Plenary Presentation

6.3 IMPLICATIONS OF THE WORLD TRADE ORGANIZATION VERDICT FOR PUBLIC HEALTH AND GLOBAL TRADE

BARRY CASTLEMAN, SCD

Dr. Castleman's presentation was based on the paper reproduced below:

WTO CONFIDENTIAL: THE ASBESTOS CASE

BARRY CASTLEMAN, SCD

This case was a challenge by Canada to the ban on asbestos by France. Canada argued that banning asbestos was an unnecessarily extreme measure, because regulation (or "controlled use") of asbestos can render the remaining hazards to workers and society "undetectable" (elsewhere this allegedly preventable cancer mortality was referred to as within "epidemiologically based practical thresholds").

The World Trade Organization (WTO), established in 1995 with over 130 member countries by 1999, was called upon to adjudicate this trade dispute, considering whether the French ban on asbestos was justified by public health considerations. WTO would decide the case against France if it found that there were less trade-restrictive measures than a ban that would suffice to satisfactorily protect public health. So this organization, WTO, whose main reason for existing is to promote international trade, was in effect a world government where national laws could be challenged, in this case laws in many countries banning asbestos.

WTO's decision in this case affects whether any country can ban asbestos; however, it is based on consideration of only the narrow case of France. Canada had no expectation of resuming significant exports of asbestos to France even if successful in the case.

A decision in Canada's favor would have threatened national bans across Europe and beyond. The real target of the case was the Third World, mainly Asian countries that are the major importers of Canadian chrysotile asbestos today. Canada didn't want Third World countries asking why they should use a product so deadly that it was scheduled to be banned by all countries in the European Union by 2005. But the WTO Panel of judges was not taking testimony about "controlled use" of asbestos in Asia, Africa, and Latin America, where uncontrolled use is the norm. Consequently, there's a dangerous difference between what this case was formally about and what it was really about, a difference that calls into question the role and operating principles of the WTO in making such far-reaching decisions.

Even the United States sided against Canada in asking WTO to dismiss this complaint, saying that it is the right of each nation to determine the acceptable degree of risk that is tolerable and to determine the appropriate level of protection for its citizens. It is politically relevant that there is not a single large corporation left in the U.S. that cares what happens to the asbestos industry in the 21st century. Liability and regulation in a climate of intense public awareness have all but ended the use of asbestos in the United States.

We are dealing here with the leading known cause of occupational cancer in human populations all over the world, one of the most thoroughly studied toxic substances. If there isn't enough evidence to ban the use of asbestos (mainly used in building panels and pipes and vehicle brakes, hazardous uses where safer substitutes are available), what can be banned by any country without undermining the primacy of international trade? This case was thus about much more than asbestos.

Opening Statements

As a rule, opening statements of the parties in WTO cases are confidential unless the parties release them publicly. Canada, the USA, and the European Commission (representing France) publicly released their statements. Third-party statements by Brazil and Zimbabwe were not publicly disclosed. There was controversy in Brazil over this, because the statement, which was prepared by private lawyers in Washington, contained misstatements of fact that could not be challenged publicly in Brazil.

Selection of Scientific Experts by WTO

The Panel of "judges" in the case decided to appoint a group of scientists to report directly to them on specific scientific questions. The WTO asked international scientific organizations (International Labor Office, World Health Organization, International Program on Chemical Safety, and International Agency for Research on Cancer) and an industry standards organization (International Standards Organization, ISO) to recommend experts. Canada and the European Commission (EC) were also asked to recommend additional experts, and they did so. The nominated experts were asked to submit summaries of their professional backgrounds to WTO, and most of them did. The WTO declined to ask them to disclose what work they had done for the asbestos industry. But the EC request that WTO do this and WTO's failure to do it were not in any public record. Not even the recommended experts' names were disclosed publicly.

The parties in the case then had a couple of weeks to review massive lists of publications, etc., and comment on the recommended experts, some of whom had been longtime consultants to the asbestos industry. It was problematic that some of the nominated experts were the best people to ask about the qualifications and bias of some of the others – but the procedural rules did not permit direct consultations with the nominees. The expert recommended by the ISO and others were criticized by the EC as having strong business links with the asbestos industry. None of the comments on the experts were publicly available.

There was no public questioning of WTO for asking ISO for recommendations of experts in this case, lacking as ISO is in having a public health orientation. An ISO "standard", ISO-7337, for working with asbestos-cement construction materials, states that certain tools including circular saws and lathes may be used without attached local exhaust ventilation and dust capture attachments. The ISO was unable to cite any supporting references in the scientific literature where worker exposure from cutting A-C panels and pipes with these tools had been measured. When pressed on this question, ISO sent only title pages from asbestos industry publications of dubious relevance. The names of the standard's authors were requested but not provided; this "standard" appears to have been authored by the asbestos industry.

Canada objected to a number of scientists recommended by international public health organizations because they were members of the Collegium Ramazzini, a respected international group founded by Dr. Irving Selikoff, the leading researcher on asbestos in the latter half of this century. The Collegium had issued a call for a global ban on asbestos in 1999. Canada even objected to one scientist because he was on the editorial board of one of the journals that published this call for a global asbestos ban. The WTO Panel's failure to select any of these scientists, some of whom were the most qualified experts recommended to the Panel by the international scientific organizations, was not explained or publicly questioned. It was confidential.

It was preferred but not required that scientists from the European Union and Canada, the parties in the case, be excluded. Objections were made by both parties to nominated scientists with even dual citizenship including E.U. countries. The European Commission objected to one of the Australian scientists on grounds that he was also a British citizen, but he was selected by WTO nevertheless.

The WTO selected four experts from the lists of recommended scientists. The one from the USA, Dr. Peter Infante, had been recommended by Canada, evidently because of his publications on cancer risks of working with fiberglass, one of the asbestos substitutes. The European Commission made no objection to him. The other three experts, Australians, were initially recommended by international scientific organizations. Canada commented favorably specifically on these three as well as only one or two others recommended by the international scientific organizations. In contrast, the European Commission lawyers declined to state the names of the scientists recommended by the international scientific organizations whom they preferred. The reason was that the European Commission lawyers, who had had much prior involvement in WTO cases, were afraid that this would harm the chances of those scientists' selection. What does this say about the fairness of this process?

The four scientists selected to advise the WTO Panel were sent a form to complete asking about possible conflicts of interest. The form was quite clear about asking whether the experts had actively participated in public interest groups with declared agendas on the issues, and it was also clear in asking about relevant public statements by the experts. But the form was far more limited in its listing of financial interests and vague on the subject of professional interests which might include such things as: receipt of corporate funding for research and academic programs; corporate consulting in damage suits where WTO acceptance of Canada's line on asbestos might be invoked by defendant corporations; and consulting in the development of legislation where WTO acceptance of Canada's line might be used to political advantage. Even more was left to interpretation regarding the scientists' connections with corporate front groups such as industry trade associations, scientific institutes established and run by business interests, and outside counsel hired by corporations. It is disappointing that questions about potential conflicts of interest were not raised before the selection of experts by the WTO, as had been requested by the European Commission in the asbestos case.

The names of the scientists selected to advise the WTO, the disclosures of the scientists about possible conflicts of interest, the written questions propounded by WTO to the scientists, the written answers the scientists gave, the comments by the parties on the quality and possible bias of the experts and their answers, and the record of questions and answers at a day of scientific hearings at WTO in Geneva – were all kept confidential throughout the proceedings.

Controlled Use Defined

Only in a statement filed on December 13, 1999, one month before the scientific hearings were about to take place, did Canada explain in some detail what was meant by that critically important phrase, "controlled use" of asbestos. This started with a limitation never before expressed: "Canada has advocated the use of chrysotile in high-density products only; textiles are not of that category…" This unprecedented declaration did not include any explanation of whether or how Canada has in place any system to implement this national policy in export sales restraint. Asbestos textile plants are found today only in countries where asbestos use is least restricted. Canada's policy of not selling asbestos to plants in Asia, etc., where it would be used to make asbestos textiles raises another question. What market is left to Canada for the most expensive, long grades of asbestos fibers – other than textiles?

Canada went on:

"With regard to downstream use sectors, 'controlled use' implies that all distributors/manufacturers of asbestos will be required to have an import permit. This permit will be withdrawn if the company does not meet the following commitments:

- to distribute its products only to companies (users) licensed to purchase these products. Those companies must have workers trained and licensed to install products, and must be in compliance with regulations. Approved users shall not resell to third parties, and any unused materials must be returned to the manufacturer;

- to provide a list of users to the responsible government agency;

- to provide products cut to specification and to establish centres equipped to cut the products to size, and where persons cutting the products are trained and are licensed to work with asbestos;

- to police downstream users in cooperation with the government. The product manufacturer visits, monitors and reports on the performance of the downstream users at regular intervals. There are penalties for failing to provide this product stewardship."

To start at the end, there was no product stewardship role contained herein for Canada and other countries exporting asbestos from their mines. Nowhere does it say that asbestos-exporting countries or companies have any responsibility to assure that manufacturers using their raw material allow inspection by the fiber suppliers and meet minimum requirements or face a cut-off of supplies. This entire program of surveillance and punitive measures was instead relegated to the asbestos product manufacturing industry (and the importing country governments), even though there is no historical precedent for the industry ever having done such things anywhere in the world. Why is a country obligated to assume the societal costs associated with restraining the abuses of an asbestos industry – just so Canada can have the unrestricted freedom (from product stewardship) to export asbestos?

Canada's suggestion that the asbestos companies would establish field fabrication centers for construction industry users of asbestos-cement products, to cut the products to size and thus obviate the need for such work to be done at construction sites, is ludicrous. One need only spend a short time in traffic in Sao Paulo or Bangkok, for example, to find unintended humor in the idea that the asbestos industry would provide any number of

such centers or that construction companies would regularly interrupt their work to make use of them if the centers existed.

Similarly, it is impossible to imagine the asbestos product manufacturing companies conducting industrial hygiene surveillance of their customers, let alone also reporting miscreants to the government regulators. There has not been a single asbestos product manufacturing company that has done such "police" work in the past hundred years anywhere in the world. This would be more fitting as a theme for a preposterous movie spoof, an asbestos company being run in this "eccentric" manner by a Peter Sellers type of character.

It can only be presumed that the lawyers for Canada were encouraged to express such fairy tales to the WTO as national policy because the document was kept confidential during the proceedings according to WTO rules.

Other Elements of the Canada's Case for Asbestos

Canada maintained that France had economic motivations for banning asbestos but could produce no strong evidence to support that claim. The EC observed that one of the main asbestos substitutes, cellulose, France imports from Canada in amounts exceeding ten metric tons daily. Those who have been involved in national struggles over banning asbestos know that the predominant issue involved was always public health, not trade.

Canada asserted that asbestos fiber substitutes are either known to be too dangerous or have been too poorly studied to replace chrysotile asbestos (the mineral variety that accounts for 95% of all the asbestos ever used). This was contradicted by a recent analysis by scientists reporting to the UK Health and Safety Executive, justifying Britain's ban announced while the WTO case was underway. Both safer substitutes for asbestos fiber and asbestos-containing products have demonstrated their commercial feasibility in many European countries where asbestos has been banned for years. Asbestos is now banned by all the leading economic powers of Europe.

Canada's statements to WTO included the charge that bans in the US and France were reactions to anti-asbestos propaganda and American public opinion was in "prey of panic" during the Reagan and Bush Administrations when the asbestos ban rule was developed. Canada claimed that the Environmental Protection Agency reversed itself (recognizing that products containing chrysotile such as asbestos-cement and brake linings do not constitute a "detectable risk" to public health) after the ban was overturned in the courts in 1992. But in fact, the EPA then tried to get the major auto manufacturers to agree voluntarily to phase out the use of asbestos-containing parts. Canada also asserted incorrectly that the other (amphibole) asbestos varieties other than the most widely used form, chrysotile, were banned in the US.

Canada did not acknowledge that its asbestos industry would have closed years ago but for hundreds of millions of dollars in government subsidies, including nationalization of some mines, after it became clear that asbestos mines had become liabilities by the late 1970s. Canadian asbestos interests thumbed their noses at claimants in the U.S. courts even while using U.S. courts to challenge the U.S. government's ban on asbestos products (and thus create new liabilities while failing to pay for the old ones). Some free trade!

The Scientific Hearings

Hearings took place in WTO's large, ornate building on Lake Geneva on January 17, 2000. There were 36 people in the room, including the three Dispute Resolution Panel members, WTO staff, the four scientists appointed by WTO, and the lawyers and scientific advisers for the European Commission and Canada. Not permitted into the room were the media, third-party governments (the US, Brazil, Zimbabwe), representatives of international organizations (e.g., ILO, WHO) and non-governmental organizations (e.g., union organizations and environmental groups).

The Panel members sat along one table at the end of the room in business suits. The parties were seated on opposite sides of the room along tables running perpendicular to the Panel's table. At a table behind the one where the Canadian lawyers were seated, three of Canada's scientific advisers sat. They were all from the "Canadian chrysotile school" – Drs. Graham Gibbs, Michel Camus, and Jacques Dunnigan. At the table with Canada's lawyers further distant from the Panel's table sat Drs. J. Corbett McDonald and Alison McDonald, whose research on asbestos epidemiology was started in Canada under sponsorship of the asbestos industry in the 1960s.

The EC team was arrayed differently, with the lead attorney surrounded by his scientific advisers (Drs. Marcel Goldberg and P. Hure from France, Benedetto Terracini from Italy, Antti Tossavainen from Finland, and Barry Castleman from the USA), the other lawyers in the case seated further down the table away from the Panel.

Canada's lead attorney introduced the McDonalds this way: "The Professors McDonald are serving as honorary members of the delegation and have declined to accept any compensation from Her Majesty in order that both their independence and the appearance thereof may be guarded." At a number of occasions during the proceedings, Dr. J.C. McDonald interjected his own scientific opinions, at one point after lunch even being called upon by Canada's lead attorney to give a short narrative. The EC lawyer made no objection to this, even though the customary practice was that the only person to address the Panel from each side was the lead counsel. This was a reminder that this proceeding was not occurring in a court, where such procedural liberties would have been objectionable. The EC lawyer's failure to try to take issue with things McDonald said or left out derived from an unwillingness to confer "expert witness" stature on McDonald; this was to be expected, and it left Canada's lawyer the chance to introduce testimony without cross-examination of his witness. The Panel politely listened to McDonald's speeches.

The scientists chosen by WTO sat at a table between the main tables for the two parties, in front of the Panel's table. They were epidemiologists Peter Infante (USA) and Nicholas de Klerk (Australia), pathologist Donald Henderson (Australia), and pulmonary clinician William Musk (Australia). The scientists were first asked to elaborate upon their written answers to questions they had been asked to address months earlier by WTO. The rest of the day was spent going through the six themes of the questions, with the lawyers for the parties taking turns asking questions of (one or more of) the scientific experts.

Adrian Macey, the Chairman of the Panel, spoke for the Panel. At one point, he tried to cut off discussion of availability of non-fibrous substitutes for asbestos products (e.g., cast iron and clay pipes for asbestos-cement pipes), preferring to narrow the discussion to fibrous substitutes for asbestos. Only after the EC lawyer observed that such alternative products were envisioned by one of the WTO's questions to the scientist-experts did that question go to the experts. Unfortunately, none of the experts had apparently given much thought to this, so this important issue passed unaddressed in the

hearings. The two other Panel members did not disclose their ignorance by speaking, although one of them was having difficulty staying awake during the testimony after the 100-minute lunch break.

Some of the most dramatic moments came when the experts were asked about Canada's representation of "controlled use" as set forth in the previously-quoted submission to WTO.

Musk: This sort of regulation would require a new system for enforcement which hasn't previously existed anywhere that I know of. Secondly, it doesn't take into account people working with products that are already installed, modifying and installing pipes, electricians, plumbers and the like. So it certainly wouldn't cover all the opportunities for exposure.

Infante: I feel that this stewardship program, when I read this, I feel that it's not a reality… I just recently read an article about asbestos, chrysotile-asbestos exposure in Morocco, which imports Canadian chrysotile, and I see these photographs in this article just published this year – I have a copy of the article – and it shows that asbestos is just all over the place. So I'm wondering if the Canadian Government, if it has this partnership for a sustainable development, why are there countries like Morocco, Brazil and India that seem not to be following what's required by this stewardship and the controlled use?

Henderson compared the policing function described by Canada to automobile manufacturers trying to police dangerous drivers of the cars they sold. "It's one that I would think would create an immediate conflict of interest between sales and profitability on the one hand, and the policing and regulatory function on the other. But I think it's fine in principle, but I suspect that's it's unworkable in practice in Australia, at least unenforceable at law."

de Klerk: I was just curious as to whether there was any sort of precedent for the system that they put into that document. I can't imagine anything like that working anywhere with anything. But presumably there may be some precedent somewhere for that kind of system?

Canada's lawyer declined to respond to Dr. de Klerk's question. He went on to try to equate the existence of regulations for abatement of asbestos products in place to the acceptance of the "controlled use" principle for continuing to use asbestos materials in new construction.

WTO Process Weaknesses

In the asbestos case, the Panel members did not expose their ignorance by asking a single question of the scientific experts during their day of testimony. Immediately after lunch, one of the Panel members even seemed to be having trouble staying awake during the questioning by the opposing parties' lawyers and the scientists' responses.

WTO procedures force resolution of the most complex problems in one year, and appeals are decided in 6 more months. Though it might appear that the Panels selected to manage the case are judges, the real work is in fact done by faceless bureaucrats within the WTO secretariat. Most of these WTO employees are political scientists, economists, and lawyers. There are few if any scientists employed by WTO.

One can only wonder how WTO employees could be susceptible to influence by business interests, lacking as they are in expertise in technical areas under discussion (hormones in beef, genetically modified foods, asbestos, etc.) Are there rules against business lobbyists, consultants, and collaborating academics having contact with WTO staff? The companies are not, strictly speaking, parties in these cases, the parties are governments, although the governments are often used like "banana republics" to do the bidding of corporations.

Panel members are selected from lists of names recommended mainly by EC countries and the US. They are a mixture of retired trade officials and still-busy trade diplomats, etc. In the asbestos case, many names were rejected until the parties in the case agreed on three. It may be a once-in-a-lifetime job to be a Panel member and doesn't pay much. These people mostly have no legal backgrounds much less any experience as judges, and some are way too busy to read all the technical documents submitted in these cases. The written questions propounded to the scientists selected to advise the Panel in the asbestos case were almost certainly drafted by the WTO Secretariat, not the Panel members. The scientists selected from the list of nominees to advise the Panel were in all likelihood picked by the WTO Secretariat. In the end, it was most likely the WTO secretariat that decided the case, not the Panel. And it may well be that promotion within WTO is limited only by one's creativity in justifying free trade above all else. The reality of WTO staff dominance in the judicial management of these cases is not established in the World Trade Agreement, the charter of the WTO's operation.

In theory, a Panel member could demand changes to a decision drafted by the secretariat, but that would take someone who had a strong personality, felt strongly about the issue, and didn't care about ever being asked to be on a Panel again. Such resistance to just going along with the institutional decision might well be seen as betrayal among the members of the trade diplomats' "club" that begat GATT and have a strong interest in avoiding disharmony within the new WTO system.

The European Commission wants to abolish the Panel system and have 25 full-time judges for these cases at WTO. The appellate body is already set up in this way. The big reason this reasonable recommendation has not been accepted is that it is opposed by the United States.

It is most troubling that the European Commission legal office, which defends the interests of international public health more than any other party to appear before the WTO, was staffed by only 9 attorneys as of the end of 1999. These people are overwhelmed by the mounting wave of cases coming to the WTO, and the quality of their vital work could be improved by substantially increasing the size of the staff. As new cases loom such as one over European bans on genetically modified foods, the EC lawyers can again expect to face the full force of the US government assisted by legions of lawyers from the affected industries.

The Decision in the Asbestos Case

Only after WTO decision was publicly announced in September, 2000 was the transcript of testimony at the one-day hearing on scientific issues at WTO in Geneva publicly released, appended to the final decision in the case. The experts all agreed that there was no safe level of exposure to any kind of asbestos, that "controlled use" as defined by Canada was unrealistic and had not occurred anywhere they knew of, and that safer substitute products were available.

Despite some testimony to the contrary, WTO decided that controlled use was possible in asbestos mining and product manufacturing plants, and even that it was possible in removal and destruction of in-place asbestos products. There was in fact no testimony that there was a safe way to demolish asbestos-cement buildings. The unanimity of the experts in saying that controlled use of asbestos products by construction workers was unrealistic was important in getting WTO to finally reject Canada's claim on that basis.

The lack of interest in this case by big corporations, the result of social movements in many countries, translated into the political isolation of Canada in this case. Following the massive protest in Seattle in 1999, the asbestos case was a relatively easy case for WTO to use to demonstrate that it has more than a one-dimensional trade framework for resolving disputes.

WTO thus approves of governmental decisions to ban at least some products due to known hazards to workers and to the public. Countries wishing to apply the precautionary principle in restricting new technologies – as opposed to banning notorious, proven killer technologies -- will still face disapproval from the free trade crusaders at the WTO and the ever more dominant global corporations who seem to be the main architects of this system.