

WTO CONFIDENTIAL: THE CASE OF ASBESTOS

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The World Trade Organization (WTO), created in 1995, adjudicates “trade disputes” between member nations in cases with great human rights, cultural, environmental, and public health significance. Throughout the process of dispute resolution and even after a case is concluded, very little of what happens is made accessible to the public. However, it is one thing to criticize the WTO for its lack of transparency from outside the process, and another to critically examine what was withheld from disclosure and what dangers that presents. This is the inside story from a scientific adviser to one of the parties in a WTO case, analyzing what happened from a public health point of view. This analysis concludes that the public health justification of banning asbestos was accepted in the end by the economists at the WTO, despite the WTO’s bias in favoring the party (Canada) making the free trade challenge (to public health legislation, in this case) in numerous stages of the process, despite the WTO’s utter lack of expertise in science, medicine, engineering, and public health, and despite important erroneous statements made to the WTO under the cover of confidentiality. Despite its result, this case illustrates that the WTO’s threat to national sovereignty could never withstand the light of day, that the people of the world would reject this dangerous free trade fundamentalism if the limitations and dangers of the process were open for all to see.

In 1999, the World Trade Organization (WTO) was called upon to adjudicate a trade dispute between two of its members, Canada and France. Canada claimed that the French ban on chrysotile asbestos (the mineral variety that accounts for 95 percent of all asbestos ever used) was unnecessarily restrictive to trade because “controlled use” of asbestos rendered any associated health hazards “undetectable.” The WTO convened a Dispute Resolution Panel (the Panel) to determine if less restrictive measures would satisfactorily protect public health. If so, either the ban on asbestos would be struck down or WTO would authorize

Canada to impose retaliatory tariffs on France and other member nations that banned asbestos. However, even if Canada prevailed, it had no expectation of resuming significant exports of asbestos to France.

The real target of Canada's action was developing countries, where asbestos remains in wide use. Almost all asbestos mined in Canada is exported to such countries. Canada sought to keep these markets viable by preventing further bans on asbestos. Therefore, there is a significant difference between what this case was formally about (France) and what it was really about (maintaining exports to developing countries). As experts in world trade, WTO authorities were probably aware of Canada's implicit motivation, yet the case was decided only in the context of France. Even the United States (a "third party" in the case) asked the WTO to dismiss Canada's petition, stating that each nation has the right to determine acceptable risk and level of protection for its citizens. Regulation, public awareness, and liability have all but ended the use of asbestos in the United States. Therefore, there was no corporate pressure on the United States to support Canada in this case.

The public health implications of this case were tremendous. Asbestos is the world's leading known cause of occupational cancer and one of the most thoroughly studied toxic substances. If there is not enough evidence to ban the use of asbestos, what indeed can be banned?

OPENING STATEMENTS

As a rule, opening statements in WTO cases are confidential unless parties release them publicly. Canada, the United States, and (representing France) the European Commission (EC) released their written statements. Third-party statements from Brazil and Zimbabwe were not disclosed. Brazil's statement was prepared by private lawyers in Washington, D.C., and contained misstatements of fact that could not be disclosed and challenged publicly in Brazil.

SELECTION OF SCIENTIFIC EXPERTS BY THE WTO

The WTO decided to assemble a group of scientists that would report directly to the Panel on scientific matters. Several international organizations were asked to recommend experts: the International Labor Organization (ILO), World Health Organization (WHO), International Programme on Chemical Safety, International Agency for Research on Cancer, and International Organization for Standardization (ISO). Recommendations were also accepted from Canada and the EC, but the WTO preferred that scientists residing in either party's jurisdiction be excluded. Most of the experts submitted summaries of their professional backgrounds. The EC requested that the WTO exclude scientists who had worked for asbestos interests—or at least require them to disclose any such work. The WTO denied this request. The fact that such a request was made (and denied) was

never disclosed publicly. The names of nominated experts were kept confidential as well.

The parties were given a couple of weeks to review massive amounts of writings by the nominees (some of whom were long-time consultants to the asbestos industry) and comment on their suitability to advise the Panel. Some of the nominees were the best people to ask about the qualifications and biases of others, but WTO rules prohibited direct consultation with the experts. Moreover, the EC complained that some individuals (such as the scientist recommended by the ISO) had strong business ties to the asbestos industry. Again, such objections were not disclosed publicly.

The selection of the ISO to recommend experts in this case is particularly troublesome. The ISO standard for working with asbestos-cement construction materials (ISO-7337) states that certain tools (including circular saws and lathes) may be used *without* attached local exhaust ventilation and dust capture attachments. When questioned on the basis for this standard, the ISO was unable to cite any supporting scientific studies that measured worker exposure from cutting asbestos-cement panels and pipes with these tools. The ISO offered only title pages from asbestos industry publications of dubious relevance to support the standard. 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 public health organizations because the nominees 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 the 20th century. The Collegium issued a call for a global ban on asbestos in 1999. Canada also objected to asbestos expert Dr. William Nicholson because he served on the editorial board of a journal that published the Collegium's call for a ban (12 other journals published this material as well). The Panel's failure to select any of these highly qualified scientists was not explained or publicly questioned. It was confidential.

The WTO selected four experts from the lists of recommended scientists, but did not release their names to the public. One of those selected, Dr. Peter Infante of the U.S. Occupational Safety and Health Administration (OSHA), was recommended by Canada apparently because of his published remarks on the cancer risks of working with fiberglass, an asbestos substitute. The EC did not object to Dr. Infante. The three other experts were from Australia and were recommended by international organizations. Canada commented favorably on these experts and one other recommended by the organizations. The EC lawyers declined to state which scientists they preferred. Based on their experience in other WTO cases, the lawyers believed their endorsement would reduce the chances of these scientists being selected.

The four scientists selected by the Panel were sent a conflict-of-interest disclosure form. (Since the form was sent *after* selection, it apparently had no bearing on the selection process.) The form clearly asked the experts whether they

had actively participated in public interest groups with declared agendas on the issues—and whether they had made any public statements about such issues. The form was far less probative about potential financial conflicts of interest. Respondents were not explicitly required to disclose conflicts such as receiving corporate funding for research projects, consulting for corporations in damage suits, and working in support of pro-industry legislation. Furthermore, the experts were not required to disclose affiliations with trade associations, scientific institutes established and run by corporations, or legal counsel for business interests. The disclosure forms, written responses, and comments from the parties remained confidential throughout the proceedings.

CONTROLLED USE DEFINED

In a statement filed on December 13, 1999—one month before the scientific hearings were scheduled to take place—Canada explained its use of the phrase “controlled use.” The statement began with a qualification never expressed before: “Canada has advocated the use of chrysotile in high-density products only; textiles are not of that category.” (During the scientific hearings in January 2000, Canada’s senior attorney went so far as to assert that “Canadian asbestos is not used, cannot be used these days in the manufacture of textiles, because nowhere do we know are these textiles being now manufactured.”) This unprecedented declaration did not include any explanation of how Canada restricts exports to makers of “high-density products” only. Indeed, the Canadian asbestos company Cassiar was advertising “high quality weaving fibre” later in 2000.

Canada’s December 13 statement continued:

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.

The statement does *not* advocate a stewardship role for Canada and other countries that export asbestos. Nowhere does it state that asbestos-exporting countries and companies have any responsibility to assure that manufacturers meet minimum safety requirements or that violators will be cut off from supplies. Instead, the Canadian statement places the burden of surveillance and punitive action on the product manufacturing industry (and importing governments)—even though the industry has never done such things anywhere in the world. Why are nations that import asbestos obligated to assume the cost of restraining the abuses of the asbestos industry? Presumably, so Canada can enjoy unrestricted freedom (from product stewardship) to export asbestos.

Canada's suggestion that asbestos suppliers would establish field fabrication centers to cut products is wholly implausible. One need only spend a short time in the dense traffic of Sao Paulo or Bangkok, for example, to doubt that the asbestos industry would provide any number of such centers—or that construction companies would regularly interrupt work to use them. Similarly, it is difficult to imagine that product manufacturers would conduct industrial hygiene surveillance of their customers, let alone report miscreants to the government. Again, not a single asbestos product manufacturer has ever done such policing.

Why did Canada present such eccentric ideas to the WTO as national policy? Perhaps because the document would remain confidential (and thus free from criticism) during the proceedings.

OTHER ELEMENTS OF CANADA'S CASE

Canada maintained that France had economic motivations for banning asbestos, but could produce no evidence to support its claim. The EC noted that France imports ten metric tons of cellulose—a leading asbestos substitute—daily from Canada. Throughout the world, the primary motivation for banning asbestos has always been public health, not trade.

Canada asserted that asbestos fiber substitutes are either too dangerous or too poorly studied to replace chrysotile asbestos. This claim was contradicted by a report commissioned by the U.K. Health and Safety Executive to justify Britain's ban (coincidentally released while the case was under way). Substitutes for asbestos fiber and asbestos-containing products have proved safer and economically feasible in European countries where asbestos has been banned for years. As of 1999, asbestos had been banned by all the leading economic powers of Europe.

Canada's statements to the WTO included the charge that the U.S. ban on asbestos was a reaction to propaganda. Canada claimed that U.S. public opinion was in "prey of panic" during the Reagan and Bush (Sr.) administrations, when the rule banning asbestos was developed. Canada also claimed that the U.S. Environmental Protection Agency (EPA) reversed its position on asbestos when the ban was overturned by the courts in 1991. According to Canada, the EPA recognized that products containing chrysotile, such as asbestos-cement and brake

linings, do not constitute a “detectable risk” to public health. In truth, the EPA’s position that asbestos should be banned *has never changed*. After the ban was overturned in a court challenge, the EPA appealed to auto manufacturers to voluntarily phase out the use of asbestos-containing parts.

For all its claims, Canada did not acknowledge that its asbestos industry would have collapsed years ago if not for government intervention. In addition to hundreds of millions of dollars in subsidies, some mines were nationalized in the late 1970s as it became clear that they were burdened with insurmountable liabilities. Neither was it mentioned that Canadian asbestos interests refused to pay damages awarded to asbestos victims by U.S. courts—while simultaneously using the U.S. court system to challenge the U.S. ban on asbestos. Under WTO rules for dispute settlement, such issues were not deemed relevant.

THE SCIENTIFIC HEARINGS

The scientific hearing took place on January 17, 2000, at WTO headquarters on Lake Geneva. There were 36 people in the hearing room, including the three members of the Panel, WTO staff, the four scientists appointed by the WTO, and the lawyers and scientific advisers for the EC and Canada. The Panel members sat at one table, and the parties sat at opposing tables perpendicular to the Panel’s table. The following were not permitted to witness the proceedings: the media; third-party governments (the United States, Brazil, Zimbabwe); representatives from international organizations (ILO, WHO, etc.); and nongovernmental organizations (trade unions, environmental groups, etc.).

Canada’s scientific advisors were from the “Canadian chrysotile school”: Drs. Graham Gibbs, Jacques Dunnigan, and Michel Camus. Also present on Canada’s behalf were Drs. J. Corbett McDonald and Alison McDonald, whose epidemiological research on asbestos began in the 1960s under the sponsorship of the Canadian asbestos industry. Blair Hankey, the lead attorney for Canada, introduced the McDonalds in 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.” Despite his “honorary” capacity, J. C. McDonald regularly interjected his own scientific opinions; he was even called upon by Hankey to give a short narrative. The EC lawyers did not object to McDonald’s role (partly because it did not want to confer “expert witness” stature on him), even though custom dictates that only lead counsel may address the Panel. Such procedural liberties would likely not be permitted in a true court of law. The Panel listened politely to McDonald’s speeches. Some of his statements were disputed by the WTO’s selected experts. Given the evidence and opposition of the experts, McDonald made no impact on the case.

The lead attorney for the EC, Theofanis Christoforou, was surrounded by his scientific advisers: Drs. Marcel Goldberg and P. Hure of France, Dr. Benedetto

Terracini of Italy, Dr. Antti Tossavainen of Finland, and Dr. Barry Castleman of the United States. Other lawyers representing the EC were seated farther down the table.

The scientists chosen by the WTO sat at a table situated between the parties and in front of the Panel. The four experts were epidemiologists Drs. Peter Infante of the United States and Nicholas de Klerk of Australia, pathologist Dr. Douglas Henderson of Australia, and pulmonary clinician Dr. William Musk of Australia. The Panel first asked the scientists to elaborate on their written answers to the questions posed by the WTO months earlier. The rest of the day was spent reviewing the six categories of questions, during which time counsel for both parties questioned one or more of the experts.

The Experts Weigh In

Canada miscalculated when it nominated Peter Infante to serve as an expert advisor to the WTO. Infante co-authored a report in 1994 that stated fibrous glass may be as capable of causing lung cancer, fiber for fiber, as chrysotile. This conclusion was based on a study of workers in fiberglass manufacturing plants, published by Canadian epidemiologists. At the WTO hearings, Infante announced he no longer believed there was sufficient evidence on the carcinogenicity of fiberglass. He explained that he had made further inquiries since writing the article:

I recently spoke with workers who are employees of the fibreglass manufacturing facility that showed a two-fold risk of lung cancer. Those workers explained to me that there were other known human carcinogens to which they were exposed at that facility, which had not been mentioned in the report, namely they were exposed to asbestos and crystalline silica . . .

On the subject of controlled use, Infante (the only government official among the experts) testified that OSHA issued over 4,000 citations for violating the OSHA asbestos standard from 1996 to 1998. His testimony continued:

Even in the manufacturing sector, just this past October, we fined an asbestos brake manufacturer \$125,000 for being over the permissible exposure limit, for not providing respirators, for doing dry sweeping. That's in the United States where we've had an asbestos standard in place for a number of years. So my point is that it may be theoretically possible but it's not practical to think that you can control exposure to asbestos even in the example I gave in manufacturing, and it's certainly less practical to begin to control it in construction.

Some of the most dramatic moments occurred when the EC lawyer asked the experts about Canada's representation of "controlled use" in its December 13 statement:

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. . . . I don't know where they [Canada's prescribed safeguards] came from and I'm not aware of them existing elsewhere.

Infante: I feel that this stewardship programme, 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: [The policing function described by Canada] 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 it's unworkable in practise 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? . . . I asked earlier about whether there was any precedent for such a system. Because I don't know of one and that's why I was asking the Canadians.

The chairman of the Panel, Adrian Macey, asked Canada's attorney if he wished to respond to de Klerk and Musk's challenge. Hankey declined, preferring to harangue Musk, a pulmonary physician, with questions suggesting that regulations for abatement of asbestos products amounted to acceptance of the "controlled use" principle for using asbestos in new construction. Musk firmly rejected this argument. Henderson proved no easier to lead. He refused to accept Hankey's assertion that "in Australia, you are able to exercise control, it seems, when necessary to remove this stuff." Henderson added that he had recently seen mesotheliomas in a fireman and a university lecturer who were mere bystanders to asbestos removal operations.

Asbestos Substitutes

As the focus turned to asbestos substitutes, chairman Macey (the only Panel member to speak) moved to cut off any discussion about the availability of nonfibrous substitutes, preferring to confine the discussion to fibrous substitutes for asbestos products. However, in its written questions to the scientists, the WTO had made specific reference to nonfibrous substitutes. When the EC lawyer

Christoforou politely reminded the Panel of this discrepancy, Macey examined the text and concluded, “Having reread the question very carefully, I can say there were one or two references to nonfibrous substitutes. I would invite the experts to respond on that point.”

When questioning the experts, Christoforou listed nonfibrous substitutes for asbestos-cement pipes and sheets: cast iron pipe, high-density polyethylene pipe, concrete pipe, metal roofing, clay roofing tiles, and plaster boards. None of the experts had studied such materials, and several admitted they had only considered *fibers* that could replace asbestos. As a result, no additional evidence on this important issue emerged from the hearings.

This brief exchange about substitutes is very significant. It indicates that the written questions sent to the experts were mostly likely written by WTO staff, not by the Panel. Moreover, if the Panel was familiar with the record in the case, it would have known that the availability of nonfibrous substitutes was a major justification for banning asbestos. Equally important, this episode demonstrates that questions drafted by economists and posed to experts in the health sciences may fail to properly address technology issues—especially in a context that attempts to resolve all scientific issues in an unrealistically short time.

The previous paragraph must be qualified by the admission that it is sometimes difficult to distinguish incompetence from mendacity. A more devious interpretation of Macey’s maneuver is that he knew the WTO planned to confine its decision to an analysis of fibrous substitutes, and therefore did not want the record to show significant evidence that conflicted with the WTO’s decision. Under WTO rules, a decision most favorable to Canada would have to be based on “like product” analysis. To recognize that many substitutes are not “like” asbestos products (i.e., nonfibrous) would exclude the type of analysis most advantageous to Canada’s case.

THE DECISION

The WTO announced its decision in September 2000. The transcript of the hearings was appended to the written decision (the first time it was released since the hearings). In the end, the four experts had agreed that (a) there is no safe level of exposure to any kind of asbestos, (b) “controlled use” as defined by Canada is unrealistic and not known to occur anywhere in the world, and (c) safer substitutes for chrysotile asbestos products are available. But would the WTO see it this way?

“Seems Possible” Canada Could Have Won

The Panel had already concluded that the ban discriminated against “chrysotile-cement products as compared with fibro-cement products containing PVA (polyvinyl alcohol), cellulose, or glass fibres.” The EC carried the burden of proving that the ban was “necessary to protect human life.” Disturbingly, the WTO

only considered the justification for banning asbestos-cement construction materials (not other products), despite its own admission that the “scientists consulted . . . produced statistical data [that] confirmed the impact of chrysotile on mechanics exposed to that material in a car brake maintenance context.” Furthermore, the WTO’s decision was based on analysis of alternative fiber-cement compositions (“like” products) only, which therefore did not include the full range of substitutes for asbestos-cement products. Thus, the WTO “trade court”—and the narrow rules that govern it—failed to make a full and fair evaluation of the case for banning asbestos, in the process favoring Canada.

The written decision credited the Panel with making the decisions in the case. Though it was said that “the Panel feels bound to point out that it is not its function to settle a scientific debate,” the Panel’s role was described as to “determine whether there is sufficient scientific evidence to conclude that there exists a risk for human life or health and that the measures taken by France are necessary.” In fact, the WTO was attempting to resolve a scientific debate on public health in a manner that consistently favored the party that challenged restrictions on international trade.

Despite some testimony to the contrary, the WTO concluded that “it *seems possible* to apply controlled use successfully” (emphasis added) in asbestos mining and product manufacturing plants. Despite testimony exclusively to the contrary and a complete lack of evidence, the WTO also concluded that “it *seems possible* to apply controlled use successfully” (emphasis added) in removal and destruction of in-place asbestos products. However, the opinion of all four experts that controlled use of asbestos products in the construction trades was unrealistic could not be ignored. The WTO ultimately rejected Canada’s claim based on the experts’ firm and unanimous testimony. The decision might have gone the other way if a single physician or statistician among them thought it “seems possible” that regulatory agencies in France could adequately protect construction workers.

The WTO rejected Canada’s recommendation to follow the ISO standard for use of asbestos-cement products, stating that the standard would result in exposures higher than those considered acceptable by France. The ISO standard, written in 1984, recommends that the asbestos content of “clean air flow” not exceed 0.2 fibers per cubic centimeter (f/cc). The French occupational exposure limit at the time of the ban was 0.1 f/cc. Perhaps the ISO standard would have carried more weight if Canada had challenged the ban on asbestos in Belgium (for example), where the occupational exposure limit was 0.5 f/cc.

The fact that large corporations in many countries no longer use asbestos translated into political isolation for Canada. Following the massive protest in Seattle in 1999, the asbestos case provided an opportunity for the WTO to improve its one-dimensional, pro-capital image. Adding to the political pressure, all leading economic powers of Europe and many other countries had already banned asbestos.

This case indicates that the WTO approves of government bans on at least some products known to be hazardous to workers. However, countries wishing to apply the precautionary principle to new technologies (as opposed to notorious ones such as asbestos) will still face disapproval from the WTO and its allies. The WTO's decision in this case—which seemed reluctant despite overwhelming evidence—by no means assures that it will protect public health in other circumstances.

THE APPEAL OF THE DECISION

After the decision, Canada filed an appeal with the WTO Appellate Body. On November 8, 2000, the Appellate Body made the unprecedented announcement that it would accept applications for amicus briefs—that is, briefs from parties not directly involved in the case but wishing to intervene. The deadline for submitting applications was November 16 at noon in Geneva. By November 16, the WTO had received applications from at least 12 nongovernmental organizations (including Greenpeace, Worldwide Fund for Nature, Center for International Environmental Law, Foundation for International Environmental Law and Development, the American Public Health Association, and the International Ban Asbestos Secretariat) and some from the asbestos industry. The WTO refused applications from the International Confederation of Free Trade Unions and the Society for Occupational and Environmental Health because they surpassed the deadline by 30 minutes and 3 hours, respectively. The WTO did not disclose who submitted applications or whether any were accepted. (All were rejected.)

Comments on the decision from member nations were accepted until December 1. In its submission, the United States ridiculed the Panel for failing to consider toxicity when comparing asbestos to “like products.” The United States characterized the Panel's position on “like products” as follows: “In deciding whether two beverages would be ‘like,’ it would be irrelevant whether one of them was a poison.” Furthermore, the United States argued that the dispute should have been resolved under the Agreement on Technical Barriers to Trade (TBT), which permits regulation to protect human health and safety. If the dispute had been handled under the TBT, the burden of proof would have been on Canada to show that “controlled use” of asbestos is achievable (as it was, France had to prove the opposite). The assignment of the burden of proof in this case set a disturbing precedent for cases involving banned or hazardous products.

The Appellate Body upheld France's fight to ban asbestos to protect human health. However, it did not concur with the Panel on other issues. The Appellate Body declared that (under WTO rules) toxicity is indeed a valid criterion in the evaluation of “like products” and therefore Canada had not established that all fibrous substitutes are “like” asbestos. The Appellate Body also agreed with the United States that the case fell within the jurisdiction of the TBT, but stated that the record did not support an examination of how the TBT could have been applied.

WEAKNESSES IN THE PROCESS

The WTO dispute resolution process bestows expert status on individuals too freely. This tendency encourages selected scientists to testify beyond the limits of their true expertise. The process accepts “experts” as authorities on *all* issues surrounding a case, which is inimical to the development of a reliable record of scientific information. In the asbestos case, this flaw resulted in a lack of sound evidence on the full range of technological alternatives to asbestos products. Moreover, the WTO does not explicitly require experts to disclose relevant relationships with business interests. The disclosure form is very direct in asking about positions taken against business interests, but vague in asking about positions taken in support of them. The fact that disclosure forms are sent to experts after they are selected defeats the very purpose of disclosure (i.e., to select unbiased experts).

WTO rules force resolution of even the most complex problems within one year (with an additional six months if the decision is appealed). Though it may appear that the Panel members serve as judges, the real decision-making occurs within the WTO Secretariat. Most WTO officials are political scientists, economists, or lawyers. There are no scientists on staff. Lacking as they are in technical expertise, WTO employees may be susceptible to influence from business interests. There do not appear to be rules prohibiting corporations from having contact with WTO staff while a case is pending. Corporations have much at stake in WTO cases and can deploy extensive expertise in science, engineering, medicine, and law to protect their interests and influence others.

Panel members are selected from lists of candidates submitted primarily by the EC and the United States. (In the asbestos case, many candidates were rejected by the parties.) Panel members are generally trade diplomats or retired trade officials. Few of them have legal backgrounds, much less judicial experience. Many are too busy with other pursuits to read all of the technical documents submitted in these cases. In the asbestos case, the questions submitted to the scientists—and the scientists themselves—were almost certainly selected by the WTO Secretariat, not the Panel. (One member of the Panel had difficulty just staying awake during the hearings.) The EC has proposed abolishing the Panel system in favor of 25 full-time judges (the Appellate Body already operates this way). This recommendation has not been accepted, due largely to opposition from the United States.

JUDGING THE WTO

This case was a resounding victory in the global struggle over asbestos. The WTO rejected the argument that there is a safe level of exposure to asbestos and that “controlled use” of asbestos is feasible in France. The WTO affirmed a country’s right to ban a deadly substance as a means of absolute protection from it. The decision sends a strong message that commercial use of asbestos should be ended

in all countries, especially those where “controlled use” would be even more implausible than in France. Canada has no justification for continuing to mine asbestos for export. The government should pension off the miners (numbering no more than 2,000) and close the asbestos mines—as recommended by the *Globe and Mail* newspaper when it first reported the Panel’s decision.

While the decision in this case was favorable to public health, the process itself bears little resemblance to judicial processes in any developed country. It is highly unlikely that Panel members would ever split on a decision and publicly express conflicting opinions. The role of the Panel is largely ceremonial; the real players operate behind the closed doors of the WTO. The lack of transparency is intended to obscure this fact—so that the world will become accustomed to the loss of national sovereignty without realizing what was lost in the trade. National laws and regulations, which may have taken many years to develop, can be challenged in a WTO process that is far less rigorous than the legislative processes of many countries. It is ironic that laws developed in open societies with input from all sectors can now be penalized and even overturned in a closed process where only governments have the standing to be heard. Only the greatest powers on earth, the global corporations, could have induced the governments of the world to discard their national sovereignty and accept this system of governance so ruled by commerce. Seen up close, it is fundamentally flawed and constitutes a tremendous threat to the well-being of people around the world.

(Laurie Kazan-Allen’s perspective on the same WTO case, “Asbestos Poisons World Trade Organization Atmosphere,” was published in an earlier issue of the *Journal [Int. J. Health Serv. 31: 481–493, 2001].*)

Note — This article is adapted from a chapter in the forthcoming book *Balancing World Trade with Social Welfare*, working title, to be published by the International Labor Organization.

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