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Op-ed: Mulcair misunderstands NAFTA's Chapter 11

Posted on Tue, Oct 18, 2011, 5:15 am by Howard Mains

The dispute settlement provisions of the North American Free Trade Agreement (NAFTA) Chapter 11 are one of the most controversial aspects of the agreement and are often publicly maligned for allowing foreign investors to challenge government decisions affecting investments in Canada. The recent settlement between Dow AgroSciences LLC and the Government of Canada, as well as the Province of Quebec, is just the latest to be characterized as encroaching on Canadian sovereignty.

However, the opposite holds true. Commenting on the Dow AgroSciences Settlement Agreement on May 27, International Trade Minister Ed Fast stated, "This agreement with Dow AgroSciences demonstrates that the NAFTA dispute settlement mechanism works. Today's agreement also confirms the right of governments to regulate the use of pesticides. This right will not be compromised by Canada's participation in NAFTA or any other trade agreement."

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Recent comments by NDP MP Thomas Mulcair are indicative of the prevailing misunderstanding surrounding the dispute settlement mechanism. In a



Howard Mains is the Co-President of **Tactix Government Relations and Public Affairs Inc.** of Ottawa. He provides strategic government relations counsel to clients in agriculture, chemicals management and environment sectors. The opinions expressed above are his own based on his experience of working on the subject matter for more than ten years.

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recent iPolitics interview, Mr. Mulcair is quoted at length about NAFTA Chapter 11 and the Dow AgroSciences Settlement Agreement with Canada and Quebec.

Like many who have commented on this recent NAFTA settlement agreement, he seems to have reached a conclusion which does not benefit from a full understanding of the federal pesticide regulatory process, the consideration of 2,4-D by Quebec during the 2002/03 period and the findings of provincial officials at that time, the details of the settlement agreement as well as the underpinnings of NAFTA itself.

The Dow AgroSciences case against Quebec was the result of changes to the province's Pesticide Management Code, first tabled in July 2002, banning the use of 13 pesticides for residential lawn applications. Numerous industry groups began working with the Government of Quebec in an effort to have science-based risk management form the foundation of any changes. Based on evidence presented, Quebec officials – including the Minister of Environment – could not scientifically justify a prohibition of 2,4-D on the basis of the available evidence.

In presenting his recommendation to his Quebec Cabinet colleagues in February 2003, then-Environment Minister André Boisclair, submitted: "The prohibition cannot be scientifically defended on the basis of the criteria put forward."

The prohibition went ahead anyway in March 2003, with the government of Quebec knowing full well it could not ban the use of 2,4-D on the basis of scientific evidence, the argument it had advanced as the reason for the ban.

NAFTA fully recognizes the rights of Canadian governments to implement measures to protect the health of Canadians and their environment. However, Article 712 (3) of NAFTA stipulates that any sanitary and phytosanitary measures that are adopted within Canada must be based on scientific principles:

Each Party shall ensure that any sanitary or phytosanitary measure that it adopts, maintains or applies is:

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a) based on scientific principles, taking into account relevant factors including, where appropriate, different geographic conditions;

b) not maintained where there is no longer a scientific basis for it; and

c) based on a risk assessment, as appropriate to the circumstances.

In addition, Article 1114 (1) guards Canadian government interests in protecting the environment:

Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

These measures are critically important to trade as they ensure investors in Canada and abroad have confidence that government decision making is based on transparent scientific criteria. So important is this provision, that it is the subject of its own WTO agreement, the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).

The fundamental reason for the NAFTA claim was the detrimental public statement by the Government of Quebec that incorrectly claimed that 2,4-D was potentially harmful to human health – when dozens of agencies around the world mandated with protecting the public's health made the opposite determination.

When challenged on this basis, the Government of Quebec agreed to settle this dispute, acknowledging in the Settlement Agreement that "... the Government of Quebec agrees that products containing 2,4-D do not pose an unacceptable risk to human health or the environment, provided that the instructions on their label are followed, as concluded by Health Canada's Pest Management Regulatory Agency ("PMRA") in its May 16, 2008, decision on the re-evaluation of 2,4-D."

This is an unambiguous admission that Quebec's initial claim about potential harm arising from the use of 2,4-D was incorrect.

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C-13, An Act to implement certain provisions of the 2011 budget as updated on June 6, 2011 and other measures

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The settlement also fully acknowledges the Government of Quebec's right to regulate the sale and use of these products.

This case is a clear demonstration that the trade dispute mechanism works, allowing investors to enter negotiations with the aim to find a mutually acceptable agreement without the need to engage in a lengthy and costly arbitration process.

The settlement agreement also exemplifies the principle that NAFTA governments, as required under Article 712 (3) must make transparent evidence-based decisions when it comes to protecting their citizens' health. As well, the importance of having a well-defined dispute resolution mechanism should be underscored as it provides the parties with a means to reach an agreement that upholds the environmental provisions of Article 1114 (1).

Far from posing a threat to effective health and environment regulation, this case demonstrates NAFTA works. Canadians have been well served by a government that negotiated a trade agreement which has stood the test of time.



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