The long and winding road to an asbestos free workplace

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The aim is to document, with a wide range of contributions written by outstanding experts, that asbestos is still with us and that there is no reason to lean back. Because this is exactly what has happened in the last decade.

The EU-wide ban is not the end of a hazardous story; it is one of the necessary steps to protect workers and citizens against the fatal consequences of the use of a mineral fibre that started as the eternal, global insulation champion.

The ban needs to be complemented with pro-active inspection, identification and mapping of contamination. Training and qualification are decisive steps for a controlled and responsible phasing out of asbestos containing products. In some countries victims still have to follow complicated and dismissive procedures on their way to find justice. And, last but not least, asbestos is still carried around the globe.
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Contents

Preface and introduction
Stephen Hughes and Jan Cremers ......................................................... 4

Part I: The fight against the use of asbestos

The long and winding legislative road
Jan Cremers ......................................................................................... 9

Workers against asbestos – past, present, future
Rolf Gehring ....................................................................................... 21

A global industrial success story – and health disaster
Laurent Vogel ....................................................................................... 37

Part II: The free trade of construction products and workers’ health

The end of Canada’s role as the leading global advocate for the production and use of asbestos: is an international ban now possible?
John Calvert ......................................................................................... 59

Trade unions and the Federal Environment Agency – instigators of an asbestos ban in Germany
Gerd Albracht ....................................................................................... 77

Switzerland, heartland of Eternit
Maria Roselli ........................................................................................ 89

A successful campaign to ban asbestos in Switzerland in the 1980s
Interview with Vasco Pedrina by Dario Mordasini .................................. 97

Asbestos – still a killer
Fiona Murie .......................................................................................... 101

Part III: Perspectives and future challenges

New century, new dynamics in the ban asbestos struggle
Laurie Kazan-Allen ............................................................................. 119

The EFBWW’s asbestos campaign: state of play and prospects
Rolf Gehring ......................................................................................... 133

The long legislative road to an asbestos ban
Interview with Stephen Hughes by Jan Cremers .................................... 143

Appendix: Report on asbestos related occupational health threats and prospects for abolishing all existing asbestos 2012/2065(INI) ........................................... 147
The end of Canada’s role as the leading global advocate for the production and use of asbestos: Is an international ban now possible?

John Calvert

Introduction

The year 2012 will go down in history as a major turning point in the global fight against asbestos. On 5 September, the day after its election, the new Quebec government fulfilled a key campaign promise. It revoked the previous provincial government’s offer to finance re-opening the Jeffrey mine in Asbestos Quebec. The underground mine would have had the capacity to produce approximately 250,000 tonnes of chrysotile asbestos, annually, for at least 25 years. Faced with newly elected Parti Quebecois (PQ) Premier Pauline Maurois’ decisive action, the Canadian federal government, the industry’s most vocal international champion, reluctantly announced later that month that it would end its policy of promoting asbestos. Quebec’s decision meant that Canada would no longer be producing and exporting the dangerous mineral.1 Canada also announced that it would finally be willing to

1 However, the Conservative federal government still tried to ‘spin’ its policy reversal by alleging – wrongly – that the Quebec government had unilaterally closed a viable industry, costing > p. 55
include chrysotile under the ‘Prior Informed Consent’ list in Annex III of the Rotterdam Convention. As the only country that opposed labelling asbestos as a hazardous material at the last Convention meeting, this change means that the mineral may be added to the Convention’s hazardous list in 2013, if no other country exercises a veto. Earlier the same year, the Quebec-based Chrysotile Institute, which had received a total of $20 million in subsidies from the Canadian government since 1984, indicated that it was closing its doors permanently (Kazan-Allen 2012). Cumulatively, these decisions will end Canada’s reprehensible role as the only developed country to promote continued production and use of the ‘killer dust’ which the WHO estimates is responsible for an annual death toll of 107,000 and which other researchers have projected will eventually kill between 5 and 10 million people (WHO 2011, La Dou 2004).

While Canada’s changed position represents a major step towards a global ban on mining asbestos, it is not clear how quickly this decision will lead to a significant reduction in the 2 million tons of asbestos produced and used, annually (Verta 2012). The legacy of past industry lobbying, much of it under Canada’s leadership, has borne bitter fruit in the industrial policies of several countries – notably Russia, Kazakhstan, China and Brazil – that continue to mine and manufacture the deadly mineral, as well as others, notably India, Thailand, Vietnam, Indonesia and Iran (Verta 2012, 2009). The strategies used by the restructured global industry today are based on the approach pioneered by its earlier corporate owners and, subsequently, by Canada as its international champion. That the countries that continue to mine and use it will eventually realize the awful health consequences of their policies is a given, in light of the overwhelming medical and scientific evidence now available (Linton et al. 2012). But this does not mean that they will do so in the immediate future. It may be many years before a global ban is finally achieved. Like a zombie that refuses to die, the industry has resisted all efforts to drive a stake through its heart. It has found new champions to replace the corporations that have abandoned production and use in the developed world as a result of lawsuits, bankruptcies and government bans. The fundamental question is whether the industry will be able to mount an effective rearguard action against international pressure to ban the mineral, in the absence of support from the Canadian government. The answer lies, partly, with the (Russian) Chrysotile Association which, as the leading spokesperson for the largest global exporter, has taken over the fight to maintain asbestos production and use,

residents of Asbestos their jobs and the community its economic future (Ruff, ‘The Belated Demise of Canada’s Asbestos Industry’ Toronto Star, Sept 22, 2012). Far from recognizing that this reprehensible chapter had finally come to an end, Prime Minister Stephen Harper and his key federal Cabinet Minister from Quebec, Christian Paradis, deliberately portrayed the policy of Quebec’s newly elected provincial government as demonstrating an irresponsible lack of concern about the province’s employment and economic development needs.

2 Despite this major, if reluctantly taken, step forward, the government continues to maintain that asbestos can be ‘safely’ used. Moreover, it has still not taken measures to ban it within Canada or to bar imports of certain items such as brake pads that contain asbestos (Ruff, Toronto Star Sept 22, 2012).
Internationally (Kazan-Allen, Nov. 11, 2012). It also lies with the domestic policies of the world’s second largest producer and consumer, China, as well as the measures that importing countries, primarily in Asia, adopt to protect the health of their populations.

However, a global ban is only part of the challenge. Asbestos is widely distributed in the environment. As early as 1960 the industry boasted that over 3,000 manufactured products contained asbestos. Over the past 130 years the industry has produced 198 Mt of asbestos (Virta 2006, 2012). Tens of millions of tons of asbestos litter the world’s communities. Its most obvious legacy is the vicinity of mines and asbestos manufacturing facilities – both former and current. However, its widespread use, particularly in cement-based products such as asbestos reinforced concrete, roof tiles, water and sewer pipes, drywall and a host of other fire retardant and reinforcing applications means it is now embedded in much of our infrastructure, including roads, power plants, shipyards, industrial facilities, office buildings and many other parts of our built environment. While cement based products now account for approximately 85-90% of current asbestos use, in the past it was used in many other applications where its insulating properties, heat resistance and strength as a reinforcing agent made it an attractive – and relatively inexpensive – product. When the World Trade Centre towers collapsed an estimated 1,000 tonnes of the mineral were spread over New York City (McCulloch and Tweedale 2008). Many of the products in which it has been embedded will deteriorate over time, freeing the fibres to contaminate homes, offices, schools, factories and many other parts of our environment. This hazardous legacy will continue to pose a major threat to public health and a major occupational risk to those who continue to be exposed to it at the workplace (ILO 2006, WHO 2011).

To understand why it is still so difficult to implement a global asbestos ban, it is necessary to trace the history of the industry and its efforts to promote the mineral. This has been extensively documented by scholars and anti-asbestos campaigners (Selikoff, Castleman, McCullough, Tweedale, Kazan-Allen, Ruff, et al.). The focus of this chapter is Canada’s unique – and reprehensible – role in this process, including its efforts to block international initiatives to ban the mineral. It will assess the current landscape in which a reconfigured industry continues to promote the mineral to the developing world and examine how the global adoption of neoliberal policies and, particularly, trade and investment agreements may influence the outcome of the international effort to ban asbestos by providing the industry with new legal mechanisms to protect its interests.

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1 World asbestos production fell from a peak of 4.8 Mt in 1977, to 1.9 Mt in 1999 (Virta 2006, Table 4). However, since then it plateaued at an average of just over 2 million Mt over the following decade, with the estimate for 2011 being 2.03 Mt (Virta 2011, Table 7). Between 2007 and 2011, Russia, the world’s largest producer, has maintained a steady output level, averaging just over 1 million tonnes, annually, while Kazakhstan averaged about 240,000 in the same period, and China just over 400,000, annually (Virta 2012b, Table 7). Brazil increased its asbestos production by 52,000 Mt during this period. It is now the third largest producer with an annual output of just over 300,000 Mt in 2011 and has become a significant exporter.
Canada’s problematic legacy: the industry’s champion

While asbestos has been mined in a number of Canadian provinces over the past century, Quebec has been the core of the industry throughout its history. Significant volumes of chrysotile were first discovered in 1876 at Thetford Mines, Quebec. The first open pit mine, lac d’Amiante, was started there two years later (the site is currently owned by LAB Chrysotile, Inc.). This deposit, and others subsequently found in the area, were among the earliest and, arguably, most significant discoveries of the mineral in modern times. Another major deposit was discovered nearby, in what became the future town of Asbestos. Initially developed by local investors, the Jeffrey mine was acquired by US-based Johns-Manville in 1918. During the following 60 years, Johns-Manville was a central player in Quebec asbestos policies. By 1924, mines in the Asbestos region were producing 162,000 Mt of the mineral, annually. This represented 84% of world output. In 1950, Canada still accounted for 61% of world production and, even in 1970, for 43% of a much larger global total. In the 1960s and 1970s, the industry prospered and the region hosted 10 mining companies (Kuyek 2003). In total, Canada produced 61.2 Mt between 1900 and 2003 of which 77% was exported, primarily to the US. Production peaked in 1973 at 1.7 million Mt. (Verta 2006).

Almost from the beginning the industry was foreign owned and export oriented. Through most of the twentieth century, production was dominated by major US corporations, the largest of which was Johns-Manville, although British owned, Turner and Newall became a significant investor through its acquisition of the Bell mines in the Asbestos region. Proximity to the US, combined with low production costs, made Quebec mining investments attractive to an industry focused on serving an expanding US market. Canada was the most important supplier of the US throughout the 20th century, accounting for 94% of US imports between 1910 and 2003 (Verta 2006). However, shipments to the US declined after the mid-1970s peak, as American companies abandoned its use to avoid the growing cost of lawsuits by victims. To compensate for this, Quebec based producers, with the assistance of the Canadian government, successfully developed new markets, primarily in the third world. In 2011, its last year of full operation, Canada produced 150,000 tonnes of asbestos, 90% of which was shipped to developing countries, primarily in Asia (CBC Sept. 14, 2012).

In 1949 a transformative event occurred that had a profound effect both on the industry and on Quebec politics: the bitter asbestos strike against Johns-Manville and the other major asbestos companies. While the unions wanted better wages and benefits, they also demanded improved health and safety measures, including effective dust control. There were numerous ugly clashes between strikers, strike

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4 British Columbia had a major mine in Cassiar with a tragic legacy of asbestos diseases among those working or living there.

5 It carried out both surface and some underground mining until 1959. Underground mining ceased, as a result of the opening of a larger open pit operation. In the first decade of the twentieth century, the owners spent large sums developing a new underground mine, which was to become the major supply source. But, project costs escalated and even with significant subsidies from the provincial government, the company ended up going into bankruptcy. The Quebec government’s offer of $58 million was to facilitate the re-opening of this mine.
breakers and police. Hundreds of workers were arrested. After four months, the strikers were forced back to work with little to show for their sacrifices. However, the strike precipitated fundamental changes in the political culture of Quebec, contributing significantly to the ethos of the ‘Quiet Revolution’ that swept the province in the 1960s, and which ushered in a number of significant social democratic reforms as part of what was viewed at the time as bringing the province into the twentieth century. It was also the subject of a major book sympathetic to the workers, *The Asbestos Strike*, by Pierre Trudeau, who later became Prime Minister of Canada. The strike gave rise to the demand that the industry be nationalized, which it was, in part, 30 years later (although Johns-Manville remained in private hands and was sold to J.M. Asbestos in 1983, when the US parent company was forced into bankruptcy).

The legacy of the asbestos strike and the subsequent partial nationalization of the industry profoundly shaped attitudes within the Quebec population, its government and its labour leaders. Ironically – and tragically – asbestos became a source of regional pride, in part because of the heroic labour struggle. As a result, it was an industry that was extremely difficult to criticize. During the 1960s and 1970s it was also a booming industry, as production expanded to meet a growing US market, becoming the dominant employer in a region that otherwise had few economic advantages (Sentès 2009). The symbolism of the industry as a component of Quebec’s identity fostered an unholy alliance between the industry, the government and the unions. The United Steel Workers of America (USWA), an affiliate of the Quebec Federation of Labour (QFL), and the Confederation des Syndicats Nationaux (CSN), an independent Quebec based union federation, came to play a significant role in the politics of asbestos both in Quebec and, in the case of the USWA, in Canada as well. Competition for members between the two trade unions and fear of being labelled as failing to support the iconic industry, created a situation where continued union support for asbestos symbolized support for Quebec itself.

This dynamic was strengthened by the personal involvement in the asbestos industry of one of Quebec’s most prominent labour leaders, Clement Godbout. Director of the Quebec region of the USWA and, subsequently, head of the Quebec Federation of Labour (QFL), Godbout became a leading spokesperson for Quebec’s asbestos industry and a long serving president of the Asbestos Institute (Calvert 2010, Kazan-Allen 2012). Under his leadership, Quebec mining unions engaged in a relentless effort to prevent other unions, such as those in construction and transportation, both in Canada and internationally, from achieving a ban on asbestos production and use. The QFL’s support for the industry had national repercussions as well. The Canadian Labour Congress (CLC), which included by far the largest number of unionized workers outside Quebec, was reluctant to take a position on banning asbestos because it feared that its Quebec unions might disaffiliate. At a number of CLC national conventions from the 1980s onwards, resolutions submitted by its affiliates outside Quebec were kept off the agenda because the QFL threatened to walk out if they were passed. Labour’s position only changed recently, in part because within Quebec, unions such as the CSN, changed their position and because pressure from other unions such as the building trades, coupled with the overwhelming medical evidence, resulted in the CLC deciding to support an eventual ban.
The symbolism attached to the Quebec asbestos industry made it possible for the companies, with labour's endorsement, to lobby the Quebec and Canadian governments to provide financial assistance and an industry-friendly regulatory and policy environment. Until the PQ government cancelled the $58 million loan guarantee, both the provincial Liberals and the PQ had repeatedly endorsed asbestos mining, neither being willing to be seen as abandoning an industry with such symbolic importance in the province. Support for the industry became a way for both the federal Conservative Party and the federal Liberal Party to attract votes in the Asbestos region. Both were anxious to avoid being challenged by the Quebec government on the issue.

One demand of the 1949 asbestos strike was nationalization of the industry so that the profits of the resource could be reaped by the Quebec people, rather than foreign corporations. The PQ provincial government of Rene Levesque chose to do this in the late 1970s. However, this decision came just at the time that the US market was beginning to collapse due to the financial impact of worker compensation lawsuits. Sales to the US fell from 543,233 Mt in 1978, the year of nationalization, to 79,690 Mt a decade later and continued to fall rapidly thereafter (Verta 2006). The Quebec government, which had anticipated the new public corporation being a source of revenue – the year of nationalization over 1.4 million Mt was produced – found the opposite, as sales to the US and Europe plummeted in the following years. It concluded that if the industry were to be viable again, it would have to find new markets. In response to Quebec pressure, the Federal Government embarked on a major campaign to sell asbestos to new customers. Until 2012, it worked closely with the Chrysotile Institute to promote the use of Canadian asbestos in developing countries. Using its embassy contacts, it hosted investors, potential customers, labour representatives and government officials at meetings both in Quebec and in their own countries, sharing extensive 'educational' material with them as well as technical and operational information about how to incorporate asbestos into various products. It even conditioned some of its foreign aid to the purchase of Canadian asbestos (McCulloch and Tweedale 2008, Sentes 2009, Kazan-Allen 2012). It also used its influence to dissuade governments, such as Korea, from imposing bans on importing and manufacturing chrysotile. In one particularly reprehensible episode, it wrote the government of Brazil demanding that a civil servant in its Ministry of Labour involved in an anti-asbestos campaign, be reassigned (Kazan-Allen 2003, McCulloch and Tweedale 2008).

In 1984, the Quebec and Canadian governments agreed to provide financial support for a new industry-based lobbying group: the Asbestos Institute (subsequently renamed the Chrysotile Institute). The federal contribution amounted to $20 million by 2007. Total government subsidies, including federal, provincial and local governments to the Institute amounted to $43 million (McCulloch and Tweedale 2008).

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6 In response to a Freedom of Information (FOI) request by David R. Boyd filed on Oct. 30 2006, entitled 'Environmental Petition No. 179, to the Commissioner of the Environment and Sustainable Development Canada's policies regarding chrysotile asbestos', the contributions to the Chrysotile Institute between 1984 and 2007 were released on March 15, 2007. The FOI response listed also the countries and the amounts exported to each for the years 2001 to 2005.
2008). The fact that asbestos remains in widespread use today is in no small measure due to the efforts of this organisation and its backing by Canada and Quebec. The Asbestos Institute played a key role in promoting Canadian asbestos exports and mobilizing the international asbestos industry to fight for continued production and use of the mineral. The Institute organized international medical conferences, such as one at Harvard in the early 1990s, which showcased researchers who questioned the evidence that chrysotile was responsible for the large number of cancers among asbestos workers (McCulloch and Tweedale 2008). The last major conference was held in Montreal in 2006. According to the Chrysotile Institute website conference participants came from India, Russia, the UK, Switzerland, the USA, Mexico and Brazil. Until its closure in 2012, the Institute maintained that the mineral could be handled safely and that a ban was completely inappropriate (Chrysotile Institute website, Nov. 19, 2012). The Institute, along with the industry, quietly funded a number of researchers, such as Professor John Corbett MacDonald at McGill University, whose publications minimized the hazards of chrysotile and promoted the view that under the right circumstances it could be handled safely. The industry frequently pointed to this and other research it had funded to try to discredit critics of asbestos, such as Irving Selikoff. It used this research to challenge the claims of asbestos workers attempting to sue for damages. It also promoted the concept of a safe ‘threshold’ of exposure, which created the illusion that exposure below this arbitrary amount of dust posed virtually no threat to workers’ health. Many of the arguments and strategies currently utilized by Russian asbestos producers and manufacturers, in support of continuation of the industry, were developed as part of the Institute’s efforts to maintain Quebec production.

Another function of the Institute was to reassure workers that their exposure to the mineral would not trigger asbestos related diseases. Through ‘educational’ material, conferences and lectures by pro-asbestos researchers, as well as concealing the evidence of harm, it promoted the myth of ‘safe use.’ As the Canadian industry’s markets declined and production fell during the first decade of the 21st century, maintaining workers’ support became a challenge. Mine closures, layoffs and cuts to wages and benefits threatened to undermine worker and union support. However, given the lack of other options for a numerically diminishing – and aging – workforce in an economically depressed area of Quebec, the Institute’s efforts to maintain Canadian exports enabled it to assert that it was defending worker interests. In addition, the Institute was able to portray itself as a champion of Quebec against meddling outsiders, including health advocates and unions, who did not understand the important contribution of the industry to Quebec’s economy and were, in its view, mistakenly attempting to choke off the investment needed to make the industry viable again.

7 The Macdonald findings have been questioned by a number of health researchers, most notably, Dr. David Egliman and Professor Fernand Turcott. These critics argue that he manipulated the data to get the results he wanted. McGill University asked its Research Integrity Officer, Dr Abraham Fuks, to review the evidence. Fuks’ report maintained that there had been no evidence of wrong doing by McGill or MacDonald. However, the report came under widespread criticism by health advocates who felt it did not seriously examine the evidence that had been presented to Dr. Fuks (Egliman, Turcott and Ruff, Letter, Feb. 4, 2013).
Arguably, the end of the industry came not so much as a result of good public policy and occupational health research but, rather, because its economics no longer made sense. During the first decade of the twenty-first century, production at the Jeffrey open pit mine gradually diminished, as its surface deposits were exhausted. In anticipation of this, during the late 1990s, its owners invested $125 million in the construction of a new underground mine to exploit a rich seam of the mineral with the goal of producing about 250,000 tons per year for at least 25 years. The Quebec government subsidized the initiative heavily. Unions also invested pension funds in the project. However, before the work was completed, J.M. Asbestos Ltd. ran out of funds, declared bankruptcy and mothballed the mine. The other asbestos mine in the area, owned by LAB Chrysotile, ceased production in 2011, due to a major rock slide and a labour dispute. By the end of 2011, Canada was no longer producing any significant volume of asbestos (Ruff 2012, Mittelstaedt 2012, Virta 2011).

In this context, the former Quebec Liberal government of Jean Charest decided to offer a $58 million loan to Bernard Coulombe and Baljit Singh Chadha under the condition that they raised sufficient private funds to complete the anticipated total needed of $83 million to restart the Jeffrey mine. Coulombe and Chadha formed a company, Mineral Fibre Inc. and found one investor from Thailand to join with them to top up the Government’s loan guarantee. Opponents of asbestos mining were furious that the government planned to sink such a large amount of public money – money which many thought would never be repaid – into restarting an industry that effectively had been shut down. Ban Asbestos Canada, Canadian unions outside Quebec – particularly in construction – and a wide range of medical and health organisations all protested to the Quebec government to reverse its decision. But the Liberals, headed by former Premier Jean Charest, refused to back down. They were determined to restart production and apparently unmoved by all the appeals to change their policy. During the summer of 2012, the owners hired 100 employees to begin the work. A month after they began, Charest called a provincial election. He lost and the new premier, Pauline Maurois cancelled his offer. To the surprise of many, this position was articulated by her in the middle of the election campaign and, as noted, implemented the day after her closely won election. The Federal Government of Prime Minister Stephen Harper, quickly changed its position as well, but not before attacking the new Parti Quebecois government for allegedly abandoning the interests of the Asbestos region and sacrificing the jobs of the workers in the industry. Maurois has also faced criticism from local governments, the provincial Liberal opposition, some unions and the local chamber of commerce for her decision, but has stuck with her position (Ruff 2012). There has been some speculation that one of the reasons Harper was so quick to make an announcement about his government’s U-turn on the Rotterdam Convention – which it was under no pressure to do – was that this announcement would remove one of the irritants in the negotiations with the EU over the conclusion of the Comprehensive Economic and Trade Agreement (CETA), an agreement Harper desperately wanted finalized.

As noted, the decline in asbestos sales in the 1980s resulted in a major effort to find new markets. However, the industry was also facing the problem that the adverse health effects of asbestos were becoming much more widely appreciated, globally.
Worse, from its perspective, was that some governments were contemplating banning its use entirely, sending a worrying signal to other countries that perhaps continuing to import and use asbestos was not such a good idea. This is part of the background for Canada deciding to attempt to derail a major US health policy initiative. In 1986, the Environmental Protection Agency (EPA) announced that it planned to ban all asbestos use in the US. The Quebec based Asbestos Institute wrote to the EPA demanding that the policy initiative be abandoned. It claimed that there was no scientific justification for the ban, that asbestos could be safely used and that the ban would deny the US (and other governments that might follow its example) the use of an important, indeed life-saving, material. It also argued that Canadians strongly supported asbestos use and that the proposed ban was effectively an anti-Canadian move by the EPA. The Canadian government and the Quebec industry intervened in the EPA’s hearings on the proposed ban along with pro-asbestos US interests. The process dragged on for several years and eventually ended up in the US courts. In 1991 a court struck down elements of the EPA’s proposed regulations. The agency decided not to pursue the matter further even though it might have been able to redraft its initiative to address court criticisms. Whether Canada’s intervention influenced this decision is not clear. But the fact that Canada chose to intervene in such an important US regulatory process underlines how much effort it was willing to make to defend Quebec’s industry. Although very little asbestos is currently used in US manufacturing, or in products that it imports, the US still does not have an outright ban (Sentes 2009).

Canada’s role in stopping the listing of asbestos in the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade was another of the government’s major international efforts to shore up the industry. The proposal to list asbestos as a hazardous substance was identified when the Convention was first approved in 1998. The Convention came into effect in February, 2004. Over 170 countries have signed it. As part of the Commission’s work, it established a scientific panel to examine the hazards of chrysotile for its 2006 meeting. At the meeting, the Review Committee recommended that chrysotile asbestos be listed under schedule III. This requires countries exporting the mineral to notify the countries receiving it that it is a hazardous substance (the Convention, if approved, still would not impose an outright ban on international trade in asbestos). Canada refused to accept the panel's recommendations and vetoed listing chrysotile as a hazardous substance at this meeting. Four other countries supported Canada’s position: Russia, Ukraine, India and Peru. At the 3rd and 4th meetings, listing was again proposed, but Canada and several countries continued to object. At the 5th meeting in June, 2011, Canada again anticipated that its objection would have the support of several other countries. But it found itself isolated as the others indicated they would not object. Nevertheless, Canada proceeded to cast the sole veto that stopped the listing of chrysotile. To make matters worse, the government then refused to provide any reason or rationale for its decision (Ruff 2012, Dec 23). Many of the countries participating in the meeting were extremely upset at Canada’s decision. In a somewhat unusual move, 66 of them drafted a separate declaration underlining their commitment to the expeditious listing of the mineral.
There are several possible explanations for Canada’s position during this period. Prime Minister Harper faced a federal election in the spring of 2011 and wanted to increase the number of Conservative MP’s from Quebec where his party was – and remains – poorly represented. Campaigning on a platform that included strong support for the asbestos industry was a way to attract votes. Harper’s key Quebec lieutenant, Christian Paradis, a member of the federal Parliament, represents a riding in this Quebec area, so sending a signal that his government was supporting the industry would potentially benefit his ally. It is also likely that Harper has fundamental ideological objections to the Convention. He has been very dismissive of the UN in recent years and appears not to support many of its multilateral objectives. As a strong supporter of neoliberal economic policies he rejects extensive government oversight of the economy and opposes strict environmental regulation on the grounds that it imposes excessive costs to business. In his 2012 budget he introduced legislation, now passed, that significantly weakened Canada’s environmental protection regulations, a move that was widely criticized by environmentalists across the country. Faced with Quebec’s decision to end asbestos production, Harper no longer had any major reason to continue to object to listing chrysotile in the Rotterdam Convention. And, as noted, supporting the Convention would remove an irritant in negotiations with the EU over the proposed CETA agreement. However, even if a future Rotterdam meeting lists Chrysotile, Canada will have helped delay implementation of the Convention for almost a decade, giving legitimacy to the ongoing international trade in the mineral and, perhaps, kept the door open for Russia to step in to do the same in the future.

Canada’s WTO challenge to France’s ban on asbestos

The World Trade Organisation (WTO) was officially established in 1995 as a result of the conclusion of negotiations in the Uruguay round of the General Agreement on Tariffs and Trade (GATT-1947). Its purpose is to establish a global system for regulating trade and investment, based largely on neoliberal economic principles. The WTO now has 158 members, which means that virtually every country in the world is part of its global system for regulating trade and investment. The WTO oversees 30 agreements dealing with a wide range of trade and trade related issues, including services, financial services, investment, intellectual property and government procurement. It has an effective system of enforcing the decisions it makes, primarily through the use of trade sanctions. The most well-known WTO agreements are the General Agreement on Tariffs and Trade (GATT-1994), the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) and the General Agreement on Trade in Services (GATS). It includes a number of others, two of which, along with the GATT-1994, became the focus of a major trade dispute between Canada and France involving asbestos: the Agreement on Technical Barriers to Trade and the Sanitary and Phytosanitary Agreement (WTO Dispute DS135).

Many trade and investment treaties contain specific investor-state dispute provisions (such as NAFTA’s Chapter 11) which permit an investor to go directly to a trade panel, or the International Centre for the Settlement of Investment Disputes
(ICISD), with its claim, without having to obtain permission from its own government to launch a trade challenge. Settlements can be very large and are normally based on a projection of the asset value or the future profits a company will lose as a result of a government imposing new regulations.

In 1996, France decided to ban asbestos and issued Decree 96-1133 to this effect. The major sector affected by the ban was the construction industry where asbestos products were still being extensively used. France’s decision was based on the evidence that asbestos was a major health hazard and followed bans that had already been implemented in a number of other EU countries. The decision was a response to campaigns by health advocates, victims’ groups and trade unions that asbestos was inflicting an enormous health cost on the population and was supported by the overwhelming body of medical and scientific studies – studies which had demonstrated that there was no safe exposure limit to asbestos.

France’s ban was not, at least on the face of it, discriminatory to Canadian asbestos because it banned all asbestos, regardless of country of origin. However, Canada’s asbestos producers and its government disagreed with this assessment and feared that a successful French ban would trigger similar bans by developing countries, especially in France’s former African colonies that were importing Canadian asbestos. Canada proceeded to launch a trade challenge at the WTO. It argued – in the face of all the scientific evidence to the contrary – that asbestos could be handled safely under controlled conditions and that the mineral did not pose a significant, or unacceptable, health threat to the French population. Canada claimed that the real reason France was banning asbestos was protectionist: to give the market to French firms manufacturing asbestos building substitutes using polyvinyl alcohol (PVA), cellulose and fibreglass. These firms were producing materials that could be used instead of asbestos, but which were not otherwise competitive, presumably because they were less effective, or more expensive. Hence Canada argued that the WTO should overturn France’s policy on the basis that it constituted discrimination against a legitimate Canadian product under Article III: 4 of GATT-1994.

Part of Canada’s trade challenge hinged on the concept of national treatment, which establishes the principle that countries must treat foreign produced goods in the same way as domestically produced goods. A key element of national treatment is that countries are not permitted to discriminate against ‘like products’, that is, foreign products that are basically similar to domestic products, even if they are made of different materials or through a different process, if the functions they perform are similar to those of their domestic competitors. The concept of non-discrimination against like products had been developed in the GATT to deal with the problem that governments could design regulations, or standards, in such a way as to exclude foreign goods while permitting the sale of similar domestic goods. To stop this form of protectionism, the WTO has the power to determine if such standards, or regulations, constitute a trade barrier that violates a country’s national treatment obligations and, if so, to impose trade sanctions until such regulations are repealed.

Another basis for Canada’s challenge was its view that the WTO’s Technical Barriers to Trade agreement (TBT), required countries imposing new health or
environmental regulations to demonstrate that these regulations were the ‘least restrictive’ of all the potential options. Article 2.2 of the TBT reads as follows:

‘2.2 Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.’

In Canada’s view, France had not ensured that its measure was the least trade restrictive of its options. Asbestos, it argued, could be handled safely if the appropriate regulations were in place. France should have adopted such regulations, rather than a ban, and had failed to demonstrate that such regulations were unworkable. The same issue was raised with respect to the Sanitary and Phytosanitary agreement which the Panel dealt with in a similar manner. Canada also alleged violations under two other provisions of the SPS agreement, but according to the Appellate (Review) Panel, did not elaborate substantially on its SPS objections.

Although the WTO’s initial trade panel eventually ruled in favour of France’s ban, the decision itself was very controversial. For the panel agreed that asbestos was similar to substitutes. Hence France was violating GATT by discriminating against Canadian imports. However, the panel also determined that under another provision of GATT, Article XX (b), France could justify its ban on the basis of protecting public health. It also rejected Canada’s argument that France had violated that TBT and SPS agreements on a technicality. The rationale was because the ban was universal; it did not fall within the scope of these agreements. Thus the issue of whether the ban was a violation of the least trade restrictive requirement was not one that it needed to consider further. As Howse and Tuerk have noted, the panel’s reasoning on this point was truly odd. On appeal, the original WTO panel’s decision under Article III:4 was reversed. The Appellate Panel asserted that distinctions based on health could be taken into account and that the original panel was wrong to exclude them in assessing whether products were ‘like.’ Asbestos was not the same as other substitutes due to its adverse health impacts. Thus Canada’s challenge was denied. Having done so, the Appellate Panel did not see the need to revisit the TBT and SPS component of the original decision, so the issue of whether France had adopted the least trade restrictive measure was not revisited. But the review panel did indicate that it had concerns about the original ruling on this point, even if it chose not to address them (Howse and Tuerk 2009).

The potential impact of trade agreements on future asbestos regulations

While the Canada-France WTO decision may suggest that trade agreements are not likely to be an impediment to a future global ban on mining and manufacturing asbestos, such a conclusion may be too optimistic. Even though the decision was the
right one from a public health standpoint, the fact that the WTO had the power to intervene and to adjudicate such a critical health matter raises profound concerns over the right of countries to make evidence based health decisions when these decisions conflict with international trade law. It is worrisome that a critical public health and workers’ occupational safety matter is subject to trade agreements whose purpose is to reduce barriers to trade, open markets and limit the ability of governments to interfere with the decisions of investors.

Future WTO panels are not bound by precedent, although they are obviously influenced to some extent by earlier decisions. Nevertheless, a new case with somewhat different issues, or based on other provisions of WTO agreements (or other free trade or bilateral investment agreements) could conceivably result in a different decision. Even the Canada-France asbestos decision underlined the variety of interpretations possible under the GATT, SPS and TBT agreements. The interpretation of the Appellate panel was significantly different from that of the original panel on a number of issues, giving rise to confusion about the principles that will guide such decisions in the future. In addition, the task of proving that a policy measure is the least trade restrictive, which could be an issue in a future case, might have resulted in a different ruling if the original panel had not dismissed Canada’s TBT and SPS arguments. Arguably, this could be a very high bar to meet in future trade challenges.

As noted earlier, the international commercial regulatory system is now extremely complex. In addition to the WTO agreements, there are regional free trade agreements (FTAs) and country to country bilateral investment agreements (BITs) all of which have the capacity to strike down policies of governments that interfere with trade and investment. Incredibly, there are now more than 3,000 of these various agreements in place globally. The decisions adjudicated in many of these agreements have not been nearly as favourable to environmental and occupational health concerns as was the Canada-France WTO asbestos case. Many trade challenges filed by investors in recent years have overturned environmental or health regulations. In addition, the protections given to investors – an issue not dealt with at all in the asbestos case – are now very strong in many FTAs and BITs. They are more onerous on governments than those in the WTO’s own Trade Related Investment Measures (TRIMS) agreement. These investment agreements provide foreign investors with new mechanisms to deter governments from policies that interfere with the value, or profitability, of their investments.

In a detailed review of the environmental and occupational health impacts of the WTO asbestos decision, along with its decision on beef hormones and retreaded tires, Timmermans concludes that trade panels that adjudicate disputes are not inclined to give these issues the weight they deserve. Rather, they tend to focus, narrowly, on trade law precedents. Moreover, she believes that there is a trend for some governments and investors to file challenges not only to pursue their own grievances, but also to set a precedent for third parties in international disputes.

...'It is worrying that in two of the three recent disputes relating to environmental health issues, the challenge apparently was at least in part directed at developing countries not actually involved in the case. This indirect targeting, aimed at pre-
empting measures not yet contemplated or put in place, is neither accidental nor harmless. These are calculated moves to pressure countries, while avoiding the potential political backlash that may result from straightforward challenges to health and environmental measures of developing countries. Apprehension about such indirect targeting is aggravated by the potential for misrepresentation – be it orchestrated or accidental – of the scope of the decision and for playing into fears of a possible WTO challenge. The disproportionately high costs that involvement in a WTO dispute may entail for developing countries is bound to create a chill effect that may well prevent (developing) countries from enacting measures to protect health and environment that are in fact WTO compliant. (Timmermans p. 314)

Many potential disputes are never filed. This is because countries often choose to comply with demands to repeal regulations (or avoid making them) if they fear triggering a dispute. The ‘chilling’ effect of trade and investment agreements on government policy and regulatory decisions is widely accepted. Governments are normally not anxious to impose regulations that international trade bodies may overturn and which may end up being costly – and politically damaging – policy failures as a result. The threat of a trade challenge by asbestos investors or their governments, with both its financial and political costs, may deter governments from banning imports of the mineral. In addition, developing countries may feel particularly vulnerable to pressure from hostile corporate interests, fearing being labeled as jurisdictions that are not ‘business friendly’. Decisions about asbestos regulation do not take place in a policy vacuum. Governments weigh them in the context of other objectives they may have and, as a result, may determine that the ‘candle is not worth the price.’

As noted, many of the trade agreements now in place have very strong provisions protecting investors and their investments. Global mining interests have been major proponents of these agreements. They have lobbied for international rules to protect their assets in developing countries not only from potential expropriation by new governments, but also from changes in environmental, land use, health and labour laws. A disproportionate number of ICSID cases involve mining disputes. The investor rights of these agreements benefit all mining companies, including those with asbestos interests. Consequently, governments considering imposing bans on asbestos production, or imports, now need to consider whether such policies might make them liable to investor compensation claims.\(^8\)

Russia’s entry into the WTO in 2012 and its ratification of a number of trade and investment agreements may also become a factor if it chooses to oppose an international ban on the mineral. It still has significant markets in the former Soviet

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\(^8\) If the experience of the international mining industry is any guide, corporations will not hesitate to make full use of their international rights if they believe they can win a trade challenge. This has been the case with respect to a number of disputes over environmental regulations in developing countries, most notably in the resource extraction sector; there are many precedents of major settlements being awarded to companies, the largest currently being the $1.77 billion award against Ecuador for expropriating Occidental Oil’s assets in 2006 (Nathan Gill, Bloomberg Business Week, Oct. 9, 2012). Oil and mining companies frequently go to the ICSID for compensation, or use the obligations in FTAs, to try to roll back environmental legislation.
Union, as well in parts of Asia. It exports approximately 75% of its 1 million tons of production (Verta 2012). The industry is estimated to be worth between $800 million and a billion dollars. It has 50 BITs, including ones with the US and China, which are not yet in force. Its WTO membership removes a barrier to implementing these and other investment treaties. Prior to joining the WTO neither it, nor its businesses, could use this trade treaty to challenge asbestos bans by other governments.

Kazakhstan, the world’s fourth largest producer, with output of 223,000 Mt in 2011 (Verta 2012), has 39 trade and investment agreements (ICSID website). It is a significantly global exporter and, according to various reports, does not believe that asbestos is a significant health hazard. It lacks the political influence of Russia and would, on its own, find it difficult to be the sole opponent of a global asbestos ban. But it could be an ally of Russia in this cause. Moreover, it would still be able to challenge other governments through its trade and investment agreements.

China, the world’s second largest producer, with an estimated 440,000 Mt production in 2011 (Verta 2012), has 90 investment agreements (ICSID website). It concluded a major bilateral investment treaty with Canada to provide security for investors in the mining, oil and gas sectors. China has major mining interests in Asia, Africa and Latin America, many of which are covered by investment agreements. While its asbestos exports are modest, it does have markets in parts of Asia. It could use its trade agreements to try to prevent its trading partners from imposing bans.

Brazil, the world’s third largest producer, with 302,000 Mt of output in 2011 (Verta 2012), has 15 BITs. Fortunately, none of these are with major consuming nations. Brazil appears to be heading, incrementally, towards implementing its own asbestos use ban, internally and, perhaps, on production for export as well.

A number of the major importing countries also have BITs and FTAs with asbestos producers as well as other countries that are, or could become, major investors in their asbestos manufacturing operations. These investments would also be covered by the terms of these treaties. It remains to be seen whether and, if so, to what extent, these new international arrangements – most of which have been negotiated since the fall of the Soviet Union – will end up providing support for the asbestos industry. This will depend, critically, on whether the major exporting countries are determined to keep markets open and how far they are prepared to go to achieve this objective.9

While the WTO and other trade and investment agreements now have extensive mechanisms to discipline governments that fail to honour market friendly commitments, neither the WHO, nor other international institutions such as the ILO, has a comparable capacity to enforce labour rights or health and safety protections for workers. These matters remain within the jurisdiction of individual governments. Countries that have ratified ILO conventions do not face sanctions if they ignore their commitments, a fact which contrasts sharply with the onerous penalties they face if they violate investor rights or commitments to maintain open markets. Regrettably, the ILO convention on asbestos – largely unenforceable in any case – has only been ratified by a small minority of its members, primarily in the developed world.

9 One major positive development is that Iran has dramatically reduced asbestos imports over the past decade. According to an article by Kathleen Ruff on the Rideau Institute’s web site, imports have fallen 90% from 83,000 Mt in 2003 to 9,000 Mt in 2011.
The prospects of change: contradictory signals

The incremental move towards a global ban on asbestos mining and use over the past two decades – and the recent change in Canada’s position – signals that this goal is achievable. There is virtually no possibility that major developed countries will allow asbestos to return to their markets. And world opinion, supported by overwhelming scientific and medical evidence, confirms that there is no safe limit of exposure to the mineral, a fact that is well understood by strong coalitions of public health officials, physicians, scientists, trade unions and victim advocacy groups around the world. International agencies, including the WHO, ILO, EU, and UN are also clear about this matter.

As noted, the industry is now located primarily in Russia, Kazakhstan, Brazil and China where different considerations come into play. World opinion is not a major factor and the industry is still characterized by a strong sense of denial about the health impacts of asbestos. The legal systems in these countries are far less supportive of the ability of workers to sue, so the threat to companies of litigation leading to bankruptcy is far less than in the US, UK and parts of continental Europe. And some of these countries have shown little interest in adopting and implementing conventions or other recommendations of the ILO, WHO and other international organisations on asbestos.

But perhaps most significantly, organized labour’s contribution to the struggle against the asbestos industry in developed countries may not be easy to replicate. Trade unions played a major role, both at the national and international level, to the elimination of asbestos usage, largely because it was their members who were the victims. Pressure from individual unions, national federations and international union bodies, as well as union representation at the ILO, all contributed to the progress achieved. Additionally, many unions pushed for improved health and safety conditions at the bargaining table.

However, in the major asbestos producing countries trade unions are weak and lack resources. Many are employer dominated. International competition and the absence of domestic policies to transition out of asbestos production pressures existing unions to focus, narrowly, on keeping current jobs. As the questionable role of the Quebec labour movement illustrates, the illusion of safe use can persuade domestic unions to oppose an asbestos ban. Much of the progress towards eliminating asbestos in the developed world took place when trade unions were considerably stronger than today. Three decades of neoliberal policies have hollowed out much of the labour movement in the US, parts of Europe and other developed countries such as Canada and Australia. Consequently, their international leverage is considerably diminished.

Governments in most asbestos producing and consuming countries are also much less willing to respond to union concerns about occupational health and safety. This is not to suggest that there is an absence of labour opposition to continued asbestos production and use. Rather, it is to note that the context in which unions operate is far less favourable than in the developed world during the period when asbestos use was gradually phased out. Many developing countries, especially in Asia, see cheap labour as a competitive advantage in attracting investment: hence workers’ rights,
including the right to organize and the right to a safe and healthy work environment are not high priorities. As McCulloch and Tweedale note:

‘The reasons for the rebirth of the asbestos industry have tended to vary from region to region, but there are a number of common features. They include the lack of state capacity and the rampant corruption which are typical of the developing world. There is the industry’s influence over medical knowledge and the commercial appeal of asbestos as an ingredient in simply-made building materials. The new industry is also part of the global transfer of technologies that have become politically unsustainable in North America and Western Europe. These transfers include the manufacture and use of pesticides and PCBs, and the dumping of toxic waste. When things go wrong, as in Bhopal (1984) and the Ivory Coast (2006), the costs of corporate misconduct can be minimized because of the corporate veil.’ McCulloch and Tweedale (2008, p. 228)

The ascendency of neoliberal policies has imposed a chilling effect on governments’ appetite for new regulations. Market fundamentalism asserts that governments should not be regulating business. Rather they should be adopting 'business friendly' policies supportive of the interests of national and international investors. But eliminating asbestos will require new regulations by governments, both at the national and international level. Even though the worker safety and public health rationale for a total ban is clear, the imposition of new regulations is antithetical to the neoliberal trade and investment agenda.

In conclusion, despite significant progress in recent years towards a global ban on asbestos, and despite Canada’s final abandonment of its disreputable support for the industry, it remains unclear whether – or perhaps, more accurately, how long – it will take to end production and use of the ‘killer dust’. Hopefully, the evidence of harm and the long term health of workers and communities will pressure governments to make the right decisions in the near future. But we will have to wait and hope that this result will come sooner rather than later.

References


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