

The vital issues in the WTO asbestos dispute

By Sam Zia-Zarifi*

The TUTB asked Sam Zia-Zarifi and Mary Footer of the Erasmus University in Rotterdam to analyse the row over asbestos between Canada and France in the World Trade Organization. Their report¹ will help inform the debate on the problems of expanding the WTO's reach into other areas, especially labour/social policy. The issues raised by this dispute - the precautionary principle, health risk assessments, the choice of experts on the panel, the standing of civil society, especially the unions, to put over their views on the marketing of products mainly affecting workers' health - are indicative of the forthcoming debates and the bounds which need setting to the sphere of activity of organizations like the WTO.

In this article, Sam Zia-Zarifi outlines the big issues at stake in this dispute, which marks another, if not the final, chapter in the long-running saga which ended with a ban on the marketing of asbestos in Europe, which the TUTB Newsletter has tracked every step of the way (see box p. 5).

The decision of the WTO panel was initially scheduled for November 1999, but was put back first to March, and now July 2000.

The growing importance of the World Trade Organization in the process of economic globalization can be seen from the fact that the fate of Europe's legislation to ban all asbestos use is now in the hands of WTO trade lawyers and diplomats. Given the pace of economic globalization, it is imperative for civil society, and especially labour unions whose interests are most closely bound to the process of economic globalization, to recognize the WTO's new role and to engage the organization in a constructive but critical dialogue.

Canada's complaint

Canada initiated a challenge² in the WTO dispute settlement body (DSB) against France's decree banning asbestos from its markets. Canada argues that the French Decree hurts Canada's production and export of asbestos and therefore violates the WTO's trade liberalization rules. This dispute (in which the European Communities represent France³) represents the culmination of a longstanding effort by Canada to maintain its asbestos mining industry in the face of growing global regulation. The adoption of a total ban on asbestos use by France and the EC threatens not just Canada's entry into these markets, but also, and perhaps more importantly, Canada's ability to export asbestos to developing countries that might follow the lead of their more industrialized peers.

If the WTO agrees with Canada, it has the authority to ask the EC to repeal the French Decree or, should the EC fail to do so, to authorize import fines by Canada on European exports to the extent of financial

injury suffered by Canadian asbestos exporters. It should be noted, however, that a WTO decision against the French Decree does not automatically cover asbestos bans enacted by other European countries or the EC itself. Therefore, it is highly unlikely that the EC will overturn its asbestos ban even if it loses this dispute; rather, as indicated by past European response to contrary WTO decisions on matters of controversial social policy, it is more likely that the EC will simply accept the imposition of relatively minor import tariffs on its products. Should Canada lose its challenge, it is highly unlikely that it will challenge other asbestos bans, even though it is technically able to do so under the WTO rules.

An early analysis of the case, based on the material available at this time, suggests that Canada will most likely lose its challenge. Nevertheless, the Asbestos dispute is significant not just because it affects the long struggle against the dangers of asbestos, but because it 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.

The "scientific" basis of risk assessment

Canada's challenge relies mainly on a particular subset of the WTO Agreements known as the Technical Barriers to Trade Agreement. In order to comply with the TBT's requirements, Members must engage in a risk management exercise, whereby they:

* Legal expert, GLODIS Institute Department of International Law, Erasmus University, Rotterdam

¹ To be published by the TUTB later this year.

² On 28 May 1998.

³ The European Communities represent individual Member States in WTO disputes because they have exclusive jurisdiction in international trade relations.

- scientifically assess the risks posed to achieving a legitimate objective (such as national security or human health) by a particular imported product;
- consider the availability of alternative methods of regulating the product's risk, including those set out in international guidelines; and
- objectively base their technical regulation on this assessment.

Thus, one of the central issues of inquiry under the TBT Agreement is the scientific basis of the technical regulation in dispute. This elevation of scientific principles is intended to minimize the role of political considerations in establishing regulations that may inhibit international trade by limiting the choices available to policy makers to those established through scientific assessment alone. But the WTO dispute settlement system was designed to address questions of international economic law and diplomacy, and it is not well-suited to dealing with issues implicating significant social and scientific problems.

To help explain the scientific basis of the technical regulation in dispute, the panels hearing disputes may rely on a group of 4 to 6 experts selected in consultation with the parties. The experts are intended to clarify the scientific basis of the technical regulation at issue. These experts are drawn from a list prepared by relevant international organization, the parties, and the WTO Secretariat. While there are some procedural safeguards for assuring the impartiality of the experts and their testimony, they still fall far short of satisfying legal standards of due process.

Then the WTO must determine that the challenged technical regulation is objectively and rationally based on a scientific assessment of the risks from a certain product. This evaluation must also consider economic factors and the availability of alternative, less trade-restrictive measures. These concepts have not yet been fully fleshed out, and whether the WTO interprets these concepts narrowly or broadly will decide the extent and impact of the TBT Agreement's impact on the ability of Members to protect their citizens.

First challenge under the TBT

The TBT has never been the subject of WTO dispute settlement. If the WTO's analysis of this first dispute under the TBT Agreement follows previous analogous disputes, the central question in this dispute will be the quality of the risk assessment conducted

by France before enacting its Decree. If the WTO finds that France properly assessed the probability of the risk caused by controlled use of asbestos and its Decree is rationally based on this assessment, then it is highly likely that the French Decree will survive Canada's challenge. Informal information from the process indicates that the four experts used to help the WTO judge the French Decree all agreed that "controlled use" of asbestos was not a realistic option and that the existing science supported totally banning the use of asbestos. The panel is due to publish its decision in July.

Squaring away trade liberalisation and national sovereignty on health protection

But the Asbestos dispute further implicates some very important nonscientific, political and trade policy issues, which also indicate that the WTO is likely to reject Canada's challenge. The WTO has tried in recent disputes to respond to public criticism about the WTO's intrusiveness into areas of social policy by supporting the right of Members to protect their citizens and their environment. A decision against Canada in the present dispute would allow the WTO to articulate its support for the sovereignty of its Members at fairly minimal cost to the principles of international trade liberalization. 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. Since this dispute is the first heard under the TBT Agreement, a decision against Canada allows the WTO to establish this Agreement as a serious instrument of international trade liberalization without casting it as another source of public criticism of the process of economic globalization.

The WTO's agenda reflects the wishes of its Members to surrender part of their sovereignty in exchange for facilitating international trade, while maintaining their sovereign ability to discharge their primary responsibility of protecting their citizens' well-being. It is now clear that the WTO's rules at times tilt this balance unduly toward trade and away from Members' concerns for the well-being of their citizens. This substantive bias is strengthened by the institutional bias of the WTO (and in particular, its dispute settlement body), whose functionaries are drawn primarily from the world of trade lawyers and diplomats. As a result of this imbalance, the WTO as it currently functions is at times incapable of adequately protecting the ability of its Members to

An article by Laurent Vogel "The WTO asbestos dispute: workplace health governed by trade rules?" setting the asbestos dispute in context can also be found on our Internet site (and will be published in French, in *L'année sociale* later this year, and in English in *European Trade Union Yearbook 1999*, ETUI, Brussels).
<http://www.etuc.org/tutb/en/tutb-info1.html>

vouchsafe their citizens' lives and their environment in the face of economic globalization.

This is not to accuse the WTO of conspiring against workers and their safety. It is simply that the WTO was designed by its Members to liberalize international trade. However, it would be incorrect to imagine that the WTO is completely close to other interests. Rather, the existing (perceived) isolation of the WTO from various sectors of civil society represents at least in part a failure of these sectors to engage the WTO. The Asbestos dispute, regardless of its outcome, should alert labour unions and other segments of civil society to the growing importance of the WTO, and the increasing urgency of assuring that the WTO assumes a more balanced approach that supports human health above mere trade interests. ■

Internet sites

WTO : www.wto.org

ICFTU : www.icftu.org/index.html

French Ministry of Labour, special page on asbestos :

<http://www.travail.gouv.fr/actualites/sante-f.html>

Articles published in past TUTB Newsletters:

- *Asbestos ban: towards a European consensus (I)*, by Karola Grodzki, No 7, December 1997
- *Asbestos ban in France: too late for many*, by Jean Claude Zerbib, No 4, November 1996
- *Asbestos and substitute fibres: international trade unions demand ratification of ILO Convention No. 162*, No 7, December 1997
- *ILO Convention No 162: its impact on Spain*, No 7, December 1997
- *Asbestos ban: towards a European consensus (II)*, by Karola Grodzki, No 9, June 1998
- *Asbestos ban: towards a European consensus (III). Asbestos-free Europe next stop?*, by Karola Grodzki, No 10, December 1998
- *ETUC Resolution on a Europe-wide ban on asbestos*, No 10, December 1998
- *Eternit and Saint-Gobain in Brazil*, No 10, December 1998
- *Asbestos ban: towards a European consensus (IV). Final page turned in an epic tale?*, by Karola Grodzki, No 11-12, June 1999

All these articles are available on our Internet site : <http://www.etuc.org/tutb/en/newsletter1.html>

Brazil moves towards an asbestos ban

Brazil is one of the world's main asbestos producers. But Brazilian trade unions, environmental campaigners and asbestos victim support groups have long been fighting to get it outlawed. Their pleas have long been stonewalled by President F.H. Cardoso's government's support for asbestos multinationals. Hence Brazil's backing for Canada's WTO complaint against France's asbestos ban.

Combined labour and public action seems finally to be turning the tide, however. Environment Minister Mr José Sarney spoke out for an asbestos ban in July last year. In April 2000, major progress was achieved when the federal government's advisory body, the National Environment Council (CONAMA), threw its weight behind an asbestos ban. Industry employers' organizations are now resigned to the

inevitable. They have given in on the principle, but are holding out for an eight year adjustment period. The Environment Minister is backing the CONAMA's majority view that an asbestos ban should be in force by 1 January 2005 at the latest (also the European Union's planned date). The new legislation should be on the statute books before year-end. The jury is still out on the Brazilian government's attitude in the WTO dispute. Will it stick by Canada's complaint while gearing up to impose its own ban ?

Sources : Estadão de São Paulo, 13 and 17 April 2000; Fernanda Giannasi (e-mail : giannasi@telnet.com.br)
<http://www.estado.com.br/editorias/2000/04/13/ger512.html>