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U.S. Chemical Company Challenges Pesticide Ban

by Luke Eric Peterson

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The North

The issue of free trade was largely a non-issue during our recent federal election.

However, the North American Free Trade Agreement might have garnered a few headlines if the Feds had disclosed that U.S. chemical giant Dow signalled in late August that it is gearing up to sue Canada.

Dow Agrosiences insists Quebec's province-wide ban on the residential use of weed-killing chemicals breaches legal protections owed by Canada to U.S. investors under the NAFTA.

The U.S. company, which has an extensive manufacturing and sales operation in Canada, wants to be compensated by the Feds for losses incurred to its star product, 2,4-D, one of the most popular chemical ingredients used in commercial pesticides.

The Dow claim is the latest in a long string of disputes to arise under Chapter 11 of the NAFTA—a legal back channel which permits foreign investors to detour around local courts and sue the federal government before an international tribunal.

The company triggered a 90-day waiting period in August, after which it can bring the federal government to binding arbitration.

For cross-border investors, these types of legal protections can come in handy if a tin-pot dictator sends in the tanks and seizes your factories or oil fields. But when such legal provisions are invoked by foreign investors in an effort to ward off health or environmental regulations, eyebrows drift skyward.

Kathleen Cooper, a senior researcher with the Canadian Environmental Law Association, says the Quebec ban has been warmly endorsed by medical and environmental organizations—and enjoys wide support in public opinion surveys. She's troubled that chemical producers can invoke NAFTA in an effort to "undermine the decisions of democratically-elected governments."

The spectre of a NAFTA lawsuit comes at an auspicious moment.

The Province of Ontario has signalled that it will follow Quebec's lead, passing legislation earlier this year, and working on regulations that could come into force next spring.

Such regulatory moves will eventually draw wider attention and scrutiny in other jurisdictions—including the far more lucrative U.S. market. If the U.S. chemical industry hopes to avert a domino effect, it may need to borrow a page from the War on Terrorism tactics book: fighting tougher regulation abroad, so they don't have to fight it on the homefront.

For its part, Dow insists Quebec and Ontario are out of step with the international consensus on a product that has been used for decades in dozens of countries.

The company points to a 2007 risk assessment by Canada's own Pest Management Regulatory Agency which said the product could continue to be used safely on lawns. Dow stresses that Quebec's decision to ban certain uses of the product is not based on scientific



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evidence. Spokesperson Gary Hamelin says it is a real problem when companies are "making investments of tens of millions of dollars for products that—based on a scientific assessment—[are] acceptable."

While Dow jousts with its critics over the scientific evidence, Quebec (and now Ontario) have taken the view that more stringent standards should be imposed by provincial health regulators—particularly where the product is not necessary, but is used for purely cosmetic purposes.

It could fall to a panel of three arbitrators to decide whether such provincial regulations run afoul of Canada's NAFTA commitments.

Of course, threatening to file a NAFTA claim is hardly a guarantee of success. Nevertheless, chemical producers seem to be warming to the NAFTA option.

Already, the government is defending against another NAFTA Chapter 11 claim filed by another U.S.-based chemical producer. When Canada's Pest Regulatory Management Agency moved to ban the use of Lindane-based seed treatments, U.S.-based Chemtura Corporation sued for \$100 million in damages. That arbitration is currently going on behind closed doors, following a January confidentiality order.

One wonders if this is the tip of the legal iceberg. After all, the Feds are now undertaking a broad review of thousands of under-tested chemicals currently on the market.

Just last week, the government added the controversial substance Bisphenol A (BPA)—which is used widely in plastics—to a registry of toxic substances. Although there are no immediate plans to ban the use of the substance as a lining in food and drink cans, it is very likely that BPA will be eliminated from polycarbonate baby bottles.

It remains to be seen whether tougher regulations on BPA and other chemicals will also be challenged under NAFTA Chapter 11.

For almost two months, the federal government has been mum about the latest legal salvo from Dow.

Although Dow formally signalled its intentions in late August—setting in motion a 90-day consultation period—the Department of Foreign Affairs only disclosed the potential lawsuit yesterday.

Until now, Canadian taxpayers—who foot the bill to defend NAFTA lawsuits and pay any compensation awarded by arbitrators—have been denied the opportunity to weigh in with their own views on the matter.

However, given that nearly 7,000 members of the public submitted comments on the Ontario Government's proposed pesticides ban, one can guess that the Feds will receive plenty of feedback in the weeks to come.

Luke Eric Peterson is a columnist for Embassy and the editor of an investigative reporting service tracking NAFTA-style arbitrations, the Investment Arbitration Reporter (www.iareporter.com).

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Comments

Herbicides kill weeds and pesticides kill insects. It's a common American mistake to confuse the two by calling herbicides pesticides.

May I suggest, better yet, You've got to watch Mr. Mel Hurtieg's recent docu-dvd called Who Killed Canada? No fan of NAFTA, he has the stats to prove that Canadians and Canada have truly suffered under this misrepresented "Sale of Canada Act" Watch it on line. <http://video.google.com/videoplay?docid=8632069635967998175>

When Dow Chemical, Monsanto and the other 35 companies who made Agent Orange used in Vietnam, accept their responsibility for the deaths of many thousands of Vietnamese, and the horrific disabilities they left to over 3 million Vietnamese, and make full compensation to the victims and their families, then maybe, just maybe they can talk about suing.

The Canadian government is presently involved in what may well be the largest Class Action law suit in this country's history against its own citizens that were exposed to 28 years of chemical exposure perpetrated by Ottawa and it's Department of National Defense, with guess who as co-defendants? That's right, Dow and Monsanto, makers of the the death that was spread over 181,000 acres of Canadian Forces Base Gagetown. They say there no honor amongst thieves and I agree.

Actually, Dow describes 2,4-D as both a pesticide and a herbicide.

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