Future Imperfect

Should companies exporting potentially dangerous materials to the developing world take responsibility for their actions whatever the legislation enforces?

NEIL HODGE

Western companies have for years been criticised for exporting hazardous materials and products to the developing world when their own domestic markets have steered clear of them or banned them outright. Manufacturers counter that they are simply supplying markets that allow their sale and that they comply with the local laws of those countries they export to. They argue that the fact that the legislation may not be as tough as that of the US or the EU, for example, or is not adequately enforced, is not their problem.

Zeina Al-hajj, head of campaign group Greenpeace's agriculture and toxics unit, says that the organisation has been working to expose what it calls companies' 'double standards' for some time. 'We are sure that companies have double standards with regards to their production and marketing practices,' says Al-hajj. 'Legal duties and enforcement action in developing countries is often not as stringent as in the European Union and the US, which means that companies can legally market products that are less safe – or unsafe – in some places that would be unthinkable in developed countries,' she says.

Agriculture

One of the most criticised products is pesticides. Since many countries in Asia, Africa and Latin America do not have the necessary capabilities to mass produce widely-used pesticides without infringing patent rights in their manufacture, they import cheaper or older variants that are no longer used in more developed countries. For example, as part of its long bid for EU membership, Turkey announced in August 2009 that 74 pesticides are off limits because they are poisonous and feature on an EU list of 135 illegal chemicals. Another six will get the axe this year.

While Turkish agricultural officials say that the first 74 chemicals are relatively unimportant and are not often used in Turkish agriculture, the government admits that the remaining 55 will be harder to eliminate because they are some of the most crucial pesticides to local farmers. A board member of the country's Adana Chamber of Agriculture believes that the European demands may be unrealistic: 'some of these pesticides are not needed in the EU as the products for which they are used are not widespread or there are other alternatives. However, Turkey has continued to sell them because it could not develop any alternatives,' he said.

Quite recently there have been international attempts to limit the practice of selling potentially lethal products to the developing and underdeveloped worlds. The UN's Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, agreed in 1998 and which came into force in 2004, is a multilateral treaty to promote shared responsibilities in relation to importation of hazardous chemicals. Under the Convention, extremely hazardous chemicals and pesticides that have already been banned or severely restricted in various parts of the world are put on a special list. Countries must then first obtain 'prior informed consent' before they can export these hazardous products to another country. In other words, the Convention requires that intended recipient countries be informed of the hazards and have the right to refuse entry of the hazardous chemical, if they believe they are not able to handle it safely.

Culpable negligence?

However, not all dangerous substances have been added to the list. Kathleen Ruff, senior adviser in human rights at the Rideau Institute, a Canadian foreign policy research consultancy, says that Canada has 'consistently stalled' the inclusion of chrysotile (white) asbestos from being added to the list, despite a review by the UN's own clinical review committee which recommended that it should have been included. With the support of a handful of other asbestos-allied countries – Kyrgyzstan, Iran, Ukraine, India and Peru – Canada blocked the move of more than 100 countries attending the Rotterdam Convention Conference in 2006, and refused to allow chrysotile asbestos to be listed. Ruff says that under the terms of the Convention, there needs to be universal consensus from all members before a substance can be banned, 'so it is easy for countries that have a vested interest against hindering the activities of its own industries to thwart the entire process'.

'I believe that there is a strong case for culpable negligence for knowingly selling a product that is extremely dangerous to countries where health and safety measures are low,' says Ruff. 'There is a very strong case that could be made against the asbestos industry, the Quebec government and Canada to assure people that the product they mine is safe to export, while Canada – and most other countries – either no longer use it because they know it is unsafe or have decided to ban the substance altogether. Such actions are grossly irresponsible and should amount to criminal negligence,' she says.

The Canadian Government states that it has had 'a memorandum of understanding' between it and the country's asbestos producers since 1997. It insists that, to this day, the chrysotile industry still does not export to companies that do not use chrysotile in a manner that is consistent with Canada's controlled-use approach. But Ruff says that 'in actual fact, this "memorandum of understanding" is meaningless, because the government and the industry do nothing to enforce it. In the face of indisputable evidence that asbestos use in the developing world is uncontrolled, the memorandum of understanding lacks credibility'. Other experts are equally damning. 'Anyone who says there's controlled use of asbestos in the third world is either a liar or a fool,' says Dr Barry Castleman, an independent consultant and asbestos expert.

Anti-asbestos campaigners in India are exploring ways of bringing a case against Canada and its asbestos producers for deaths caused by its usage throughout India. The country is one of the world's major users of chrysotile asbestos, and knowledge of how the material should be used and what health and safety precautions should be undertaken is alarmingly low. Anthony Menezes, an asbestos victim support campaigner based in Mumbai, says that 'we are finding new cases of people suffering from asbestosis and breathing difficulties nearly every week because they were working with asbestos directly or in factories where it was used to lag pipes and boilers. Not one of them was ever given any kind of instruction about the dangers of the substances they were handling, or even provided with dust masks. Now most of these factories have closed down and there is no possibility to try to bring a case against them. Since Canada exported these chemicals, it can take responsibility for the deaths that they have caused.'

Raghunath Manwar, general secretary of the Occupational Health and Safety Association

in Ahmedabad, India, says that 'if you look around you, almost everything in this city is made from asbestos cement, and dangerous fibres are released if the material is cracked, which most of it is. It is shameful that a product whose dangers were known over 100 years ago in the west is still being exported to poorer countries. The only ways to stop this are to get the substance banned internationally, and to try to take legal action against the Canadian government and the asbestos producers that are based there.'

AHMEDABAD, INDIA: A health and safety campaigner holds up an x-ray of a power station employee who has recently been diagnosed with asbestosis.

Similar cases have been successful in the past, though the number is low. In February 1992, mercury-based chemicals manufacturer Thor discovered that several South African workers had contracted mercury poisoning. Twenty workers brought compensation claims against the parent company and its chairman in the English High Court. The claims alleged that the English parent company was liable because of its negligent design, transfer, set-up, operation, supervision and monitoring of an intrinsically hazardous process, particularly since the company's UK operations had been criticised for its poor health and safety standards prior to establishing the factory in South Africa.

Thor unsuccessfully applied to stay the action on *forum non conveniens* grounds (a mostly common law legal doctrine whereby courts may refuse to take jurisdiction over matters where there is a more appropriate forum available to the parties), and its appeal was struck out by the Court of Appeal. This was the first recorded case of this type. In 1997, following a series of hearings concerning the acceptability of Thor's disclosure of documents and an unsuccessful strike-out application, the claim was settled for £1.3 million. A further 21 claims were commenced by workers from the same factory the following year.

However, during that case, it emerged from company documents filed in December 1999 that Thor's parent company, TCL, had undertaken a de-merger which involved transfer of subsidiaries valued at £19.55 million to a newly-formed company, Tato Holdings Limited. Two weeks before the start of the three-month trial, an application to the Court was then made, on behalf of the claimants, for a declaration under section 423 of the Companies Act 1986 that the dominant purpose of the de-merger was to defraud creditors, such as the claimants, and it was thus void. The Court of Appeal held that in the absence of information to the contrary, the inference that the demerger of Thor was connected with the claims was 'irresistible'. The case was settled on the first day of trial.

In December 2001 a £21m settlement was signed for around 7,500 claimants who were suffering – or had died from – asbestos-related diseases while working for asbestos mining company Cape Plc in South Africa. Due to the insolvency of Cape's South African subsidiaries, the only realistic target for legal action was the parent company Cape in the UK even though the general legal principle is that the liability of a limited company does not attach to its shareholders. Notwithstanding obvious negligence, multinationals such as Cape had been able to depend on this principle to protect the parent company from liabilities arising from operations ostensibly conducted by subsidiaries. But in July 2000, in a landmark decision in favour of the claimants heard in England, all five Law Lords held that the case should be allowed to continue in the English High Court and that a case of such magnitude required expert legal representation and specialists on technical and medical issues, none of which could be funded in South Africa.

John Sherman, senior fellow at the Harvard Kennedy School in Boston, Massachusetts, says that companies can – and should – be held liable for dangerous products that they market to countries that either are not aware of the dangers inherent in the product, or which have low levels of health and safety legislation and enforcement to protect those people that may come into contact with it. He says that a key way to do this is to make organisations more accountable for the actions of their supply chains.

'Protect, respect, remedy'

In June 2008, the UN Human Rights Council welcomed the 'Protect, Respect, Remedy' (PRR) policy framework put forward by the UN

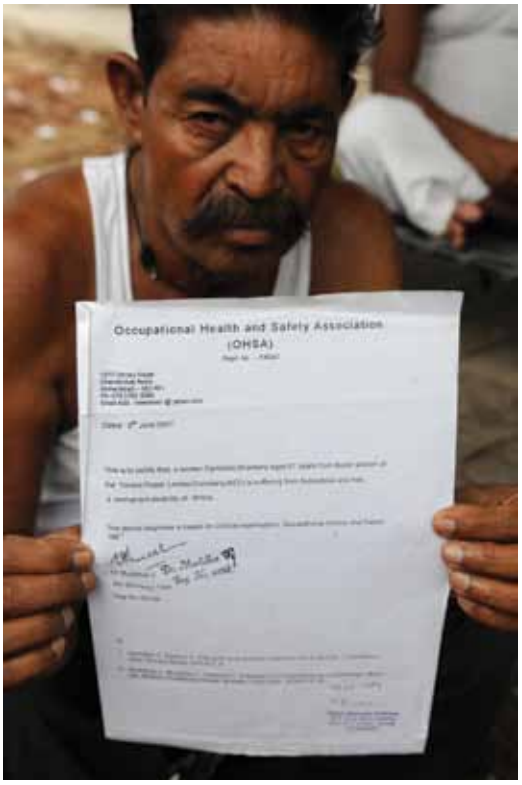
Secretary-General's special representative on business and human rights (SRSG), Professor John Ruggie. While not legally binding, the Council underlined the state's duty to protect people from abuses by or involving non-state actors, including business. It also affirmed that business has a responsibility to respect all human rights. Furthermore, it stressed the need for access to appropriate and effective judicial and non-judicial remedies for those whose human rights are impacted by corporate activities.

In a UN report put before the UN General Assembly on 22 April 2009, the special rapporteur said that 'the State duty to protect is a standard of conduct, and not a standard of result. That is, States are not held responsible for corporate-related human rights abuse per se, but may be considered in breach of their obligations where they fail to take appropriate steps to prevent it and to investigate, punish and redress it when it occurs.'

'A lot of legislation that has recently come into force – such as anti-bribery, corruption and anti-competition legislation – specifically tries to hold a company to account for the actions of third party contractors, suppliers and joint venture partnerships that are acting in its name,' says Sherman. 'There should be more scrutiny surrounding the business activities of those companies that produce dangerous products. They should be held more accountable for how their products are sold, where they are sold, and how they are used. I can see no reason why such concepts are not extended to companies producing and selling substances that are clearly known to be hazardous to health and I think that this is an area that is ripe for negligence claims.'

Yet some companies have been applauded for their efforts in trying to keep tighter control on the use and sale of their products. One example is General Electric (GE) which changed the way its GE ultrasound machines are sold, marketed and distributed to urban and rural customers in India after allegations surfaced that its ultrasound technology was being misused to facilitate female sex-selective abortions.

India's Pre-Natal Diagnostic Techniques (PNDT) Act of 1994 prohibits the use of equipment or techniques for the purpose of detecting the sex of an unborn child. The Act was amended in 2003 to explicitly recognise the responsibility of manufacturers and distributors to protect against female feticide. Under the legislation, manufacturers must confirm that their customers have valid PNDT certificates and have signed affidavits stating that the equipment shall not be used for sex determination. They must also provide the government with a quarterly report disclosing to whom the equipment has been sold.



AHMEDABAD, INDIA: A former power station worker holds up a doctor's letter certifying that he has asbestosis.

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Since 2000, GE Healthcare India has worked to increase the stringency of the sales review process through a combination of training programmes, amendments to legal contracts, regular auditing, and rigorous sales screening and tracking. At present, a single sale of GE ultrasound equipment goes through up to five internal checks – from the initial sales contact to equipment installation – to verify that the customer has a valid PNDT registration certificate. Machines are also labelled with a sticker that warns that 'fetal sex determination is illegal and punishable by law'.

Sales people are trained on how to advise end-users of the equipment on the implications of the PNDT Act and to escalate any concerns about observed or suspected non-compliance to their managers. They are also encouraged to prevent sales if they suspect that the equipment may end up in the hands of unscrupulous or unlicensed practitioners. This screening process does not end after the equipment's sale. A practitioner must also present a valid PNDT registration certificate before having the equipment serviced by GE Healthcare India or purchasing updated accessories.

'Companies can do the right thing quite easily and should be forced to do so,' says Sherman. 'Making them legally accountable for their products, as well as for the actions of their supply chains, would have the desired effect, but such changes require greater political will.'