absence of a threshold, see paras. 5.306 et seq. and, more particularly, Dr. Infante, para. 5.315.

¹⁴⁹ The absence of a study on the impact of chrysotile on building workers was confirmed by the scientists consulted by the Panel (see Dr. Infante, para. 137; Dr. Henderson, para. 140; Dr. Musk, para. 202 of the transcript of the meeting with experts, Annex VI). Concerning Canada's arguments and the comments of the experts, see the discussion of the relevance of the study of Charleston textile factory workers (hereinafter "Charleston study", see footnote 150) as compared with the study of Quebec asbestos mine and mill workers (hereinafter "Quebec workers study", see footnote 151), paras. 135–153 of the transcript of the meeting with experts, Annex VI.

¹⁵⁰ See, in particular, Dement J.M., Brown D.P., Okun A., *Follow-up Study of Chrysotile Asbestos Textile Workers: Cohort Mortality and Case-Control Analyses*, *Am J Ind Med* 1994; 26; Dement J. M., Brown D.P., *Lung Cancer Mortality among Asbestos Textile Workers: A Review and Update*, *Ann Occup Hyg* 1994; 38.

¹⁵¹ See, in particular, McDonald A.D., Case B.W., Churg A., et al., *Mesothelioma in Quebec Chrysotile Miners and Millers: Epidemiology and Aetiology*, *Ann Occup Hyg* 1997, 41. With respect to non-occupational situations, see Camus M., Siemiatycki J., Meek B., *Nonoccupational Exposure to Chrysotile Asbestos and the Risk of Lung Cancer*, *New England Journal of Medicine* 1998, 338.

¹⁵² See the comments of Dr. Infante on the Quebec workers study by McDonald et al, para. 19 of the transcript of the meeting with experts, Annex VI, and those of Dr. Henderson, paras. 5.118 and 5.158–5.162 above.

¹⁵³ See Weitowitz H.J., Rödelberger K., *Mesothelioma among Car Mechanics?* *Ann Occup Hyg*, 1994.

¹⁵⁴ See Dr. Henderson, paras. 59, 89 and 101 of the transcript of the meeting with experts, Annex VI. We note that Canada has not formulated a specific request with regard to friction products, such as car brakes, for example.

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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. On the other hand, Canada has not succeeded in rebutting the presumption established on the basis of the evidence submitted by the EC and confirmed by the experts. The Panel concludes therefore that the French policy of prohibiting chrysotile asbestos falls within the range of policies designed to protect human life or health, within the meaning of Article XX(b) of the GATT 1994.

8.195 Accordingly, the Panel will now turn to the question of whether the measure is "necessary" within the meaning of Article XX(b).

(ii) "Necessary"

The ban on chrysotile asbestos in its various forms

8.196 According to the European Communities, the danger of inhaling asbestos at levels above 0.1 fibre/ml concerns not only the asbestos mining and processing sectors but, more especially, secondary (textile, building and automobile industry, for example), para-occupational (servicing, maintenance) and domestic (DIY) workers whom Canada mentions only in part or not at all. Even in production and processing, which in principle are easier to monitor, there are limits to the controlled or safe use of asbestos, which does not halt the spread of the risks. So-called "controlled" or "safe" use is *a fortiori* completely ineffective in cases of occasional exposure to asbestos. The 1997 INSERM report¹⁵⁵ indicates that the risk occurs mainly among those who work with materials containing asbestos. The encapsulation of asbestos in a matrix cannot be guaranteed to make asbestos-cement products harmless, inasmuch as any subsequent working of the product will release large numbers of carcinogenic fibres in the form of dust. Controlled use is impossible to implement where hundreds of thousands of people are involved in sectors as unregulated in terms of health as the building industry. The 1984 ISO standard is inadequate in relation to the French health objective. The EC also note that, once asbestos is on the market, there is no reasonable way of controlling its use and, in particular, of controlling the everyday operations that many people are likely to perform. Moreover, the numerous, particularly legal obstacles which confront the victims of current exposure seeking redress in the courts constitute an additional social justification for resorting to a total ban.

8.197 With regard to the test of necessity, Canada takes the same approach as in connection with Article 2.2 TBT¹⁵⁶, considering that in many respects the test of necessity is similar in the two provisions. According to Canada, the measure must not be an excessive or over-reaching means to achieve a legitimate end. The two factors to be considered are, on the one hand, the risks that the absence of a technical regulation would create and, on the other, the existence of a less trade-restrictive alternative measure that would make it possible to fulfil the stated objective. As far as the second test is concerned, Canada notes that the controlled use of asbestos fibres allows fulfilment of the French objective of protecting human health while authorizing certain safe or controlled uses of chrysotile and products containing it. As controlled use is a less trade-restrictive alternative based on scientific data and having international support, a total ban on asbestos is not necessary. Canada is of the opinion that, today, high-density non-friable products do not pose a detectable risk. The risks which existed in the past and in certain cases still exist today are associated with past uses, very often

¹⁵⁵ INSERM: *Rapport sur les effets sur la santé des principaux types d'exposition à l'amiante*, INSERM joint report, 1997. This report was submitted by the European Communities as one of the underpinnings of the measure adopted by France.

¹⁵⁶ See Canada's arguments, paras. 3.279 *et seq* above.