Healthy Result, Toxic Logic

On 18 September 2000 the World Trade Organisation (WTO) released a preliminary judgement upholding a French ban on the import of chrysotile (“white”) asbestos. The ban, which was challenged by Canada as violating global free trade rules, was designed to protect French workers and consumers from this highly toxic material. Banned in many industrialised countries, asbestos is still used, particularly in developing countries, as insulation and a fire retardant in construction and manufacturing materials. Canada, concerned that its remaining markets for asbestos may impose similar bans, has a maximum of 60 days to decide whether to appeal the ruling.

The WTO Panel’s ruling will be welcomed as the first health-based trade ban to be upheld by the Geneva-based trade body. However, the reasoning behind the result sets a dangerous precedent, and reveals the way the WTO’s free-trade obsessed “judges” can undermine governments’ efforts to protect their citizens from dangerous products. The Panel cleared the ban only after initially finding that the French trade restrictions violated the WTO’s basic rules that require all imported products to be treated fairly. France was then required to justify its “violation” through an exception to the WTO rules, based on the protection of public health.

Trade First. Ask Questions Later

Following the Panel’s toxic logic isn’t easy. It is clear that WTO rules prohibit its member governments from treating imported products less favourably than “like” products that have been produced domestically. (GATT Article III:4) It is also clear that the French ban was “country-neutral”, prohibiting all imports and sales of asbestos and asbestos-containing products, regardless of their origin. The Panel, nonetheless, found that the ban discriminated against imported products because France had not also banned the sale of domestically produced products used for similar purposes.

In other words, the Panel interpreted basic WTO rules as prohibiting France from singling out asbestos for its highly toxic properties. Imported concrete containing carcinogenic asbestos, according to the Panel, is “like” domestically produced concrete containing non-toxic cellulose, and to treat them differently violates...
Canada’s right to access French markets. The burden then shifted to France to prove that it was entitled to an exception to WTO rules in order to protect human health (GATT Article XX(b)). In the face of the overwhelming evidence of asbestos toxicity, an exception was allowed and the ban upheld. In other words, once the principle of free trade was secured, the public health was left to bear the burden of proof.

The Power of “Precedent”

Although WTO Panel findings have no formal legal precedent – they will be binding only on Canada and France – in practice they have had a great influence on the reasoning and rulings of later panels. If the same reasoning is applied to future disputes, it may prevent governments from distinguishing between toxic and non-toxic products on the basis that they have the same end-uses. In circumstances where evidence of the threat to public health is less obvious than is the case with asbestos, a trade-biased panel may deny the importing government an exception. This approach will endanger democratic choices in important areas of social, environmental or cultural policies.

Need for a Breath of Fresh Air

The asbestos case effectively demonstrates the limits of the WTO’s dispute resolution system. The current panel procedure is incapable of dealing with cases involving complex linkages between trade, science, and human health. Specifically, the asbestos case involved a series of highly technical scientific questions that trade experts are not suited to answer. The Panel would have needed to address issues such as the toxicity of various types of asbestos, the availability of safe alternatives and the adequacy of control procedures for the handling of asbestos. Although the WTO allows panels to request the assistance of technical experts or expert review groups, these proceedings are conducted behind closed doors.

In the aftermath of Seattle, civil society will not accept an inaccessible panel of trade experts deciding in secret whether or not domestic policy measures to protect human health are compatible with international economic obligations. Rather, any scrutiny to which national policy measures are submitted must be fully open and transparent, allowing for both the provision of input to and the free flow of information from the proceedings.

The European Community, which argued the case on behalf of France, has signalled it is happy with the result, and will not appeal the reasoning. Unless Canada appeals, the Panel’s reasoning will not be reviewed by the “quality control” system of the WTO’s Appellate Body of legal experts.

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