

The WTO Trade Dispute's Impact on Global Efforts to Ban Asbestos

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Abstract

The establishment of the WTO in 1995 created a forum on the global stage where national asbestos bans could not only be challenged individually but collectively. Canada, the world's leading exporter of asbestos fiber, decided to risk taking a case to this "world court of trade" as national bans on asbestos proliferated across Europe and were proposed in Asian and South American countries. Though WTO must have seemed an ideal forum, where trade was the predominant priority, there were also considerable risks for Canada and what remained of the asbestos industry at the turn of the century. The WTO's decision that asbestos bans did not violate international trade agreements, that they were fully justified on public health grounds, was a green light for asbestos ban efforts around the world and has now led to bans in a growing number of countries in all parts of the world. This is an analysis of the global struggle in which activists, scientists, unionists, and public health workers defeated attempts by asbestos interests to manipulate UN organizations. From Seattle to Geneva to the Third World, it is an epic story of a public health struggle that has come to involve a virtual network of people all over the world and stands as a model for these times.

The Context of the WTO Asbestos Case

A global ban on trade in asbestos products will virtually have to be won one country at a time. In every country the process is individualized. The personalities, the non-governmental elements of civil society, the governments and the laws are individual to each country. Each country has its own social and industrial history, customs and culture, media and courts. Each has its own limited resources and choices to make in development and trade. Each country has its own susceptibility to official corruption, its die-hard merchants of asbestos who are threatening and formidable adversaries. And though a global ban might not be won in one stroke, it could have been prevented at a world tribunal that did not even exist until after a number of countries had already banned asbestos. The establishment of the World Trade Organization in 1995 created a global forum in which national asbestos bans could not only be challenged individually but collectively.

The 1990s was a decade of asbestos bans. Led by the Nordic countries, other European nations issued bans on asbestos, paving the way for a regional ban in Europe. Following bans on most, if not all, uses of asbestos in Germany, Italy, Austria, the Netherlands, and Switzerland, the ban in France had a stunning impact. It was announced the first week of July in 1996, as an expert panel met in Geneva under the auspices of the International Program on Chemical Safety (IPCS). The IPCS had spent three years developing an Environmental Health Criteria document on chrysotile asbestos, amid unprecedented publicity and protest. The U.S. National Institute for Occupational Safety and Health, under the leadership of Dr. Richard Lemen, had severed relations with IPCS over the asbestos industry bias of its first expert panel on chrysotile. There had been a letter of protest sent to the sponsoring UN agencies of the IPCS, signed by 81 distinguished authorities in occupational and environmental health, which led to a meeting by all (8) U.S. government agencies that had relations with IPCS. The week before the reconstituted expert panel met in Geneva to consider the very incomplete third draft of the report on chrysotile, a letter from the U.S. Department of State was sent to IPCS urging 12 specific procedural changes to deal with the problem of conflicts of interest of experts appointed to IPCS expert panels.

The Canadian Chair of the IPCS expert panel faced a revolt by scientists who were knowledgeable contributors of scientific literature on asbestos. When the panel decided that there was no evidence of a (non-zero) safe level of exposure to chrysotile asbestos and went on to warn that chrysotile not be used in construction materials, Bette Meek stepped down as the Chair. Perennial representative of the asbestos industry, “observer” Graham Gibbs, was told to leave the room when the committee discussed conclusions and recommendations. The panel report reaffirmed the basis for national bans on chrysotile asbestos, by this time the only type of asbestos in international commerce. Over 90 percent of the chrysotile market at the time was in asbestos-cement construction materials, most of that used in relatively poor countries.

Gibbs and Jacques Dunnigan, of the Asbestos Institute, were principal authors of a report submitted to the International Labor Office improperly purporting to be from the International Commission on Occupational Health, where Gibbs was a chairman of a committee on fibers (ICOH). This was exposed when this “draft” report was considered by ILO for publication as its own and sent it to reviewers in 1997. Within a week of this scandal circulating on the internet, ILO announced that the report would not be published by the ILO. That was the year Poland banned asbestos.

Meanwhile, the World Health Organization Regional Office for Europe (in Copenhagen) had drafted two reports for local health officials on asbestos. The reports read like they had been written by the asbestos industry. They said little of how deadly asbestos was, had only the vaguest information about the hazards of building with asbestos-cement sheets and pipes, despite the decisions to use safer substitute materials by the growing number of European nations that had banned asbestos. One of these reports preposterously dismissed high exposures to asbestos as largely a thing of the past, in contradiction to the everyday experience in the many poor countries where asbestos continues to be widely used. Once

again, a furious controversy ensued starting in 1997, which would ultimately result in a very much improved report in 2000.

The pattern of moves on the international scientific organizations reveals a strategic plan by Canada to advance the position of the asbestos industry even as bans were proposed in more and more countries. Canada had long cultivated influence at international organizations and was now trying to put that to use. The newly created WTO would be expected to show great deference to statements of international bodies that addressed the questions before them. A victory for the asbestos interests at IPCS, ILO, or WHO could well have tipped the balance of a case at the WTO.

It was the ban in France, which caused the conversion of seven asbestos-cement plants by the end of 1996, that Canada chose to challenge at the WTO. In 1997, Canada's Prime Minister said they would take this to the WTO, claiming that the French ban on asbestos was an unacceptably severe barrier to trade. This conveniently avoided the real issue in the case, the real targets of raising this trade dispute, the poor countries where almost all of Canada's asbestos was exported.

By 1999, time was running out for Canada. Saudi Arabia and Belgium had banned asbestos. Now, a majority of the countries in the EU had banned asbestos, Britain was the last of the major economic European powers set to do so, and the European Parliament adopted Jan. 1, 2005 as a deadline for all EU countries to have asbestos bans in place. That would include the 10 countries planning to join the European Union in 2004.

WTO did not disappoint its architects, who favored trade heavily when it was weighed against environmental and public health concerns. Canada's action led WTO to establish a Dispute Resolution Panel in 1999, a "trade court" which would issue a decision the next year. As a scientific adviser to the European Commission in defending the French ban at WTO, I was able to bear witness to the entire process from a public health point of view after the case was decided at WTO. This was an extraordinary examination of a highly confidential process, where lack of transparency and public accountability led the governments of Canada and Brazil to make what can politely be called misstatements of fact. The WTO process and its administration, as expected, consistently favored the party invoking free trade (Canada). And Canada was a big wheel at the WTO: people referred to the "Big Four" at WTO as Japan, the EU, the U.S., and Canada. If there was any place where Canada could still halt the tide of national asbestos bans on the world stage, it was the WTO.

The Social Movement

Canada's plan to use the World Trade Organization to stop the spread of national asbestos bans had not taken account of the growing social movement protesting the WTO and its impact. The WTO panel took up the trade dispute in 1999, and later that year massive, broad-based public protests all but closed down the WTO's meeting of national leaders in Seattle. The public image of WTO around the world was taking form, as the tear gas cleared

over Seattle, that WTO was a creature of industry and a menace to public health, the environment, human rights, and indigenous culture around the world. The 4-year-old WTO was on the defensive over its secrecy and bias. Governments were assailed with charges that they had surrendered national sovereignty to global corporations and were acting as the agents of business interests at the WTO. The U.S. was ridiculed for taking a banana case to WTO on behalf of U.S.-based global corporations, even though the U.S. had never exported a banana in its history.

Social movements had brought about national bans on asbestos products around the world. The success of these efforts had by 1999 all but ended the era of asbestos-based multinational corporations. What remained of the asbestos industry was mainly national companies based in countries where awareness and regulation of asbestos were minimal. So there were no global corporations in Europe and the U.S. left to fight for asbestos. This translated into a lack of political support for Canada's position. Despite rumors to the contrary put out by the Asbestos International Association, the U.S. government came down solidly on the side of France in this dispute. Canada had only weak support from other asbestos-mining countries Brazil and Zimbabwe. This was, from a political point of view, the ideal case for WTO to demonstrate that it cared about other things than unrestricted trade.

What the WTO Asbestos Case Established

Though the case was limited to the issue of asbestos use in France, major issues were raised that would have implications for the (then 130 plus) countries that were members of WTO as well as other countries. Canada's desperate gamble was intended to set a precedent that asbestos bans were in violation of global trade agreements. But the risk was that WTO would consider all the issues Canada raised and set a precedent of an opposite kind. And that is what happened.

WTO selected four scientific experts to advise the trade dispute panel, and these health scientists were asked to deal with related questions first in writing and then at a hearing held in Geneva. Though all four of the scientists selected had the blessing of Canada, they took an independent view of things and rejected Canada's arguments on all the main points. The WTO, which intended to publish the transcript of the scientific hearings along with the dispute resolution panel decision, could not contravene the unanimous views of the independent scientists it had appointed. The scientists concluded that:

- 1) There is no safe level of exposure to chrysotile asbestos that is free from cancer risk;
- 2) "Controlled use" of asbestos is not realistic, particularly in the construction industry; and
- 3) Safer substitute products are available to replace the most common asbestos products, asbestos-cement construction materials.

WTO's dispute panel issued its decision, and though the case was appealed to the WTO Appellate Body by Canada, it was clear that the central decision would survive intact. This decision was a green light for other countries to move forward with asbestos bans of their own.

The Social Movement's Response

As the WTO decision came out, activists from 32 countries met in Osasco, Brazil, to advance efforts to prevent asbestos disease, compensate asbestos victims, and ban asbestos worldwide. The participants included scientists, doctors, lawyers, political leaders, unionists, and representatives of asbestos victims' groups and non-governmental environmental groups. The Mayor of Osasco announced that asbestos would be banned in his city, formerly home to extensive asbestos products manufacture, and this set off successful efforts to ban asbestos over the next several years in Chile, Argentina, El Salvador, and other parts of Brazil. Campaigns in Peru and Mexico were strengthened by the decision from WTO.

Australia, where there has been a tragic and well-documented toll of death and disease from asbestos, banned asbestos in 2003. This enjoyed strong support of unions and asbestos victims groups.

Organized efforts by citizens' groups in Japan and Korea drew strength from the WTO decision. Japan followed Vietnam in 2004 in announcing that asbestos would be banned. Previously, the only Asian country to ban asbestos had been Saudi Arabia. However, there had been partial bans on use of asbestos-cement in construction by Syria and Singapore.

In Eastern and Central Europe, countries planning to join the EU in 2004 moved ahead with asbestos bans in anticipation of meeting the requirement of having bans in place by 2005. Greece, Spain, and Portugal, as older members of the EU (now 25 countries in all), also have to have bans in place by 2005.

Even Russia and China, which were not in the WTO at the time the asbestos case was decided, will be affected by the WTO decision in international trade.

The only remaining sophisticated opposition to national asbestos bans on the global stage is the government of Canada. Canada's opposition to including asbestos under the Rotterdam Convention, even with some support by countries with powerful asbestos industries (e.g., India), will not hold back action for long. The convention clearly states that, once a commodity is banned as ultra-hazardous in several parts of the world, it comes under the requirement that international exports be approved by "prior informed consent" of the importing country. This will be one more nail in the coffin of this killer industry. Now that there is a movement to close the asbestos mines and ban asbestos in Canada, it is hoped that civil society will act to bring about this result before market forces do so. This in turn will pave the way for the final battles in the asbestos wars, to end trade in asbestos and asbestos

products and eventually end the commercial use of asbestos even in countries that mine it and use large amounts internally (mainly Russia and China).

The Asbestos Industry in 2004

The demise of the multinational corporations based on asbestos has eliminated some problems and created others. Some companies that made asbestos products in the past make asbestos substitute products today. The multinationals were susceptible to publicized charges that they did not operate under as high a standard of control in the poor countries as they did in the rich countries. They had influence with governments in Europe and the U.S., and through these connections they could influence international bodies in many ways.

Today's asbestos companies are national firms that have less concern about charges anyone can raise about their ethics and reputation. In some cases, they are run by people who have taken over businesses they formerly ran for the multinational firms. In other cases, they are run by people who got in when the multinationals got out. The thinking of these investors was evidently that if they could save enough money on prevention and compensation, they could operate profitably for enough years to make it pay off. This then is the *modus operandi* of the asbestos industry, that as long as the costs of occupational and environmental illness can be laid off on society and the workers especially, asbestos products can be competitively priced and sold widely. Central is the presumption that the costs to society created by asbestos use can continue to be "externalized" by the industry and not borne by the asbestos industry or built into the purchase price of asbestos products. They are hoping that they can go on running a discredited, hazardous industry and dissolve the company if they ever are saddled with liability for all the death and disease and environmental contamination they are creating.

Society does not have any obligation to let companies like this continue to operate. The asbestos industry is a corrupting influence wherever it exists. In Brazil, labor inspector Fernanda Giannasi has faced enormous pressures for advocating an asbestos ban and trying to assist workers disabled by asbestos to obtain compensation. There have been death threats, civil and criminal defamation charges, administrative pressures on the Brazilian government by Canada, and pressures on and within the government to restrict inspector Giannasi's activities. In India, Dr. T. K. Joshi, a leading educator in occupational health, has faced threats from government officials, politicians, and professional colleagues since he started proposing that asbestos be banned. What would it mean to have even one prominent person of integrity driven out and replaced by a professorial chair in occupational medicine endowed by the asbestos mafia through some innocuously-named foundation? The impact of such a coup would be to intimidate whoever decent was left and corrupt the profession, with far-reaching effects on worker and community health in India.

Even in countries where little or no asbestos is used today, there can be strong pressures to defend the good name of asbestos. In the U.S., hundreds of corporations and insurers are facing liabilities estimated at \$200 billion. There is increasing liability for the major

producers of cars and brakes, who have sought to establish in scientific literature that asbestos exposure in brake work does not cause asbestos disease. This has been done with the auto makers' generous sponsorship of articles by Dennis Paustenbach and other technical experts hired in the defense of these lawsuits. In 2003, a huge law firm pressed the U. S. Environmental Protection Agency (EPA) to withdraw its guidance document warning mechanics about the hazards of asbestos in brakes. The lawyers would not even disclose who they worked for, and the Bush Administration has accomodatingly not required this disclosure. The law firm includes among its clients the major brake defendants General Motors and Honeywell. They seek to justify corporate failure to warn 30-50 years ago with government failure to warn today. Here, liability is retarding public health efforts. EPA has said that the revised brake guidance document will be released for public comment in August or September of 2004.

One can reasonably conclude that even in its death throes, the asbestos industry today is a dangerous adversary and a serious threat to public health. The way to a world free of commercial use of asbestos lies through national bans, but these could still be long delayed. Success at WTO was necessary but not sufficient to assure that asbestos products could be banned worldwide. We are now confronting the bottom dwellers on the corporate food chain, companies whose business and relation to society have to be regarded with deep concern. Though there is still international trade in asbestos and asbestos products, in the future it can be expected that this can be driven down by international cooperative efforts of public health workers. New asbestos factories are still opening in India, and Thailand's use of asbestos remains very high. It is hoped that the momentum created by the bans in Japan and other Asian countries will diminish the consumption of asbestos elsewhere in Asia, the last stronghold of asbestos use.

How to Finish this History

In the more than 10 years the international ban asbestos movement has existed, this social movement has become more widespread and organized with every year. Major international conferences have been held since the 2000 event in Osasco in many other countries. New national campaigns have started in India, Malaysia, Canada, and South Africa (the former asbestos mining country announced its intention to ban asbestos in June 2004). International campaigns have been mounted, successfully, to fend off political and economic forces used to persecute leading activists and independent authorities in Brazil and India. The remaining defenders of asbestos in the scientific community are few, and they are mainly perennial Canadian apologists and expert witnesses working to help makers of chrysotile asbestos products escape liability in U.S. courts.

The virtual network of public health workers that has fought and won so many battles is strong and has gained much from experience. We will work with people in an increasing number of countries where doctors, unionists, asbestos victims, environmentalists, public health authorities, and political leaders want to stop the carnage from asbestos. We will

provide information on worker training, control measures, and compensation. We'll supply both information and expert scientific, legal, and legislative assistance. The world's operating experience and technical information on substitute materials will be made available, from independent experts and countries that have curtailed the commercial use of asbestos. To the extent that multinational corporations continue to use asbestos in some countries but not others, as has been documented in the automotive industry, those companies will be targeted in public campaigns charging that they follow "double standards" on health and the environment and violate human rights. Compensation for asbestos victims will be sought even where multinational companies that operated these businesses have attempted to avoid liability through legal and accounting shenanigans.

As the goal to ban asbestos globally comes closer, the defenders of asbestos lose ground every year. It is expected that Canada, the nation most prominently associated with the promotion of asbestos trade, will soon close its asbestos mines and ban asbestos. Once the battle has been won at the international level, the remaining rounds of the struggle will consist of supporting national efforts to recognize its hazards and ban the use of asbestos in asbestos-using countries, as they act upon the examples of their neighbors and adapt to an international market in which asbestos products no longer have a place.

No one should minimize the difficulty of the remaining task. The battle is different in every country, depending on its social, cultural, and industrial history. Some countries have very limited means to take the public health measures to confront the asbestos problem, some countries have corruption that substantially complicates what would be an already formidable task. The world's use of asbestos has dropped by about half in the last 15 years, but is still around 2 million metric tons per year and appears to have leveled off at that volume in the past few years.

The few countries that mine and use a lot of asbestos internally, particularly Russia and China, may at some point become amenable to declining the pariah status and devastation to health they will have if they hold out to the bitter end. However, if the day comes when such countries are the only ones still using asbestos commercially, activists in those countries will have a lot of help to call upon.