Robarts Centre Research Papers

The First Seven Years of the WTO and Canada's Role at the Centre Stage: A Report Card on Trade and the Social Deficit

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THE REPORT CARD

Student: World Trade Organization

Grading Period: January 1, 1994 to January 1, 2001

Individual Subjects	**Grade**
Public Health*: Canada – Patent Protection of Pharmaceutical Products* The 20-year patent term was upheld, thereby reducing access to cheap generic drugs. Also, the WTO interpreted "limited exceptions" to patent protection narrowly and on the basis of commercial norms without concern for public health interests.	***C***
Industrial Policy*: Brazil – Export Financing Program for Aircraft* Brazil was condemned for using subsidies to develop its aircraft industry while similar financing programs used by Canada, to develop its own aircraft industry, were upheld. This decision skewed the playing field between developing and developed nations.	***F***
Regional Policy*: Canada – Certain Measures Affecting the Automotive Industry* Struck down Auto Pact on the basis that it was discriminatory while failing to take into account that the policy promotes free trade within regions. This decision limits the ability of developing nations to use similar tools to develop key sectors of their economies.	***F***
Public Safety*: European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* Public health triumphed over commercial interests by eliminating Canada's right to export asbestos to France. Yet Canada is still able to export asbestos to developing countries with more lenient public health and safety standards, thus remaining a threat to public health.	***B***

Comments:

Shows lack of attention to detail and independent expression. Easily influenced by others. Unable to balance trade interests with those of the public. Needs to address the social deficit, but its governance structures are underdeveloped and minimal. Flexibility in application of rules, consideration of the needs of developing countries, and democratic input from civil society would strengthen its ability to deal with social issues arising from trade. Try harder.

INTRODUCTION: EXECUTIVE SUMMARY

Few in Canada have recognized the role of the WTO in defining Canada's trade policy. Canada's active involvement in leading trade disputes raises the following issues about the WTO's ability to be an effective international decision-making body:

- After seven years of operation and dispute management, is the WTO an effective guardian of the world trading system?
- Is there an international body of jurisprudence emerging on key issues, such as health and labour standards, cultural policy, and state aids?
- Is the WTO, with its stronger rules and dispute resolution system, producing better outcomes?
- Are the new rules and practices beginning to address the social deficit of the world trading order?
- How innovative has Canada's participation in these leading decisions been and have they effectively advanced Canada's interests?

The narrowness of many of the WTO's decisions raises questions, in the Report which follows, of whether other international bodies are needed to address the complex policy issues that arise from the world trading system, bodies that would ensure a proper balance between the need to trade and the social effects of trade. The WTO has no mandate to be a legislative forum to make policy or to redefine the boundary between domestic policy and international governance. On the other hand, its litigation capacity falls far short of the expectations that many had for it and so far its decisions are not a dramatic step-up from the GATT rules-based system, its immediate predecessor.

It is increasingly evident that WTO jurisprudence is, so far, inadequate to the task and that different institutions and norms are needed to address human rights, labour standards, environmentally sustainable practices, financial regulation, and social and economic development for the southern world.

At the present time, the WTO has grand governance ambitions with, as Sylvia Ostry has characterized, the most minimal legal and governance structure. There is a growing consensus that unless the WTO finds a way to address the social impacts of trade and reduce the social

deficit, its credibility and legitimacy as an institution will remain under attack by the anti-globalization movement in a post-Quebec summit world. Given its existing framework, the WTO is simply not an effective litigator nor is it an effective legislator.

Out of the four major disputes analyzed in this study, all of which have direct impact on key policy areas, Canada has lost three. Ottawa has not been able to defend its trade interests, as was illustrated by the Auto Pact, asbestos, and pharmaceuticals disputes. Of the four disputes under consideration, Canada won only the dispute over aircraft subsidies between Canada and Brazil.

Canada's troubling win-loss record raises many questions about whether Canada should be spending so much time and energy in the dispute settlement process to protect its national interests. Are there other options and does Ottawa need to rethink its strategy?

One of the aims of this report card is to clarify the relationship between the WTO's legal culture in setting the trade rules of the global trading system. An examination of the first period of the WTO reveals that there is much to be learned about the legal precedents, practices, and norms of the world trading system. Leading trade disputes provide a unique way to understand the principles and practices of the WTO's legal culture and the way it uses legal rules for commercial ends. WTO decisions are settled within a framework of purely commercial objectives, creating a gap between trade and social considerations. For example, in the pharmaceuticals dispute, the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement treats *patents on life-saving drugs* in the same manner as *patents on ice-cream machines.* This does not make for sound jurisprudence or supportable international norms to justify a new round of free trade.

The principle findings of the study are that:

- Canada continues to have a poor batting average in trade disputes. It has lost a surprising number of cases at the WTO and won few. Significantly, the asbestos, pharmaceuticals, and aircraft subsidies disputes all have direct implications for global standard-setting and global governance. The WTO rules undermine the ability of governments to implement policies in the public interest and do not create new norms for international co-operation. In effect, the WTO creates a regulatory void and may be an obstacle for countries that wish to set new rules of the game in critical areas of international public life.

- In Canada's dispute with Europe over the extent of patent protection on pharmaceutical products, important issues around the availability of cheap generic drugs were raised. While the 20-year patent term was upheld, reducing the availability of cheap generic drugs to developing countries, Canada's generic producers received some slack. The decision allowed them some start-up time for administrative reasons before the expiry date of the patent.

- Canada's dispute with Brazil over aircraft subsidies was a case in which free trade objectives clashed with accepted business practices which operate to support national industrial policy objectives for a targeted industry. The core issue in the dispute was the right of a developing nation to export subsidies to secure overseas markets, a practice that continues both with respect to the European Union's airbus as well as Boeing defence contracts in the US. It is significant in this dispute that the WTO did not take into account Bombardier's receipt of development funds from Quebec as well as finances from the corporate account of Ottawa's Export Development Corporation., nor the 'subsidy' in the form of loans to Bombardier's US buyers.

- In the Auto Pact case, European exporters challenged Canada's right to maintain the Auto Pact on the grounds that it violated the principles of Most Favoured Nation and National Treatment. The challenge to Canada's Auto Pact measures raises difficult questions for governments that wish to make domestic arrangements for developing an infant industry into a world-class producer.

- Canada's challenge to France's ban on asbestos, a carcinogenic substance, was rejected by the Panel on public health grounds. At the centre of the dispute was Canada's national interest in exporting asbestos in order to facilitate the Quebec asbestos industry despite having internationally banned asbestos for domestic use. Also, the dispute opens the door for future Panels to subject domestic policy to WTO review, thereby increasing the intrusiveness of the WTO in domestic policy areas, despite its looming legitimacy deficit.

Another principle finding addresses the failure of WTO jurisprudence to address the social deficit. The social deficit can be defined as the

absence of concern or the inability or unwillingness to address the social ramifications of trade. A social deficit can be measured in terms of job loss, falling incomes, environmental risk, and social exclusion. This inability to address the social implications of trade has become increasingly pronounced in WTO trade panel rulings. This is a dangerous trend that needs correcting.

A close analysis of the four disputes reveals that there is a range of social deficits particular to each dispute. Throughout its first seven years, WTO jurisprudence has often been unwilling to address the social impacts of narrowly based trade rules on health and labour standards. This is paradoxical because in the asbestos ruling, what appears to be a win for health standards may permit the WTO to become more intrusive in the domestic practice of nations. So far, the social deficit continues to go unaddressed by WTO Panels.

At the present time, the WTO is caught between 'the fixers', civil society movements who want to create accountable, democratic, and transparent governance (WTO+), and 'the nixers', opposition groups who see little value or merit in keeping the WTO as the primary institution of global governance. Ironically, the trade dispute panels were intended to be the strong suit of the recently created WTO. However, Canada's experience shows that, in panel after panel, national interest is compromised by the commercial norms of the WTO.

WTO jurisprudence was designed to provide predictability and stability, but the cases examined by the Robarts Research Team reveal that the low-quality and narrowness of dispute panels have created uncertainty and unpredictability for many countries who might have considered using the newly designed WTO dispute resolution system. The inability of the WTO to address the social deficit bodes ill for the future. And despite the fact the WTO is a rules-based trading system, it is proving to be a disappointing instrument for addressing the social consequences of trade.

WTO decisions are never black and white in their resolve. Many government authorities, including Canada, fail to grasp fully the implication of this finding. In the asbestos case, public health advocates, in France and Canada, were clearly winners by any standard. But Canada lost the case, and so did the multinationals that had a vested interest in being able to sell asbestos internationally. The Canadian and international health communities are unanimous in their belief that Canada's interests were well served despite the loss. The dilemma for observers is to establish criteria with which to determine a win from a loss. Few nation states are prepared to accept that a loss may be in the global public interest. This raises the additional question of why Canada and the EU did not decide to

establish an international ban on the trade of asbestos, a step that would have been in the interests of civil society.

It is important that the public and policy makers become WTO-literate. In an effort to increase awareness of WTO rules and interpretive norms, the Robarts Research Team has summarized the contending issues in each dispute, presented the trade panel's decision, and examined the decision in terms of the social deficit. The reader will also find the relevant WTO articles or national legislation that are at the source of the trade conflict.

The four cases chosen for this study have a direct impact on important policy areas such as public health and safety standards, targeted industrial policy, and regional economic strategy. These disputes are some of the most important decided by the WTO's dispute settlement system and they are typical of its thinking. Furthermore, these cases represent the kinds of effects that the WTO can have on domestic policy-making. A second report card of the WTO's performance is underway and will be published in December 2001. The disputes in this second report will revolve around culture, public health, and work and employment standards in developing countries.

The work of compiling the report was done by the Robarts Research Team. Sirvan Karimi was responsible for the primary research on the asbestos dispute. Nirmala Singh is the primary author of the chapter on patent protection of pharmaceutical products. Remonda Kleinberg mastered the intricate details of the Canadian-Embraer subsidies controversy. Chris Gillespie skillfully compiled the dossier on the Auto Pact dispute. A special thanks goes to Scott Sinclair, Sylvia Ostry, Robert Wai, and Marjorie Cohen for their vetting of an earlier draft of this project, though they bear no responsibility for the conclusions drawn in this study.

Analysis and Commentary

Canada – Patent Protection of Pharmaceutical Products

Complaint by the European Communities and their member states

WTO Panel Report, March 17, 2000

WT/DS114/R

Win	***Loss***
European Communities	*Canada*

DISPUTE SUMMARY

Overview:

The EC and their member states requested the Dispute Settlement Body on November 11, 1998 to establish a panel to examine their complaint against provisions of Canada's Patent Act in relation to their consistency with the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement. This Agreement sets international rules to protect patents in a series of sectors such as copyright and trademarks, but it is particularly important for pharmaceutical companies. The Agreement obliges WTO Members to guarantee patent holders the exclusive right to a patented invention for 20 years. Canadian legislation allowed persons, who were not the patent holders and without the consent of the patent holder, to use patented inventions. This enabled individuals to conduct tests to obtain marketing approval of patented medicine copies before the relevant patent expired, and also to manufacture and stockpile medicines for up to six months before patent expiry. Australia, Brazil, Cuba, India, Israel, Japan, Poland, Switzerland, Thailand, and the United States indicated their interest in participating as third parties in these panel proceedings.

The EC claimed that Canada's legal regime violated provisions of the TRIPS Agreement by allowing third parties, without the consent of the patent holder, to carry out experiments required for marketing approval, and by manufacturing and stockpiling patented products before the expiry of the patents concerned. The EC challenged the conformity of subsections 55.2(1), the "regulatory review" exception, and 55.2(2) the "stockpiling" exception, of Canada's Patent Act with the TRIPS Agreement. It argued that the regulatory review exception was not limited in time and that activities could be performed "without the consent of the right holder at any point in time during the

EC's Argument:

The EC argued that the Canadian provisions of Section 55.2(1) and 55.2(2) of the Patent Act, together with the Manufacturing and Storage Patented Medicines Regulations, violated Article 28.1 and Article 33 of the TRIPS Agreement. This violation allowed for the manufacture and stockpile of pharmaceutical products, without the consent of the patent holder, during the six months immediately prior to the expiration of the 20-year patent term.

DISPUTE SUMMARY (CONTINUED)

EC's Argument (Continued):

The EC emphasized that Canada's patent regime violated the 20-year patent protection term stipulated in Article 33 of the TRIPS Agreement, by allowing third parties to conduct experiments necessary for marketing approval, and the manufacture and stockpiling of patented products before the expiry of the patents concerned. More specifically, the EC argued that "the term of effective patent protection in Canada amounted to a maximum of nine years to a minimum of one and a half years"[3], thereby undermining the 20-y

Canada Patent Act

55.2(1) It is not an infringement of a patent for any person to make, construct, use or sell the patented invention solely for uses reasonably related to the development and submission of information required under any law of Canada, a province or a country other than Canada that regulates the manufacture, construction, use or sale of any product.

55.2(2) It is not an infringement of a patent for any person who makes, constructs, uses or sells a patented invention in accordance with subsection (1) to make, construct or use the invention, during the applicable period provided for by the regulations, for the manufacture and storage of articles intended for sale after the date on which the term of the patent expires.

Section 55.2(3) The Governor in Council may make regulations for the purposes of subsection (2), but any period provided for by the regulations must terminate

Trade Related Aspects of Intellectual Property Rights

28.1 Patentable Subject Matter

A patent shall confer on its owner the following exclusive rights:

- **(a)** where the subject matter of a patent is a product, to prevent third parties not having the owner's consent from the acts of: making, using, offering for sale, selling, or importing for these purposes that product;
- **(b)** where the subject matter of a patent is a process, to prevent third parties not having the owner's consent from the act of using the process, and from the acts of: using, offering for sale, selling, or importing for these purposes at least the product obtained directly by that process.

30 Exceptions To Rights Conferred Members may provide limited exceptions to the exclusive right conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.

33 Term of Protection The term of protection available shall not end before the

Further, the EC tried to establish that commercial drug damage had been done to the European manufacturers of pharmaceutical products. It claimed that these relevant parts of the Canadian Patent Act and the Regulations had resulted in “economic losses” of approximately $100 million (CDN) per year.[3]

DISPUTE SUMMARY (CONTINUED)

Canada's Argument:

Canada argued that its patent regime is part of a balanced approach that protects patent rights and allows immediate distribution of products after expiry of patents. In defending its position, Canada contented that the regulatory review exception, Subsection 55.2(1) of the Patent Act, allows third parties to use a patented invention during its term of protection, provided such use is directed towards obtaining regulatory approval for the marketing of an equivalent product upon expiry of the patent. This is an exception to normal patent protection, which in most circumstances prohibits the use of a patented invention by another and would expose an unauthorized user to patent infringement liability.

Canada maintained that the regulatory review exception is a valuable component of the Government's balanced drug patent policy, given that the regulatory review for drug approvals can be very time consuming. Generic manufacturers take an estimated two to four years to develop a regulatory submission and another estimated one to two and a half years for Health Canada to complete its approval. The exception is important in that it allows corporations to do this work prior to patent expiry and to supply consumers with an approved generic drug as soon as possible after patent expiry.

The stockpiling exception, Subsection 55.2(2), applies to second-entry drug manufacturers who have taken advantage of the regulatory review exception and are entitled to regulatory approval upon expiry of the patent. The stockpiling exception is given legal force and effect by the Manufacturing and Storage of Patented Medicines Regulations and authorizes second-entry drug manufacturers to manufacture and accumulate the generic version of a patented medicine during a period of six months preceding the patent expiry date.

Third Party Arguments:

While the United States straddled the fence, Japan and Switzerland disagreed with Canada's patent regime. The United States disagreed with Canada's stockpiling exception while accepting the validity of the regulatory review exception. Rejection of the stockpiling exception by these three countries was based on the arguments that the exception violated the exclusive rights of the patentee and that the stockpiling exception was not necessary to ensure immediate market entry of drugs. Japan and Switzerland rejected the regulatory review exception on the grounds that it violated the exclusive rights of the patent holder guaranteed by the TRIPS Agreement and it was not

consistent with the meaning of 'limited exceptions' as conferred by Article 30 of the TRIPS Agreement.

DISPUTE SUMMARY (CONTINUED)

Third Party Arguments (Continued):

Brazil argued that the interpretation of the TRIPS Agreement sought by EC and its member states would lead to "an undue advantage to the patent holder, in terms of a *de facto* extension of the patent term, to the detriment of the balance of rights and obligations carefully negotiated in the TRIPS Agreement."[4]

Many of the defending countries emphasized the need to interpret the TRIPS Agreement "in such a way that the important objectives and principles it contained were not relegated to the background by the overriding application of its other provisions."[5] The main issue behind the dispute, they argued, is the balance between private intellectual property rights and social welfare and public health objectives. The Preamble of the TRIPS Agreement itself expresses the need to balance these two interests.

WTO Panel Decision:

The WTO Panel endorsed the regulatory review exception, Section 55.2(1), but found the stockpiling exception, Section 55.2(2), to be inconsistent with Canada's TRIPS obligations under Article 27.1 and 28.1. The Panel therefore asked the WTO Dispute Settlement Body (DSB) to request Canada to bring Section 55.2(2) into conformity with the TRIPS Agreement.

More specifically, the Panel argued that Section 55.2(1) fulfilled the definition of 'limited exception' under Article 30 of the TRIPS Agreement because it was confined to conduct necessary to compliance with the requirements of the regulatory approval process. The Panel states:

> Without the regulatory review exception, the patent owner might be able to prevent potential competitors from using the patent to comply with testing requirements, so that competitors would have to wait until the patent expires before they could begin the process of obtaining marketing approval. This, in turn, would prevent potential

> competitors from entering the market for the additional time required to complete the regulatory approval process, in effect extending the patent owner's period of market exclusivity beyond the end of the term of the patent.[6]

However, the Panel argued that Section 55.2(2) did not fulfil the definition of 'limited exception' under Article 30 of the TRIPS Agreement because it curtailed exclusionary rights required to be granted to patent owners under Article 28.1 of the TRIPS Agreement. Therefore, the stockpiling exception was found to be in violation of Article 33 of the TRIPS Agreement.

DISPUTE SUMMARY (CONTINUED)

Does this case represent a step forward or backward? A more accurate description would be a step sideways. The WTO Panel struck down the stockpiling exception in the Canada Patent Act, but upheld the regulatory review exception. On the one hand, the WTO's validation of the regulatory review exception represents a major victory for Canada and supports Canada's balanced drug patent policy that promotes effective patent protection while allowing generic drugs to reach the market as soon as possible upon patent expiry. The loss of the stockpiling exception can be viewed as minimal when compared to the WTO's validation of the regulatory review exception. Moreover, the repeal of the Manufacturing and Storage of Patented Medicines Regulations renders the stockpiling exception no legal force or effect, and will ensure that Canada conforms to its international obligations under the TRIPS Agreement. The effect of this repeal is ambiguous, as it is unclear if there will be any significant economic consequences or any measurable impact upon Canadian consumers' access to generic drugs. On the other hand, by rejecting the stockpiling exception, the WTO has raised the probability for an increase in drug costs as it presents delays in making generic drugs available to consumers.

SOCIAL DEFICIT

Assessing the Winners and Losers:

Winners	Losers
The public interest is partially validated in this dispute because the WTO upheld the right for drug manufacturing companies to test new products before the expiry date of the 20-year patent. Length of time to put generic drugs on the market is reduced after intellectual property rights expire. The WTO decision to strike down the stockpiling exception can also be perceived as a win for commercial interests because the 20-year patent period was upheld. This has an immediate effect on drug prices and availability of cheap drugs for the developing world.	Commercial interests lost in this case because the Panel upheld the regulatory review exception, thereby restraining intellectual property rights for public health interests. In addition, the length of market exclusivity after expiry of patent is not guaranteed (loss of monopoly). Generic drug companies are not able to produce low price drugs in an efficient and timely fashion.

The Social Deficit:

Within the context of the WTO's dispute resolution process, a social deficit can be interpreted as the absence of political consensus and effective norms to account for the social implications of trade.

On the surface, the Panel's decision can be interpreted as a victory for public health advocates. The regulatory review exception, which allows competing generic manufacturers to test patented products before the expiration of patent protection, was upheld as consistent with the TRIPS Agreement. This maintains the availability of generic drugs as well as cheaper, and therefore more accessible, generic drugs for people who need them and who otherwise may be unable to afford the more expensive version. Hence, this decision can be seen to illustrate the triumph of public health interests over commercial interests, as patents for pharmaceuticals are translated into intellectual property rights.

The companion measure, which permitted the manufacture and storage of patented products (stockpiling) before the expiration of the patent so that they can be available for sale immediately upon expiration of the patent, however, was struck down. This decision was based on a narrow definition of 'limited exception' under Article 30 of the TRIPS Agreement.

SOCIAL DEFICIT (CONTINUED)

Both of the exceptions were aimed at achieving Canada's longstanding policy goal of providing relatively low cost medications to consumers as soon as possible after the expiry of the 20-year patent term, which is stipulated in the TRIPS Agreement. The Panel, however, considered the meaning of 'limited' solely from the perspective of the rights holder, and without any consideration to the overall policy goals or purposes of the exception.

Moreover, the Panel assumed that the basic purpose of the TRIPS Agreement was to "lay down minimum requirements for the protection and enforcement of intellectual property rights."[7] However, Article 7 of the TRIPS Agreement indicates that "the basic purpose is *not* protection and enforcement of these private rights as such, but rather in a manner so as to achieve a *mutual* advantage of both producers and users and a *balance* of obligations and rights."[8] To maintain consistency with this purpose, the Panel should have interpreted the meaning of 'limited' from the perspective of not only the right holder, but also from the perspective of consumer interests.

Furthermore, the decision of the Panel reinforced the legal duration of patent protection for pharmaceutical products at 20 years. This favours commercial interests. The 20-year patent term came into force in 1995 and requires that all members of the WTO maintain a 20-year patent term for all products. Developed countries were required to meet this obligation by January 2000 while the least developed countries (LDCs) have been given until 2006 to bring their patent laws into compliance.

This has major implications for developing countries as the developing world is home to the vast majority of the world's 36 million people infected with HIV/AIDS. The result for developing countries will be a significant decline in the generic drug manufacturing industry and a significant increase in the prices of protected drugs. Price is a matter of concern for developing countries whose poor may not be able to afford protected drugs.

In parts of Asia and Africa, where AIDS is reaching epidemic proportions, this is a major concern. South Africa is the worst affected region in the world for HIV/AIDS. Over 25 million of the 36 million people infected with HIV live in sub-Saharan Africa. In the year 2000, 2.4 million people in the region died from the effects of AIDS.[9] Less than a tenth of the 36 million people infected by HIV, however, can afford the drugs used to treat the disease.[10]

The TRIPS Agreement makes it difficult to make generic drugs quickly available after the expiry of the 20-year patent, thus increasing the prices of patented drugs. Oxfam has argued that the TRIPS Agreement has deepened the public health crisis by increasing the cost of medicines.[11] The TRIPS Agreement, in effect, treats patents on life-saving drugs "the same way as patents on ice-cream machines."[12]

SOCIAL DEFICIT (CONTINUED)

As a consequence, TRIPS delays the production of many inexpensive generic substitutes for ten year s or more, increasing prices of many medicines up to at least three times higher than they would otherwise be. Prolonged high prices for patented medicines reduce the accessibility of these drugs for poor people.

Oxfam notes that there are "concerns that companies in developing countries are already abandoning the practice of developing generic versions of new patented medicines coming on to the market"[13] and are under pressure to halt the production of cheap generic drugs such as treatments for HIV/AIDS.

In February of 1998, a group representing many of the world's leading pharmaceutical companies filed a lawsuit seeking to overturn a law that would allow the South African government to import cheap generic drugs in an emergency situation. At the heart of the case was the Medicines Control Act (signed into law in 1997 but never put into force because of the court challenge) that allows South Africa to buy large amounts of generic drugs and sell them cheaply. The law could affect any pharmaceutical product, but it is primarily aimed at providing cheaper sources of AIDS drugs. In addition, South Africa could compulsorily license HIV drugs and manufacture them within its borders, undercutting multinational pharmaceutical companies.

Pharmaceutical companies claim that these measures undermine their patents on medications and conflict with the TRIPS Agreement. The South African government, AIDS activists and international human

rights groups argue that drug companies are putting their profits before public health goals. The issue is critical for Africa because generic drugs, which are usually made in East or South Asia, are often a fraction of the cost of drugs produced by the western pharmaceutical companies. The TRIPS Agreement, however, does allow parallel importation and compulsory licensing in the face of a public health emergency. AIDS/HIV in South Africa is just such an emergency. The national emergency loophole in the TRIPS Agreement is a viable option for countries facing public health challenges in justifying the implementation of such measures.

Thus, in the case at hand, the Panel clearly divorced commercial interests from social interests. The WTO works within an explicit framework of purely commercial objectives, creating a gap between trade and social considerations. Although the WTO assures the public that it protects health standards, its emphasis on corporate interests led to the rejection of the stockpiling exception in this case. It could be argued that the Panel acted in the name of corporate interests and over-ruled Canada's stockpiling exception aimed at protecting people's health.

SOCIAL DEFICIT (CONTINUED)

This ruling also raises the question of whether WTO rules should undermine the ability of governments to determine national policies in the public interest. The TRIPS Agreement allows countries to adopt measures necessary to protect public health, but then requires such measures to be 'consistent' with the Agreement. In effect, the TRIPS Agreement gives governments little flexibility over basic features of their national patent laws and limits the right of governments to determine when and how they may reasonably override patent laws.

In addition to these limitations of the TRIPS Agreement, the US has pressured developing countries, through the use of trade sanctions, to enact laws that are based on a highly restrictive interpretation of the TRIPS Agreement. For instance, India has been placed on the hit list for trade sanctions for "failing to include highly restrictive compulsory licensing in national legislation, and for allowing generic companies to export copies of patented drugs"[14] to low-income, developing countries. These actions are, in themselves, inconsistent with WTO rules.

World trade must be viewed as a means to attain the social development of the majority. This decision affects the health and lives of millions of people. By concentrating on commercial objectives, the WTO raises the risk of ignoring issues of human dignity and health. Hence, when disputes have a non-trade dimension, such as public health, the Panel should not only take into account this non-trade dimension, but also place this dimension above commercial interests. Basic services to the public, such as access to cheap generic drugs, must not be factored into the logic of trade.

The decision of the Panel, by failing to interpret the TRIPS Agreement in a way that does justice to the balance between intellectual property rights and public health interests as expressed in the purposes of that agreement, constrains the regulatory autonomy of Member states to implement policies aimed at public health. The Panel's ruling did not address Canada's national interests and policy goals of providing cheap generic drugs for its public. The Panel, in doing so, upheld a clear separation between public interests and economic interests.

Health Economics and Drugs DAP Series No 7, 2nd edition, Geneva: WHO.

World Trade Organization. Panel Report. Canada – Patent Protection of Pharmaceutical Products. WT/DS114/R. 17 March 2000.

Analysis and Commentary

Brazil – Export Financing Program for Aircraft

Complaint by Canada

WTO Panel Report, April 24, 1999

WT/DS46/R

Win	***Loss***
Canada	*Brazil*

DISPUTE SUMMARY

Overview:

Canada and Brazil have been quarrelling about their subsidy practices. Both countries employ different policy instruments to offer subsidies through their respective export credit agencies. Canada subsidized Montreal-based Bombardier Inc. through the Technology Partnerships Canada (TPC, which drew from the Canada Account), while Brazil subsidized financing to customers of Embraer S.A. through *Programa de Financiamento as Exportações* (PROEX, see Annex).

Three international trade issues dominated the agenda from the outset of this dispute: the definition of subsidies; the establishment of a WTO panel; and the category of special and differential status. Prior to requesting WTO intervention, Canada sought consultations with Brazil about the export subsidies granted under PROEX to foreign purchasers of Embraer aircraft. As an exporter of medium range aircraft, Canada claimed unfair competition from Brazil in the international aerospace market.

After a series of failed consultations between the two countries, Canada called for WTO intervention in July 1998 requesting the establishment of a Panel. The DSB established a Panel in accordance with Article 4 of the SCM Agreement. The WTO ruled in favour of Canada giving the green light to impose countervail of 1.4 billion dollars against Brazil. Canada can suspend tariff concession or take other actions against Brazil for up to 233.5 million dollars a year for up to six years.

Canada's Argument:

Canada argued that PROEX payments are grants by the Government of Brazil to purchasers of exported Brazilian regional aircraft. These payments reduce the purchaser's net interest rate - sometimes by as much as half of market interest rates - over the term of a financed transaction. The bonds issued by the Brazilian government (NTN-1) for these payments may, alternatively, be discounted in the market for a lump sum to be received by the purchaser in the form of a discount on the price of the aircraft. Either way, these payments lower the cost of exported Brazilian regional aircraft for the purchaser. As such, this financial contribution by the Government of Brazil confers a benefit and constitutes a "subsidy" within the meaning of Article 1.1 of the SCM Agreement.

DISPUTE SUMMARY (CONTINUED)

Canada's Argument (Continued):

Subsidies and Countervailing Measures (SCM) Agreement

I:1 Definition of a Subsidy For the purposes of this Agreement, a subsidy shall be deemed to exist if:

(a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:

(i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfer of funds or liabilities (e.g. loan guarantees);

(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);

(iii) a government provides goods or services other than general infrastructure, or purchases goods;

(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments.

3.1 Prohibition Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:

(a) subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I;

(b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.

27 Special and Differential Treatment of Developing Country Members

1. Members recognize that subsidies may play an important role in economic development programmes of developing country Members.

4. Any developing country Member referred to in paragraph 2(b) shall phase its export subsidies within the eight-year period, preferably in a progressive manner. However, a developing country Member shall not increase the level

Finally, Canada claimed that PROEX payments should be regarded as an *indirect financial contribution* by a government through a funding mechanism or a private body entrusted or directed, in the sense of Article 1.1(a)(1)(iv) of the SCM Agreement, to transfer payments made by the Government of Brazil upon the redemption of treasury bonds issued under PROEX to the ultimate beneficiaries. Such a contribution, when made by a government, *directly or indirectly, amounts to a subsidy*.

DISPUTE SUMMARY (CONTINUED)

Brazil's Argument:

Brazil argued that PROEX interest equalization payments for aircraft constitute an export subsidy, but this is exempt from the prohibition of Article 3.1(a) by virtue of Article 27.

Instead of arguing that PROEX payments comprised a financial contribution by the Brazilian government, Brazil stated that the issuance of a PROEX commitment letter constituted a "potential direct transfer of funds."

Brazil disputed Canada's claim that PROEX export subsidies are made for the benefit of foreign purchasers that, for the most part, borrow funds from non-Brazilian institutions on the basis of their own credit risk. Brazil also disputed Canada's claim that Brazilian subsidies brought down the financing costs of specific airlines below market-based costs of financing. Brazil stated that it does not make PROEX payments to airlines, but that interest equalization payments are made only to financial institutions. In order to determine that PROEX is prohibited, it would be necessary to find that it secures an advantage in the field of export credits and that this advantage is material.

Third Party Arguments:

Brazil was supported by the EC, claiming that the SCM Agreement allows for a much broader interpretation of what a financial contribution permits. Acknowledging the importance of subsidies to the economic development of developing countries, the EC contended that Article 27.4 of the SCM Agreement should not be interpreted to exempt developing countries unconditionally from the disciplines of Article 3.2 of the SCM Agreement. The WTO, however, ignored this argument.

The US argued for a much stricter interpretation of the use of export subsidies to counter non-credit subsidies offered by a non-Member. It

saw no substantive reason why Brazil should be allowed to secure a material advantage in the field of export credit terms.

WTO Panel Decision:

The Panel submitted its final report to the parties on 12 March 1999. The original panel found for Canada and stated "... we find that payments on exports of regional aircraft under the PROEX interest rate equalization scheme are export subsidies inconsistent with Article 3 of the SCM Agreement." The Panel then recommended that Brazil withdraw the subsidies identified within 90 days. The WTO also ruled that Technology Partnerships Canada (TPC) and Canada Account were prohibited subsidies as applied to regional aircraft.

SOCIAL DEFICIT

Assessing the Winners and Losers:

Winners	Losers
The Winners in this case are those nations that have either already subsidized important private sector manufactures or those nations, which already have a fully serviced aerospace industry that is highly competitive on the world market. Canada is the third largest exporter of medium-range aircraft and will now be assured its place without 'subsidized' aircraft pushing it out of its international ranking.	The Losers in this case include the developing world where high-end or medium and high technology manufactures are not able to get off the ground, because of WTO subsidization prohibitions (and where a weak entrepreneurial class exists). The alternative to state support thus, may be to open up the high and medium-end manufactures to foreign capital. While it may appear the most "efficient" economic strategy, it prevents an emerging nation from developing strong, internationally competitive indigenous industries. Indeed, Canada may also fit into this category in other areas of manufactures, e.g. automobiles.

The Social Deficit:

The social deficit in this case can be viewed as the negative effects developing nations experience when they do not have (or are denied) access to needed subsidies for important industrial or technology sectors. In most cases, the more developed nations have utilized subsidies long before WTO rulings have attempted to eliminate them, thus maintaining a competitive edge over less developed nations' manufactures in the international market. Indeed, as middle powers, both Brazil and Canada experience a social deficit as a result of the rulings in this case. Indeed, the Canadian industry has emerged in the shadow of dependent development with the United States. However, while Brazil is increasingly competitive in the international market as this case suggests, it still suffers extreme poverty, unemployment and inequalities of a dimension not experienced in Canada, entrenching Brazil in the category of 'developing world.' As Celso Amorim,

Brazilian ambassador to the WTO stated the Embraer case is unique because it reflects the problems developing countries have in competing on the international market in the high-tech industries.

SOCIAL DEFICIT (CONTINUED)

Brazil had long maintained that the benefits provided by PROEX only sought to balance the interest rates paid by Brazilian exporters with those existing in economically advanced nations. Indeed, Embraer, which was in the red when Brazil privatized it in December 1994, is now the fourth largest aircraft manufacturer in the world (Bombardier is the third largest). Government incentives allowed Brazil to consolidate a high-tech company and compete at this level, particularly in the extremely competitive market for aeronautics. The WTO decision however may put this newfound competitiveness at risk, threatening to erode Brazil's international edge.

It is notable that the amount of countervail imposed on Brazil, though less than what Canada originally requested, was the largest compensation package ever ordered by the WTO body, in essence, punishing Brazil for what has been long-standing practice in most developed countries. After all, Canada had a very complex and sophisticated method of extending export credits to Bombardier, a major player in international aeronautics for several years. The difference at present is the legalistic and binding Dispute Settlement Body within a more comprehensive WTO – unlike the more ad hoc dispute settlement procedures under the less comprehensive GATT. This puts into question the issue of a level-playing field, particularly for developing countries that are attempting to break into the international market with a comparative advantage other than cheap labour. As a result of the ruling, in addition to impeding Brazilian exports to Canada, or increasing Canadian imports in the case an agreement is reached, the midrange ERJ-135 and ERJ-145 jets will increase in cost due to the loss of government financing.

Seemingly exacerbating Brazil's decline in comparative advantage, as recently as January 2001, Canada provided up to $1.1 billion of financing for a $1.5 billion purchase by Air Wisconsin, an affiliate of United Airlines, of up to 75 of the Bombardier jets. Bombardier sought the Canadian government's help, in the form of a low-interest loan to Air Wisconsin, to help counter "below market" financing offered by its

rival Embraer. Does this increase the social deficit already experienced by Brazil? On a certain level, it may appear to. However, employing 24,000 aerospace workers, Bombardier argued that its share of the world market for regional jets has declined from 65 percent to about 46 percent in the mid-1990s when Embraer expanded its sales and production. Moreover, when the Brazilian enterprise was privatized in 1999, a French aerospace consortium including Dassault Aviation, Thomson-CSF, Aerospatiale Matra and Snecma, bought a 20 percent stake in the company.

In essence, both companies will lose an edge in the level playing field, given their status as medium range exporters. And while the two have similar experience with foreign capital as the main engine for export growth, Brazil is still the weaker of the two and has an incredibly long way to go before it can boast the level of economic growth and internal stability that characterizes Canada.

ANNEX

Proex:

Created by the Government of Brazil on June 1, 1991, PROEX provides export credits to Brazilian exporters either through direct financing or interest rate equalization payments. Through direct financing, the Government of Brazil lends a portion of the funds required for the transaction. Interest rate equalization allows for grants provided by the National Treasury to the financing party to cover the difference between the interest charges contracted with the buyer and the cost to the financing party of raising the required funds. Ministerial Decrees set the financing terms for interest rate equalization payments. The length of the financing term, which is determined by the product to be exported, varies normally from one year to ten years.

In the case of regional aircraft, however, this term has often been extended to 15 years, by waiver of the relevant PROEX guidelines. The length of the financing term, in turn, determines the spread to be equalized: the payment ranges from 0.5 percentage points per annum, for a term of up to six months, to 2.5 percentage points per annum, for a term of nine years or more. Resolution No. 2667 of 19 November 1999 provides that, in respect of regional aircraft financing, "equalization rates shall be established on a case by case basis and at levels that may be differential, preferably based on the United States Treasury Bond 10-year rate, plus an additional spread of 0.2% per annum, to be reviewed periodically in accordance with market practices."

The lending bank charges its normal interest rate for the transaction and receives payment from two sources: the purchaser and the Government of Brazil. In this way, PROEX reduces the financing costs of the purchaser and, thus, reduces the overall cost to the purchaser of purchasing an Embraer aircraft. PROEX interest rate equalization payments begin after the aircraft is exported and payments are made in the form of bonds issued by PROEX to the financing institution. “After each export transaction is confirmed, the Bank of Brazil applies to the National Treasury of Brazil for the issuance of bonds designated as National Treasury Note – Series I ("NTN-I") bonds. The National Treasury issues these bonds and transfers them to the Bank of Brazil, which in turn passes the bonds to the lending bank (or its agent bank). The lending bank can redeem the bonds on a semi-annual basis for the duration of the financing, or can sell them on the market at a discount immediately upon receipt NTN-I bonds are denominated in Brazilian currency, indexed to the dollar as of the date the bonds are issued.”

ANNEX (CONTINUED)

The bonds can only be redeemed in Brazilian currency *in* Brazil. PROEX is administered by the *Comitê de Crédito as Exportações* ("Committee"), a 13-agency group, with the Ministry of Finance serving as its executive. Day-to-day operations of PROEX are conducted by the Banco do Brasil. For applications for financing transactions not exceeding US$5 million, whose terms otherwise fall within PROEX guidelines, Banco do Brasil has pre-approved authority to provide PROEX support without requesting the approval of the Committee. All other applications are referred to the Committee, which has the authority to waive some of the published PROEX guidelines. In the case of regional aircraft, the most frequent waiver has been to extend the length of the financing term from ten to fifteen years.

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Analysis and Commentary

Canada – Certain Measures Affecting the Automotive Industry

Complaint by Japan and the European Community

WTO Panel Report, February 11, 2000

WT/DS139/R, WT/DS142/R

Win	***Loss***
Japan and European Community	*Canada*

DISPUTE SUMMARY

Overview:

Following two rounds of unsuccessful consultations with Canada in order to find an agreeable solution to the dispute, the European Community (EC) and Japan requested that the Dispute Settlement Body establish a Panel to examine a complaint against the operation of the Auto Pact as implemented by Canada in 1965 as a bilateral agreement between the US and Canada. The EC and Japan argued that certain measures under the Auto Pact were contrary to Canada's WTO obligations. In particular, the complaints were focused on the provisions allowing only certain motor-vehicle manufacturers operating in Canada to import vehicles into Canada duty-free and to distribute them in Canada at the wholesale and retail levels. This duty-free treatment was contingent on two requirements: a Canadian value-added (CVA) content requirement that applied to both goods and services; and certain performance requirements based on production-to-sales ratios. In other words, the United States allowed qualified manufacturers to import automobiles and parts that originated from Canada duty-free and Canada allowed qualified manufactures to import automobiles and parts from around the world duty-free provided they maintained a certain production presence within Canada.

The Panel struck down the Auto Pact on the grounds that it violated several international rules. Subsequently, Canada appealed against certain conclusions of the Panel. More specifically, Canada requested the Appellate Body (AB) to reverse the Panel findings concerning the alleged incompatibility of the Auto Pact with the Most Favoured Nation (MFN) clause in the GATT and GATS agreements. Canada also contested the Panel findings qualifying the production to sales ratio as an export performance subsidy prohibited by the WTO Agreement on Subsidies. Interestingly, Canada refrained from challenging the Panel finding that the regime violated the national treatment clause of GATT and GATS. The AB, however, affirmed the decision of the Panel, confirming that the import duty exemption violates the MFN clause and that the scheme constitutes an export subsidy.

Japan's Argument:

Japan's core argument was that the Auto Pact was designed to be discriminatory in nature and that this discrimination was exacerbated by the implementation of the Canada-US Free Trade Agreement (CUFTA) and the North American Free Trade Agreement (NAFTA).

Japan argued that the eligibility limitation to qualify for duty-free status under the Auto Pact violated Article I: 1 of GATT because it had the effect of *de facto* discrimination in favour of certain countries.

DISPUTE SUMMARY (CONTINUED)

Japan's Argument (Continued):

Since 1989, the Auto Pact Member list was closed, blocking new companies from being eligible for import duty-free. After 1989, the only way a company that was not on the list could qualify for duty free treatment afforded under the Auto Pact was through affiliation with a company that was already on the list. Therefore, not allowing any new companies to achieve duty-free status, Canada discriminated against companies based on their origin.

Japan also argued that the CVA is inconsistent with Article III:4 of GATT and Article 2 of the Trade-Related Investment Measures (TRIMs) Agreement because it created an incentive to purchase or use domestic Canadian parts and materials over imported like products.

General Agreement on Tariffs and Trade: 1994 (GATT)

I:1 Most Favoured Nation Status With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred in paragraph 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any [Member] to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for all other [Members].

III:4 National Treatment The products of the territory of any [Member] imported into the territory of any other [Member] shall be accorded treatment no less favourable than the accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase

Japan also alleged that the Auto Pact measures were inconsistent with Article II of GATS because they favoured services and service suppliers from certain countries at the expense of Japanese companies with respect to the granting of the import duty exemption to a limited number of manufacturers of motor vehicles.

EC's Argument:

The EC claimed that the Auto Pact discriminates based on origin of the manufacturer, explicitly naming the Big Three American manufacturers: General Motors Corp., Ford Motor Co., and Chrysler Corp., as it was known before becoming Daimler Chrysler.

The EC argued that local content requirements, including those that compel a manufacturer to use domestically produced goods in order to obtain an advantage, are prohibited by the GATT and TRIMs Agreement. In addition, the EC contended that the requirement that US vehicle manufacturers build at least as many cars in Canada as they sell is an illegal export subsidy, and therefore violates the SCM Agreement.

DISPUTE SUMMARY (CONTINUED)

EC's Argument (Continued):

Finally, the EC asserted that the tariff exemption constitutes a subsidy within the meaning of Article 1.1 of the SCM Agreement because revenue that would otherwise be due to the Canadian Government is foregone, thereby conferring a benefit to the beneficiaries.

Canada's Argument:

Canada argued that the Auto Pact does not discriminate based on national origin, nor do the conditions contained in the CVA requirements constitute a subsidy. The tariff regime under the Auto Pact, argued Canada, is fully consistent with Article I of GATT. Also, Canada maintained that the mere limitation of the number of eligible beneficiaries to the Auto Pact did not violate Article I: 1 as it forbids only discrimination based on origin of the product. A WTO Member may therefore treat products differently so long as the distinction in treatment is not national origin. Canada maintained that the Auto Pact does not make distinction based on imports based on origin. Canada also argued that even if there was a *de facto* advantage toward its North American Free Trade Agreement (NAFTA) partners, that advantage would be legitimate for NAFTA is a free trade zone within the understanding of Article XXIV of GATT and as such, exempt from the disputed provisions of Article I: 1.

Finally, Canada emphasized that the Auto Pact did not distort export trade but rather facilitated imports through its duty-free treatment. Therefore, the Auto Pact did not qualify as a subsidy under the SCM Agreement. Canada pointed out that Auto Pact manufacturers' production to sales ratio was more than double the minimum stipulated by the ratio. If Auto Pact manufacturers were merely

exporting to receive the ability to import duty-free, they would only manufacture to the minimum as outlined in the ratio requirement.

WTO Panel Decision:

The Panel found that the import duty exemption discriminates in favour of imported cars essentially originating from the US and Mexico, and therefore, is in violation of the MFN principle of the GATT and GATS. The CVA requirement that compels the beneficiaries to fulfil certain local content requirements was found to be inconsistent with the national treatment clause of GATT since it confers an advantage upon the use of domestic products over imported products. In addition, the Panel ruled that the import duty exemption bestowed to the Big Three constitutes a prohibited subsidy in the SCM Agreement, as it is contingent upon export performance. The Panel recommended that Canada withdraw the measures within 90 days from the date of the adoption of the Panel report.

DISPUTE SUMMARY (CONTINUED)

WTO Panel Decision (Continued):

Similarly, the Panel also ruled that Canada acted inconsistently with its obligations under the SCM Agreement by granting a subsidy which is contingent upon export performance as a result of the application of the ratio requirements as one of the conditions determining eligibility for the import duty exemption. Finally, the Panel considered duty from vehicles originating from the US and Mexico as revenue foregone by Canada, and therefore government revenue "otherwise due." Accordingly, the Panel recommended that Canada withdraw the export subsidy within 90 days of the adoption of the Panel report.

The Panel ruling to strike down the Auto Pact is a controversial one as the decision augments the asymmetrical relationship between Canada and the US by removing Canada's entitlement to investment that was contained in the Agreement. The ruling raises questions about the feasibility of bilateral agreements in an increasingly globalized world, while also highlighting the sanctioned discrimination that exists through trade blocs.

The discrimination that existed under the Auto Pact pales in comparison to that of NAFTA, yet NAFTA is sanctioned while the Auto Pact is shunned. The Auto Pact was dismantled because it discriminated against the EC and Japan, yet, following the same

reasoning would lead to the conclusion that regional trade blocs should also renounced. This contradiction invites uncertainty about the legitimacy of an international tribunal finding a regional free trade agreement to be superior over a bilateral agreement.

SOCIAL DEFICIT

Assessing the Winners and Losers:

Winners	Losers
EC & Japan The EC and Japan have established that the Auto Pact discriminated unfairly against their manufacturers.	Canada lost an important investment sharing agreement. Although there is no consensus, this decision may adversely affect the standard of living for the Canadian worker and the future ability of the government to secure sectoral sharing agreements. Non-NAFTA auto manufacturers face a general 6.1% tariff in the post Auto Pact trade environment. Developing countries will not be able to enter into Auto Pact-like agreements, depriving them of this instrument of industrial policy.

The Social Deficit:

One way in which the social deficit is understood is by the loss of investment opportunities and employment benefits. What was unique about the Auto Pact was that it guaranteed a share of new investment as well as assembly of cars and trucks. Over the last four decades, Canada benefited enormously because the guarantees in the Auto Pact addressed the asymmetry of the two countries. The Auto Pact was so successful that Japan transplants also established significant manufacturing presence in Ontario.

The auto industry employs over 80,000 people and one-fifth of cars that are supplied in South-central Ontario are manufactured in North America. By the year 2000, Ontario had surpassed Michigan as the premier assembler site of North America. If there is an example where Canada has benefited from North American integration, the Auto Pact in promoting free trade in this sector is at the top of the list.

It is unclear what the immediate loss of the Auto Pact will mean to Canada and Canadian autoworkers and their families. So far, American auto assemblers have found that they have little incentive to alter in any fundamental way their investment and production commitments as established by the Auto Pact. With high productivity levels and an extremely stable workforce, American auto producers would have little to gain from disinvesting in Canada or moving production southwards.

SOCIAL DEFICIT (CONTINUED)

Canada's auto production facilities have some of the highest productivity ratings in North America and it would be next to impossible to do better elsewhere. Lower labour costs have never been the principle reason for North American assemblers in Canada to take their business elsewhere. In fact, since the end of the 1992 recession, investment in the Canadian auto industry has grown markedly.

For reasons quite different, the Canadian AutoWorkers (CAW) and the Big Three auto producers are in agreement on the fundamental point that the dismantling of the Auto Pact does not threaten the North American auto industry in its present form.

One of the short-term effects of the end of the Auto Pact will be that the Big Three and the Japanese transplants will have to become more price competitive. The North American auto industry has met other challenges from foreign competitors by reorganizing production and making significant new investments in plant and equipment. The end of the Auto Pact could well lead to the expansion of auto capacity in Canada and new investment once the American economy recovers form the present tailspin.

As well, there are other incentives that will leave most of the present arrangements in place. Health insurance is publicly provided and this constitutes an enormous saving for US producers. Many attribute Canada's highly competitive auto industry to the fact that auto assemblers and the CAW have a pragmatic working relationship in which disruption and time loss is minimal and the strong labour union working relationship is facilitated by the introduction of new workplace technologies. The American auto giants do not want to jeopardize their relationship with the union and provoke militant opposition on the factory floor.

The fact that there will be a 6.1% tariff on EU and Japanese high-end imports will have some offsetting effects. Yet, the future of the North American auto industry is anything but certain. Auto sales are very sensitive to downturns in the American business cycle. Canada's share of this export-oriented industry could well face a very difficult future as the American economy struggles against the tide of recession.

But the more important concern about the dismantling of the Auto Pact is that it represented an efficient tool of public policy that promoted, for Canada, free trade and industrial development. For developing countries or other industrializing countries that see much utility in bilateral agreements as part of an industrial strategy, the WTO ruling is a crippling setback. The WTO decision prevents countries from adopting a highly efficient trade and investment strategy to develop leading-edge industries in key sectors of the economy. In an information age, many countries are seeking to develop their own telecommunications, pharmaceuticals, or biotechnology industries.

SOCIAL DEFICIT (CONTINUED)

The Auto Pact is a prototypical example of the important benefits that two major trading nations can share by forming a strategic alliance for the production, investment, and sale of mass consumer goods in an integrated market. The production investment guarantees, as well as the ability to restrict access to the North American market, were its other features. In dismantling the Auto Pact, the WTO has ruled out one of the most effective instruments for liberalizing trade in regional settings.

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Analysis and Commentary

European Communities – Measures Affecting Asbestos and Asbestos-Containing Products

Complaint by Canada

WTO Panel Report, September 18, 2000

WT/DS135/R

Win	***Loss***
France	*Canada*

DISPUTE SUMMARY

Overview:

In reaction to France's ban on asbestos, Canada requested the WTO to assign a Panel to examine France's prohibition. Canada, while endeavouring to challenge France's ban, has itself restricted the usage of its own asbestos-containing products within its own boundaries. In Canada, the federal and provincial authorities have imposed strict standards to diminish workers' exposure to asbestos and have also banned consumer products that release asbestos fibres into the atmosphere. Of the 510.800 tons of chrysotile (white asbestos) produced in Canada during 1995, 509.575 tons were exported. Furthermore, the asbestos cement used in the Quebec building industry is reported to have been imported.[1] If true, the import of asbestos by Quebec is contrary to Canadian law and its own provision laws. Nonetheless, both the federal and Quebec governments oppose France's ban on asbestos fibres even though they have restricted the use of asbestos for most purposes.

The French Decree No. 96-1133 of 24 December 1996 Banning Asbestos

1:I For the purpose of protecting workers, […] the manufacture, processing, sale, import, placing on the domestic market and transfer under any title whatsoever of all varieties of asbestos fibers shall be prohibited, regardless of whether these substances have been incorporated into materials, products or devices.

1:II For the purpose of protecting consumers, […] the manufacture, import, domestic marketing, exportation, possession for sale, offer, sale and transfer under any title whatsoever of all varieties of asbestos fibers or products containing asbestos fibers

France's Argument:

After years of inaction and resistance to the EU's restrictions on chrysotile asbestos, the French government was finally compelled to consider a ban on asbestos fibres. This was due to pressures from an informal coalition of workers, scientists, academics and the victims of asbestos. Subsequent to a thorough review and analysis of international studies on asbestos, the French Medical Research Council (INSERM) determined that:

> …all asbestos fibers are carcinogenic and the increase in mortality from lung cancer arising from exposure to asbestos fibers as high in population exposed to chrysotile as in those which have combined exposure or exposure to amphiboles alone. Populations exposed occupationally to fibers known commercially as chrysotile have an indisputable additional mortality from mesothlioma.[2]

The French Medical Research Council's verification of the danger of asbestos fibres to human health led the French government to officially declare a ban on 24 December 1996 on the manufacture, sale, import, domestic marketing, possession and transfer of all variations of asbestos fibres.

DISPUTE SUMMARY (CONTINUED)

Canada's Argument:

The core of Canada's case is that while asbestos was indeed a threat to human health, if handled carefully, the risk is minimized. Further, the link between lung cancer and chrysotile asbestos was only indirect and substitutes for asbestos have the same potential risk in threatening human health.

GATT does not permit unequal treatment of "like" products on the basis of their method of production, except to protect human, animal or plant life or health. Canada argued that the ban imposed less favourable conditions on Canadian-produced chrysotile asbestos than it did on French-made substitute fibres and products containing it. The French ban, however, was country-neutral, prohibiting all imports and sales of asbestos and asbestos-containing products, regardless of their origin.

Canada is one of the leading exporters of asbestos after Russia and Kazakhstan and claimed to have incurred economic losses because of this ban. It fears that a total international ban would threaten Canada's ability to export asbestos. Since the French Decree, Canada has launched intense international negotiations to neutralize France's ban on asbestos. To deflect criticism and promote asbestos fibres, the Asbestos Institute has received $50 million from Ottawa and the province of Quebec, since 1984.[3]

Major trade unions and social organizations in Canada have denounced Canada's attempt to challenge France's ban on asbestos. Canada has declared that the French Decree is a "Technical Regulation" within the meaning of the definition given in Annex 1 to the Technical Barriers to Trade (TBT) and that provisions of the French Decree violate Articles X1.1 (Discrimination), XX111.4(National Treatment) and XX111: 1(b)(Nullification or Impairment of Benefits) of the GATT 1994.

Third Party Arguments:

In addition to the EU's defence of the French ban, the United States, as a third party, allied itself with France and urged the WTO to dismiss Canada's complaint. The US argued that it is the legitimate authority of each nation to determine the appropriate levels of protection for its citizens. As a defender of free trade, the US seems to have adopted a stance that seems to be uncharacteristic, but this stance can be explained. US support of the right of national governments to determine the parameters of domestic public policy can be explained

by the fact there is no single large corporation in the US that might be concerned with the fate of the asbestos industry. Furthermore, regulations and the rising number of lawsuits against asbestos have drastically diminished the use of asbestos fibres in the United States. Therefore, this dispute provided an opportunity for the US to display itself as a defender of the legitimate right of national states to formulate appropriate policies to protect public health.

DISPUTE SUMMARY (CONTINUED)

Third Party Disputes (Continued):

Canada was joined by Brazil and Zimbabwe in arguing that France's ban violated provisions of the GATT 1994. As major asbestos-producing countries, Brazil and Zimbabwe are aware of the fact that other countries might imitate France's ban on asbestos, and consequently, they would incur economic losses. Zimbabwe, in particular, would be affected given the weakness of its economy.

Non-Parties to the Dispute:

Noteworthy was that *amicus curiae* briefs from the Collegium Ramazzini and The American Federation of Labour and Congress of Industrial Organization, all highly critical of Canada's export policy, were incorporated into the European Union's brief. These affected the outcome of the Panel's finding.

WTO Panel Decision:

The Panel ruled that part of the French Decree dealing with the general ban on marketing of asbestos and asbestos-containing products did not constitute a "Technical Regulation." The Panel confirmed that the provisions of the French Decree violated Article XX111.4 (National Treatment) of the GATT 1994, as was claimed by Canada. The Panel found that the ban discriminated against imported products because France did not prohibit the sale of "like" products made in France for similar purposes, thereby violating Canada's right to access French markets. The Panel found that asbestos and other less dangerous fibres are "like" products as defined by GATT and should in principle be accorded the same treatment on the French market. The Panel considered it inappropriate to take into account the health risks associated with asbestos fibres when examining likeness of the product with alternative products. In contrast to the Panel's approach to interpreting likeness, the Appellate Body stated that evidence relating to health risks associated with a product might be pertinent in an examination of likeness.

The burden was placed on France to prove that it was entitled to an exception to WTO rules in order to protect human health. In the face of the overwhelming evidence of asbestos toxicity, an exception was allowed and the ban upheld.

The Panel's key finding refuted Canada's principle claim that:

> Controlled use does not constitute a reasonable alternative to the banning of chrysotile asbestos that might be chosen by a decision-maker responsible for developing public health measures.[4]

DISPUTE SUMMARY (CONTINUED)

WTO Panel Decision (Continued):

After adjudicating 202 trade dispute cases since the commencement of its institutional life in 1995, the WTO for the first time upheld the primacy of public health and safety standards over narrow commercial interests. For critics of the WTO, this was a creative and innovative decision because it addressed the social impact of trade on health, the workplace, and environment. While Canada cannot export asbestos to Europe, it can continue to sell asbestos to other countries that do not have the same regulation as France.

One of the reasons why France successfully invoked Article 20 is that a consensus exists within the international health community on the health risks associated with asbestos. The WTO's panel of scientific experts concluded that:

> We therefore consider that we have sufficient evidence that there is in fact a serious carcinogenic risk associated with the inhalation of chrysotile fibres.[5]

Some trade experts have been critical about the WTO decision for politicizing trade liberalization measures by dangerously broadening the WTO's understanding of its rules and practices. They worry that the recent Panel decision would lead the WTO into uncharted waters where commercial rules will be circumscribed by social, environmental, and human rights considerations.

Finally, the Panel rejected Canada's claim that it had suffered an impairment of benefits within the meaning of Article XX111:1(b) of the GATT 1994.

SOCIAL DEFICIT

Assessing the Winners and Losers:

Winners	Losers
The public in France, advocates of public health and social movements that decry the impact of trade on human and environment can be identified as winners. The decision also has the potential to provide a legal precedent for social movements pressing for an international ban on asbestos fibres.	The federal and Quebec governments are the primary losers. Quebec's asbestos industry may face job losses of some 2,400 workers. Other asbestos- producing countries particularly, Third World countries might also incur economic losses in future because the ban might also spread to other countries. Multinational corporations can also be identified as losers because this ruling restricts where they can produce and export asbestos. Although the decision is a win for international health standards, it still does not establish an international ban on the trade of asbestos.

The Social Deficit:

A social deficit can be construed as an absence of concern for the social ramifications of international commerce. Within the parameters of this definition, a social deficit occurs when the WTO ignores the impacts of trade on the public interest. In this case, the Panel departed from past practice and gave greater weight to public health needs than Canada's right to export asbestos without restriction.

The Panel's decision to uphold France 's ban on asbestos can be regarded as a triumph for advocates of public health who, besides the French public, can be identified as winners. Besides the loss associated with the Quebec asbestos mining industry, the ruling also represents a setback for multinational corporations because it restricts the

manoeuvrability of corporations. The decision has also a positive externality because it has provides a legal precedent for the adoption of a total international ban on asbestos by the international community. Therefore, other asbestos-producing countries, including the Third World Countries, might incur economic losses in the future.

SOCIAL DEFICIT (CONTINUED)

What was learned from this case is that a high degree of unpredictability seems to be a striking dimension of dispute resolution within the WTO's parameters of jurisprudence. In contrast to the beef hormone case, which also revolved around issues of public health and safety, the WTO ruled against the EU's ban on the use of certain hormones in European livestock and imported beef. The Panel also rejected the EU's insistence that it was within its right to set higher standards than ones sanctioned by the WTO. What was apparently the determining issues for the Panel in the asbestos dispute was that the scientific evidence was overwhelming, whereas in the beef hormones case, there was significant but inconclusive evidence presented, and thus, the WTO showed its conservative face and ruled against the EU.

This decision does not set a precedent. However, it does create an expectation that the WTO can and will uphold public health and safety concerns, but there is no certainty that it will. The WTO operates on a case-by-case basis and thus creates a wilderness of single instances.

Despite a favourable ruling, the ruling did not satisfy many of the concerns expressed by environmental and public health organizations, and international civil society interests. In response to the Panel's judgement, Amy Gonzalez, then interim head of World Wildlife Fund in the U.S., gave the WTO decision a green light by stating that "we see this as a positive development in the balance between trade and environment."[6] On the other hand, Sam Zia Zarifi, a legal expert from Erasmus University, has raised a serious concern that is shared by many social and public organizations at both the national and international levels:

> ...the asbestos dispute...potentially constitutes the most significant expansion of the WTO's reach into the area of human health and work safety once exclusively reserved for sovereign states.[7]

It is the public's lack of confidence in the WTO, even when it takes a positive measure to protect public health, that is disturbing and has created a credibility gap between itself and international civil society interests. This distrust can be explained by the fact that the WTO's decision to support the ban on asbestos for reasons of public health

does not lead to an international ban on asbestos. Any country that wishes to prevent the importation of asbestos will be required to follow the same steps as France; gather scientific evidence, demonstrate that its citizens are dying; and present its findings to the WTO. Within trade dispute practices and rules, there is a serious issue to be addressed: there is no provision within its rules to establish viable and important international public health standards to which all countries adhere.

SOCIAL DEFICIT (CONTINUED)

WTO supporters would argue that a trade dispute decision is not the proper forum to establish an adequate common standard for all. The difficulty with this kind of response is that one of the sources of standard-setting comes from international jurisprudence and if the WTO's jurisprudence is not innovative and of a high enough quality, the WTO's critics are right to be skeptical about whether trade panels will ever be more than a court of commercial interest.

Canada also lost at the appeals level because it could not counter the strong scientific proof presented by France. Canada now faces some difficult choices. The real danger is that Canada will continue to export to Third World countries that have lower health and safety standards than those of Canada and France. It is doubtful that the Supreme Court of Canada would tolerate the federal government ignoring the letter and spirit of one of its decisions. While the WTO does not have the same judicial powers as the Supreme Court, as the highest judicial authority in these matters, its judicial authority is very weak. In order for a country to have higher standards, it must go through the highly complex WTO review process and establish that higher standards are not a barrier to trade. So far, the WTO has proven to be an important kind of institutional obstacle to the establishment of modern, forward-looking safeguards in the area of human rights, the environment, and public health.

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CONCLUSION

The principle finding of this report is that Canada has a poor win record in WTO trade disputes. Out of the four disputes studied, Canada lost three cases and won only the dispute concerning aircraft subsidies. Since the WTO came into existence seven years ago, Canada has been involved in 13 Panel disputes and 7 appeals, winning 8 Panel cases and 3 appeals. At first glance, these statistics generally reflect a good record for Canada's success at the WTO. However, a closer analysis of the content of the disputes reveals that this appearance of success is undermined by the reality of failure. These disputes have illustrated the failure of the WTO to address the social deficit.

In the patent protection dispute, the WTO Panel struck down the stockpiling exception, but upheld the regulatory review exception. On the surface, the WTO made a modest gesture to accommodate intellectual property rights and public health. Despite this modest gesture, the Panel interpreted the meaning of 'limited exception' from the perspective of intellectual property rights and disregarded the overall policy goals of the Canadian government. Indeed, a broader approach to its interpretation of the legal text of the TRIPS Agreement and a more balanced consideration of the policy objectives of Canada's legislation may have led the Panel to uphold both of the exceptions. Moreover, what is illustrated in this case is that intellectual property rights are at variance with the need to provide the world population with affordable drugs. The 20-year patent protection period emerged unscathed, making it difficult for generic drug producers to provide cheap generic drugs to the public.

In the aircraft subsidies dispute, Canada was able to protect its national interests, but the WTO failed to provide a fair remedy that would have permitted Canada and Brazil to subsidize this strategic industry. This dispute is an instance of trade objectives clashing with accepted business practices in support of national industrial policy. The issue in dispute was the right for export credits in middle-income nations to use export subsidies to secure overseas markets. The Panel decided that Brazil's subsidies were inconsistent with international trade rules. Bombardier depends heavily on development funds from Quebec and financing from the corporate account of Ottawa's Export Development Corporation. But the WTO was silent on Canada's subsidy practices, which in the court of international opinion is not acceptable. Canada was given permission by the WTO to impose

trade sanctions on Brazil for non-compliance, amounting to the largest compensation package authorized by the WTO. This case reflects the difficulties developing countries have in competing on the international market in high-technology industries and the barriers to entry created by the WTO's dispute panel.

CONCLUSION (CONTINUED)

In the Auto Pact dispute, the WTO supported Japan and the EU's argument that the Auto Pact discriminated unfairly against certain countries by giving wrongful duty exemption to the Big Three. Nevertheless, Canada's claim that it is WTO-compliant is strong. There was no discrimination based on the origin of the products themselves because companies that qualified for Auto Pact status were able to import vehicles from anywhere in the world. It was hardly a wall. In dismantling the Auto Pact, the WTO not only disregarded Canada's national interests, but also prevented any developing country from making similar kinds of strategic alliances for its industries.

In the asbestos dispute, Canada argued that France's ban was not based on adequate science and that the ban was contrary to international trade rules. The Canadian government also argued that asbestos is safe if adequate safety measures are taken. But a report by the Scientific Committee on Toxicity, Ecotoxicity and the Environment of the European Commission found that all forms of asbestos are carcinogenic to humans. Canada's interest in this case was rooted in the need to appease the Quebec-based asbestos industry by securing their right to sell asbestos. Canada itself had banned the use of asbestos, a carcinogenic material, and provinces required that this toxic substance be removed from all public buildings.

The asbestos dispute effectively demonstrates the limits of the WTO dispute settlement system. The current panel procedure relies on scientific technical experts and their findings to determine whether an exception should be made to WTO rules. In theory, this appears to be a sound way of proceeding. In practice, it creates as many difficulties as it solves because often, such proceedings are conducted behind closed doors without full public disclosure and accountability. More importantly, scientific communities cannot agree on the standards and evidence required to protect public health concerns. This allows the

WTO to pick and choose the standards that it believes to be correct, these are most often not the highest standards. In this sense, the WTO acts not as a standard-setter, but as a standard-follower.

Fortunately, in the asbestos dispute, there was a consensus in different international health communities because of 25 years of research, discussion, and debate. But in critically new areas (hormones, genetically modified foods, etc.) American and European scientific communities are deeply divided because they have such different scientific criteria. Does this mean that for the next 25 years all issues concerning important public health and environmental issues are on hold until Europeans are able to convince their American colleagues that higher standards are needed? It is significant that much of the research in the US is financed by multinationals and private foundations, whereas in Europe, the research community follows a more independent line and is largely funded by public not-for-profit bodies.

CONCLUSION (CONTINUED)

Moreover, in circumstances where the 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. However, the ruling is highly problematic because it enables the WTO to be more intrusive and invade domestic policy jurisdiction. This is a dangerous precedent that needs to be closely monitored.

The most pivotal aspect of this study has been the examination of the different forms that the social deficit takes within each dispute. As this report demonstrates, the WTO's internal processes and decision-making are deficient for developing countries that have neither the resources nor the expertise to utilize the WTO's trade court to protect their industries from all kinds of unfair practices. Of approximately 250 decisions to date, southern countries are underrepresented, except for India, Brazil and a few others. The situation is so serious that the WTO has undertaken a programme to train trade experts from developing countries, but it is unlikely that developing countries will be in a position to use the WTO for a long time to come.

The extension of the rule of law to the world trading system is not a new development, but a rules-based system, one that provides

predictability, stability, and accountability, has yet to establish itself. This is because many continue to confuse the *rule of law* with the *legal culture* of the WTO. The WTO borrows legal concepts and principles from the well-established body of international and national jurisprudence, but its trade dispute panels use these legal norms and practices for narrow commercial ends. This distorts the culture of legalism in subtle and not so subtle ways. As we have seen, the principle shortcoming of panel decisions is their very narrow and cautious approach to complex issues that require a more compelling interpretation of legal norms. The four panels we have examined failed to balance commercial interests with social needs.

The disconnect between an innovative use of international jurisprudence and rigid adherence to a narrow legal framework of compulsory dispute settlement and appellate review is greater than many experts could have predicted. Increasingly, as Joseph Weiler, a prominent legal expert has observed, WTO decisions are crafted to command the consent of both parties and be acceptable for adoption. This makes for bad law as the legal culture of the WTO is designed to accommodate the interests of the parties in dispute rather than fashion legally innovative remedies to protect the social needs of countries in many contentious policy areas. Compared to its ambition to be an institution of global governance, the WTO's culture of legalism is a stunning disappointment.

CONCLUSION (CONTINUED)

Social deficits arise when there is no consensus or political will to address the social impact of markets. The social deficit can be measured in terms of employment and income loss, environmentally unsustainable policies, and inadequate state management practices to cope with highly complex market effects.

At the present time, the WTO has grand governance ambitions with, as Sylvia Ostry has characterized, the most minimal legal and governance structure. There is a growing consensus that unless the WTO finds a way to address the social impacts of trade and reduce the social deficit, its credibility and legitimacy as an institution will remain under attack by the anti-globalization movement in a post-Quebec summit world. The WTO is simply not an effective litigator nor is it an effective legislator.

This raises a final point. It is likely that the WTO is an inappropriate body to address the social impacts of markets. It has neither the mandate nor the policy capacity to do so. The WTO was created to enhance market access and broaden corporate investment rights. In a post-Quebec summit world, the issue is no longer enhanced markets for the multinationals and financial institutions, but what do citizens expect and want of a trade regime. They want standards of all kinds to reduce market intrusiveness and to protect the planet from corporate excess. In its present form, the WTO ill fits the bill to create higher global standards. Instead, the WTO continues to operate like a private club of diplomats rather than an open rules-based juridical system.

The WTO's new constitutionalism has not been a frictionless exercise. A rights regime like the WTO is always a two-edged sword because it quickly becomes apparent that extending rights to economically powerful actors cannot be a step forward in the direction of new global governance unless the rights and concerns of global civil society are also at the table. There is a final reason why after the Quebec summit, there is new urgency to rethink the design and structure of the WTO. Time is running out for the WTO to transform itself in order to be able to address the social impacts of trade.

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