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The long and winding legislative road

Jan Cremers¹

Setting the scene

Because of its insulation capacity, its resistance to fire, heat, electrical and chemical damage, its sound absorption and (relatively) cheap price asbestos became popular among manufacturers and builders in the late 19th century. It was used as ‘everlasting’ insulation for hotplate wiring and in building insulation, fireproof roofing and flooring.² In construction asbestos was often used in a mixture with cement (fibre cement). Early concern on the health effects of asbestos exposure was reported in the annual reports of the British Chief Inspector of Factories (as early as 1898) and in first studies of mortality among asbestos workers in France. Scientific evidence of hazardous risks related to the use of asbestos stem already from the early 1900s. From that moment on specialists started to publish articles, sometimes still largely anecdotal, that stated that asbestos workers generally declined on account of the assumed health-injurious conditions in the mining of asbestos.

According to the early studies that reported on a respiratory problem that had never been seen before (Murray 1907, Hoffman 1918) the inhalation of asbestos dust had at least contributed to, if not actually caused, the death of the workers. In the US the first compensation claims were formulated in the late 1920s. Several empirical

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² The legislative definition describes asbestos as a collective term for naturally occurring crystalline silicate with fibrous structure. The highly heat-resisting mineral was named asbestos, a Greek word for inextinguishable. The asbestos cement patent was called ‘Eternit’ by its Austrian inventor L. Hatschek. ‘Eternit’, later on used by one of the biggest European asbestos cement producers, was not chosen by coincidence; it referred to the eternal characteristics of asbestos products.

studies conducted later on made clear that asbestos is the most important single cause of mesothelioma, a mostly fatal cancer of the pleura. Studies that correlated male pleural cancer death rates in several countries with per capita asbestos consumption 25 to 30 years earlier found a linear relationship. The knowledge of the dangers associated with exposure to asbestos date back to the period in between the First and the Second World War. By the 1930s, asbestos manufacturers and their insurance companies knew that asbestos was killing workers at alarming rates. The Attorney's Textbook of Medicine published in 1934 devoted a full chapter to asbestos exposure, noting that asbestosis was incurable and usually resulted in total permanent disability followed by death.³ Soon there was also enough evidence to conclude that lung cancer and asbestosis correlate with past asbestos consumption rates and that no safe use exists.⁴ And this evidence applied to all forms of asbestos, including chrysotile.⁵ However, asbestos based products remained popular and the production of asbestos peaked worldwide in the late 1970s and early 1980s, when asbestos was being mined in some 25 countries.

Asbestos consumption varied considerably in European countries, with low per capita use in less industrialised countries and vast use in construction, ship building and other insulating industries in the US and North West Europe. For over 100 years the workforce was confronted with occupational diseases stemming from the handling of asbestos although the general public (and the workers) knew only briefly about the risks for workers. Since there is a calculated time lag from asbestos exposure to disease onset of 10 to 45 years, recent increases in mesothelioma incidence might reflect the intensified use of asbestos during the peak period (around 1976 the world production peaked at approximately 5.2 million tons). Thus, the asbestos-related incidence is expected to reach maximum levels between 2010 and 2020 in industrialised countries (Leithner 2006). Asbestos exposure was particularly common in construction and shipbuilding and a majority of latent cases will probably occur to workers in these trades. Beyond this, the occupational threat from the demolition of existing structures (particularly system-built construction, sprayed or partitioned between 1948 and 1980 with mixed asbestos) will remain topical.

Although the first legislative initiatives at European level date from the mid-1970s it took public scandals like the asbestos pollution found in 1990 of the seat of the European Commission in Brussels, the Berlaymont building that was built in the early 1960s, before a European policy of prohibition of the production, importation and sale of all forms of asbestos really got off the ground. In the political arena the deliberations were strongly influenced by effective global lobby groups specialised in downplaying the dangers of asbestos and in postponing the adoption of bans. Most asbestos lobbying organisations are nowadays based in countries that have economic

³ The Manville Personal Injury Settlement Trust stated in 1988 that corporate knowledge of the dangers 'dated back to 1934', http://www.ewg.org/sites/asbestos/documents/pdf/Austern_Full.pdf

⁴ Researchers that correlated male pleural cancer death rates in 18 European countries with per capita asbestos consumption 25 to 30 years earlier, found a linear relationship (Leithner 2006).

⁵ In a 2002 expert report that thoroughly resumed all scientific evidence collected since the early 1970s, it was concluded that chrysotile fibres produce 'lung and pleural cancer in man' (EC 2002).

ties to asbestos like Russia, India and Brazil.⁶ Although chrysotile asbestos is found to be potentially similarly harmful as amphibole asbestos (Smith 1998) the Chrysotile Institute, first formed in 1984 to promote the use of chrysotile asbestos, insisted for instance on behalf of Canada's asbestos mining industry that the use of chrysotile asbestos poses little risk to workers if handled safely.⁷ But also inside the labour movement the debate was sometimes tough between the producing industries and the users. The loss of jobs in the asbestos industry was an argument that often counterbalanced the worries of trade unions that defended the interests of exposed workers. The absolute *nadir* was the creation of the International Alliance of Chrysotile Trade Unions with a youth league and veterans battling for chrysotile.

The fight against the asbestos use – for a healthy and safe workplace

The carcinogenic properties of asbestos were established scientifically in the interwar period and the mid-20th century. However, the first large-scale measures to control the use of asbestos were taken in the 1970s in most of the European countries. That the European legislator was aware of the risks related to the asbestos exposure became clear as the first list of occupational diseases was formulated in 1962. With reference to article 117 and 118 of the Treaty of the European Economic Community (EEC), it was noted in the recitals of the Recommendation that the EEC Commission had the task to stimulate a narrow cooperation between Member States especially in the field of social security and related to the 'prevention of occupational diseases' (EEC 1962). The aim was to harmonise the existing national lists in order to achieve 'social progress'. In the Annex, asbestosis (with or without lung tuberculosis or cancer) was listed in the category 'occupational diseases by inhalation', based on the notion that danger to human health arose mainly from the inhalation of fine asbestos dust, particularly during the production and processing of asbestos products. The central purpose of the list was the recognition of *the right to be compensated*. Next to this the need to exchange information between the EEC countries was stressed, and future prevention activities were announced. A revised Recommendation in 1966 added several other diseases and stood again under the sign of the compensation right.

The first legal notions related to a joint *protective* European policy on asbestos stem from the intentions to formulate regulations and provisions in the EEC related to the placing on the market of dangerous substances. The rules discussed had to protect the public and the possible users. Environmental considerations also played a role. The European Commission had noted that the rules formulated by the Member

⁶ In the late 1970s the USSR became the main producer, with a share of the total global production that increased to 60% in 1987 (GTZ 1996).

⁷ In its last Newsletter (2011) the Institute wrote: 'In fact, many scientists indicate that when properly used under controlled conditions, chrysotile asbestos in its modern day high-density applications does not present risks of any significance to public and/or worker health' (Newsletter from the Chrysotile Institute, Volume 10, Number 1, November 2011).

States differed; these differences could constitute an obstacle to trade and thus directly affect the functioning of the common market. The Council Directive that was formulated in 1976 on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations (76/769/EEC) did not refer to asbestos in the core articles. Besides, the Directive neither applied to the carriage of these substances, nor to their transit and export to non-member countries. An important new legal feature, however, was the introduction in the recitals of this Directive of the possibility to move ‘gradually to a complete ban’ on certain dangerous substances.⁸

A few years later, in 1978, the Council Resolution of 29 June 1978, on an action programme of the European Communities on safety and health at work, expressed the necessity of protection of workers against dangerous substances. In the programme asbestos figured in a long list of toxic substances. The necessity was expressed (in Article 4) to develop a *preventive and protective action* for substances recognised as being carcinogenic, by fixing exposure limits, sampling requirements and measuring methods, and satisfactory conditions of hygiene at the work place, and by specifying prohibitions where necessary. Asbestos was also listed as one of the substances that asked for specific Directives to be put forward. The European Commission had in the meantime commissioned a group of experts that, after assessing the latest medical and scientific findings, came to the conclusion that ‘There is no theoretical evidence for an exposure threshold below which cancers will not occur. A safe exposure level to asbestos has not been established’ (Zielhuis 1977).⁹ In parallel, the European Parliament had discussed several initiatives tabled by the British labour MEP John Evans. After an 18-month investigatory period, he concluded that asbestos presented ‘a danger both to workers in the asbestos industry and to those exposed in other situations’ and that ‘all varieties of asbestos in use in the Community can present a danger to human health’ (EP 1978). A parliamentary committee chaired by Evans formulated a resolution that asked for the ban on crocidolite and on the spraying of asbestos. The committee furthermore asked that the use of asbestos should be gradually phased out and finally be forbidden where safe substitutes exist.¹⁰

⁸ It took 29 years before this legal possibility became reality as the ban on the marketing concluded in the Commission Directive 1999/77/EC and completed with Directive 2003/18/EC of the European Parliament and the Council was taken effect on 1 January 2005 at the latest.

⁹ This clear position has not been obviously taken over by the legislator. In a reaction to the own initiative report of the European Parliament that include proposals to lower the limit value of asbestos fibres the UK government still stated in 2012 that any calls to lower the existing limit value must be based on a consideration of robust scientific evidence and a detailed impact assessment.

¹⁰ The European decision-making process changed over this period. Until 1989 the legislative power and the mandate to decide was exclusively in the hands of the Council of Ministers. The European Parliament could only come up with an opinion and the European Commission had the right to initiate. By a decision of the Council (89/678/EEC), the Commission obtained the mandate to adapt provisions relating to restrictions on the marketing and use of certain dangerous substances and preparations by Commission Decisions. Subsequently, the position of the European Parliament, enhanced through the Maastricht Treaty in 1992 and the scope of its co-decision right, increased considerably with the Amsterdam Treaty (May 1999) as the EP became co-legislator.

More detailed measures were formulated in the Council Directive on the protection of workers from the risks related to exposure to chemical, physical and biological agents at work (80/1107/EEC of 27 November 1980). With reference to the functioning of the common market, this Directive aimed ‘in the interests of a balanced development’ to improve and approximate the measures taken by Member States to protect workers from the risks related to exposure to chemical, physical and biological agents at work. The policy formulated spoke about limit values and additional measures to *prevent exposure* or keep it at as low a level as reasonably practicable, not about prohibition or banning from the market. These additional measures consisted, in the case of asbestos and several other substances, of appropriate surveillance by the state of the health of workers during the period of exposure and access for workers and/or their representatives at the place of work to appropriate information on the dangers which these agents present. Moreover, a specific instrument for asbestos was announced.

This specific instrument, the Council Directive on the protection from the risks related to exposure to asbestos at work, was concluded in 1983 (83/477/EEC). Asbestos, and notably crocidolite, was called a harmful agent with potential health risks. In the absence of ‘scientific knowledge’ that could underpin a level ‘below which risks to health cease to exist’ the European legislator formulated *minimum requirements*. Most of the formulated measures did not apply as long as exposure stayed below certain limits during an eight-hour reference period. The wording of the Directive was still very soft, measures had to be taken as long as ‘reasonably practicable’, the number of workers exposed must be limited to ‘the lowest possible figure’ and waste must be collected in ‘suitable sealed packing’ (and this measure did not apply to mining activities). Yet, the application of asbestos by means of spraying was prohibited. The Directive introduced the use of warning signs and of suitable respiratory equipment and protective clothing that must be worn. Workers and/or their representatives were given the right to be consulted on measures that were taken in the case of certain activities where it was foreseeable that the limit values would be exceeded.

Obviously the measures in the 1983 Directive led to much criticism as the collection of scientific evidence had progressed much further while asbestos consumption in Europe was still at a high level. This criticism came notably from insiders who thought that preventing hazardous exposures and providing medical care and financial compensation for the asbestos-injured would be regarded as top priorities.

Asbestos has been phased out of use in Western Europe. It was Norway that banned the general use first, in 1984. It was banned in Denmark in 1986, in Italy in 1992 and in the Netherlands in 1993. In the Federal Republic of Germany a decision forbidding the production or use of asbestos was concluded in 1989 and, at the end of 1994, the prohibition of asbestos manufacturing and use in Germany came into effect. France followed in 1997 and Belgium in 1998. Notwithstanding this, it took again a long period before further progress could be achieved at EU level. The European Parliament (EP) expressed its disappointment and came up with proposals for a complete ban. In a 1990 amendment the EP formulated a proposal that said: ‘the use of asbestos shall be prohibited except in cases classified as essential by a Commission group of experts’ (OJ No C 284, 12-11-1990).

In the first revision of the 1983 Directive (Council Directive 91/382/1991) it was noted that the prohibition of the application of asbestos by means of the spraying process was not sufficient to prevent asbestos fibres being released into the atmosphere. The legislator concluded that other working procedures that involve the use of certain materials containing asbestos must also be prohibited. The revision announced a review in 1995 and led to a further sharpening of the limit values. In 1998 any amendments necessary to adapt the asbestos policy to technical progress were integrated in the procedure laid down in Article 17 of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at the workplace. The articles of this so-called framework Directive applied from that moment to the exposure of workers to asbestos.

On the eve of a ban in Europe

March 2003 brought the definite 'ban' Directive that workers had been waiting for since the mid-seventies (Directive 2003/18/EC). In the legislative acts asbestos is taken to mean six fibrous silicates (actinolite, asbestos grunerite, anthophyllite, chrysotile, crocidolite, and tremolite). In its 5th consideration the Directive states 'All workers should be protected against the risks associated with exposure to asbestos and the derogations applicable to the sea and air sectors should therefore be removed'. Council and European Parliament integrated a new clause to article 5 in the existing legislation that said:

'Without prejudice to the application of other Community provisions on marketing and use of asbestos, activities which expose workers to asbestos fibres during the extraction of asbestos or the manufacture and processing of asbestos products or the manufacture and processing of products containing intentionally added asbestos shall be prohibited, with the exception of the treatment and disposal of products resulting from demolition and asbestos removal.'

The notification system for activities involving exposure to asbestos had to be adapted to new work situations. For the determination of sporadic and low-intensity exposure Member States had to lay down practical guidelines, following consultation with social partners in accordance with national law and practice. The existing limit values pertaining to in-air concentrations (0.60 fibres per cm^3 calculated or measured for an eight-hour reference period for chrysotile and 0.30 fibres per cm^3 calculated or measured for an eight-hour reference period for all other forms of asbestos) were repealed and replaced by a single maximum limit value for airborne concentration of asbestos of 0.1 fibres per cm^3 as an eight-hour time-weighted average (TWA).

It is interesting to analyse the argumentation that has been used in the latest stage of the EU legislation that led to the ban and to compare the arguments with the knowledge collected over the years. In early 1999 the European Parliament and the Council made reference to the 1996 action plan to combat cancer within the framework for action in the field of public health in a Directive that contained

restrictions on the marketing and use of certain dangerous substances.¹¹ The reasoning was that, in order to improve health protection and consumer safety, substances classified as carcinogenic, mutagenic or toxic to reproduction and preparations containing them should not be placed on the market for use by the general public. In line with this reasoning, Commission Directive 1999/77/EC considered in July 1999 that the use of asbestos and products containing it can, by the release of fibres, cause asbestosis, mesothelioma and lung cancer. Therefore, placing on the market and use should be subject to the severest possible restrictions (1st consideration). In the Directive it is noted that, for most remaining uses of chrysotile asbestos, substitutes or alternatives are available which are not classified as carcinogens and are regarded as less dangerous. Also it is repeated that: ‘no threshold level of exposure has yet been identified below which chrysotile asbestos does not pose carcinogenic risks’ (7th consideration). The Commission speaks about phasing out the marketing and use of chrysotile asbestos and products containing it and announces the request to the Scientific Committee on Toxicity, Ecotoxicity and the Environment to undertake a further review of any relevant new scientific data on the health risks of chrysotile asbestos and its substitutes before 1 January 2003. In the Annex the placing on the market and use of all types of asbestos and of products containing asbestos fibres added intentionally is prohibited. However, there is still the chrysotile derogation, Member States may except diaphragms used for electrolysis in existing installations until they reach the end of their service life, or until suitable asbestos-free substitutes become available, whichever is the sooner. The Commission announces further the review of this derogation before 1 January 2008. After the entry into force of the Directive to 1 January 2005, Member States may not allow the introduction of new applications for chrysotile asbestos on their territories. Directive 1999/77/EC can thus be seen as the irreversible gateway to a final ban.

However, Directive 2003/18/EC of the European and of the Council of 27 March 2003 (amending Council Directive 83/477/EEC on the protection of workers from the risks related to exposure to asbestos at work) is more outspoken. The Directive contains several important aspects that go beyond a simple ban and the derogations applicable to the sea and air sectors are removed. This includes the need for special training, a policy related to demolition and removal and clinical surveillance of exposed workers. Notification to the authorities and the obligatory recording of the presence or presumed presence of asbestos in buildings or installations is mandatory; this includes the communication of this information to others who may be exposed to asbestos as a result of its use, of maintenance or of other activities in or on the building. And, with this Directive, the overall derogation of chrysotile ends.

In a 2004 Directive on the protection of workers from the risks related to exposure to carcinogens or mutagens at work, the annotation was made that, as regards asbestos, the provisions of that Directive should apply whenever they were more favourable to health and safety at work. Finally, Directive 1983/477/EEC was repealed

¹¹ Directive 1999/43/EC of the European Parliament and of the Council of 25 May 1999 amending for the 17th time Directive 76/769/EEC on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations.

in 2009 as Directive 2009/148/EC brought a codification of the whole legislation, in the interests of clarity and rationality. This Directive repeated the amended article 5 that settled the prohibition of the use of asbestos and it defined four types of activities in which workers are or may be exposed in the course of their work to dust arising from asbestos or materials containing asbestos (mainly maintenance, removal, encapsulation and sampling). These activities must be limited to activities with exposure that is sporadic and of low intensity and must be covered by a notification system administered by the responsible authority of the Member State. The Directive listed several important notions gathered over the lengthy legislative process – demolition or asbestos removal work should be carried out by undertakings which are familiar with all the precautions to be taken in order to protect workers; special training for workers exposed or likely to be exposed to asbestos should be provided in order significantly to contribute to reducing the risks related to such exposure; recommendations on the clinical surveillance of exposed workers should be laid down in the light of the latest medical expertise with a view to the early detection of pathologies linked to asbestos.

Nowadays, the rules at EU level regarding risks from asbestos can be found in two legislative regimes:

- The REACH Regulations prohibit the importation, manufacture, use and supply of asbestos-containing articles; thus preventing new asbestos risks arising. There are some exemptions in the REACH Regulations for particular circumstances, for instance the use of chrysotile asbestos in electrolysis installations (as formulated in Annex 17, part 6 of REACH: this part also allows for the continued use of articles placed into service before 2005). However, REACH also contains provisions for the exemptions to be removed when asbestos-free substitutes become available.
- Directive 2009/148/EC introduces controls on exposure to workers and places requirements on employers of workers who may be exposed to existing asbestos and asbestos containing materials (for example in buildings) as part of their work activity.

One special aspect of the legislative fight has still to be mentioned. After the introduction of the internal market, a clash between the economic freedoms, in this case notably the free circulation of goods in the EU, and the protection of workers, became visible. Member States that already knew a ban or where the social partners had agreed to ban it from their industry (as for instance in the Netherlands by the end of the 1980s) could not completely close their borders to asbestos-containing products. The overall ban in the EU was necessary to close this gap. However, even with this ban not all asbestos containing goods were eliminated from EU territory. The EU ban on asbestos fibres does not apply to goods that are under customs supervision, provided that they do not undergo any treatment or processing, and are in temporary storage, in a free zone or warehouse with a view to be re-exported or in transit. Shipments of asbestos in vessels moored in European harbours on their way to ports outside the EU are considered not to be imported into the EU and thus not subject to the ban.

Besides, the WTO free trade rules also affected the possibility to ban the use of asbestos from the market. For instance, Canada challenged France's import ban on

asbestos and asbestos-containing products at the World Trade Organization in 1999. The WTO panel and its appellate body rejected Canada's challenge. The WTO website stated 'The European Communities justified its prohibition on the ground of human health protection...'. This illustrates why the European Parliament's call for a worldwide ban on asbestos stayed topical.¹²

The broader legislative agenda

With the ban the problems with asbestos were of course not solved. A widespread use in the after Second World War period in residential and non-residential building and installation combined with an incubation time of 10-45 years gave the presence of asbestos containing items and objects the character of a ticking time bomb. Over a longer period of time serious problems related to asbestos removal have become manifest, which ask for further regulation:

- Compliance with relevant regulation and legislation is not controlled in a sufficient manner.
- Companies do not always respect the current removal and safety rules.¹³
- Local communities lack expertise and have serious shortcomings in the execution of prevention, surveillance and enforcement tasks.
- Surveillance and enforcement tasks and competences are too fragmented, with too many authorities involved.
- Waste management is in its infancy; training facilities are inadequate or lacking.

In an own initiative report, the European Parliament has sought an all-encompassing and comprehensive approach in 2013 (European Parliament 2013, see also Appendix).¹⁴ The starting point of the report is that the protection of workers from

¹² The WTO relationship still plays a role. MEP Stephen Hughes tabled in mid-2010 three written questions to the European Commission. These were (a) Is the commission aware that the Canadian and Quebec Governments intend to provide a \$58 million loan guarantee and thereby provide a subsidy to resume asbestos production on the Jeffrey mine in Asbestos, Quebec? (b) Is the Commission further aware that most, if not all, the asbestos produced will be exported to developing world countries? (c) Does the Commission agree that such a loan guarantee is contrary to WTO rules? Will the Commission lodge a complaint with the WTO?

¹³ According to a 2012 Labour Inspectorate Report (period 2008-2010), 54% of sites visited in NL were in offence, as cited by the Dutch newspaper NRC Next (26 July 2012).

¹⁴ The report passed the European Parliament plenary session on 14 March 2013 with a huge majority of 90% of the votes. The reactions to the Hughes report were varied. Although the report was an own initiative directed towards the European Commission a few Member States found it necessary to intervene already in an informal way. Some Member States pleaded for a voluntary approach instead of further legislation and took the stand that provided asbestos and asbestos containing materials (ACMs) are in good condition or encapsulated and not likely to be disturbed, then on safety grounds it is better to leave them in place and manage any resulting risks. Mandatory rules to make information available regardless of the actual level of risk, could also lead to potentially unnecessary public concern. The UK government was especially worried about the business environment: as 'some of the proposals in the report (for example, action plans for the removal of all asbestos from buildings) could place considerable burdens on business without corresponding benefits to workers' (UK Government briefing on the Hughes report, dated October 2012).

asbestos must be improved. It needs to be ensured that only an authorised and well-trained workforce can strip asbestos from buildings. The report refers to existing asbestos in private and public buildings, land, residential and non-residential housing, infrastructure, logistics, ships, trains and piping. In the recitals it is noted that the hazardous impact of all types of asbestos has been documented and regulated and that increased cancer risks have been observed in populations exposed to very low levels of asbestos fibres, including chrysotile fibres. The report states that, despite the ban, existing market surveillance is unable to ensure that asbestos is not imported into European markets. Although specialised training has been developed for maintenance workers and others who work with the removal of asbestos-containing materials, younger workers and construction workers often do not recognise asbestos in buildings when performing refurbishment or demolition work. The report asks for a mandatory asbestos audit of buildings that would provide a solid and informed basis for national, regional and European removal programmes. In the report it is observed that Poland is the only Member State to have adopted an action plan for an asbestos-free country.

The basic demands are screening, registration and monitoring obligations, combined with the mandatory establishment of public asbestos registers by Member States. The report pleads for action plans for owners of public buildings for the safe removal of asbestos and encouragement of private house owners to audit their premises. Next to the proposal for a specific directive with minimum requirements for the vocational training of construction and maintenance workers, the EU has to set up minimum requirements for mandatory asbestos-specific qualifications related to removal. The European Commission is urged to amend Recommendation 2003/670/EC to reflect the progress of medical research and the EU has to ensure that all asbestos-related occupational diseases are recognised and compensated for. Therefore, the Commission should create binding minimum guidelines for national procedures for the recognition and compensation of asbestos-related diseases. The report ends with demands related to assistance to asbestos victims' groups and with the ban on asbestos in the global context. The EU should address the unacceptable dumping of asbestos on developing countries at forums where trade agreements are being discussed and exert diplomatic and financial pressure on asbestos-exporting countries to shut down asbestos mining industries and stop the illegal and unethical practice of exporting end-of-life ships containing asbestos.

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