CANADIAN ENVIRONMENTAL LAW ASSOCIATION
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

November 11, 2008

Prime Minister Stephen Harper
Office of the Prime Minister
80 Wellington Street
Ottawa, ON
K1A 0A2

President-Elect Barack Obama
The White House
1600 Pennsylvania Avenue NW
Washington, DC
20500

Obama for America
P.O. Box 8102
Chicago, IL 60680

Honourable Sirs,

Re: CHAPTER 11 of NAFTA

Congratulations to you both on your recent election successes.

We write today to request that you take immediate action to repeal or at the very least, amend Chapter 11 of the *North American Free Trade Agreement.*

We raise this matter in light of the following concerns. Dow Agroscience recently filed a claim pursuant to Chapter 11, the Investment chapter of NAFTA, against the government of Canada. They base their claim on the *Quebec Pesticide Code* and regulatory decisions by the government of Quebec contained therein. Actions by the provinces and municipalities in Canada are constitutionally valid regarding a range of environmental matters including pesticides. This division of roles with respect to regulating pesticides across the federal, provincial/territorial and municipal levels of government in Canada was confirmed by the Supreme Court of Canada in its decision concerning the Hudson, Quebec pesticide bylaw, wherein the Court described a complementary tri-level regulatory regime.
(114957 *Canada Ltee (Spray-tech, Societe d'arrosage) v. Hudson (Ville)* (2001), 40 C.E.L.R. (N.S.) 1.)

The recent actions by Dow Agroscience will, if successful, compensate this company for financial losses alleged due to the *Quebec Pesticide Code*. This law enjoys massive public support in Quebec and indeed across Canada and represents progressive and precautionary public policy taken by a sovereign government within Canada in the interest of environmental protection and public health. There can be no doubt that most Canadians would find it offensive that Chapter 11 gives foreign companies the ability to obtain such financial compensation.

Provisions in recent bilateral trade agreements between the United States and Chile as well as the United States and Singapore, Australia, Morocco, and others, which were negotiated subsequent to NAFTA added express language to prevent valid environmental, health and safety regulation

from being subject to investor compensation claims such as Chapter 11 of NAFTA provides. These Agreements have included this language in part because of the experience under NAFTA whereby these types of investor challenges have been launched and adjudicated. Subsequent negotiators, including those of the United States, have determined (with Congress's input) that this clarifying language must be added to forestall such challenges to valid environmental regulation.

We note that some recent NAFTA panels established in certain investor claim cases under Chapter 11 have found in favour of the state and the valid public welfare objects' enactments. However, there remains a significant amount of concern that such claims may be brought, that there is some risk of success by the claimant, and that these risks may operate as a regulatory "chill," causing some jurisdictions to hesitate before taking the action they contemplate even when it is for protection of health or environment.

Accordingly, recent bilateral agreements negotiated between the United States and Chile, as well as the United States and Singapore, and the United States and Australia, among others, have included express language which in general is phrased as follows:

> Non-discriminatory regulatory action designed for legitimate public welfare objects, public health, safety and the environment do not constitute indirect expropriation. (see examples cited below)

For example, regarding the the US – Chile Free Trade Agreement, the Final Environmental Review by the Office of the U.S. Trade Representatives found in respect of that Agreement that:

> the Parties have clarified the FTA's provision on expropriation (Article 10.9) by including an interpretative annex that elaborates on relevant principles of U.S. law and clarifies the relationship of indirect expropriations and domestic regulations. Specifically, the annex makes clear that "[e]xcept in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."
> (http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Chile_FTA/asset_upload_file411_5109.pdf)

The Final Environmental Review further stated that:

> *Conclusion*
> The investor-State mechanism in the FTA makes existing international arbitral fora available to Chilean investors in the United States to bring possible claims based on U.S. environmental measures. However, the FTA's provisions, in particular the numerous improvements over previous investment agreements described above, reduce the risk that arbitral tribunals would find inconsistencies between the investment provisions and U.S. environmental measures. Thus, the FTA provisions should not significantly affect the United States' ability to regulate in the environmental area.
> (Ibid, page 32)

Other important differences between NAFTA and the US – Chile Free Trade Agreement, for example, include the provision in the latter that all arbitral panel proceedings under the Investment chapter be conducted in public.

The comparable provision in the US – Singapore agreement reads:

> Except in rare circumstances, nondiscriminatroy regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations."
> (*Exchange of Letters on Expropriation, Side Agreement*, U.S. – Singapore Free Trade Agreement http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/asset_upload_file58_4058.pdf)

The US – Australia Free Trade Agreement also contains similar provisions in its Chapter 11, the comparable Investment Chapter:

> Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, and the environment, do not constitute indirect expropriations.
> (U.S. – Australia Free Trade Agreement, Annex 11-B http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/asset_upload_file248_5155.pdf)

In short, we urge you to recognize that Chapter 11 as it stands in NAFTA, constitutes an archaic approach that should not allow foreign investors to undermine the public welfare, environmental, conservation, health and safety public policy, decisions and legislation of democratically elected governments. The fact that this issue continues to arise as an attempt to over-ride such public policy decisions is illustrated by the recent challenge filed by Dow Agroscience against Canada with respect to the *Quebec Pesticide Code*.

By repealing or at the very least, amending Chapter 11 to protect enactments of the parties (and their sub-national governments) designed for legitimate public welfare objects including public health, safety and protection of the environment you would assist all of the governments and the public in re-establishing confidence in the credibility of government acting first and foremost for the protection and welfare of its residents.

This would also bring these provisions into line with the several more recently negotiated Free Trade Agreements that better protect regulatory action in these respects.

Importantly, both Canada and the United States official guidance for the negotiation of bilateral Free Trade Agreements recommend the inclusion of an updated provision providing this clarifying language that regulation for "legitimate public welfare objects including public health, safety and protection of the environment" does not constitute indirect expropriation (and would therefore preclude the type of claim that Dow Agroscience has now filed against Canada).

The Canadian Model Foreign Investment Promotion and Protection Agreements (FIPA) states:

> The updated FIPA model incorporates a clarification of indirect expropriation which provides that, except in rare circumstances, non-discriminatory measures designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation and are not subject, therefore, to any compensation requirements. (http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/what_fipa.aspx?lang=en#annexb (Annex B.13(1): Expropriation))

The U.S. Model provides similarly:

> Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations. (http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf (Annex B, Expropriation))

It is imperative, therefore, that the NAFTA itself be brought up to date with the official guidance.

Furthermore, there are many other provisions included in the recent Free Trade Agreements that also better protect the ability of the Parties to regulate and protect environment, health and safety. Accordingly, there will be other relevant measures that should similarly be negotiated in a revised NAFTA.

We thank you for your attention and look forward to your favourable consideration of this matter.

Yours very truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION
Per
Theresa A. McClenaghan
Executive Director and Counsel