

Extra-Congress Submission

15.10 WTO UPHOLDS FRENCH BAN ON CHRYSOTILE

LAURIE KAZAN-ALLEN

A landmark verdict by the World Trade Organization (WTO) has validated the rights of Member States to prohibit the import and use of goods which contain carcinogenic substances such as chrysotile (white asbestos). On March 12, 2001 the WTO's Appellate Body (AB) issued its ruling in the case of *Canada vs. the European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* (AB-2000-11). The AB members upheld and strengthened aspects of the earlier WTO decision in this case: *Report of the Panel* (September 18, 2000) while reversing, what has become known as, its “toxic logic.” AB Judges Florentino Feliciano, James Bacchus and Claus-Dieter Ehlermann confirmed: chrysotile is an established carcinogen, there is no safe threshold and “controlled use” is not an effective alternative to a national ban. Pascal Lamy, European Union Trade Commissioner, said: “This ruling shows that the WTO is responsive to our citizens’ concerns. Legitimate health issues can be put above pure trade concerns. The ruling confirms that regulators can set the desired level of protection of health.” Aimee Gonzales, a spokesperson for WWF International commented: “In this case, the scientific evidence supporting the French ban on asbestos was overwhelming, however the Appellate Body’s guidance on the relevance of scientific opinion confirms that all Member governments may be entitled to opt for maximum protection of humans, animals and plants even where scientists disagree as to the risks justifying protection.”

The first WTO decision

On September 18, 2000, the WTO published the Report of the Panel; analysts found both good and bad news contained within the 465 page opus. Good news: the 1997 French ban on chrysotile, the only form of asbestos still legal within the European Union (EU), was upheld. Bad news: by treating chrysotile and chrysotile-containing products less favourably than domestically manufactured alternatives, France had violated multilateral trade agreements. David Waskow, from Friends of the Earth, told reporters: “This is a dangerous precedent. The reasoning that a carcinogenic product is the same as a non-carcinogenic product defies logic.”

What was this case about?

French Decree 96-1133 prohibited the import and use of chrysotile (white asbestos) and all chrysotile-containing products as of January 1, 1997. Canada, currently the world’s leading exporter of chrysotile, had grown used to French custom and support. France, once the third largest importer of asbestos worldwide, had been a stalwart ally within the EU. French politicians and civil servants, no doubt much encouraged by the industry-backed Standing Committee on Asbestos, led the resistance to EU restrictions on chrysotile; in recent years, France purchased six per cent of Canadian chrysotile annually. While unilateral bans in nine other European countries (Iceland 1983, Norway 1984, Denmark 1986, Sweden 1986, Austria 1990, Netherlands 1991, Finland 1992, Italy 1992 and Germany 1993) had been overlooked, this betrayal by a former ally could not go unpunished.

When viewed against decades of inaction, the French legislation was truly remarkable. The lives of thousands of French asbestos victims had been decimated by

a powerful industry which had continuously reassured trade unions, civil servants and the public of the safety of its products. As ever, jobs took precedence over health. French awareness of the appalling asbestos legacy increased during the 1990's due initially to the efforts of an informal coalition of workers, trade unionists, academics, scientists and environmentalists. ANDEVA, a national association of asbestos victims, was set up to formalise this association, to coordinate efforts on behalf of French asbestos victims and to lobby for a complete ban. The French Medical Research Council (INSERM) was asked to review international studies, academic papers, data and information on the national situation. Whether the Labour Relations Service and French Health Directorate had anticipated the damning conclusions reached by the eleven members of INSERM'S Joint Expert Analysis Group is unknown. The day after The Effects on Health of the Main Types of Exposure to Asbestos was published, Jacques Barrot, the Minister of Labour, Health and Social Affairs, announced his government's U-turn. The dominance of asbestos cement, "the most widely used material in France in finishing works since the end of the 1960s" was over.

Industry's Reaction

Asbestos producers did not welcome INSERM's conclusions that: "all asbestos fibres are carcinogenic" and "the increase in mortality from lung cancer arising from exposure to asbestos fibres is as high in populations exposed to chrysotile as in those which have combined exposure or exposure to amphiboles alone... populations exposed occupationally to fibres known commercially as 'chrysotile' have an indisputable additional mortality from mesothelioma." The Asbestos Institute (AI), a Canadian body set up in 1984 to "maximise the use of existing resources in a concerted effort to defend and promote the safe use of asbestos on a global scale," went on red alert. AI Members were advised of steps being taken to counter "the impact of the French decision in Europe and at the international level." An emergency meeting of the Governing Council was called and "a strategy aimed at avoiding the adoption of an asbestos ban at the level of the European Union" was implemented by the Institute's European Advisory Council. Towards the end of July, 1996, discussions were held between personnel from the AI and the Governments of Canada and Quebec on commissioning an assessment of the INSERM report and securing the active involvement of other chrysotile-producing countries in lobbying the European Commission and individual member states.

On September 17, 1996, Health Canada requested that The Royal Society of Canada "convene an international expert panel to review" the INSERM report. The ninety-five page critique: A Review of the INSERM Report on the Health Effects of Exposure to Asbestos is a strained, demeaning and hasty exercise: all the work, including peer review, was completed within ten weeks. Many controversial issues remained unresolved. Trying to explain away divergent opinions, it was noted that: "Scientists cannot achieve a consensus on contentious issues after two weeks of reading and two days of face-to-face discussion... In science, consensus emerges; it does not arise from short-term confabulation. And it emerges most slowly when there are major uncertainties, as in the case of asbestos risks." Of the seven panellists, five were North American, one British and one, Dr Enzo Merler, Italian. His opinion stands out: "The INSERM Report could have underestimated the number of deaths due to asbestos exposure. In fact, in addition to causing human lung and pleural mesothelial tumours, exposure to asbestos also causes peritoneal mesothelioma in humans (and it possibly increases the risk of cancer at other sites, larynx, renal, colon and rectum). Deaths from peritoneal mesothelioma are not considered, quoted or counted in the INSERM report, which resulted in a possible underestimation of the causes of deaths attributable to asbestos that are potentially preventable."

That the AI had been closely monitoring developments in France was to be expected but the methodical approach they adopted is almost breath-taking in its attention to detail. AI records contain entries on everything from the publication by Ban Asbestos of The Black Book on Asbestos, the founding of the Anti-Asbestos Committee at Jussieu University (October, 1994), the holding of a press conference Asbestos: a Public Health Problem at which scientists “notably, British epidemiologist Julian Peto, who had recently published estimates in the journal *The Lancet*, which projected increased mortality rates amongst building maintenance and repair workers exposed to asbestos,” spoke (April, 1995) to the formation of ANDEVA, a “victims’ rights group,” (February, 1996) and the bringing of a civil law suit (June, 1996) “which accused asbestos industry officials, technical and scientific consultants as well as French government officials of having conspired to delay the introduction of new, more stringent regulations on asbestos in buildings as well as to delay the ban of all uses of asbestos despite knowledge of its inherent health risks.”

The keen, some might say obsessive, industry interest in all French asbestos developments was matched by intensive behind-the-scenes efforts by the Canadian government to persuade, cajole and bolster international support for Quebec’s chrysotile. Between July, 1996 and May, 1998 high-ranking officials lobbied community leaders, asbestos industry stakeholders, Prime Ministers, Ministers of State, Ambassadors, trade representatives, journalists and scientists from EU agencies and directorates, Belgium, France, the UK, Korea, Morocco, Brazil, South Africa, Russia, Swaziland, Zimbabwe and elsewhere. An analysis of a Chronology of Developments in the Asbestos Issue distributed by the Canadian government shows fifteen entries for meetings with UK or French politicians, academics, health and safety experts during this period. It was no accident that on June 18, 1997, Environment Minister Angela Eagle told the House of Commons that the Labour government intended to introduce a ban on chrysotile and two days later, at the Denver Summit, Prime Minister Chretien pressurized the new British Prime Minister for an exchange of “scientific information about the health risks associated with the use of chrysotile”. The chronology boasts that “in February, 1998, the United Kingdom announced it would be pursuing consultations on workers’ safety with respect to chrysotile as opposed to announcing its intentions to ban the use of asbestos.” It is obvious that the industry regarded the delay as a crucial and possibly enduring victory. Frantic trade missions were organized, foreign journalists feted, quasi-scientific workshops held and spurious agreements publicized¹. Quebec politicians, asbestos industry representatives and others consulted with International Trade Minister Art Eggleton, Treasury Board President Marcel Masse, Natural Resources Minister McLellan and the Deputy Minister for International Trade. Clearly decisions were being taken at the highest level.

The WTO Process

An agreement to raise the profile of the dispute must have been reached because on June 20, 1997, the Canadian delegate on the WTO’s Committee on Technical Barriers to Trade requested that France rescind this “irrational and disproportionate” ban. Expressions of support from Columbia, Mexico and South Africa were countered by calls for information on these countries’ asbestos industries. After the initial sabre-rattling, nothing much seemed to happen. The following January, a WTO spokesperson confirmed that Canada had not indicated whether it wished to proceed with the dispute. Further submissions expected at the March 27, 1998 meeting of the Committee on Technical Barriers to Trade never materialised. Instead, Canada raised a procedural question on the failure of the Belgian government to notify the WTO of new measures limiting the marketing, manufacture and use of asbestos. Finally, on May 28, 1998 the gloves came off. The Government of Canada lodged an official request with the WTO for consultations with the European Commission, the body

with exclusive jurisdiction in international trade matters for Member States, “concerning certain measures taken by France for the prohibition of asbestos and products containing asbestos.” Natural Resources Minister Ralph Goodale confessed: “The (Canadian) government’s objective is to maintain market access for chrysotile asbestos products, which are safe when used properly, according to the safe-use principle of the Government’s Minerals and Metals Policy.” It is significant that the formal announcement was made as the finale to a meeting in Quebec of Ministers and industry stakeholders from Thetford Mines, Asbestos and Black Lake, Quebec. In accordance with WTO dispute resolution procedures, the two sides had sixty days to resolve their differences. The first round of talks between the European Commission/France and Canada took place in Geneva on July 8. When bilateral talks failed, Canada asked the Dispute Settlement Body to establish an official panel. The following November, Canada confirmed this request but when EU representatives arrived in Geneva in mid-December to discuss the composition of the dispute panel, they were informed that Canada had requested a postponement. Simultaneously, EU officials were petitioned to reconsider the prohibitions.

Behind Closed Doors

The WTO’s lack of transparency is legend; the operation of the chrysotile panel reveals an organization in which procedural secrecy is sacrosanct. Appendix 3 of the WTO Dispute Settlement Procedures states: “The panel shall meet in closed session...The deliberations of the panel and the documents submitted to it shall be kept confidential.” The identity and credentials of panel members and expert witnesses, the content of written statements, oral testimonies and panel discussions are restricted as are disclosures of conflicts of interests by scientific advisors, the questions put to them, their opinions and the rebuttal of the parties involved. The three-man tribunal which was convened on March 29, 1999 to hear this case was headed by Adrian Macey, New Zealand’s Ambassador to Thailand; the other panellists were William Ehlers and Ake Linden, a Swedish consultant on trade policy matters. The ability of working diplomats and trade experts to resolve a highly technical case within the short time allocated is questionable. These time constraints mean that much of the work is carried out by political scientists, economists and lawyers seconded to the WTO by national governments. No scientists are employed by the WTO and the impartiality of temporary appointments cannot be taken for granted.

Submissions and Delays

The Canadian brief was received by the first-instance panel on April 26, 1999. Leading scientific and medical authorities called it: factually inaccurate, substantially inaccurate, misleading, selective and wildly untruthful. Julian Peto wrote: “The Canadian report is... a biased political document rather than a serious scientific review.” The EU’s defence of France and the US support of the EU position were submitted in May. Canada’s position was supported by Brazil and Zimbabwe, other asbestos-producing countries. Throughout the Summer of 1999, a persistent dispute over the commissioning of independent scientific advice dragged on; the Canadians objected to experts from any European country. Eventually, agreement was reached on the appointment of one American and three Australian scientists. In January, 2000 they were brought to Geneva to confirm their written evidence which is cited on pages 284-340 in the Report of the Panel. The replies by Dr. Infante, Dr. de Klerk, Dr. Henderson and Dr. Musk to questions posed by the Panel are conclusive and unanimous: chrysotile is a carcinogen, the concept of “controlled use” is unrealistic and safer alternatives exist. The Panel decision originally expected in December, 1999 was initially delayed until March, 2000 and further delayed until the Summer. The interim decision was disclosed to the litigants in June and finalized in July, 2000.

What was this Case Really About?

Why would Canada jeopardise its international reputation and poison relations with the third world for a moribund industry which offers employment to a mere 2,000 or so Quebec residents? The answer is simple; jobs, votes and the fragility of Quebec's position within the Canadian federation. Cathy Walker, Health and Safety Director of the Canadian Auto Workers' Union, agrees that the impetus is political: "The Canadian and Quebec governments are competing with one another to show just how prepared they all are to protect Quebec jobs." The loss of French trade is not crucial to the industry; the possibility that developing nations might adopt similar prohibitions is. Currently, Asian countries buy 65% of Canadian chrysotile. Morocco, Tunisia and Algeria, all former French colonies, are also good customers. Despite the relevance of the WTO decision to asbestos use in these nations, the terms of reference excluded testimony "about the technical feasibility of applying 'controlled use' of asbestos in Asia, Africa and Latin America, where uncontrolled use is the norm."² An anonymous Canadian trade official, worried about the domino effect, told an Australian reporter: "If we were to lose this challenge, other countries would not be reluctant to go ahead and impose their own ban on asbestos."

Canadian disregard for foreign lives is mirrored by the federal government's lack of interest in the damage caused by asbestos within Canada itself. Despite estimates by the National Cancer Institute of Canada that nine percent of cancer deaths are occupationally-related, only one tenth of one percent of National Cancer Institute of Canada research is into these diseases. According to Jim Brophy from the Occupational Health Clinic for Ontario Workers in Sarnia, Canada "has never maintained a cancer registry that could actually document the impact of asbestos exposure on our own citizens." This accusation is unfair. There is concern about the effects of asbestos exposure in Canada; substantial sums are being spent on the removal of asbestos from parliamentary buildings in Ottawa. It's unfortunate that the politicians' desire to safeguard their own well-being does not extend to that of Canadian, Malaysian, Moroccan or French workers.

Steven Guilbeault, a consultant with Greenpeace in Vancouver, revealed another reason for continuing government interest in chrysotile. A Toronto company, Noranda Incorporated, is developing a method of extracting magnesium from asbestos waste. The Societe Generale de Financement du Quebec owns 20% of Magnola Metallurgy, a Noranda subsidiary; operations to produce magnesium at Magnola Metallurgy's first facility are due to begin soon. The new plant is located in Quebec.

Canadian Reaction to The WTO Verdict

Executives from LAB Chrysotile, Canada's largest asbestos producer, were disappointed by the first WTO decision. Jean Dupere, President of LAB, called it: "a very hard blow for Thetford Mines and Asbestos," while Tom Coleman, Vice President of LAB's Operations, was in denial: "there are always people talking about (bans)... If we hear of it, we make an effort through the Asbestos Institute to (educate people) on how to use it safely." Bernard Coulombe, President of the Jeffrey Asbestos Mine, was critical of the illogical and excessive ruling of the WTO and the "evil (the chrysotile ban) which took place in France four years ago."

The day the WTO decision was announced, Pierre Pettigrew, Canada's International Trade Minister, and Minister Ralph Goodale confirmed Canada's intention to appeal. An official press release accused the Panel of exceeding its mandate which "did not include ruling on the safety of the applications, or on the principle of safe use of chrysotile asbestos." The release continued: "the French approach is excessive, and ...

the safe use approach is sufficient to ensure the health and safety of workers and the public. In Canada, as well as in other countries, the use of chrysotile asbestos is strictly regulated.” (So strictly regulated in fact that Canada exported 99.55% of what it produced in 1996, the most recent year for which data is available!) Many Canadians are disgusted by their government’s position; the Council of Canadians urged that “the Government of Canada not appeal the interim WTO ruling... (and) suspend funding the asbestos industry proponents.” Nevertheless, strong support persists and is openly acknowledged: “the Government of Canada has worked on this file in close co-operation with all its partners, including the Government of Quebec, the chrysotile asbestos industry and the unions, all of which had an active role in formulating the arguments that Canada submitted to the WTO Panel.” The position of Canada’s trade officials could not be more compromised. On the one hand, they support the discredited industry position of “controlled use” in the WTO challenge; on the other, Pierre Pettigrew, Canada’s International Trade Minister, declares: “Canada has long encouraged our corporations to act responsibly throughout the world.”³ Pettigrew’s comments were made on June 27, 2000 during the launch of new Organization for Economic Development guidelines for the conduct of multinational enterprises. The rules “will complement the best practices of Canadian companies and play an increasingly significant role in fostering good corporate citizenship around the globe,” Pettigrew said. Industry Minister John Manley and Labour Minister Claudette Bradshaw confirmed Canada’s good intentions with Manley claiming: “we believe that these guidelines are an important step toward ensuring sustainable growth of the global economy to benefit all countries,” and Bradshaw adding: “the revision of the guidelines furthers efforts to promote global respect for the International Labour Organisation’s core labour standards.” Did the appeal of the dispute panel’s findings really encourage industry to “act responsibly throughout the world?” Journalist Madelaine Drohan thought not: “Having our Prime Minister flogging asbestos around the world doesn’t do Canada’s image as a ‘green’ country much good... It would be better for the federal government to give all 2,500 workers in the asbestos industry large severance packages to retrain or retire than to continue this losing battle.” Maude Barlow, Chairwoman of The Council of Canadians, agrees: “The federal government’s plan to appeal the WTO asbestos ruling shows a total disregard for human life.”

Implications of the Panel’s Report

The sheer size of the report and the complexity of the arguments ensured that only diehard WTO observers would get involved in the nitty, gritty of the findings. For the rest of us, here are selected highlights from the verdict of Macey, Ehlers and Linden:

- the vindication of the French ban safeguarded other unilateral asbestos bans. Canada had previously warned that other national prohibitions might be challenged if the WTO case against France succeeded;
- the panel established that the use of chrysotile was a health risk “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;”
- the concept of “controlled use” was exposed: “the European Communities have shown that controlled use is neither effective nor reasonably available, at least in the building sector and for DIY enthusiasts. Accordingly, controlled use does not constitute a reasonable alternative to the banning of chrysotile asbestos...”
- for the first time, a dispute panel used Article XX(b) of the General Agreement on Tariffs and Trade (GATT) to settle an international trade disagreement. This exception clause allows the imposition of trade-restrictive measures to protect human life or health;

- the French Decree violated international law by denying equality of treatment to foreign products containing asbestos. The reasoning which equated imported chrysotile fibres and chrysotile-cement products with domestic PVA, cellulose or glass fibre and fibro-cement products was convoluted and opaque. According to one expert: “the Panel interpreted basic WTO rules as prohibiting France from singling out asbestos for its highly toxic properties. Imported concrete containing carcinogenic asbestos, according to the Panel, is ‘like’ domestically produced concrete containing non-toxic cellulose and to treat them differently violates Canada’s right to access French markets. The burden then shifted to France to prove that it was entitled to an exception to WTO rules in order to protect human health.”
- during the Autumn, 1999, submissions from the Collegium Ramazzini and the American Federation of Labor and Congress of Industrial Organizations, non-parties to this dispute, were incorporated into the EC’s brief and considered by the Panel “on the same basis as the other documents furnished by the EC in this dispute.” At that time, no official policy existed for dealing with non-party input, although in eight previous cases such submissions had been considered by panels and appellate judges. The adoption in November, 2000 of “an additional procedure to deal with any written briefs received by the Appellate Body from persons other than a party or third party to this dispute” was unprecedented. The new procedures, only applicable to the chrysotile case, were described in a one and a half page document entitled: Communication from the Appellate Body: WT/DS135/9. Potential participants were given eight days and three pages in which to convince the Appellate Body (AB) that they might “make a contribution to the resolution of this dispute that is not likely to be repetitive of what has already been submitted by a party or third party to this dispute.” Seventeen applications were submitted; all were rejected. The following groups made unsuccessful applications to submit so-called amicus curiae (friends of the court) briefs or simply amicus briefs in this case: The American Public Health Association, The Society of Occupational and Environmental Health, The Occupational and Environmental Diseases Association, The International Confederation of Free Trade Unions/The European Trade Union Confederation, The Australian Centre for Environmental Law, The International Ban Asbestos Secretariat, The Ban Asbestos Virtual Network, Greenpeace International, Worldwide Fund for Nature, Foundation for International Environmental Law and Development, The Center for International Environmental Law and Robert Howse, professor of international law at the University of Michigan Law School. As some of the applications were joint efforts, the groups listed above accounted for seven submissions. Of these, five were summarily rejected by the AB Secretariat; when further clarification was sought, none was forthcoming. The remaining two rejections were time-barred by the arbitrary imposition of a Central European time zone deadline. The previously vague cut-off (The Additional Procedure Adopted Under Rule 16(1) of the Working Procedures for Appellate Review stated only: “Any person, whether natural or legal, other than a party or a third party to this dispute, wishing to file a written brief with the Appellate Body, must apply for leave to file such a brief from the Appellate Body by noon on Thursday, 16 November, 2000”) further reinforced the increasingly popular view that the WTO was making the new procedures up as it went along. So although the Society of Occupational and Environmental Health brief was faxed before the US Eastern Coast deadline, it was received and rejected after the Central European deadline. Similarly, the joint The International Confederation of Free Trade Unions/The European Trade Union Confederation submission arrived half an hour late and so was disqualified. It is salutary to note that although significant numbers of public interest organizations applied for leave to file a written brief, even more asbestos industry bodies clamoured to be heard. The widespread geographical diversity of pro-chrysotile applicants suggests a coordinated response with applications received from: the Asbestos Information Association (US), HVL Asbestos (Swaziland), South African Asbestos Producers Advisory Committee, Associacao das Industrias de Produtos de Amianto Crisotilo (Portugal), Asbestos Cement Industries Ltd. (Sri

Lanka), The Federation of Thai Industries, Roofing and Accessories Club, All India A.C. Pressure Pipe Manufacturer's Association, Korea Asbestos Association, Asociacion Colombiana de Fibras and Japan Asbestos Association.

The AB's seeming departure from the infamously closed system of the WTO was, ostensibly, promoted "in the interests of fairness and orderly procedure in the conduct of this appeal." Publicly the WTO was becoming more responsive and transparent; privately, the imposition of the new system was tailor-made to manage unwelcome interference by non-members of this exclusive club of 139 national governments. Between October 23, 2000 when Canada notified the Dispute Settlement Body that it was to appeal the panel's chrysotile decision, and November 8, when the regulations for lodging an application appeared on the WTO website, the AB Division had received thirteen unsolicited briefs. Adoption of the procedure enabled the Division to return all of them; if you want to re-submit, the NGOs were told, you must follow the new protocol. The AB, aided and abetted by ingenious new rules and "deliberately stringent" criteria had constructed a big, shiny get-out clause: "your application ... has been denied for failure to comply sufficiently with all the requirements set forth in paragraph 3 of the Additional Procedure." Seasoned WTO observers maintain that this theory assumes a degree of consistency uncharacteristic of the WTO. No sooner had details of the AB's additional procedure appeared on the WTO website, then a storm of controversy blew up which led to the organization's first constitutional crisis. The AB was accused of appropriating the Members' rule-making powers. The Egyptian Ambassador called for a Special General Council Meeting with one subject on the agenda: "the additional procedure adopted by the Appellate Body in an appeal now being heard by the Appellate Body." At the November 22, 2000 meeting, the representative from Pakistan called for the resignation of the AB's Chairman. Although there was a consensus against the alleged lack of consultation by the AB, the status quo was upheld by the reluctance of the US to support any immediate action. On March 9, 2001, Debra Steger, the Director for the WTO's Appellate Body Secretariat, unexpectedly tendered her resignation. After six years of overseeing the Secretariat's work and acting as legal in-house advisor to the seven AB judges, Steger cited personal reasons for her decision to return home to Canada. Speculation that the criticism generated by the AB's "judicial activism," especially the furore stirred up by the adoption of the special procedures in the chrysotile case, is widespread.

Reservations

Some WTO-watchers believe that establishing asbestos as a precedent for bans of toxic substances could, in the long run, prove limiting: "In effect, by accepting a ban on asbestos (a product with a fairly low international trade value), the WTO could discourage bans on other products whose hazards are not as well known as asbestos," wrote Sam Zia Zarifi, a legal expert from Erasmus University in his article: The Vital Issues in the WTO Asbestos Dispute. Medical evidence and statistical data on occupational asbestos exposure have been accumulating for decades; few other cases are as conclusive. By setting the benchmark so high, civil society could find itself barred from regulating the use of other dangerous substances. Zarifi is also concerned that: "the Asbestos dispute... potentially constitutes the most significant expansion of the WTO's reach into areas of human health and worker safety once exclusively reserved for sovereign States." Others agree: "By reducing the right to health to 'technical provisions,' the WTO's arbitration shifts the legitimacy of it from the political arena to that of scientific and technocratic expertise, beyond all democratic control."⁴ In other words, by acceding to the WTO charter, the 139 member states relinquish the democratic right and civic responsibility for the well-being of their citizens.

Implications of the Appeal verdict

For years asbestos industry apologists have maintained that their products can be used safely. The “controlled use” mantra has been at the heart of attempts to preserve markets threatened by growing international awareness of the repercussions of continued asbestos use. National bans were, according to the industry, over-reactions to misinformation disseminated by scientists and campaigners intent on “engendering widespread fibre-phobia.” The Asbestos Institute, set up in 1984 to “maximize the use of existing resources in a concerted effort to defend and promote the safe use of asbestos on a global scale,” is still peddling this line. Responding to news of the AB’s rejection of the Canadian brief (March 12, 2001), the Asbestos Institute’s Director, Denis Hamel, told journalists that depriving developing countries of chrysotile’s multifarious benefits would increase mortality rates. The AB ruling has demolished the “controlled use” smokescreen: “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.” Hammering the final nail into the “controlled use” coffin, the AB ruling said: “the efficacy of ‘controlled use’ is particularly doubtful for the building industry and for DIY enthusiasts, which are the most important users of cement-based products containing chrysotile asbestos.”

It is important to note that the AB reversed the original ruling’s convoluted reasoning which equated chrysotile and chrysotile-cement products with safer alternatives containing PVA, cellulose and glass fibres. In September, 2000 Panel members Adrian Macey, William Ehlers and Ake Linden chose to ignore chrysotile’s toxicity, chemical composition, physical structure and consumer attitudes focusing instead on: “the end-use of the products (which) should affect the way in which we examine the properties of the fibres.” According to Macey et al, in examining the concept of “likeness,” the health risk was an irrelevance within the meaning of Article III of The General Agreement on Tariffs and Trade 1994 (the GATT 1994). The Appellate Judges disagreed, highlighting the need to examine the molecular structure, chemical composition, fibrillation capacity, health risks, consumers’ tastes and habits and tariff classifications in assessing “likeness”: “In examining the physical properties of the two sets of cement-based products, it cannot be ignored that one set of products contains a fibre known to be highly carcinogenic, while the other does not... We, therefore, reverse the Panel’s finding... that these health risks are not relevant in examining the ‘likeness’ of the cement-based products.”

The AB findings have been welcomed despite lingering concerns over some aspects of the decision and WTO procedural matters such as the refusal to accept NGO submissions and the method of selecting expert witnesses. Reversing the original Panel’s ruling, the AB agreed with Canada that the French ban constituted a “technical regulation” under the 1994 Technical Barriers to Trade Agreement (TBT). Although the TBT was intended to further the objectives of the GATT 1994, the TBT “imposes obligations on Members that seem to be *different* from, and *additional* to, the obligations imposed on Members under the GATT 1994.” Having decided that general prohibitions are subject to TBT regulations, the AB refrained from taking the analysis any further. Theoretically, Canada could bring a TBT challenge against the French or other national chrysotile bans; such an action would be the first WTO case brought under the TBT. Since re-trying the chrysotile case would involve an attempt to refloat the discredited “like” products analysis, it seems an unlikely prospect. Also worrying, however, are the implications of the AB’s support for the rights of

Members to claim compensation for measures which adversely affect trade regardless of the reasons for the restrictions. Thus, even if a national prohibition is legitimately adopted on health grounds, “the measure may give rise to a cause of action under Article XXIII:1(b) of the GATT.” Barry Castleman, a consultant to the EC legal defense team, is happy with the victory but worried about the future: “I fear that talk of the WTO understanding the need for the precautionary principle and allowing the maximum protection of humans from toxic substances in the face of scientific dispute is wildly optimistic. Look at the politics and the economics. This case was won because the WTO desperately wanted to look like they care about something more than free trade after the protests in Seattle. Canada was virtually alone in their defence of chrysotile lacking any powerful multinational corporations for allies and facing the USA and the EU as opponents. We may not be so lucky next time.”

Conclusion

As Western markets for chrysotile continue to shrink, producers are increasingly targeting customers in developing countries. Now that the French ban has been upheld, markets in South America, Asia and the Far East will be even more fiercely defended. Hopes that the WTO ruling might create acceptance of an asbestos-free future look naive. Throughout the chrysotile debate, Canada’s asbestos lobbyists have proved themselves to be persistent and resourceful. Recent statements reveal the adoption of a new strategy designed to increase their power base by appealing to groups with similar vested interests, such as the industrialists, lobbyists and producing governments of other endangered minerals. According to the website of Natural Resources Canada: “Canada’s interest in the case extends well beyond chrysotile asbestos. As one of the world’s foremost producers of minerals and metals, such as aluminium, copper, nickel and zinc, Canada has an interest in ensuring the safe and sustainable use of all natural resources.” The struggle continues.

¹ In March, 1997 A Memorandum of Understanding on the “responsible use of asbestos” was signed by representatives of the federal government and Canadian asbestos producers. Natural Resources Minister McLellan and Treasury Board President Masse announced the signing at a press conference at Thetford Mines on March 3, 1997.

In March, 1998 “Canada along with other asbestos-producing countries signed an Aide-Memoire on the responsible use of asbestos. This Aide-Memoire was submitted by the participating Ambassadors to the European Union.”

² Castleman, B. The WTO Asbestos Case and its Health and Trade Implications. Paper presented on Environmental and Health Day, Seattle November 29, 1999.

³ The Canadian Department of Foreign Affairs and International Trade. Canada Endorses Improved OECG Guidelines For Multinational Enterprises. Press Release No. 164, June 27, 2000.

⁴ Herman, P. and Thebaud-Mony, A. Canada v France: WTO Rules. Le Monde Diplomatique, July, 2000