

**SYMPOSIUM:
THE GREENING OF THE WORLD TRADE ORGANIZATION¹**

MR. REED: To open our program, let me welcome you.

My name is Patrick Reed, and I am the Chairman of the Committee On International Trade at the Association Of The Bar Of The City of New York. It is our pleasure to be a cosponsor of this symposium this evening on The Greening Of The World Trade Organization. It is the third symposium that we cosponsored with the Center for International Law at New York Law School, and we are very pleased with this collaboration.

Our subject this evening is one of the most complex and difficult and interesting aspects of trade policy: the way that the trade regime treats domestic regulatory measures intended to protect animal and plants and human life and health, as well as the environment. Our moderator and panelists will discuss the subject in more detail.

I would just like to thank our other cosponsors in addition to the Center For International Law. Our cosponsors include the Committee On International Environmental Law here at the Association; The Environmental Law Interest Group Of The American Society Of International Law, Chaired by Laura Campbell; The Customs And International Trade Bar Association, represented by Sydney Weiss, President; and The Journal Of International and Comparative Law at New York Law School.

I would also like to welcome my one distinguished guest, Judge Thomas Aquilino of the Court Of International Trade.

With that, let me turn the floor to Professor Sydney Cone of New York Law School.

PROFESSOR CONE*: Thank you. It's wonderful to be able to work with the Committees of the Association of the Bar of the City of New York. I am very grateful with the organizations that have been mentioned for working with us, including Mr. Ghett.

I am especially grateful to the people who are seated up here with me this evening for coming here to talk to us about the asbestos case². We are quite fortunate to have them here. I will not intrude on their time any more than absolutely necessary.

They will speak in the order in which they're seated at the table, from my left, your right; to my right, your left. The first speaker is Amelia Porges, who is a former senior lawyer, both at the Office of the United States Trade Representative and the Secretariat of the GATT³, predecessor to the World Trade Organization.

Andreas B B Andy Lowenfeld, who has probably taught quite a few people in this room. He is a professor at New York University Law School. He served on some of the panels that were set up under the GATT. He is currently fighting with a publisher over a voluminous text that he has prepared on the law of world trade, and I, for one, look forward to the publication of that text.

To my right is Steve Charnovitz, who was the Director of Environmental Law Group at Yale University. He has participated in another symposium right here in City Bar on trade and environmental issues. We're happy to have him back. He's now at a law firm in Washington.

Robert Howse is a professor at the University of Michigan Law School. He is very well known in the area of law of world trade. He is a prolific author in the area.

1. The symposium was held in the Stimson Room at the House of the Association of the Bar of the City of New York on October 3, 2001.

* Sydney M. Cone, III is the C.V. Starr Professor of Law and Director of the Center for International Law at New York Law School and Of Counsel, Cleary, Gottlieb, Steen & Hamilton.

2. *European CommunitiesBBMeasures Affecting Asbestos and Asbestos-Containing Products*, Report of the Appellate Body, WT/DS135/AB/R (Mar. 12, 2001).

3. General Agreement on Tarriffs and Trade.

All of that having been said, I would like to ask the speakers to speak in the order in which I mentioned. We are going to keep this within a reasonable time frame because it is very important, in the opinion of the people up here at the table, to turn this into a discussion by and with you, the audience. We particularly look forward to having your questions once the presentations have been made. Please ask questions and please participate in the discussion once the floor speakers have finished.

Amy.

MS. PORGES*: Thank you very much for inviting me, and I want to thank everyone for coming. I'm really kind of surprised at such interest in really a somewhat obscure topic, especially when everyone has really much more important things to think about.

Let me just say that before I was in the private bar, when I was at USTR⁴, I litigated quite a number of cases, including some cases in this area of international trade. And I would say, just for full disclosure, that I authored the U.S. third-party submission in the asbestos case in the panel level. So basically, like a lot of litigators, I tend to think that the things that I argued to the judge were right even if the judge didn't agree, perhaps even especially if the judge didn't agree.

So I would like to just start things off tonight by talking a little bit about asbestos and trade in asbestos. It's useful to know about it and to talk about this case, the legal theories that were advanced by the parties, some of the procedural aspects that were interesting, the outcome, the panel decisions, and if there is time, to talk a little bit about the history of how the GATT and the WTO dealt with the issue of international trade: a very fundamental principal of nondiscrimination against imported products.

As for asbestos, asbestos is nasty stuff. Everybody agrees. Well, at least everyone in the United States; not everyone in Canada. Asbestos is nasty stuff. It has been known to be hazardous since the Romans, who noticed that slaves in the asbestos mines tended to die quite fast. It has a crystal formation in the form of long thin fibers that lodge in people's lungs and give them asbestosis, which is scarring of the lung tissue. It has a latency period of 15 to 30 years. Mesothelioma, cancer of the lung membranes, is a cancer which is not generally found in the absence of asbestos and which has the latency period of 30 to 40 years and then is generally fatal in about 18 months, and lung cancer, which has a latency period of 20 to 30 years. And particularly, asbestos has a strong synergistic effect with smoking.

There are three kinds of asbestos: blue, brown, and white asbestos. Chrysotile asbestos is the white asbestos. The major producer of the world right now, at least the major producer in world trade, is Canada, and specifically Quebec, in asbestos. The asbestos mines and mills of Quebec are responsible for about 22,000 jobs and 6,500 indirect jobs. And asbestos has also been a very big motive and topic in Quebec politics.

The strike in the asbestos mines in 1949 is when Pierre Treaudeau emerged as a politician, and the start of modern French Canadian politics happen. And for this reason, in the 1980s when there was a growing move internationally to ban asbestos, the Canadians, the Quebec politicians in particular, and others interested in asbestos pressured the Canadian government to do something about those bans because exports are very important. Ninety six percent of Canadian asbestos was exported in 1997, mostly to developing countries. A lot of these exports are raw asbestos fibers packaged in paper bags with warning labels if English, for all those people out there who read English.

Well, as the last straw, I guess, for Quebec was the move in France to ban asbestos. As the regulatory process moved forward in France, it became clearly a greater and greater issue in Canada. You can actually see the traces of this in parliamentary debates in Canada which are available on the Internet. The Prime Minister Jean Chrétien was the French Canadian. Politicians demanded that Prime Minister

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4. Office of the United States Trade Representative.

Chrétien raise the asbestos ban with the French president, but it was impossible to stop the ban. The ban went into effect on January 1st, 1997, and eventually Canada brought a case in the World Trade Organization against the ban.

Now, I think it's quite possible that the Canadian government didn't really want to bring this case. It's quite possible, that is, that those involved in trade policy may not have wanted anywhere near this case, but it was politically necessary. And this is actually one of the real life lessons of this case, which is that a lot of cases are brought because of stakeholder interests that have really very little chance of prevailing or defending, where there is very little, very little chance of success.

So the case went forward. The case briefs were drafted in consultation, as I was told. There was a grand consultation process. The Canadian government tends to work very closely with stakeholders in this way: briefs drafted in big meetings in Quebec City or Montreal considering what arguments to raise.

Canada worked also very closely with the Brazilian asbestos industry. Brazil also exports chrysotile asbestos.

The Canadian theories were as follows. The Canadian theories were brought under two different agreements. One is the Agreement On Technical Barriers To Trade. The Agreement On Technical Barriers To Trade is an agreement originally negotiated on the Tokyo Round of trade negotiations concluded in 1979, and then slightly reinforced during the Uruguay Round and wrapped into the big package of the Uruguay Round Agreement. The WTO Agreement structurally strengthened it, that is, which has as a centerpiece a requirement that technical regulations, that is, regulations that lay down product characteristics with which it is compulsory to perform, may not create unnecessary obstacles to trade, and with a number of provisos attached.

So this was the central Canadian argument: that the asbestos ban was an unnecessary obstacle to trade because so called Acontrolled use,@ that is, requiring miners and millers and other people who use asbestos to wear respirators, was just an effective way of preventing deaths caused by asbestos. AControlled use@ policy was just as safe, and a ban was not necessary, and, therefore, this was more trade restrictive than necessary.

Well, this was accompanied by claims that the asbestos ban was not based on effective and appropriate existing international standards and that it wasn't a performance standard; it was a design standard, and that it violated the national treatment and most deprivation provisions in the Technical Agreement.

The second line of attack was under the General Agreements on Tariffs and Trade. The argument was that the asbestos ban was a ban on imports of asbestos under Article XI, a very silly argument. The panel basically dismissed it, and the Appellate Body ignored it, and deservedly so.

Then, I guess the court, in a most controversial argument, the argument that the ban on asbestos was a de facto discrimination against an imported product because the asbestos substitutes which were all produced in France were okay to be sold, but asbestos alone which was all imported had been banned.

So there you have the basic face-off of violation claims at the panel level.

These were also accompanied by the Canadian argument that even if there was no violation, if, even if the asbestos ban was legal, it had taken away trade benefits that Canada had a reasonable reason to expect and that, therefore, Canada needed, deserved, to be compensated for the loss. For instance, valuable market access bargained for many years ago for Canadian asbestos exports.

So that led to the case in which there were three interested third parties. At the governmental level the United States intervened, strongly opposing Canada and supporting the Community⁵, limited support for the Community. Zimbabwe and Brazil supported Canada, since they both exported asbestos.

The Community's response was very interesting. The Community's response was, of course, to deny that there was any discrimination against asbestos. The Community's argument was that simply asbestos and the asbestos substitutes, that is, both the fibers and the products containing asbestos, compare to the substitute fibers like fiberglass and PVA and so forth. And the products that contain those fibers,

5. European Community.

that those two groups of products are simply not Alike products.⁶ That when you're looking at a discrimination issue, you have to compare two different Alike products⁶ and see if the imported Alike product⁶ is being treated less favorably. Those are simply not Alike.⁶ It is not a question of treating Alike⁶ things differently; the things are not Alike⁶ to begin with.

But more interestingly, the answer to the TBT agreement⁶ argument was a denial that this agreement even applied. The argument was that all bans on products were simply not technical regulations, that the ban here didn't really lay down characteristics of products, it simply banned the products, and therefore, this agreement didn't apply at all.

So at the panel level, the panel then proceeded. The most interesting thing that happened at the panel level was the consultation of scientific experts. The panel decided entirely sua sponte, not really at the request of either of the parties, to consult four scientific experts. Why did they do this? I think because they wanted to equip themselves to rule, to decide on these TBT issues which, as you hear, are the basic difference of views between the Community and Canada. Certainly these Canadian arguments turn on, to some extent, scientific issues.

The panel wanted to hear from the scientific experts on issues such as the effectiveness of Acontrolled use.⁶ the relative pathogenicity of chrysotile asbestos and the other forms of asbestos, since, of course, a key Canadian argument is that somehow white asbestos is different, that it's less toxic than other forms of asbestos.

Well, so the panel then picked the experts in consultation with international organizations like WHO⁷ and in consultation with the parties. They picked three Australians from occupational health backgrounds and one guy who was, in fact, an OSHA⁸ regulatory expert from the U.S. Government. What was the result? And then the panel, of course, then framed questions to these people in consultation with the parties. The questions, the answers, and the minutes of the hearing session that were held are all in the panel report. You can see all their stuff if you want to read it.

The result was that the four experts completely collaborated the analysis on which the French ban was based. They all agreed that all forms of asbestos are carcinogens, that there is no threshold for exposure, that is, that lowest exposure is harmless, that exposure causes many cancers, including cancers to secondary users, that is, people who don't just work with asbestos occupationally but encounter, let's say, an asbestos cement pipe in the process of fixing plumbing, or who, for instance, buff asbestos tile floors like school custodians. They agreed that Acontrolled use⁶ is, in fact, impossible to practice and that the substitutes exist, and they're all dangerous. So it was basically a slam dunk against Canada from the standpoint of the experts.

The panel went on to rule that, on the other hand, they agreed, as a big surprise I think, with the Community argument that the TBT agreement didn't apply because product bans are not technical regulations. This was of great concern to many people in the trade policy because this ruling opened up a huge hole in the TBT agreement.

For instance, it would allow, as a random example, would have allowed the community to rephrase the hormone ban as a measure that's based on consumer preference, and at that point it would drop out of WTO regulation altogether.

6. Agreement on Technical Barriers to Trade.

7. World Health Organization.

8. Occupational Safety and Health Administration.

They agreed with Canada, however, that the asbestos and the substitutes, and the asbestos-containing products and substitute Alike products,⁹ and then they found that the exceptions clause⁹ again applied.

At the appellate level, the view of the expert evidence to find that the danger involved in asbestos justified a ban, at the appellate level, after a curious episode, Canada appealed in October of 2000. And then the Community cross-appealed, during the appellate process, as you may hear from Professor Howse, who is in the amicus.

During the appellate process, the Appellate Body, for reasons best known to itself, decided suddenly that it was going to invite amicus briefs. The consulted parties had been announced, and a process of inviting applications for leaves to file brief applications would be amici, to petition the Appellate Body for leave to file a later amicus brief. The petition would be three pages, saying who you are, what your interest is, and what you're going to say is different from what a government is going to say.

Well, after receiving 17 such applications, this announcement immediately triggered a huge flap in Geneva. The Egyptian Ambassador called for a special meeting at the General Counsel¹⁰ about this. Before the due date for the amicus briefs applications, this meeting happened and the Pakistan Ambassador called for the Chair of the Appellate Body to resign. There was generally a consensus in the meeting against the Appellate Body, partially because what the Appellate Body was doing strongly resembled a proposal that the U.S. had made in dispute settlement procedures: to have an amicus procedure.

So in the end, the Appellate Body then rejected everyone's application for the leave to file, gave rather unconvincing reasons, and left nobody happy: not the Appellate Body, not the NGOs¹¹, and certainly not the developing countries.

At the appellate level, you will hear more from parties about the decision.

The Appellate Body reversed the panel. It found that the TBT Agreement does apply to this regulation. Of course, this regulation does apply to binding characteristics, to identifiable products or groups, but they refused. They refused to rule on any of the TBT claims that Canada had made because there was not a sufficient record at the panel level. In other words, they punted. There was a huge factual record, but the Appellate Body decided not to use it. They then found that the products were not Alike⁹ after all. They redid the analysis of Alike⁹ products. Again, you will hear more from people who have more time to talk about it.

But they did the analysis of Alike⁹ products in a way which in many ways goes back to the so-called Aim and effects¹² doctrine of ten years ago. They found that the panel had failed to take carcinogenicity into account in its findings concerning Alike⁹.

But in the end, after trashing the panel's analysis of like products, the Appellate Body, the majority, refused to complete the panel's analysis using the facts and record and simply concluded that Canada hadn't met its burden to provide evidence, and that, therefore, there was no violation of national treatment. The Appellate Body then unnecessarily went on to look at the exceptions clause of the GATT Article XX(b). It had a long discussion of the panel's finding and upheld the panel's finding that the decree was necessary for health reasons. It found that Acontrolled use⁹ wasn't a reasonable alternative to the product ban, and it upheld the way the panel had dealt with scientific experts and their handling of the scientific experts. But again, these findings under Article XX are in the end just dictum.

Let me stop there. I'll hold the discussion of non-violation for the question period, in case someone is genuinely interested.

9. Paragraph (b) of Article XX of the 1994 General Agreement on Tariffs and Trade, entitled AGeneral Exceptions,⁹ refers to Ameasures necessary to protect human, animal or plant life or health.⁹

10. WTO General Counsel.

11. Non-governmental organizations.

12. Under the proposed Aim and effects¹² test, Alike⁹ under Article III of the 1994 General Agreement on Tariffs and Trade would turn on whether the aim and trade effects of a measure were protectionist of domestic products against imported products.

PROFESSOR CONE: Thank you.

Professor Lowenfeld has suggested that we go on to Steve Charnovitz and that he, Professor Lowenfeld, will join in the discussion afterward so that we can move more quickly in the discussion.

Let me just clarify one thing. Ms. Porges indicated, but rather quickly so maybe it wasn't made clear, that the Appellate Body Division, three members of the Appellate Body who ruled on this case when it was appealed from the panel, was itself divided. This is quite unusual in WTO proceedings, so the vote was in effect two to one. The division was over why were these products not Alike products¹³; why are asbestos and substitute products not Alike products¹³? One member seemed to be saying they're not like products because one is carcinogenic and the other isn't. The majority however, the two, were saying in effect B B and if the summary is inadequate, I'm sure I will be both corrected and supplemented very soon B B the two seem to be saying that asbestos and substitute product are not Acompetitive¹³ within the meaning of Article III, the National Treatment Provision in the GATT.

I am sorry to take up time.

MS. PORGES: Just to remark on the outcome. Here we are, Canada B B this is a great example of the great moral for lawyers that if you sue and lose, you're generally worse off than if you would never have sued at all. Canada has, by bringing this case B B or Quebec, by pressuring the Canadian government into bringing this case B B those who pushed for this case have succeeded in establishing a huge precedent against asbestos. They have succeeded in further burying asbestos internationally and besmirching the reputation of asbestos. Now what they have succeeded in creating is a panel report which has about 100 pages of expert testimony, endorsed by a respected international organization that finds that this stuff is nasty, and that chrysotile asbestos is just as bad as other forms of asbestos and equally deserving of the ban. This was exactly the objective that Canada sought to prevent, and that's where it winds up.

PROFESSOR CONE: Steve.

MR. CHARNOVITZ^{*}: It's a good point. Thank you.

It's good to be back here. We had a program on the Shrimp/Turtle case¹³ here just precisely three years ago, and it's right after the Appellate Body decision in this case. It's sort of interesting to think back on that evening because the mood of the country was so much different then. We had a booming economy in late 1998. We were all feeling a lot more secure than perhaps we do tonight. Our topic that evening was the security of the turtles. C-SPAN covered the event that evening. So it is somewhat of a different world today.

PROFESSOR CONE: It was broadcast in prime time. It was following an event featuring Hillary Clinton, just to show you how many years ago that was. So it did get very good coverage.

Excuse me.

MR. CHARNOVITZ: Thank you.

Amy, as she always does, gave a very good explanation of the case, and so I will try to touch in some other areas that she didn't have time to cover.

As she said, the panel had found that the French law was a violation of GATT Article III but it was saved by GATT Article XX, the environmental exception, and so France had won the case. The Appellate Body agreed that France had won.

^{*} Steve Charnovitz practices law at Wilmer, Cutler & Pickering in Washington, D.C., and has written widely on economic affairs, the environment, and human rights.

13. *United States Import Prohibition of Certain Shrimps and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R (May 15, 1998).

I think this makes this case so significant because it's the first GATT or WTO decision in which a challenged trade measure was held compliant. A B trade measure regarding health was held compliant with GATT's environmental or health exceptions. So I think it makes it a very significant decision, and it reinforced, I think, the favorable jurisprudence that started with the Shrimp/Turtle case, and it's helping, I think, to build confidence of people around the world that the WTO is now taking environment seriously. And I think, this case will also, I think, help build public support in the United States for getting new trade authority through the Congress. There is an effort in Washington right now to do that, and I think this Appellate Body decision will help in that regard.

There is also another similarity with the Shrimp/Turtle decision, which are certainly both high profile cases, but also both have very troubling WTO panel decisions that were corrected by the Appellate Body.

In December we're going to lose three Appellate Body members that are cycling off, and at the end of the year we'll have almost an entirely new Appellate Body than we had at the beginning of the WTO. Six out of seven will be new and we don't really know in the future how the new Appellate Body will operate.

But I will say the one that we had to start with has done the WTO a great service in correcting some decisions which really would have hurt the WTO if they had been allowed to stand.

I won't cover the TBT. I won't say that much again about Article III either, in the interest of time. Rob Howse has been one of the champions of this GATT Article III issue. He's written about it extensively and lectured on it, and he may have time to deal with it. If not, perhaps we can deal with it in the question period.

But I think the point to take away about the GATT Article III issue was that the panel had said that the risky asbestos and the unriskey substitute could well be Alike products no matter how much the risk was. The risk just wasn't in their mind. Risk wasn't a factor in the Alike product analysis, and that conclusion troubled a lot of people, and the Appellate Body, I think, rightly overturned that.

Amy said this. It may have gone past people, but she described the Appellate Body decision on Article XX as unnecessarily addressing Article XX because the posture of the case was that at the panel level, France had been found to violate Article III, but it was saved by Article XX. The Appellate Body having reversed on Article III left no violation. So the Appellate Body could have stopped there and said, well, we've done our work. Instead, they reviewed Canada's concerns and appeal about the Article XX decision and affirmed it.

I think that was significant. I'm not sure I quite call it dicta as Amy did, but I think it was significant in that the Appellate Body, even though it didn't have to, went ahead, ruled on Article XX, and made some very important statements about Article XX. Maybe they were trying to use their power of dicta to move the trade environment debate forward. I think they succeeded in doing it, and it was welcomed that they did.

A lot of people felt that when they reversed Article III they might stop there and undo, in effect, the panel decision on Article XX, but they didn't. They went ahead.

Let me just say a little about the Article XX issues. Canada appealed on several points. One was that asbestos was not covered by Article XX(b) because it wasn't really a risk to human health. The Appellate Body upheld the panel, stating that the panel enjoys a margin of discretion in assessing the weight of the evidence in this proceeding, as Amy said. The panel had four scientific experts. The Appellate Body used a standard of review on whether the panel exceeded the bounds of its discretion, and the Appellate Body said the panel had not. Another point of appeal is whether the French measure was Anecessary.@

You recall Article XX(b), the health exception, using the term Anecessary to protect human, animal or plant life or health.@ Canada complained that the panel had not quantified the risk of asbestos, which Canada claimed was low or nonexistent and, therefore, could not properly come to the conclusion that the import ban was Anecessary.@

The Appellate Body held that there was no requirement under Article XX(b) for a quantification of risk, and it drew that conclusion, not so much from Article XX but from SPS, the Sanitary and Phytosanitary Agreement. It drew that implication from the SPS Agreement, which I thought was interesting.

Canada further appealed on the argument that a ban on asbestos was too narrow in scope to deal with the risk. In other words, France was banning the asbestos while permitting substitutes which could be risky, too. The Appellate Body rejected this argument, saying that, and I quote here, "It was undisputed that WTO members have a right to determine the level of protection of health that they consider appropriate in a given situation."

Now the Appellate Body didn't offer any citation from that sentence saying it was undisputed. And as far as I can tell, this is a new pronouncement of WTO law unsupported by any text in the GATT. There is some support for it in the preamble of the Technical Barriers To Trade Agreement, but I think that was a significant outcome of the Appellate Body decision.

Canada's last appeal was that the French measure was not *A*necessary[@] because the alternative of *A*controlled use[@] was readily reasonably available.

The Appellate Body said that France could not reasonably be expected to employ measures that would not achieve France's chosen level of protection, which was to eliminate asbestos-related health risk. And noting that the panel had found that the efficacy of the *A*controlled use[@] option had not been demonstrated, the Appellate Body ruled that the *A*controlled use[@] was not a reasonably available alternative.

The panel had also found the French measure had met subparagraph (b), as qualified by the introductory clause to Article XX, the *A*chateau,[@] as it's sometime called. This binding was not appealed by Canada.

In my view, the panel's rationale on the chateau was a bit thin, even recognizing that the EC would bear sort of the burden of defending itself on that. So the conclusion on this Appellate Body decision, Article XX, I think it demonstrates the proposition that the WTO can afford a great deal of deference to the health choices that a government makes.

If you look at the panel decision you will see, in paragraph after paragraph, all sorts of deference to national health scientific decision making. On the other hand, though, I think Canada stated serious claims on which relief could have been granted by the WTO, and it wasn't. And Canada could very well feel that its case wasn't really taken that seriously, perhaps because of the political overtones of this case.

Let me just say a couple of words about the amicus brief controversy. I thought what the Appellate Body did was exactly the right thing to do. The governments had been saying in the Dispute Settlement Body and around the WTO for months that the Appellate Body's prior decisions in the Shrimp/Turtle case and the lead bar case¹⁴ on amicus briefs had left too much in the air; that litigant governments would not know when a panel or the Appellate Body might be accepting a NGO brief and, therefore, would not have an opportunity to respond to it quickly enough. So this was clearly being expressed by the governments at the WTO that there was more needed in the way of rules or procedure in terms of amicus briefs.

So I think the Appellate Body jumped into that and said that here we have an asbestos case which is of great interest around the world. There are a lot of NGOs that want to submit briefs. I think some had already submitted them. And the Appellate Body said we need the procedure; we've got to regularize; they have to have transparency. And I think they quite properly put out a notice on the web announcing to the world that everyone had eight days, not much time, but eight days to get an application in for leave to file an amicus brief. And I think that was an appropriate thing to do.

The governments, obviously, most of them didn't feel that way. It turned out, I think, only the United States strongly defended the Appellate Body. There were a couple of other governments that

14. *United States Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, Report of the Appellate Body, WT/DS138/AB/R (Oct. 5, 2000).

slightly defended them and called the special meeting that Amy described and, I think, twisted or kind of forced the Appellate Body, in effect, to back down.

So the Appellate Body denied all the applications, including one from Rob Howse, and I think Rob quite appropriately got his in on time. And following in the tradition of distinguished law professors who try to submit amicus briefs to international courts, and it was a shame that the governments, I think, tried to interfere with the judicial independence of the Appellate Body.

Now from the governments' perspective this is a matter of WTO legislation, so if we're going to have procedures, it's up to us the government to enact them, not the Appellate Body. But we had the WTO in operation since 1995. They haven't acted very much to provide for NGO participation. They certainly haven't acted in the case of amicus briefs. They haven't acted then, the November 2000 meeting, where they jumped on the Appellate Body. And so, I think, given the government inaction on this again, that shows why the Appellate Body felt the need to act.

Where are we now? Amicus briefs, I don't really know. I think the action of the Appellate Body in rejecting these applications really calls into question whether or not the panel's or the Appellate Body's procedure are going to accept and read unsolicited briefs. And I think that would be a shame if we lose that significant B B but I think it was a significant positive development.

Because although accepting amicus briefs by the WTO is beyond where other international courts are, the International Court of Justice does not, at this point, accept amicus briefs. The WTO was ahead of the curve on that. The WTO was significantly behind the curve with respect to other issues relating to NGOs. The NGO participation in the WTO now is basically nonexistent, whereas in the UN system, and as you have in New York, there is quite a lot of NGO participation in the United Nations.

I think it would be unfortunate if this episode leads to no amicus briefs in the future because the insularity of the WTO, I think, is one of its defects, and it's undermining popular support for trade and the WTO in this country and in other countries, too.

I think if we're going to get public support for free trade, which I think is absolutely essential, we have to have the public have confidence in the WTO system, and that means not only good decisions like the asbestos decision, and repeating that jurisprudence in the future, but also making the WTO more open and transparent than has been up to date.

Thank you.

PROFESSOR CONE: Thank you, Steve. I appreciate that very much.

As has been indicated, our next speaker is a one man NGO. He submitted an amicus brief in his own name in this case. He and 16 NGOs, so 17 briefs. The Appellate Body formerly having solicited them, then ruled or then stated that it had not accepted them. The Appellate Body did not say that it hadn't read them.

At any rate, our one man NGO is our next speaker, Robert Howse.

PROFESSOR HOWSE*: Thank you very much, Professor Cone.

I will just pick up on that note. What I did do in the three pages, because the Appellate Body didn't specify anything about font, was to basically make the entire argument on the brief because I had an intuition, based upon an encounter with a certain individual who happened to be seated near me in an airplane, that the Appellate Body was not going to accept any of the briefs. I took the chance of being considered out of order and actually said pretty well everything I had to say in those three or four pages.

What put me out, though, was the letter that I received from the Appellate Body staff that said that the brief had not been accepted because I had not been in compliance with the precise requirements that were listed in the Appellate Body's call for briefs or special procedure which included putting your name and address, disclosing any material interest you had in the case, and a number of other things. And I had

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done that scrupulously and also sent copies of it to several leading practitioners and asked them whether I made any mistakes in follow the requirements.

So I was pretty put out that I, as a professor of WTO law, who thought that I could be quite careful in following a set of procedural requirements, had for that reason been rejected, that I hadn't followed them.

I gave it as a test to my students, who are always looking for opportunities to show me up as someone who makes mistakes, and bless them, none of the students managed to find anything in those three pages that did not conform to the requirements that the Appellate Body had set out.

Of course, the Appellate Body could merely have said it was exercising its discretion not to accept an amicus brief, and that wouldn't have annoyed me. It's a discretion, and no one has a right to have their brief accepted.

Well, it's good to be here and I really appreciate Professor Cone's hospitality. Since I've arrived in town, he's treated me as if I were his personal guest. Around one o'clock, when I was checking into the hotel and doing my e-mail, when I got in the room there was a knock on the door, and usually when people knock on the door of the room it's because they're drunk and they think it's their room and it's not, or because somebody's got a room service order screwed up, or because they're trying to turn down the bed or give you chocolates. So my normal reaction is, I'm busy, go away.

Fortunately, on this occasion I was somewhat more surprised because it was none other than Professor Cone who was thoughtful enough, since he was passing through the area, to see if I could be his lunch guest. And that struck me as a really lovely example of spontaneous grace, which is something that people in the city have been showing in a big way recently.

So it's good to be here. I want to start by placing the asbestos decision in a slightly different context, although one that I think is presupposed by some of Steve's remarks, which is the context of the debate or struggle over globalization, between globalization and globalization's enemies, or to use a phrase, globalization discontent.

One of the reasons that the WTO has been a target of what one might call the discontent, or enemies of globalization, as well as people who just have doubts about the course it's taken and who's driving it, has been the perception that the legal rules of the WTO somehow result in a limitation on the ability of a democratic government to regulate in a manner that reflects legitimate public values, the expression of legitimate public opinion in member countries.

How did this perception come about? I think that we have to look back for a moment to what I would refer to as the original GATT. The GATT was a product of the post-war liberal international order. They tried to create an institution for trade. Some of you may remember that project was the ITO, the International Trade Organization, and failed. So what we got is the IMF, the World Bank, and sort of the rump of the ITO, the GATT.

The GATT was essentially a framework for reciprocal negotiation of trade concessions, the removal of tariffs or other comparable border measures. But it was recognized that if you wanted to do trade through exchange of concession or reciprocity B B and, of course, economists would often tell you that even unilateral liberalizing trade makes perfect sense B B but if you want to do it through reciprocity and bound legal commitments through a bargain or a deal, you have to make sure that people don't cheat on the deal.

One form of cheating that was clearly already perceived to be possible when the GATT was negotiated was that you can give tariff concessions to your trading partners and then keep their products out by virtue of discriminating against those imported products in your domestic rules and regulations.

So one of the anti-cheating or anti-circumvention clauses in this GATT legal frame work was the national treatment provision, which has two parts. Article III:2 deals with taxation and Article III:4 with domestic laws, regulations, and requirements. And what Article III:4 says is that you have to provide no less favorable treatment for imported products than Alike@ domestic products in respect to whole range of things: marketing, sale, and so on. So it's basically a nondiscrimination norm. You can't discriminate against imports.

The fact that the original GATT basically handled the problem that member states might cheat on their trading concessions, their tariff concessions, and so on through discriminatory internal regulation, through basically a nondiscrimination type of requirement. Countries weren't required to give a justification for how they did their domestic regulation. There wasn't an attempt to turn the GATT into the kind of global OMB¹⁵, but instead, the line was drawn at discrimination, protective discrimination.

So this was entirely consistent with what John Ruggie has referred to as the basic structure of the post-war economic settlement, namely embedded liberalism. And what embedded liberalism means was that the rules of the global economic order were not imposed on domestic policies, but rather were facilitative of domestic policies, domestic governments developing a progressive social welfare regulatory state. You can reduce trade barriers, like tariffs, quotas and so on, at the same time as building progressive, redistributive government regulation, and the two would go hand in hand.

Now, this idea of imbedded liberalism, treating the problem of domestic regulation from a trade policy point of view through a nondiscrimination norm, is entirely consistent with them. It's consistent with virtually complete regulatory diversity, right? Because the principal is, we can regulate anything and we can do it however we please, as long as the regulation is evenhanded between imported and domestic products. As long as the regulation is not protectionist, we can chose to regulate health and safety strictly or leniently, or through command and control instruments, or through other policy instruments. But if we're evenhanded and nondiscriminatory as between imports and domestic products, we're okay.

And so you can have a wide variety of regimes, ideologically, in their approach to regulation, and all of those regimes can fulfill their GATT obligations with respect to not implementing protective measures fully.

What happened to alter this? If this continued to be the case, then the people protesting that GATT interferes with legitimate domestic regulatory outcomes won't have much to say, and they would especially not have much to say because with that view of Article III:4 and Article XX, in the rare cases where you might need to discriminate against imports, in those rare cases, where you might need to discriminate against imports for legitimate regulatory purposes, you have the Article XX exception.

For example, a country might want to ban outright imports for meat from a country where mad cow disease is present. It might want to be explicitly discriminatory on the basis of country because that happens to be the easiest way of getting to a situation of low or zero risk, if you haven't had that risk or disease yet on your soil. One of the easiest ways of dealing with it is to make sure that you don't import any product from a place where that disease has occurred. It's a crude surrogate, but easier to administer at the border than inspection and so on.

So even in those rare cases where you felt the two events were legitimately regulatory objectives and you had to discriminate, there was a limitation clause. Then comes the '70s and '80s and the regulatory revolution, where regulation comes under general criticism in a range of liberal democracy and certainly by economists and many political economists, economic conservatives, regulation is suspected to be more often than not driven by the interest group captured, as opposed to serving the public interest.

And so, instead of a nondiscrimination norm, a view emerges that one needs something stronger in the trading regime, because it's certainly true. And those of you who studied discrimination law in other contexts, such as equality in employment and whatever, will know there are many forms of discrimination that don't appear on the face of the law. It's a genuine problem to deal with, nonofficial discrimination. How do you distinguish between an innocent disparate impact from a neutral rule on the one hand, and hidden discrimination on the other?

But just at the time that that was being considered or increasingly viewed as a problem in the GATT and eventually negotiated in the Uruguay Round, negotiations with respect to TBT and SBS, it was an era of what Soros would now call market fundamentalism, scepticism by regulation in general. So I think that the zeitgeists, as it were, were such that it didn't seem unreasonable that for purposes of trade liberalization, we should view the GATT norms with respect to internal government regulation as

15. United States Office of Management and Budget.

somehow requiring or putting some onus on a country that regulates to justify its regulations when they affect trade.

That's kind of the opposite of the nondiscrimination approach which says that if we don't find any protective discrimination, you can do whatever you want. We're not going to haul you before the WTO and ask you if you did cost-benefit analysis. That's a matter for domestic political debate and not for international trade negotiations.

So we got the TBT agreement, which has been already briefly mentioned, but what also developed was an interpretation of Article III:4, the national treatment provision that I've been talking about that was quite different than, I think, the understanding that developed in the post-war era.

This was the view that what Alike products[@] means is just to be defined economically according to the marketplace and not taken into account whether those products kill people, or whether they threaten endangered species, or do other nefarious things that people might care about and might want governments to regulate against. If the products are substitutable in the marketplace, we should view them as Alike products,[@] which means, therefore, that even if there's no protective discrimination, a government should have to justify its regulation under Article XX, under the exceptions provisions, which basically tells governments, even if a neutral nondiscriminatory nonprotective regulation has some impact on trade or some impact on one of your trading partners, we can haul you up before the WTO dispute settlement authorities and demand that you make an account of your regulation.

Now, in an era, as I say, where many policy people and policy intellectuals and economists and so on were skeptical of regulation generally, this doesn't seem all together unreasonable.

But circumstances and the zeitgeist change, and by the time that the Appellate Body had to deal with this case, I think it had changed somewhat, and the pendulum swung somewhat back, with the results of the deregulation revolution being very disappointing to many people, and indeed very threatening in terms of what they saw as the protection by governments of essential human interests.

So what happened was that in early WTO cases, with respect to national treatment Article III:2, the taxation provision, came to be interpreted by panels basically such that Alike products[@] meant substitutable in the marketplace, or Alike[@] in terms of factors unrelated to basic human interests that governments regulate about. And the impact would be that if you have regulatory objectives that justify treating the products as Aunlike,[@] you have to deal with that through the exceptions provision of Article XX.

The Appellate Body managed to sort of box itself in by affirming this basic approach of panels in the Japanese alcohol case¹⁶ to the problem of Alike products[@] in the taxation context. Having boxed itself in, the Appellate Body now sort of found itself with a sort of very different kind of fact situation in asbestos, where looking at whether the products are Alike[@] or Aunlike,[@] from the point of view of legitimate regulatory objectives, seems a lot more sensible and a lot more related to what the case is actually about.

But instead of reverting to something like what Amy called the Aims and Effects Test, the Appellate Body dealt with the problem through a much more indirect route. And instead of getting out of the box through the front door, it sort of tried to get out by the back door by suggesting that consumer preferences, which is in theory an economic idea, consumer preferences could be used to understand why products that kill people are different from products that don't kill people.

And they did that by looking at an idealized marketplace where consumers of asbestos and Alike products[@] would probably prefer the Alike products,[@] if you had a liability rule, but fully internalized the externalities, i.e., people dying, getting very sick from the use of asbestos. But of course, that's not a real marketplace. That's a marketplace where government or some kind of collective authority has stepped in and decided in its wisdom to produce a liability rule such that these externalities are internalized in an appropriate way. And one might also say cryptically, at some level, if you buy the cough serum, the choice of liability rules would reflect redistributive choices of that society.

16. *JapanBBTaxes on Alcoholic Beverages*, Report of the Appellate Body, AB-1996-2, WT/DS8, 10, 11/AB/R (Oct. 4, 1996).

So through this device of an idealized marketplace and through the rubric of understanding consumer preferences through this idealized marketplace, the Appellate Body has managed to find its way back to what, I think, was the original understanding of the role of Article III in the GATT. And given the kind of criticism and concerns about globalization and with WTO's role in it, that came none too soon. And on that point, I fully agree with Steve.

Am I out of time?

PROFESSOR CONE: Yes. On the other hand, you used your time brilliantly, and thank you. Amy, do you want to say just a few brief words?

MS. PORGES: Goodness, I don't quite agree. I would have some differences of view with Article III, but it's sort of hard to get into it without B B it's really a two hour argument and not five minutes. There are people that have better things to do.

PROFESSOR HOWSE: On the other hand, I'm free for a drink afterward.

MS. PORGES: Just another remark to follow up on Steve, just about amicus briefs. I don't think that amicus briefs are in a dead end at this point. I think the amicus briefs are very much alive and well. The asbestos panel accepted two amicus briefs from a place called the Collegium Ramasini, a group of basically occupational health experts who hate asbestos, and from the AFL-CIO. The AFL-CIO wrote a letter to the panel saying we don't like asbestos; it's bad. And the panel accepted it.

In fact, amicus briefs may, in fact, be most useful at the panel level because it's there that the trier of fact, the panel, can receive more information about the facts. Governments' knowledge of the facts is actually quite limited often. And there are facts that don't show up. In a case, for instance, about U.S. Home, what's is it called? The exception that allows mom and pop restaurants to play the home radio, exception to the copyright law, one of the issues was whether this exception was reasonable, whether this unreasonably impaired the rights of copyright holders. And in fact, the collecting societies like BMI, I believe, wrote to that panel and said, we feel our interests are impaired.

So let's say there's a future for amicus briefs. And, in fact, a very important future for business stake holders, not just nonprofits, but business stakeholders whose interests aren't being represented by either or any of the governments in the case.

PROFESSOR LOWENFELD*: Those of you who know me know there's a limit as to how long I can remain silent. I think listening to Amy, particularly the asbestos case, is a dumb case. It should never have been brought. And if you ask anybody, would you take this on contingency, nobody would have taken it. Nobody would go around the world saying three cheers for asbestos.

Why was this case taken? Well, there were political pressures. It had to do with differences between Quebec and the national government, and we see some of this in the United States and in other places, too.

My perception of the way that the DSU¹⁷ was formed, the idea of moving from relatively political to more judicial and legal disputes settlement, which was a major accomplishment of the Uruguay Round, was to remove politics to some extent from the disputes settlement. What turned out was that governments are not very good at screening out cases. They bring them when they're pressed, and then they appeal cases where the appeal doesn't make any sense. So now the case is that the appeal actually changed the law. But in many other cases it doesn't. It just places a broader hold.

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17. WTO Dispute Settlement Understanding.

I would like to appeal to any of you in government or who are likely to be in government sometime to take the position that the government does have a screening function. Professor Dreyfus, my colleague, and I wrote an article a couple of years ago looking at the TRIPS¹⁸ agreement and which kinds of disputes ought to be brought, whether a patent holder who in patriae is threatened somewhat can't bring the case directly, goes to it's government, say the United States or the EU¹⁹. And they ought to say, wait a minute, this isn't the right case to bring, and that's our decision to make. And I miss that function in the trade offices. End of speech.

PROFESSOR CONE: Let's have some questions.

AUDIENCE MEMBER 1: Kind of directed at everybody because I'm a little bit confused, I think maybe because there were some differences of opinion among the panel.

PROFESSOR CONE: There is.

AUDIENCE MEMBER 1: Certainly it was a bad case to bring, but Steve, you said this was a victory for the environmental community and sort of likened it to Shrimp/Turtle. I'm not sure I saw the analogy there.

But it seems there are two major issues. One was whether Alike product[@] could be distinguished based on health effects of the product under Article III, as opposed to having to go to the exception. And Professor Howse, you talked about this more. I'm not sure I fully understood, but I think your discussion was extremely interesting and basically, as I understand, on both levels said, no, but the appellate level found another way to say that these were not Alike products.[@]

From the environmental perspective, that was not great because health differences and health effects of the products are not going to be allowed, even now, to be used as a basis of distinguishing products, if I understand this correctly. The Appellate Body did not say that they were Aunlike products[@] on that basis, is that correct?

PROFESSOR HOWSE: That was what I think concerned the member who wrote the concurring opinion, that he felt that the plurality/majority opinion did not state explicitly enough that in this situation, the fact that the physical differences between the products had significantly different health effects and, therefore, would be viewed differently from the consumers. It was a clear basis for regarding the products as Aunlike.[@]

But I think that Steve was basically right. You can make an analogous argument in a wide range of situations. I mean, you could argue the Shrimp/Turtle case, which the United States didn't cross the national treatment issue and conceded that it was a violation B B or it didn't concede, said it would not contest that it was a violation of Article XI.

You can make a similar argument. Consumers, if they do care, some group of consumers do care as to whether the shrimp is turtle-friendly or not. And given those consumer preferences, in an idealized marketplace, if you internalize the global environmental externalities, the risk to the turtle mortality, that you would have fully internalized that by the appropriate rule, you would have a situation where you would have a market price differential.

AUDIENCE MEMBER 1: Let me just come back to a kind of more simple environmental perspective on this. One is the products were not distinguished based on environmental effects. I think that was the point you made, right? So you still have to look to an exception. And luckily, they said it was okay under the exception. But your whole issue about whether a legitimate regulatory objective, such as

18. WTO Trade-Related Aspects of Intellectual Property Rights.

19. European Union.

the environment, would be a basis for distinguishing the products was not accepted by either the panel or B B

PROFESSOR CONE: I think, if I may presume to interpret Professor Howse, I think he's saying in a sort of subtle way, two members of the Appellate Body who did not agree with the concurring opinion were creating an idealized argument in order to come out with the result that you would find good.

I myself would say, and I will just add one sentence and I will step back. I myself would say that I think that Professor Howse, who is quite brilliant in all of this, is doing more than postulate an idealized marketplace. I think he's postulating an idealized decision about the two members of the Appellate Division.

MR. CHARNOVITZ: Let me just add one brief point. I don't really understand the concurring opinion that well because I don't see that there is a category in the GATT or in GATT Article III:4 for Unlike products. There's simply a Like product category. So I don't know how a panel or the Appellate Body could define these things as Unlike products because that category does not exist.

AUDIENCE MEMBER 1: But you say they're not Like products.

MR. CHARNOVITZ: Yes, it had not been proven they were Like products.

PROFESSOR CONE: Sir.

AUDIENCE MEMBER 2: First, I'd like to state my bias. I'm a former chair of the International Environmental Law Committee. I want to welcome and thank the panel for being here on behalf of that committee. And also I'm a professor of environmental law and international environmental law.

I would like the panel to perhaps get back to the title of the panel, The Greening Of The World Trade Organization. It seems to me, from what you said, that the asbestos case isn't necessarily an environmental case. It actually couldn't have been brought solely under Article XX(b) because the chateau article has the discriminatory requirement in it which could have covered the Article III issue, and it could have been a straight Article XX case.

But isn't the Shrimp/Turtle case a far more important case in terms of GATT's ability to deal with environmental issues, to the extent that in asbestos you were dealing with the product itself, whereas in Shrimp/Turtle you were dealing with the way the product was cooked? There was nothing the matter with the shrimp; they weren't dangerous. And I think the environmental community is most concerned with the question of dealing with the way products are made as well as the products themselves. And perhaps Shrimp/Turtle opens the door a crack on that issue as to how GATT can deal with environmental issues. I'm not sure asbestos helps us very much on that concern.

PROFESSOR LOWENFELD: I guess I'm called on because the relation between Article III and Article XX was so out at length in this case, which was one of the panels. Of course, at that time there was no Appellate Body. But generally, that's regarded as a leading case under the subject, and the decision in that case was that the complainant has to show that its rights are violated by, for example, saying it's Article III rights have not been honored. And then only after the United States took the opposite position, but lost on that issue. And then Article XX is an affirmative defense with the burden on the regulator. I don't see how you can bring a case under Article XX until you have an initial cause of action under Article III or Article XI or one or the other articles.

AUDIENCE MEMBER 2: Shrimp/Turtle was B B

PROFESSOR LOWENFELD: It was XI, not III. But what I'm saying is Article XX is an exception to the general rule. It's an affirmative defense, and the burden of proof is on the importing, responding country.

AUDIENCE MEMBER 3: I would like to get back to the question on the distinction between the process and the product because it seems to me that I understand, first of all, the environmental community may be particularly concerned with legitimating in some way considerations of process. On the other hand, there also seems to me that starting from the post-war settlement, as Professor Howse described it, that the consent, that essentially the focus has to be if that's your starting point on the product rather than the B B let me just explain what I sort of think and maybe you can tell me in detail why I'm wrong.

I think that when you start going into the process at that point, if you agree in the original consensus, let's say not in the 1970s critique and not the subsequent, the post deregulation phase, that you're not going to be looking at so much the domestic arrangements of national states as much as the focus will be on the effects of the products when they are in your "territory". In other words, when they become imports. Then I think that's what makes it difficult to get to the process of production, assuming that the process of production falls within domestic jurisdiction.

PROFESSOR HOWSE: There is no such conception of jurisdiction in the GATT. If I want to regulate an order to prevent Turtle/Shrimp being killed outside of my jurisdiction, that's just as much a legitimate part of regulatory diversity as regulating to prevent them from being killed within my jurisdiction. No such distinction is known to the GATT treaty text.

And this, if you're interested, my colleague, Don Regan, and I have written a 40-page article in the EUROPEAN JOURNAL OF INTERNATIONAL LAW that explains why the product-process distinction is totally bogus. It has no basis in economics and no basis in the text of the GATT. It was invented opportunistically in a result-oriented way by two unadopted panels at the end of the '80s, beginning of the 1990s, because it was a way of keeping the environmentalists who were regarded as barbarians at the gate out of the GATT. The wording of Article III:4 does not refer to internal laws, regulations, or requirements effecting products or on products. Contrary to what the panel suggested and contrary to what people like John Jackson have sometimes suggested, the language in Article III:4 is different. It refers to internal laws, regulations, and requirements effecting various aspects, like market and distribution and so on, of the product in question.

And so, the idea that Article III:4 only deals with measures that regulate elements of the product itself is completely textually unfounded.

AUDIENCE MEMBER 3: I'm sure that you're right in terms of textual analysis and legal analysis, but the subsequent question is, can we change the politics sufficiently that we can now more generally go beyond Shrimp/Turtle, and going forward from Shrimp/Turtle, if you like to really integrate the process considerations?

I'm particularly interested, for example, in labor issues.

MS. PORGES: I was about to raise labor issues because, just to flash backwards to the infamous dolphin report, I was around Geneva at the time, and it was tremendously popular. And the U.S. Marine Mammal Protection Act was tremendously unpopular because of its extra-jurisdictional aspect of telling Mexico and other countries how to fish.

You have no idea how unpopular it was, and one of the reasons why it was so unpopular was precisely the link to labor. Because the logic used in defending against tuna fishing the wrong way, in the U.S., the basic perception of the developing countries then and now is that if the U.S. can stop tuna that's been fished the wrong way from entering its borders, it can also stop imports of sweaters from Bangladesh unless the people who knit those sweaters were paid the U.S. minimum wage. And if you allow that, then you don't have anymore comparative advantage. You basically have erased the reason for trading. That's

generally the feeling we hear from developing countries in Geneva. I guess it goes back to your post-war settlement.

PROFESSOR CONE: I want to get on to other questions.

PROFESSOR HOWSE: I don't think the post-war settlement was premised upon the assumption the countries would be abandoning the possibility of using trade action to protect workers or protect the environment, but I think Steve Charnovitz has actually done some historical work on this issue, and I defer to him on that.

I think the sort of wage homogenization hypothetical is a complete canard. Under standard Article III:4 analysis, if you look at the beer case where there was a minimum price requirement that seemed to be neutral between certain imported beer and Canadian beer, a panel was able to find, nevertheless, that there was discrimination because the minimum price happened to be set based upon the cost of purely domestic producers.

You don't need a product-process distinction in order to be able to fare out that kind of discrimination. The labor concern is a human rights concern. There's nothing in the post-war settlement that suggests that you couldn't have sanctions as part of the tool kit with which to deal with gross violations of human rights, including labor rights.

AUDIENCE MEMBER 4: Just a point of fact on that. I'm from Social Accountability International. We work on the standards in the labor rights area. I am not aware of any case where any of these proposed standards or codes require someone in any country to pay another country's minimum wage. And it is possible that exporters in Bangladesh peered that, but it was an incorrect perception.

PROFESSOR LOWENFELD: It's not just wages.

AUDIENCE MEMBER 4: That wages should obey domestic rules, just saying that they should meet a living wage. A living wage is, under no interpretation, the wage that we pay in the United States.

PROFESSOR LOWENFELD: It's not domestic minimum wage, but it's such issues as, for example, child labor.

AUDIENCE MEMBER 4: Yes, of course.

PROFESSOR LOWENFELD: And of course, the GATT does permit prohibition of slave and prison labor. But then you say, what about the 15 year old girl? It's not quite like the minimum wage. It's again part of the issue that Amy talked about.

AUDIENCE MEMBER 5: There's a wide range of provisions.

MS. PORGES: Let me just add one thing, which is, right now, that sanctions were really a big thing in the year when we were the almighty United States and lead the world with the mightiest economy and the eight boom years.

Now we're heading into a rather different era. We're actually heading into an era which you see the U.S. Government looking more for cooperation from other governments, and it will be very interesting to see what happens to the overall political situation for basically threatening other governments until they change their domestic policy.

AUDIENCE MEMBER 5: There are many ways to address that.

PROFESSOR HOWSE: I think the cooperation and threats B B I mean, if you know the social science literature, cooperation and threats in real life are not simply opposite kinds of strategies. They can be quite consistent strategies.

Sometimes, the reason people cooperate is what they think will happen to them if they don't cooperate. I mean, almost all negotiations are based upon threats of some kind, that is to say, predictions of what the one party will be able to do to the other in the absence of a negotiated outcome. So I don't think these things can be understood as two opposed strategies.

PROFESSOR CONE: Yes, ma'am.

AUDIENCE MEMBER 6: My question is, is this really the reading of WTO given that the Appellate Body on first impression on Article XXIII held that Article XXIII applies to provisions, and Article XXIII referring to whether there are benefits that a country receives through the marshal, in this case the Marrakesh Treaty of Canada, whether those benefits were nullified or impaired due to France's decree?

MS. PORGES: Non-violation, it's really one of the most staggering, I will say, it's one of the more obscure corners of the GATT. There have been five or maybe six successful cases under the GATT in over 50 years. It's very rare. And the last case was brought by the United States against Japan and was unsuccessful, the famous Kodak case. It's very difficult to prevail in a case like that. There is a very high legal burden required to show exactly what kind of commercial benefits one was deprived of, and Canada simply didn't meet the burden. They didn't. I think the Appellate Body successfully ducked the issue of whether Canada really had a right to expect the benefits, whether they were in fact B B whether the benefits were frustrated or not. I think the Appellate Body decision does leave certain things open, and that the possibility that a government will be sued essentially for a manner to provide compensation for regulatory actions, even if those regulatory actions are totally legal, is very remote.

PROFESSOR HOWSE: I agree with that. The Europeans had very odd lawyers. The lawyering for Europe was very odd for this case, and I don't think it was outstanding by any means.

They asked the Appellate Body to find that the non-violation remedy didn't apply to health-related disputes. You don't ask a court to make a ruling that far broader than the facts of the case you're litigating. All the Appellate Body said was, since there isn't the evidence here, the factual evidence necessary to even make the claim.

I mean, we can't say it doesn't apply to health-related issues because that would be creating law; it would be creating a general kind of bright line rule that's not in the treaty itself. But as Amy says, you're not going to, in practice, get a case where a country is going to be able to jump through all the non-violation hoops that you have in Kodak/Fuji and manage to convince the tribunal that there's liability because you expected that they would have changed their law to save their citizens' lives.

MS. PORGES: The essence of the non-violation claim is that the defending party is totally entitled to maintain their measure. They just have to compensate. They don't compensate the stakeholders; they don't actually pay money. What they do is, maybe they provide tariff compensation for some other exporting industry from the injured country. This is really not the kind of remedy that stakeholders like. What they really want is for the measure to vanish. The likelihood that you get such a claim is very, very small.

MR. CHARNOVITZ: In response to that question and an earlier question. I think the title the sponsors gave for this is appropriate, The Greening Of The WTO. Health and environment these days are really intertwined as WTO issues, and it would be hard really to say this is not an environment case. It's a precedence, a green case; it's health care. I think there has been greening in this case and along with Shrimp/Turtle, it demonstrates that.

AUDIENCE MEMBER 6: I think the NAFTA and the methane case where that is a poison, and that's permitted as long as California pays Canada. But that's against the interests of the citizenry in general. Why should the stakeholder have rights, superior rights, to the citizens when it comes to our health?

PROFESSOR LOWENFELD: It's really an investment case and not a trade case.

AUDIENCE MEMBER 6: Can I say one thing? Because of this trend toward compensation in the case of regulatory expropriation and international trade involvement, it is in the investment chapter of NAFTA and every investment treaty. Investment trade themselves are becoming, moreover, lapse. I thought this whole line of discussion, even through the nullification, hasn't been used effectively yet with WTO, is a really interesting issue to be raised.

That has to do with the question of people being opposed to the former globalization going on. It's not in the interest of the citizens.

PROFESSOR CONE: Any other questions? Let's go to the back of the room.

AUDIENCE MEMBER 7: A question on public perception of the reading of WTO. Steve Charnovitz, the Shrimp/Turtle, three years ago, about how much amount of publicity for the Shrimp/Turtle decision that has been made seemed to fall into a publicity black hole. One really, really had to look for it to find out that it existed at all. Thoughts, comments.

PROFESSOR CONE: There is somebody in the room who had more to do with that than the WTO. The U.S. Court of International Trade, and in the end, the United States or the environmentalists in the United States really prevailed.

You're absolutely right you have to follow that case very closely in order to know what happened in the end. As I say, in the end the U.S. environmentalists really prevailed. I was in the courtroom, the judge that's here who was presiding over a key hearing on that case, and I was the only person in the courtroom other than the judge and his staff and counsel. Nobody from the public was there. And that's a very good point, that these cases, what ultimately happens, you really have to want to know what ultimately happens. The press loses interest in it.

Sorry to make a speech. I should let other people yell and speak. Somebody else.

AUDIENCE MEMBER 8: Steve Charnovitz seems to indicate or imply that what happened in Seattle had some impact upon, at least, the WTO's desire to be seen in a better light, in light of the fact of the Appellate Body and its decision. Do you think that it might have? It could have?

MR. CHARNOVITZ: Yes. I think the dismal failure of the WTO in Seattle to launch a new round has had a lot of effect. It hasn't lead to a sort of reform people hoped they would and a lot of developing countries hoped they would. It did shake people up, I think, in a positive way on issues like environment and health and so-called sovereignty issues and public access to the WTO. And we'll see what happens at Doha, if it occurs.

PROFESSOR LOWENFELD: It's still true that the world likes the WTO, because it does have fairly effective dispute settlements. If, for example, you had an international environmental organization, it would either have to start with nothing or there would be no remedies readily available.

So I think your right, Steve. You want to try to green the organization a little bit, and the organization wants to be the organization which has effective dispute settlement and remedy.

You and I have talked about that before. We had a debate in Minnesota about sanctions and whether sanctions in the context of the WTO made sense. Of course, everybody knows the right thing to do is withdraw the objectionable measure and not have a counter measure, because that has the restrictions.

But the fact that there is an effective way to resolve disputes of various kinds, including these disputes, is what I think the world wants.

AUDIENCE MEMBER 9: I would like to get the theme raised about the latest Shrimp/Turtle panel decision and really to put it particularly to Rob Howse. Others may want to comment about it, about how I think he has painted his analysis of the asbestos Appellate Body decision in rather clean lines of a very broad policy in which the stakes would have regulatory freedom, provided they don't discriminate. I wasn't clear about it's a correlation.

But my question is, really, where that clean lines analysis of the asbestos decision is, in fact, really catches what's been going on. For example, the Shrimp/Turtle panel, where I think one might say the whole thing has disappeared into a very murky world of process, where the United States should negotiate in good faith with this or that country, and things go back and forth. In the event there may be a major act on the United States that is fair. It's really B B I think you can read that WTO system runs out at some point. It's not clean lines at all; its gradually fading into obscurity. So that's a hypothesis. What is your approach and what actually is going on are really very much in attention.

PROFESSOR HOWSE: I think that what the Appellate Body has recovered is something of the spirit of embedded liberalism, but through an approach that I think you have well described. I think that, probably, I misspoke if I gave the impression that what the Appellate Body was returning to or tried to return to is a clean line distinction between illegitimate discriminatory measures and legitimate ones that were nondiscriminatory. I think it's returning a bit to the zeitgeist that underlay that jurisprudential approach, but it's doing it through a somewhat different route.

I like the image that you used. And in writing about this, I've used the terminology of subsidiarity, that it's putting one layer of subsidiarity onto another, so that we scrutinize the process more carefully than substance, in the sense of not second guessing the substance outcomes so much. And then, if you don't get enough deference through being sensitive in the way you define Alike products,⁶ there's an additional layer of deference available in the Article XX stage.

So, as you say, it's more a kind of fading out, or multiple hedges and dams, against inappropriate intrusiveness. That's because while we could recover something of the zeitgeist that produced it, I don't think we can ever recover a naivete around the idea of having a clear line about discrimination.

That's why I did say that it's a genuinely messy problem. Once you start thinking through the problem of what is and isn't discrimination, you have a certain consciousness about it being a messy line that makes it hard to go back. So I think that they have gone forward, and whether the fading out metaphor or the multiple dams of defenses or whatever metaphor, I think we're grasping for the same thing, that they're doing it through a more complex and nuanced and multistage kind of route.

PROFESSOR CONE: Two more comments and then with thanks and gratitude, we'll adjourn.

MR. CHARNOVITZ: In response to Ben's question and an earlier question, might I make a couple of very brief points about this Article XXI:5 decision in the Shrimp/Turtle case? One is it's under appeal, and we should hear shortly what the outcome is. Second, there is a really interesting interplay between the WTO rules and U.S. Courts, and I call your attention to that. Third, this case really is about Article XX; it's not about Article III. And fourth, that the panel, each Article XXI:5 compliance panel suggested, I think, that there would be continuing supervision of the United States under this, that as of right now we had complied. But that Malaysia was free to bring it up in the future if the U.S. wasn't making enough progress or whatever, and therefore, that it could come back to the WTO, and that's a role of a compliance panel in supervising.

PROFESSOR LOWENFELD: I just want to say a word that came up at the beginning and not again. I like the idea that panels get scientific experts, and we saw it solved in the way of the hormones

case because the scientists couldn't show that there was a real hazard. We don't really quite understand the precautionary principal. If the panel's thinking, we're going to get clean scientists. And we wouldn't worry about their B B we'll ask about conflicts of interests, but we'll try to satisfy ourselves that they're scientific professionals. Seems to me that's a very good way to resolve the kind of issues that come up on whether it's under the TBT or SBS, and I hope that is a lesson that will continue in this case.

MS. PORGES: And it will also help the WTO get greener, at least coexist better with organizations, unlike earlier scientific groups which help panels rule that, other than measures taken ostensibly, environmental reasons were really a trade redraped or were going overboard. This one agreed; they all agreed that this was a legitimate environmental health and safety measure.

PROFESSOR CONE: I want to thank the members of the panel here, not the asbestos panel, but this panel. Thank you very, very much for your time and above all, for the quality of your contribution.

I want to thank everybody in the room for coming and for participating in it. I think we can stand adjourned.